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Ethical and Legal Perspectives in Fetal Alcohol Spectrum Disorders (FASD)

Foundational Issues

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Foreword

Fetal alcohol spectrum disorder (FASD) includes both mental and physical disabilities prevalent during the lifespan.

All FASD's are caused by embryo/fetus exposure to alcohol during the time of pregnancy. A developing child, who prenatally has been exposed to alcohol, may experience some, several, or even all of the following consequences in different grades of severity: growth retardation, malformations of the face, other organ malformations, ongoing medical problems as heart defects, cleft palate, kidney failure, hearing loss, gastroenteritis, pneumonia, bronchitis, sleeplessness, and bone and joint problems, as well as neurological disorders, and cognitive deficiencies such as problems with memory, learning, attention, and social communication. Most sections of this book deal with the cognitive issues of FASD in the perspective of their ethical and legal implications in the criminal justice system.

FASD is a spectrum of disorders and a spectrum of levels of disability, which can then be improved or made more severe through environmental, social, and other factors mentioned below. As described in Part 1, Chap. 3, on the origins of FASD, heavy drinking early on during pregnancy may cause brain damage in the offspring even before a woman usually is aware of being pregnant.

FASD is also related to a higher risk of secondary disabilities later in life, such as dropping out of school, family and placement breakdown, becoming unemployed, homelessness, abuse of alcohol and drugs, and being involved with the criminal justice system. The burden for individuals living with FASD, their parents/caregivers, and the society including health, social, educational, and legal services is huge as is described in Part 1, Chap. 4. The cost of FASD related to police, court, and correctional services is significantly higher than that for healthcare, educational, and social services. Without appropriate support, it may be devastating for the individual, the family, and other caregivers. With strong and orderly support, many of these secondary problems may not appear or can be dealt with satisfactorily. However, a person who may not fully understand the difference between what is right and wrong or cannot conceptualize legal proceedings and language needs to be supported not only by family/caregivers but also by frontline police, judges, prosecutors, other lawyers in courts, probation officers, and from staff in correctional

services, through a better understanding of and appropriate dealing with people living with FASD. The implications of the current inequality related to people with FASD in different stages of the criminal justice system are laid out in Part 1, Chap. 2 as well as in all Chapters of Part 4, and in Part 5, Chap. 1.

The contributions to this book reflect the situation mainly in North America. Mental incompetence has been recognized in the USA and in Canada as an appropriate defense in some criminal cases. Similarly, brain-based disabilities may help to qualify an individual for assistance in education and social services. In recent decades, it has become appreciated in medicine and psychology that serious incompetence defined by a very low score on an IQ test or by psychosis excludes many persons who should by all accounts be considered incompetent in all or in some arenas of daily life. The legal, educational, social, and health service systems have not been averse to considering the possibility of incompetence or disability in individual cases with more subtle presentations, but clear standards for expanding the definitions have not yet been consistently applied. This problem of appreciating subtle to moderate cognitive disabilities leading to extreme problems in adaptive and behavioral situations is especially true of individuals with fetal alcohol spectrum disorders (FASDs).

The idea for this book began when the editors organized and participated in a consensus development conference on legal issues related to FASD. The appendix describes the content and outcome of that consensus development conference, and includes a number of recommendations useful for policy makers and all professions of the criminal justice system as well as for law students. Some of the questions raised in the conference but hardly fully answered included:

- To what extent was it necessary to prove that a person who had broken the law had some form of brain damage if it did not rise to the extreme levels of insanity, cognitive impairment, or physical dysfunction currently accepted as "disability"?
- What should the courts accept as evidence that the crime was linked to the brain dysfunction and hence not committed in the usual context of knowing right from wrong?
- If these concepts were accepted, how would they/should they amend punishment?

Before such important questions can be fully answered, it is critical that all groups responsible for the answers fully understand all sides of the situation. The testimonies from the experts at the consensus development conference confirmed that the brain damage associated with FASD and the sophistication necessary to fully evaluate individual patients are a complicated issue and, also, that the barriers that might exist in translating these findings into the social, educational, and legal systems are not fully understood. As well, the effective routes to change within complex and multifaceted systems are unclear. It was also obvious from the presentations that there are gaps between the understanding of the condition among medi-

cal and legal experts. Now, several years later, these questions still remain largely open and need to be further addressed, as is done in this volume.

The answers to the many questions within the boundaries of ethical, legal, and social issues in FASD are of course relevant to many other disabilities which manifest themselves to similar forms of brain damage from any cause. Still, the FASD population, which represents an estimated 1–2% of the general population in the USA and Canada and much higher prevalence figures in many other countries, could be used as the spearhead to engage in this important problem.

Throughout most of the world, alcohol is largely a legal substance that is widely enjoyed. But it has also been widely abused for thousands of years. Part 1, Chap. 1 of this book, focuses on the history of FASD and justice and how issues surrounding alcohol have challenged public policy and the legal system. As Warren and Chezem states in that chapter: "But the interplay between pregnancy, alcohol and the law has only come to the forefront in recent years following the recognition of the existence of the fetal alcohol syndrome (FAS) and fetal alcohol spectrum disorders (FASD) less than a half century ago."

When used during pregnancy, alcohol becomes a potent chemical agent known to cause a variety of lifelong disabilities especially within the brain. No amount of alcohol can be confirmed to be safe for the unborn child at any stage during pregnancy, although most individuals diagnosed with an FASD were exposed to substantial amounts of alcohol especially in the early weeks after conception. Alcohol easily penetrates the placenta and enters the developing conceptus and may cause a range of developmental defects in the brain, based on volume of exposures, timing within gestation interactions with other potential teratogens, and issues in maternal health. These brain anomalies may be obvious, resulting in abnormally small head size, obvious malformations on clinical images of the brain (CT or MRI as described in Part 2, Chap. 2), and/or general performance in the intellectually impaired categories, but more often the structural brain changes are very subtle if detectable at all with current imaging techniques and only found through wide-ranging test of brain performance. These more subtle brain changes may still result in global performance deficits that are subsumed in categories that are recognized as intellectual disabilities. But most of the time, these changes do not cause a person to have a generalized IQ score that falls in the lowest 2 or 3 percentiles. Rather, there are specific problems in learning, memory, problem solving, etc. These are still significant issues that may have lifetime implications for normal functioning in society (normal adaptation). How should society assist these individuals? Sometimes, these cerebral deficits lead to poor judgment that results in illegal acts both minor and serious. How the courts should respond to this is indeed a great challenge. The basic principles of sentencing, which assume that offenders are capable of making choices, understanding the consequences of their actions, and learning from their mistakes so as not to repeat them, are also challenged by FASD. This is discussed in several sections of this book, in particular in Part 3, Chaps. 8, 9, 10, and 11, and in Part 5, Chap. 16. As Binnie et al. have stated elsewhere (1):

- "Issues associated with the cognitive and behavioural deficits of individuals affected by FASD surface frequently in criminal proceedings. However, people with FASD may not have been diagnosed for their problems and rarely exhibit any visible signs of the disorder. This may put them in a disadvantaged position in the justice system. When these individuals face criminal charges, they often do not fully appreciate the nature and consequences of their actions, nor can they fully understand and attend to the legal proceedings and potential outcomes of their cases. Problems with memory, organizing, and contextualizing may make it difficult for them to remember or to relate important facts that would assist counsel in making a proper defense.
- They tend to be suggestible and to have a desire to please others, and therefore to agree with leading questions and, potentially, false confessions. They often misunderstand basic legal terminology and procedures, such as the difference between 'guilty' and 'not guilty' or the fact that a false confession cannot be retracted – as a result, individuals with FASD are at increased risk of wrongful convictions. Their cognitive impairments also reduce their reliability as witnesses and complainants. When they are the victims of crime, their victimizers are therefore less likely to be convicted.
- General deterrence, meaning that the punishment given to one person for breaking the law will operate to deter other persons, presupposes the ability to process and translate information as well as to remember it. Similarly, rehabilitation, as it is conventionally understood, is largely a cognitive process premised on the ability of those other persons to understand, to learn, to remember, and to make choices. None of these assumptions fits well with what is known about FASD. Offenders with FASD are held to a standard that they cannot attain, given their impairments."

The need to identify and to address FASD more effectively within the context of the law is increasingly acknowledged in many judicial and legislative branches in North America as well as by caretakers and families of individuals who have FASD. Many plans and strategies on FASD stress the importance of awareness and the synthesizing of findings from research. It is our hope that this book will contribute to the knowledge exchange needed for change. Many complex legal issues associated with FASD need to be resolved in order to ensure that FASD-affected individuals receive fair and equitable treatment in the criminal justice system. This requires that the legal system, including the police services, prosecutors, defense counsels, judges, and staff in correctional services, be better served with information about the nature of FASD and its potential cognitive and behavioral dysfunctions. Above all, we hope that this book will contribute to initiatives that specifically support people with FASD to avoid coming into conflict with the law in the first place and assist them to qualify for necessary services that will keep them from running afoul of the law and hope that measures for prevention of FASD will be strengthened.

Edmonton, Canada — Egon Jonsson
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Reference

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Editor and Contributors

Editors

Egon Jonsson graduated from the Stockholm School of Economics and trained as a research associate at Harvard School of Public Health. He was a co-founder and long-term CEO of the Swedish Council on Technology Assessment in Health Care, leader of the WHO Health Evidence Network, and co-editor of the *International Journal of Technology Assessment in Health Care*. He is an elected member of the US National Academy of Sciences/Medicine since 1992. Until recently, he was the CEO of the Institute of Health Economics in Edmonton, Canada. Dr. Jonsson is now a professor at the University of Alberta, Department of Psychiatry. He has published frequently on the economic, social, legal, and policy implications of FASD.

Sterling Clarren is the recently retired CEO and scientific director of Canada FASD Research Network; professor of pediatrics at the University of British Columbia, Faculty of Medicine, Canada; and Robert A. Aldrich Professor of pediatrics at the University of Washington, School of Medicine, USA. Dr. Clarren was instrumental in many advancing knowledge of FASD in etiology, diagnostics, interventions, and prevention since 1976.

Ian Binnie Hon. Ian Binnie CC QC is a former justice of the Supreme Court of Canada.

Contributors

Tricia Aiken received her doctorate degree in clinical psychology in 2003. Dr. Aiken has worked full-time for the State of Minnesota as a forensic psychologist since 2006. In addition, Dr. Aiken owns and operates Minneapolis Forensic Psychological Services (www.mplsforensicpsych.com), where she conducts evaluations and offers professional trainings. Dr. Aiken was certified by the American Board of Professional Psychology in the field of forensics in 2009.

Christian Beaulieu is a professor of biomedical engineering, an Alberta Innovates Health Solutions Scientist, and the scientific director of the Peter S. Allen MR Research Centre at the University of Alberta in Edmonton, Canada. His research focuses on the development of novel MRI methods for better visualization and quantification of brain structure, with applications to neurological disorders.

Jerrod Brown is the treatment director for Pathways Counseling Center, Inc. Pathways provides programs and services benefitting individuals impacted by mental illness and addictions. Jerrod is also the founder and CEO of the American Institute for the Advancement of Forensic Studies (AIAFS) and the editor in chief of *Forensic Scholars Today* (*FST*) and *The Journal of Special Populations* (*JSP*). Jerrod is also currently pursuing his doctorate degree in psychology.

Teresa Brown has several years' experience working with adolescents in residential treatment and within youth corrections. In 2005, Teresa began working with the FASD Youth Justice Program coordinating assessments for youth and providing ongoing FASD education to community resources and corrections staff. Teresa previously managed the FASD Youth Justice Program that involved working directly with youth and their families to identify supportive services. She currently is the acting assistant superintendent at the Manitoba Youth Centre.

Andrew Burke is the manager of the Forensic Assessment and Community Services program in Edmonton, Alberta, an outpatient clinic which offers assessment and treatment for forensic adult patients living in Central and Northern Alberta. He has worked in the field of forensics since 1998. He received his master's degree in counseling psychology from the University of Calgary and is currently completing his PhD at the University of Alberta. His research to date has focused on treatment outcomes among forensic patients, evaluation of risk assessment instruments, and the impact of the therapeutic alliance on work with forensic patients. Recently, he has begun research on the effectiveness of telemental health (video conferencing) technology with forensic patients.

Linda L. Chezem began her judicial career as a trial court judge followed by serving for 22 years as a judge on the Indiana Court of Appeals. She is also a professor emerita at the College of Agriculture, Purdue University, and an adjunct professor at the Indiana University School of Medicine. Her current service includes chairing the Indiana Juvenile Justice State Advisory Group and as a member of the Indiana Criminal Justice Institute Board of Trustees.

Albert E. Chudley is a professor emeritus in the Departments of Pediatrics and Biochemistry and Medical Genetics, University of Manitoba. His interests are in the recognition, delineation, and prevention of birth defects, including FASD. He has authored numerous scientific publications on a variety of topics related to medical genetics and birth defects. He is a recipient of several awards including the Founders Award from the Canadian College of Medical Geneticists.

Nikki Freeman is a licensed professional clinical counselor and a certified facilitator of the FASCETS Neurobehavioral Model. She has clinical experience in many

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Stephen Greenspan is professor emeritus of educational psychology at the University of Connecticut and now resides in Colorado, USA. His writings and testimony on social vulnerabilities of people with intellectual disabilities involved in criminal justice proceedings won recognition from the American Association on Intellectual and Developmental Disabilities, which awarded him its Gunnar and Rosemary Dybwad Award for Humanitarianism.

Mary Kate Harvie was appointed to the Provincial Court of Manitoba in 2000 and previously served as associate chief judge. Judge Harvie initiated a process for youth in the criminal justice system to be assessed for FASD. The FASD Youth Justice Program was awarded the Manitoba Service for Excellence Award – "partnership" category – in June 2008. Judge Harvie has presented at national and international conferences on FASD and has served on a number of community and educational boards.

Jeffrey Haun is employed as a forensic examiner at Minnesota State Operated Forensic Services (SOFS), where he conducts a variety of forensic evaluations with juveniles and adults. He is on the clinical faculty of the SOFS Postdoctoral Fellowship in Forensic Psychology and the University of Minnesota Forensic Psychiatry Fellowship programs. He also provides consultation and peer-review services at PsyBar, LLC, and is an adjunct instructor in the Forensic Mental Health program at Concordia University, St. Paul. He is certified in forensic psychology by the American Board of Professional Psychology.

Sarah Herrick has worked with sexual abusers ranging in age from 10 to elderly since 1991, in residential, community mental health, and secured settings. Currently, she is working with civilly committed sexual abusers and is an adjunct professor with Concordia University's (St. Paul, MN) forensic mental health online graduate program.

Fia Jampolsky worked for the Yukon Legal Services Society for over a decade representing clients in family, criminal, and child protection matters. Ms. Jampolsky represented residential school survivors in their sexual and physical abuse claims under the Indian Residential Schools Settlement Agreement Independent Assessment Process. She is presently counsel with the Aboriginal Law Group for the Yukon Government. Ms. Jampolsky received her master's in law from Osgoode Hall Law School in 2015.

Patricia Jones has served as a guest lecturer, an associate editor for several peer-reviewed journals, a forensic mental health specialist, and a counselor. Over the last 4 years, she has worked exclusively in a community forensic mental health setting,

providing research, grant writing, and clinical services. Her clinical focus includes complex forensic assessment, test construction, and research design. Her professional publications include the mental health correlates of juvenile fire setting behaviors and discussions of coping with mental illness presented by inmate populations.

Avril J. Keller is a professor of psychology at the University of Calgary.

Cathy Lane Goodfellow has practiced law in Alberta since 1984, spending most of that time as a defense lawyer and advocate for youth in criminal court. During the decades of representing youth, she developed a real and practical knowledge of the impact FASD has on all stages of the criminal justice process. Cathy has lectured to both community and professional groups about this issue, most recently at the Legal Aid of Western Australia's Summer Series Criminal Law Day in February 2016. Cathy achieved her master's degree in law in 1995 and was appointed Queen's Counsel in 2010. She volunteers in her community and is currently a board member of the Calgary Fetal Alcohol Network.

Sally Longstaffe is a professor of pediatrics in the Department of Pediatrics, University of Manitoba. Dr. Longstaffe is a developmental pediatrician who has held positions as section head of developmental pediatrics and as medical director of the MB FASD Centre and Network. She has had a longstanding commitment and participation in healthcare initiatives and research for children and youth who are marginalized and experience special challenges including those with FASD.

Trevor Markesteyn is the chief correctional psychologist for the Community Safety Division and has been with Manitoba Justice for more than 20 years. He developed a Provincial Program Strategy, helped implement new youth justice legislation, and subsequently worked on developing and implementing a new case management and risk assessment system for Manitoba. Dr. Markesteyn holds a PhD in psychology from the University of Manitoba and an undergraduate degree in criminology.

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Kathi Osmonson Minnesota Deputy State Fire Marshal, coordinates the Minnesota State Youth Fire Intervention Team (YFIT). YFIT partners with law enforcement, mental health, justice, and social agencies to sustain a network of professionals who collaborate to provide intervention. Osmonson started her firefighting career in 1987 specializing in fire prevention, investigation, and youth fire setting intervention. She publishes and reviews articles and presents for national and international audiences. She is currently pursuing her master's degree in forensic mental health.

Arlin Pachet is a board-certified clinical neuropsychologist and an assistant clinical professor in the Department of Clinical Psychology at the University of Calgary. Also a practicing registered psychologist, Dr. Pachet continues to complete a wide range of assessments with youth, adults, and seniors experiencing cognitive and neurobehavioral issues. Dr. Pachet provides training workshops regarding the assessment of decisional capacity, and he has published and completed many presentations in the areas of test construction, capacity assessment, and neuropsychological evaluation.

Hal Pickett is a clinical psychologist and clinical director of Headway Emotional Health Services in Minneapolis, Minnesota. He has been practicing in the field of child and adolescent psychology for 20 years and specializing in forensic assessment of youth for the past 9 years predominantly with adolescent sex offenders. His major clinical interest is how trauma affects delinquent behavior.

Jacqueline Pei is an associate professor in the Department of Educational Psychology and assistant clinical professor in the Department of Pediatrics at the University of Alberta in Edmonton, Canada. Also a practicing registered psychologist, Dr. Pei began her career as a criminologist and has continued in this vein, studying youth at risk and interventions for those with FASD. Dr. Pei currently leads the Intervention Network Action Team for the Canada FASD Research Network.

Carmen Rasmussen is an associate professor in the Department of Pediatrics at the University of Alberta and a research affiliate at the Glenrose Rehabilitation Hospital. She is also a Canadian Institutes of Health Research (CIHR) New Investigator. Her research is focused on understanding neurobehavioral difficulties among children with FASD.

Jonathan Rudin graduated from Osgoode Hall Law School. In 1990, he was hired to establish Aboriginal Legal Services of Toronto and has been with this organization ever since. He has appeared before all levels of court, including the Supreme Court of Canada. Mr. Rudin is the chair of the FASD Justice Committee. The committee created a website on FASD and the justice system: www.fasdjustice.ca. Mr. Rudin also teaches on a part-time basis in the Law and Society program at York University.

Deepa Singal is in the Department of Community Health Sciences, University of Manitoba. Her research interests are utilizing administrative data to investigate child and maternal health. Her doctoral dissertation is the first to investigate the characteristics, health, and service utilization of women who give birth to children with FASD at a population level. Deepa has received funding from provincial and national granting agencies and was awarded the Research Manitoba Dissertation Award, demonstrating research excellence in a doctoral thesis.

Kathleen K. Sulik is a professor emeritus of cell biology and physiology at the University of North Carolina, Chapel Hill, NC, USA. Dr. Sulik spent her academic career conducting basic research on birth defects, with an emphasis on understand-

ing the genesis of abnormalities resulting from early prenatal alcohol exposure. She is a past president of the US Teratology Society and FASD Study Group and has received awards for her contributions to the FASD field by these organizations as well as by the US National Institute on Alcohol Abuse and Alcoholism.

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Sarah Treit is a research associate in the Department of Biomedical Engineering at the University of Alberta in Edmonton, Canada. Her work focuses on structural MRI of brain development in children and adolescents with fetal alcohol spectrum disorders, specifically aiming to identify how deviations in cognitive development link up with deviations in brain structure.

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Kenneth R. Warren is a former deputy director and acting director of the National Institute on Alcohol Abuse and Alcoholism (NIAAA), a part of the National Institutes of Health in the USA. He currently serves as a senior advisor to NIAAA. He has been active in research and administration related to FASD for 40 years and continues to chair the US government's Interagency Coordinating Committee on FASD.

Anthony P. Wartnik was a trial judge for 34 years, presiding judge of juvenile court, family law court chief judge, dean emeritus of the Washington Judicial College, Judicial College Board of Trustees chair, and the Washington Supreme Court's Judicial Conference Education Committee chair. Judge Wartnik is a nationally and internationally recognized speaker, author, and trainer on issues involving FASD and the law and teaches postgraduate courses on forensic mental health and special needs populations at Concordia University, St. Paul, MN.

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George Woods is the president of the International Academy of Law and Mental Health. He is a forensic and neuropsychiatrist consultant in courts of law, mental illness, and crime. Dr. Woods teaches at the University of California, Berkeley Law, and Morehouse School of Medicine, Atlanta.

Margaret R. Wimberley was a field operations manager for news, sports, and entertainment for ABC TV, New York. Shows included World News Tonight, Monday Night Football, Nightline, World Series Baseball, the Academy Awards, Good Morning America, and the Tour de France. Subsequent to a career change, she turned her focus to forensic study and has a strong research interest in topics related to the criminal justice and forensic mental health aspects of fetal alcohol spectrum disorder (FASD).

Patricia A. Zapf is a professor in the Department of Psychology at John Jay College of Criminal Justice and was appointed fellow of the American Psychological Association in 2006 for outstanding contributions to the field of law and psychology for her work in competency evaluation. She has published 10 books and manuals and over 100 articles, chapters, and reports on forensic psychology. Her research involves the assessment and conceptualization of various types of competencies and the utility of various methods of competency.

Part I
Overview

Chapter 1
FASD and Justice: An Historical Perspective

Kenneth R. Warren and Linda L. Chezem

Those who don't know history are doomed to repeat it.
– Edmund Burke

Those who cannot remember the past are condemned to repeat it.
– Santayana (in The Life of Reason, 1905)

Abstract Alcohol has been widely used in societies for thousands of years so it is not surprising that issues surrounding alcohol have challenged public policy and the legal system for many years. But the interplay between pregnancy, alcohol and the law has only come to the forefront in recent years following the recognition of the existence of the fetal alcohol syndrome (FAS) and fetal alcohol spectrum disorders (FASD) less than a half century ago. In the context of prevention, some communities have enacted ordinances requiring the placing of warning signs informing the public of the risks of drinking in pregnancy at locations associated with alcohol use. A more formidable issue stems from the observation that FASD individuals are over-represented in all court systems as defendants and victims.

The review of criminal cases involving an FASD have been few to date, but even that experience illuminates the challenges that lie ahead in addressing the impact of FASD associated intellectual impairments for achieving appropriate justice. There is a need for statutes directly addressing FASD issues within the society and a model is put forth to aid communities in achieving fair and just outcomes.

Keywords Fetal Alcohol Syndrome (FAS) · Fetal Alcohol Spectrum Disorders (FASD) · Evidence · Expert Experts · History · Caselaw · Statutes

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1.1 Introduction

Alcohol has had a significant impact on many aspects of human history. Issues surrounding its use and consequences have often been addressed through policy and law. This review will describe one unique aspect of alcohol and the law: those policies, laws and court history that surround pregnancy and fetal outcome.

Laws and judicial practices involving alcohol overall, not just with respect to pregnancy, are often not evaluated for their effectiveness. At the extreme, some laws and practices have actually resulted in increasing the problem they were enacted to prevent. One case in point known to most Americans is the Eighteen Amendment to the U.S. Constitution, which brought prohibition into existence in the years 1920 to 1933. While some aspects of prohibition legislation achieved a positive outcome (i.e., a decrease in liver cirrhosis deaths), there was an accompanying increase in violence and disrespect for the law that was counter-productive. This led to the repeal of prohibition through the passage of the Twenty-first Amendment to the Constitution 14 years later.

As discussed in other reviews (Warner and Rosett 1975; Warren and Hewitt 2009; Warren 2015) societal reaction to prohibition impacted contemporary views on the use and safety of alcohol during pregnancy and may have delayed modern recognition of alcohol as a teratogenic agent. However, after that recognition, various legislative actions have been put in place in some U.S. states and Canadian provinces that are meant to reduce the occurrence of birth defects caused by alcohol and advance public health. These actions range from requiring the posting of warnings in bars, restaurants, and rest rooms about alcohol use in pregnancy (Kaskutas and Graves 1994), to laws criminalizing alcohol use by pregnant women (Guttmacher Institute 2017). In the U.S. and in France, for example, legislation currently requires the posting of a warning with respect to use in pregnancy on all beverage containers (Warren 2015). In the case of statutes that criminalize drinking in pregnancy, the number of criminal prosecutions that have taken place has been limited and primarily have focused on drug rather than alcohol use. This may change in years to come despite the overwhelming viewpoint of the medical establishment which emphasizes that drinking in pregnancy should remain a medical rather than legal issue.

Today, a generally accepted view is that individuals with fetal alcohol syndrome (FAS) or the broader category of fetal alcohol spectrum disorders (FASD) are over-represented in ~~all~~ the courts of the judicial system (Streissguth et al. 1996, 1997a, b; Fast et al. 1999; Popova et al. 2011; National Council of Juvenile and Family Court Judges 2015). Characteristic deficits in cognition and executive function make those with FASD more likely to be involved in crime, or, as is often the case, more likely to be the person who is left behind to be arrested after others have committed a crime and fled (Fast et al. 1999). These same neuro-cognitive deficits also make those with FASD more likely to be a victim of crime. Because they live in families with heavy alcohol use and alcohol use disorders they are more likely to appear in family, divorce and adoption court. Regardless of the court

system, the cognitive deficits resulting from prenatal alcohol exposure can seriously complicate the situation for affected individuals in their roles as defendant or witness.

1.2 Brief History of Alcohol, Pregnancy, and the Law

In eighteenth century England, a natural experiment involving alcohol, infant and child death rates, and the legislative ~~al~~ system occurred. That period of time has been referred to as both the "gin epidemic" and the "gin craze". The backdrop of events that led to the beginning of the gin epidemic included the ascension of William III (from the Netherlands) to the throne of England in 1689, resulting in increased political conflict between England and France. Legislation was passed in England resulting in decreased importation of French wine (brandy) and a marked increase in local gin distillation (George 1965; Coffey 1966).

The gin epidemic has been typically considered to have occurred from 1690 through 1751 (George 1965; Coffey 1966) although recent analysis suggests that it did not end until later in the 1750s or 1760s (Warner et al. 2001). The London College of Physcians petitioned the House of Commons on 17 January 1725 stating that they had "*observed, for some years past, the fatal effects of the frequent use of several sorts of distilled Spirituous Liquors… and too often the cause of weak, feeble, distempered children, who must be instead of an advantage and strength, a charge to their Country.*"

Parliament did take action passing three Gin Laws in 1929, 1736 and 1751 specifically related to the gin craze, but the impetus for their action related to economics and military strength rather than public health; with increasing death rates and decreasing infant survival, there was less manpower available for the workforce and the military (Warner et al. 2001; George 1965; Coffey 1966).

These Gin Laws provide interesting lessons in how legislation may or may not achieve the desired individual and societal changes in behavior. While the first two of these gin acts are generally regarded as not achieving the desired end of reduction of excessive gin consumption, the 1751 law was considered to have been successful in its purpose, bringing an end to the gin epidemic, a view that was expressed by M. Dorothy George (George 1965) in her 1925 book, *London Life in the Eighteenth Century*. But this conclusion was recently challenged in an analysis undertaken by Jessica Warner and her colleagues (Warner et al. 2001). Through a quantitative time series analysis examining annual per capita consumption of spirits and beer, excise tax records, real wages, and other legislative and economic variables, Warner and colleagues found that the 1751 gin act, similar to prior laws, resulted in only a short term reductions in consumption which was followed by a rebound of drinking and even higher gin consumption. It was put forth that the end of the epidemic was the result of social and cultural changes in views toward excessive gin consumption and the realization of the harm this excessive imbibing was causing (George 1965). This

argument is supported, in part, by the fact that only the city of London experienced the gin epidemic though the same tax policies that had led to the London gin craze existed throughout England. The cultural and social norms outside of London prevented the epidemic, and similar attitudes toward gin finally took hold in London with the recognition among the populace of the problems gin has caused (George 1965; Warner et al. 2001).

The ineffectiveness of the three socially motivated gin acts raises real questions as to whether statutes addressing taxation, price, production and outlets can truly change consumption behavior. The Warner and colleagues' analyses revealed that the harsher the restrictions, the more the public negatively reacted by refusing to pay fees and by harassing magistrates and tax collectors to the point that neither group would enforce the laws (Warner et al. 2001). The most restrictive of the gin laws – the 1736 law brought about the greatest increase in gin consumption as a protest to the intent of the law. The 1736 law was not only repealed, but fees paid by those few merchants who had complied with the law were actually returned.

The Warner and colleagues' analysis strongly suggests that it was not legislation but rather education (even if self-acquired) that brought the gin epidemic to its demise. Contributing to the diminution of the appeal of gin were scholarly works produced at that time including those by three important social commentators: Henry Fielding, Corbyn Morris, and the artist William Hogarth (Fielding 1751; Morris 1751; Hogarth 1751).

1.3 Legal System, Laws, and Cases

The legal systems within the United States and Canada are primarily derived on the principles of English Common Law, and the laws that relate to alcohol as well as alcohol and pregnancy derive from that same English Common law context, with accretions to the law that may or may not make clear logical sense. Because the common law is court written law, as opposed to statutes or codes, it requires a greater recognition of the judicial role than is required for law set by codes. A code jurisdiction is one that does not recognize law created by courts (common law). This is not to ignore the importance of courts in code jurisdictions but merely notes a greater reliance on statutes. Regardless of common law or codes, the constant hope is that the laws function as an expression of policy resulting from the application of good science. When alcohol is involved, that hope has not often been achieved.

1.3.1 FASD Issues Impact Every Court

The ubiquity of FASD spreads the impact of this disorder across the full justice system and the cases on any single docket (from adoption, family, probate, civil to criminal) may involve individuals with an FASD in some aspect of the case from

litigant to witness to defendant. However, gaining reliable data on the number of cases at the trial court level that involve an individual with an FASD is not an easy task. Such data is often not recorded unless a case moves to the appellate level, and cases do not enter the appellate system unless a claim is made of an error in the trial court action. Consequently, there is no simple formula to derive the number of cases involving FASD from appellate court records.

Though their numbers are fewer, cases at the appellate court level are important for their precedential value in the common law system. The opinions provide legal precedent that can be of the same weight and import as statutory law for the trial courts located in the jurisdiction of that appellate court. If an appellate court opinion affirms a trial court's action in accepting the impairments caused by prenatal alcohol exposure into consideration in deciding a case, other trial courts may do the same. The appellate court thereby sets a precedent for all cases coming after that until or unless a statute is passed that, in effect, overrules precedent as the law of that jurisdiction.

1.3.2 How Do FASD Issues Fare in the Court System?

In addressing the law and FASD one might do well to ask three questions:

1. What research-based evidence is reliable and relevant to the population that might be used to inform law and justice?
2. What should the law say?
3. What does the law say?

These three questions can be addressed in turn:

What research-based evidence is reliable and relevant to the population that might be used to inform law and justice?

The admission of evidence from lay and expert witnesses alike is governed by precedent, court rules of evidence, and statutes. There are barriers that must be passed before any type of evidence is permitted into the court. The evidence to be presented must be established as relevant to the case and reliable. Facts pertaining to an individual's FASD deficits, whether as a defendant or witness, must be accepted by the court if they are to have an impact on the court decision.

We see the reluctance of courts to consider medical findings related to neurocognitive defects in an overview provided by U.S. District Judge Jed S. Rakoff who presented at the annual 2015 meeting of the Society for Neuroscience (Davis 2015). Rakoff is a founding member of the MacArthur Foundation Research Network on Law and Neuroscience. He explained that judges are still cautious about allowing neuroscientific evidence in court. "The attitude of judges toward neuroscience is one of ambivalence and skepticism," Rakoff said. "You ask them about the hippocampus, they say it's something at the zoo." Rakoff noted that judges have reason for caution. In the not too distant past, the courts and the law allowed science to be used that was inhumane and harmful—and has been discarded. An example he

described was eugenics. State laws allowed the forced sterilization of women, and the U.S. Supreme Court upheld the practice in 1927 (Davis 2015).

Returning to the question of FASD in the court, until recently there has been a paucity of probative research about deficits caused by prenatal alcohol to answer justice system questions about reliability and relevance to the case at hand. Fortunately, court knowledge about FASD is increasing, and expert witness testimony on FASD issues will likely be increasingly admissible with time.

What should the law say?

Many advocates propose that the law should mandate the consideration of an FASD diagnosis and appropriately address the individual's deficits within each case. They propose requiring expert assessment of the individual's deficits, to be done regardless of socio-economic or legal status. An even more comprehensive statute would require judges to assure that information derived from the assessment is applied in the action of the court.

What does the law say?

The answer today would most often be "not enough". A large void of direct references to FASD exists in both statutes and appellate opinions. But courts have recognized lack of mental capacity as precluding a guilty finding. In a case where the individual with FASD is the defendant, and the question is mental capacity, the same criteria should apply to FASD as with a mental illness, even though there is no statutory basis for finding "not guilty by reason of an FASD". In determining guilt or innocence of an offence, a court could find:

(a) The defendant's impairments were such that the individual did not meet the McNaughton rule[1] requirement to have the capacity to understand the nature and quality of his acts or that the acts were wrong.
(b) The defendant's impairments were such that the individual misunderstood the circumstances of the setting of the crime.
(c) The defendant cannot assist as needed in his or her own defense because of a disability.

In determining the sentence or penalty, the courts are not prohibited from taking into account the effects of FASD on defendants' ability to obey conditions of probation or parole.

The court can require the screening and assessment of defendants for FASD as a part of the psycho-social investigation before a sentencing order is made to determine what might be reasonable terms to impose as a sentence.

[1] In the mid 1850s, the "McNaughton rule" created a presumption of sanity, unless the defense proved "at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know what he was doing was wrong." The rule remains the standard to determine whether a person shall be held criminally responsible for acts in many states and a variant in other states. The Canadian criminal code is also based on the McNaughton rule.

Even though U.S. and Canadian trial courts do have the authority to take FASD into account based on their common law tradition, the existing evidence indicates that this is rarely what happens; it would appear that the FASD status is largely ignored in most cases to date. Appellate court actions could also come into play in FASD cases but this does not happen often enough. A court's refusal to make a finding based on being unable to assist in one's defense or an impairment severe enough to meet the McNaughton requirements are not frequently grounds for a reversal upon appeal in the appellate system. Indeed, few cases reach the appellate system absent some egregious error. The data on rates of reversal at the appellate level (combined civil and criminal) runs less than 20% in most United States jurisdictions. The two explanations for the trial court's failure to consider FASD factors seem obvious. They are: (1) the attorneys are not presenting the evidence needed about the effects of FASD on the litigants' or defendant's behavior; and (2) the judges do not recognize the importance of the effects of FASD.

As noted below, there is a dearth of FASD precedent in the case law in Canada and US. There is, however substantial acknowledgement of the suspicion of the seriousness of FASD in the criminal justice system of both countries. More empirical evidence is needed about the outcomes for those with FASD in the justice system across the dockets.

Research to date clearly suggests that individuals with FASD have a high level of repeated justice system involvement (Streissguth et al. 1996, 1997a, b, 2004) whether the involvement is civil or criminal, whether as a witness, a victim or an offender. With respect to the adult population in the justice system, it is important to note that these numbers may be deceptively low, consequent to the difficulty of diagnosing FASD in adults. Yet, whether derived from anecdotal observations or structured research, FASD seems to be a greater burden in the justice system populations than has been documented by analysis to date. The difficulties of conducting research on any subject in the justice system added to the difficulties of obtaining an FASD diagnosis for an adult, speaks to the need for new study approaches on FASD and law. This holds true as well for the juvenile court population. Without better designed studies of the justice system populations and the inclusion of other dockets such as family, divorce, bankruptcy courts and small claims, the full burden of FASD will not be recognized by the justice system policy and decision makers.

In addition, a great deal more work is needed in the design of effective dispositional orders from the courts for cases involving persons with FASD. And, last, but not the least, research is needed to determine the most effective ways of disseminating knowledge about FASD to the courts in order to get the judges to use the evidence based programming.

1.4 Cases

The common law heritage of Canada and the United States provide the two countries with a shared jurisprudential approach to problems presented in court (Streissguth et al. 2004). Even so, the case law of each country differs. A review of

the case law for each country is instructive and should be undertaken in more detail than is provided here.

A foundational Canadian precedent in the Supreme Court of Canada is Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 SCR 925, 1997 CanLII 336 (SCC). In this case the focus was on glue sniffing rather than alcohol but sets a precedent that would be applicable to alcohol as well. The court held that "The law of Canada does not recognize the unborn child as a legal person possessing rights." The court's decision has been applied to efforts to stop (or rather not stop) the consumption of alcohol by pregnant women.

There is a range of case law in Canada that is captured through the website "FASD and the Justice System" located at http://fasdjustice.ca/main/about.html. The site was developed by The Justice Committee of FASD ONE (FASD Ontario Network of Expertise) with funding from the Public Health Agency of Canada and the Department of Justice Canada, Youth Justice Policy. The FASD ONE site was created for justice system professionals and others seeking legal information about FASD who want to understand more about FASD. The information about FASD that is provided on the site includes case law, legal resources, and strategies. The resources are intended to assist professionals to better represent or serve persons with FASD who enter the justice system as accused, victims, or witnesses. The Canadian legal record contains many more cases than the United States.

In the United States, few civil or criminal cases actually address the issues that might be presented by the presence of an FASD. This is disappointing because many cases at trial and appellate levels may have an individual as party or witness who has an FASD. Thus precedential guidance is rarely available either as a mandate or an illumination of the problems FASD presents to the justice system. Trial court decisions are often not published in records of court actions known as "reporters" and are only published in the lay media if the editor finds them of news or other commercial value. While those cases reaching the appellate system will be reported and accessible, few FASD involved cases reach the appellate level. The rarity of the appellate opinions is further exacerbated by the narrowness of their applicability. The appellate courts are bound by the record transmitted to them and the issues preserved for appeal by the parties. An appellate court will only decide those issues raised specifically upon appeal. It is rare to see a court on its own rule on an issue that has not been briefed, unless the issue constitutes a fundamental error in the trial.

The case of Ferguson v. Charleston (99–936) 532 U.S. 67 (2001) is often cited for its prenatal care ruling, specifically, that a pregnant women cannot be compelled into treatment by threats of criminal prosecution. But in actuality, the case is far narrower in its precedential value than often described by commentators. This is because the hospital which served as the litigant was government owned and therefore, deemed to be a state actor. The hospital staff had collected the urine of pregnant women without the informed consent of the women and used the results to threaten those who tested positive for alcohol and drugs with criminal law violations. Though the case relates to the issue of using threat of prosecution as a means of preventing prenatal drinking, it does not fully resolve the legal status of such an approach given the unique circumstances of this case.

In another FASD case, Holmes v. Louisiana (08–1358)130 S.Ct. 70 (2009), Brandy Aileen Holmes, was a 29-year-old woman with FAS on death row who had been convicted of a 2003 murder in Louisiana. Despite the amicus brief filed detailing her disability from FASD, the petition for writ of certiorari (that is, a request for review) to the Supreme Court of Louisiana was denied by the United States Supreme Court.[2]

In the case Trevino v. Thaler, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), a claim of ineffective assistance of trial counsel alleges that the attorney should have included fetal alcohol syndrome (FAS) as a mitigating circumstance. The Supreme Court of the United States opinion did not address the implications of FAS, or the merits of the claim, and remanded the case back to the lower court. On remand, the district court order declined to consider Trevino's proposed new evidence showing that he suffers from FAS or an FASD. The court found that the claim was unsupported by any showing of evidence that the petitioner's mother abused alcohol. The court further noted that there was no showing that the evidence was not reasonably available at the time of petitioner's 1997 capital murder trial (Trevino v. Stephens, Civil No. SA-01-CA-306-XR, United States District Court For The Western District Of Texas, San Antonio Division, 2015 U.S. Dist. LEXIS 75400, June 11, 2015).

In one death sentence state case, while considering the defendant's FASD status, the Court of Criminal Appeals of Texas in Soliz v. Texas wrote (432 S.W.3d 895; 2014 Tex. Crim. App. LEXIS 874, US Supreme Court certiorari denied by Soliz v. Texas, 2015 U.S. LEXIS 696 (U.S., Jan. 20, 2015): "There was sufficient evidence to support his death sentence because a rational trier of fact could have found that there was a probability that he would commit criminal acts of violence constituting a continuing threat to society; the jurors weighed his evidence of brain damage and partial fetal-alcohol syndrome along with other relevant evidence and made a normative judgment that the evidence did not warrant a life sentence."

Thus, as it pertains to criminal cases in the U.S. a number of conclusions may be drawn: First, the courts are not giving persuasive weight to the evidence of FASD as a mitigating circumstance. Next, the requirement for evidence of maternal alcohol use in one of these cases (beyond the medical FASD diagnosis) adds another barrier, for it would have seemed that in place of testimony related to the defendant's mother use of alcohol, the dysmorphological and neurocognitive assessment should have sufficiently defined the defendant's FASD mental and functional impairment. Lastly, if the evidence of FASD is not admitted at trial, it appears that the chances of reversal on appeal, alleging inadequate counsel or other errors, are quite small. Therefore, it is not surprising that the admission of evidence about FASD in civil or other cases varies greatly across both Canadian and American jurisdictions.

[2]The entire opinion consisted of this paragraph: "Motion of National Organization on Fetal Alcohol Syndrome for leave to file a brief as amicus curiae granted. Motion of Constitution Project for leave to file a brief as amicus curiae granted. Motion of Louisiana Association of Criminal Lawyers for leave to file a brief as amicus curiae granted. Motion of National Center on Domestic and Sexual Violence, et al. for leave to file a brief as amici curiae granted. Petition for writ of certiorari to the Supreme Court of Louisiana denied."

1.5 Statutes

To be most effective, policies for the prevention or mitigation of FASD should be grounded in explicit statutory provisions. One of the reasons argued for a statute is to promote equal access to justice informed by science. A second reason is that the judges are more clearly bound to consider the effects of FASD in the cases if the requirements are "hard wired" into statute.

We can analyze and organize FASD policy by using levels of state action as a way of classifying the importance attached by the government to the action. In the diagram in Fig. 1.1, the nature of the government's role and actions expected from lower priority to higher priority would reflect the level of importance of the policy. The successful use of Bloom's taxonomy (Overbaugh and Schultz 1956) in pedagogy[3] provides a possible model for the creation of a taxonomy of law and regulations to signal the priority and importance of the actions or programs to deal with FASD. Such taxonomy would provide common structure to advance legislative and regulatory provisions regarding FASD in importance and to analyze the effectiveness of the level of priority. In other words, a hierarchy matching the level of importance of the law to level of government action could be designed. Such a design would help make it clear that the tasks that are most important are performed by government as essential government functions. The tasks mandated by the statutes would be in the next lower priority.

Fig. 1.1 Hierarchy of Response

[3] Bloom's Taxonomy was created under the supervision of Dr. Benjamin Bloom as an organization approach to promote higher forms of thinking, such as analyzing and evaluating concepts, processes, procedures, and principles, rather than just memorization of facts.