

Defending Autistic People: Sex Offenses

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TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

DEFENDING THOSE ACCUSED OF SEXUAL ASSAULT ALLEGATIONS

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Introduction

Many criminal offenses codify social norms, sociosexual rules and cultural taboos that are not explicitly taught but are presumed to be understood. Many of these offenses, especially sexual offenses, are in a category of crimes for which lack of knowledge of wrongdoing is not a legal defense. However, the rules embedded in these crimes are neither appreciated, nor understood well enough, by many persons with autism spectrum disorder (ASD). They may be intelligent, but nevertheless “markedly impaired” in grasping “norms for social interaction” “in their cultural context.” DSM-5. This is a defining feature of autism. It calls for a discretely different approach in criminal defense, an approach which has proven successful in many cases, whereas treating ASD on a par with other mental disorders is largely ineffective.

Prosecution of those who, as a result of a developmental disability, are unaware of the severe opprobrium for their offending behavior, raises moral and human rights concerns. Autism is a syndrome condition that provides powerful pragmatic, moral, and legal arguments that can succeed in obtaining diversion of these cases from criminal prosecution and its further debilitating consequences, especially sex offender registration. With primary focus on empirically-based exercise of prosecutorial discretion, the clinician and the defense counsel need to overcome substantial obstacles facing the accused with ASD: the moral panic over child exploitation offenses; bias against those with disabilities; pervasive ignorance about autism and disability rights in the criminal justice system; confusion about the how rules of competency and lack of criminal responsibility apply to the developmentally disabled; irrational statutes and their arbitrary application; and overall focus of criminal justice systems on punitive, rather than therapeutic, justice.

The focus of this paper is on autistic persons charged with online sex offenses. However the fundamental propositions about ASD and its typical effects on the individual, and its relationship to problems of social competence and other

consequences, are broadly and obviously pertinent to offending behavior in other contexts.

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Chapter 1: General considerations

There are concerns about autism and criminal justice that can be stated generally, before we get into the particulars of defending cases involving autistic persons.

1.1. A human rights issue

The issue of developmental disabilities, especially for those who are intellectually intact, does not fit neatly into the prevailing criminal law framework. The treatment within the criminal justice system of persons with developmental and intellectual disabilities must be understood primarily as a matter of human rights. In the United States, we have the Rehabilitation Act, which applies to federal government actors, and the Americans with Disabilities Act, which applies to state governmental actors. Internationally, we have Article 13 of the UN Convention on the Rights of Persons with Disabilities (CRPD), the UK has the Equality Act 2010¹, and the Canadian Charter of Rights and Freedoms includes an explicit equality rights guarantee for persons with disabilities.² The import of these directives is that all governmental officials, with no exception for prosecutors and judges, must meaningfully and substantially take disabilities into account in the exercise of their functions, and follow statutory mandates. There is no direct precedent for these principles' enforcement as they relate to prosecutors' or judges' treatment of accused persons with autism. This is due in no

¹ The US is one of the few countries to have signed but not yet ratified the CRPD. Canada has ratified the CRPD, but it is unclear whether predictions of its usefulness have come true (Sala, 2012). At least in the mental health area, it has been observed that "Despite the lack of explicit implementation, the CRPD has helped to facilitate a larger shift in social and cultural paradigms of mental health and disability in Canada" (Hoffman, Sritharan & Tejpar, 2016). My aim would be to have this paradigm shift occur in the US through the confluence of the ADA/Rehabilitation Acts and the CRPD. In the UK, both the CRPD and the Equality Act 2010 have been suggested as sources for an obligation of law enforcement to take autism into account (Holloway, 2018).

² Convention on the Rights of Persons with Disabilities: First Report of Canada (2014). This report catalogs legislative provision from the Charter to the Canadian Human Rights Act (CHRA) to provincial and territorial enactments protective of persons with disabilities.

small part to the fact that, so far, defense counsel have failed to consider these principles, and relevant precedent, and bring them to bear on criminal cases, despite, in the U.S., compelling advisories from attorneys in the Department of Justice Civil Rights Division³ and initiatives from the autism community.

1.2. Extraordinary goals and efforts required

The barriers to an enlightened approach to resolving criminal charges against those with ASD are too substantial for any routine approach by attorneys, clinicians, or advocates for the disabled. Extraordinary results – dismissal, deferred prosecution – have occurred in some cases, but only with focused extraordinary effort and moral commitment. The demonstrated attainability of what might now be considered extraordinary results in a small number of cases in fact lifts the bar for what results should be sought and what efforts qualify as effective representation by counsel. Frankly, most attorneys have difficulty envisioning diversion in these cases, but it must be the primary object. (Allely and Cooper 2017).

For clinicians also, workmanlike, even exemplary, clinical reports presenting a compelling autism diagnosis, a reasoned course of therapy, and a plea for humane lenity simply will not satisfy the degree of empirical input that is needed to overcome the assumptions and heuristics that dominate the current law enforcement approach to these cases.

³ What about thinking of autism and developmental disabilities in the context of civil rights and the Equal Protection clause of the US Constitution? Treatment of those with developmental disabilities as a suspect class or quasi-suspect class for purposes of the Equal Protection Clause of the 14th Amendment to the US Constitution was foreclosed in *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985). The Americans With Disabilities Act was enacted in 1990 in response to *Cleburne*, “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” (Hoge, 2015). Ironically, later efforts to elevate persons with disabilities to a status falling within a protected class were hindered by the passage of the ADA since the passage of that legislation, in 1990, supposedly demonstrated that those with disabilities were not “politically powerless,” one of the considerations for determining whether a class of persons might be protected by the Equal Protection clause. See *St. Louis Developmental Disabilities Treatment Ctr. Parents Ass’n v. Mallory*, 591 F. Supp. 1416, 1471 (W.D. Mo. 1984). (Strauss, 2011). While that is an assumption disputed by the four-judge minority in *Cleburne*, and in congressional findings in adopting the ADA, whatever “power” the developmentally disabled community might have has not been exercised in support of the criminally accused with developmental disabilities, especially those charged with a sex offense.

1.3. Science not sympathy

Efforts to date on behalf of those with ASD charged with crimes have generally been aimed at evoking the sympathy of prosecutors or judges, based on what is objectively a tragic situation for the accused or his family. This approach is modeled on cases where the accused had a history of mental illness or personality disorder, of victimization of one sort or another, of physical handicap, or of myriad other impediments which similarly did not amount to a legal defense, but might be considered mitigating. It may seem dutiful and involve sincere effort. However, it goes neither far enough, nor in the right direction.

First, in the cases of child exploitation or sex offenses or threats, prosecutors and judges – overwhelmed by the harm and risks they attribute to the charged behavior and concern for possible reoffending – are generally inured to all “excuses” for the behavior. Second, while such an approach may yield appreciable results in the form of reduced charges or sentences, it does not address the annihilating effects of sex offender registration for disabled persons. Third, without also explaining that many young men with autism never present with the offending behaviors, relying on the diagnosis of autism and how it has made life difficult for the accused enables a negative reaction from prosecutors or judges. Without full understanding, they may actually believe that autism enhances risk, that “empathy deficits” is a trait of an antisocial personality, or that repetitive or compulsive behaviors and rigidity of thinking predict repeat offending. Indeed, defense counsel have been known to avoid discussing their client’s autism, even as a mitigating factor, because they share these misunderstandings.

So, countless young men with autism have gone to prison, and they and their families suffer a range of additional debilitating consequences of sex offender registration, because the legal system, though sometimes feeling sorry for them, has not caught up with the science of autism.

On the other hand, when counsel have brought to bear the mounting data and decades of pertinent research and clinical experience on particular cases, they have gotten better results. They have succeeded in demonstrating persuasively to

prosecutors and judges why those with ASD, and with specific social learning deficits and other deficits associated with ASD, are particularly vulnerable to engaging in objectively offensive behavior without any deviant sexual interest or awareness of wrongdoing; that they present no danger and are very unlikely, with appropriate therapy, to be similarly involved in the future. In other words, prosecutors and judges are in fact capable of coming to a distinctly empirical understanding of what autism experts have known for decades and how this addresses their concerns.

1.4. The family client

More than with any other kind of case, defending persons with autism accused of crimes requires that the family be part of the defense team. The lawyer is going to be heavily dependent upon the accused's parents and siblings for gathering the developmental history of the client. Lawyers tend to seriously overestimate the ability of clients with ASD to accurately remember relevant events or coherently narrate them, understand what they have been told by the lawyer, or make decisions about the conduct of the defense. Obtaining a thorough developmental history from the family in an organized way is a critical first step for many reasons, but primarily because it may help cure the mistaken impression that this is a working attorney-client relationship in which the involvement of parents or other advocates is not essential.

The attorney needs to understand how sensory processing issues, literal interpretation, concrete thinking, and other autistic traits, with which the family is usually intimately familiar, can invisibly negate whatever understanding the lawyer thinks the client has of what is going on. Critically, if the lawyer does not understand the means by which the client has given the usually false impression of understanding the lawyer, the lawyer will be very impaired in assessing competence or explaining how the client, "pretending to be normal," may have, through "social scripting" or mimicry, or other adaptive means so typical of those with ASD, behaved in a way that lends support to the view that the defendant was not conscious of wrongdoing.

Full understanding of how the client presents himself in different situations can also help the attorney to envision the types of "negative demeanor" that might have an

effect on how the client is perceived by the prosecutor, judge, or jury, as well as the inability to express remorse. (Allely and Cooper 2017)(Haskins and Silva 2006).

The next step is to keep family members in the loop and enlist them to help ensure that the client understands what is happening, to the best of his ability, and assist in making decisions about the conduct of the client's defense.

Breakdowns in the attorney-client relationship and the relationship with the family are common in these cases. This typically begins with the failure of lawyers to conceptualize and embrace the need for this family defense team. The first step in this breakdown is the attorney insisting that she cannot talk to the parents about the case in one respect or another, or in its entirety, because their son, not his parents, is her client. This is not only common, but even occurs in cases where the parents have complete legal guardianship!

Another step in this breakdown is simple failure to communicate with the parents – and the accused as well. While lack of communication with clients is one of the most prominent ethical problems with lawyering in general, and responsible for a large numbers of bar complaints, in these cases it almost always involves a lack of understanding of autism, and what parents have struggled with before their legal nightmare began. Many attorneys allow themselves to be put off by parents who are felt to be meddlesome and dismiss the parents' horror at what is described as an inevitable outcome – prison and registration as a sex offender – as simple naïveté about the realities of the local criminal justice system.

The main point of this discussion is that defense counsel generally need a great deal of help understanding their client and the implications of his autism for all aspects of their representation. They cannot do this without being able to see him through the eyes of the parents and embracing what they have to say about him and his way of seeing the world. Clinicians – whether already involved in treating the accused or hired as consultants or experts – cannot be shy about offering advice to defense counsel about managing the relationship with the client and his family.

Chapter 2: The Science – the vulnerability of autistic individuals to engaging in inappropriate and offensive behavior

As described above, the task of the clinician and the attorney for the accused is to demonstrate how those with autism are particularly vulnerable to engaging in offensive behavior without antisocial traits or disorder, or any deviant sexual interest in the case of sex offenses, or awareness of wrongdoing, and, further, why he is very unlikely, with appropriate therapy, to be similarly involved in the future.

The point of this is not to throw under the bus those who, though not on the autism spectrum, have serious mental health issues which justly warrant diversion or mitigation. There can never be “too much justice,”⁴ and our system cries out for “therapeutic jurisprudence” for all (Marinos & Whittingham, 2019). However, it is essential to differentiate autism from other conditions, however much, in a therapeutic jurisprudence, they too would warrant therapeutic, rather than punitive approaches. One has to remember the downside of zealous advocacy in creative efforts to avoid the worst consequences: it has always been hard to get prosecutors and judges to take seriously the many conditions, other than psychosis and extreme intellectual disability, offered in mitigation.⁵

So, it is most essential in any case of a person with autism, to make clear above all else that autism is remarkable in that failure of social perception and intuition is the core characteristic among those with autism who come into contact with the criminal

⁴ U.S. Supreme Court Justice Lewis Powell wrote for the majority in *McCleskey v. Kemp*, 481 U.S. 279 (1987) that accepting the argument that race played a significant role in the administration of the death penalty would call into “serious question the principles that underlie our entire criminal justice system.” The famous words of Justice William Brennan's dissent noted that this evinced a “fear of too much justice.”

⁵ A partial list of the disabilities that attorneys have attempted to insinuate into the criminal trial would include drug addiction, alcoholism, hypoglycemia, compulsive gambling/pathological gambling disorder, voluntary subliminal television intoxication, intermittent explosive disorder, battered child syndrome, battered spouse syndrome], alcohol amnesia syndrome, amnesia, paranoid delusions, minimal brain disfunction, XYY chromosomal abnormality, automatism, somnambulism, epilepsy, old age, posttraumatic stress disorder (PTSD), delayed stress response syndrome], premenstrual stress syndrome], psychopathic personality disorder, kleptomania, learning disabilities, arteriosclerosis, paresis, trauma, encephalitis, pseudologia fantastica, etc. This litany describes a range of sane people who are unable in degrees to adjust to the demands or the conditions of modern society, including the environment, the social order, economic conditions, and so on. (Mahoney, 1985)

justice system. (Constantino, et. al., 2017) This deficit directly impairs the ability to intuit implicit social norms. DSM-5 This goes directly to the question of moral culpability, and cannot be brushed aside in a system of law whose validity and integrity rests on the concept of blameworthiness.

It is not enough to present conclusions about how autism can render one vulnerable and morally blameless when it comes to transgressing social boundaries. There is a huge chasm between our scientific knowledge and clinical experience of autism, on the one hand, and the premises on which law enforcement typically respond to such transgressions, on the other. That chasm can be bridged only by allowing law enforcement, prosecutors, and judges to see for themselves what autism is, how pervasively it affects these young men, and how different their situation is from others as a result. It is not enough to simply assert that people with autism are markedly impaired in grasping social norms, despite their intelligence. To be effective, one must explain why this is so.

Thus, it simply is not enough to explain that those with autism are “socially awkward,” or “fail to pick up on social cues,” or are “naïve” or “childlike” in some variety of ways. Those not intimately familiar with autism have great difficulty understanding how these traits are different from the deficits they see in other defendants, or how these traits support the ultimate conclusion that a particular accused is not morally blameworthy for his conduct. These common expressions are superficial and fall far short of capturing the cause, and pervasiveness of autism’s effects.

There are many ways to view the biological causes of autism, but the “consensus is that autism is a behavioral syndrome caused by one or more factors acting on the central nervous system,” (Volkmar, et al., 2008) the primary critical effect of which, in our context, is the disruption of social learning. The typical expressions for this, such as “not picking up on social cues,” fall far short of the reality, and give the dangerously false impression that all the person needs to do is simply “pay attention to social cues” and everything will be all right.

The problem goes deeper than that. The brains of these individuals, who have acted obliviously to important social taboos, stopped seeking social information altogether in early childhood. (Constantino, et al. 2017). And, however intuitive it may seem to the autism researcher, clinician, or parent that this relates to why the person ultimately does not intuit implicit social norms, it is not altogether clear to a prosecutor or judge why this might be so. Here we confront the conundrum that, as hard as it is for persons with autism to understand how those without autism think, it is equally or more difficult for the so-called “neurotypicals,” to envision what it must be like to think and see the world as a person with autism does.

What follows is an effort to trace step by step the direct line between the neurological differences in autism and the precise functional deficits that operate prominently in these cases.

2.1. Our inherited tools for social understanding and social survival

In their brilliant introduction to Simon Baron-Cohen’s seminal work on autism and theory of mind (Baron-Cohen, 1995), John Tooby and Leda Cosmides show us that the path to social understanding begins in our own minds: We look at an apple. The apple is red. Or, our brain tells us that the apple is red. But, for those with some form of colorblindness, the apple may be green or shades of gray. Under different conditions, the apple might seem to change colors. We live our lives with the feeling that color is an inherent property of things, yet we have to accept the scientific fact that objects actually have no inherent color, but rather the characteristic of absorbing some light frequencies while reflecting others; and what we perceive as color is the operation of our brain responding to the ability of cells in our retina to differentiate light frequencies, allowing us to attribute color to things. Indeed, we “see” and name colors that are not even in the light spectrum, like brown. We understand that not all living things have color vision and that some living things have better coloration than we do. Seeing color is an invention of natural selection, giving those who have it, among other things, the ability of our ancestors to tell which are the poison berries and which are safe to eat.

Just as intuitive as the idea that color is an independent property of objects, or,

say, that the earth is flat, or the sun goes around the earth, explain Tooby and Cosmides, is the feeling that our comprehension of the social world around us is the product of how that world came to us “pre-packaged” and “acted through the senses and through general-purpose learning mechanisms to build our concepts, interpretative frameworks, and mental organization.” In other words, in this “folk psychology” they describe, we feel we know the world and how it works because it presented itself to us as infants and our senses and intelligence were enough to teach us what it all meant.

But in the latter decades of the 20th century, scientists made the astonishing discovery that there existed “face cells” in the brains of monkeys. Cells that were dedicated exclusively to detecting a face – a monkey face, a human face, even a “face” carved on a pumpkin. (Bruce, et al., 1981). And while we assume that we have simply learned the ability to detect that someone has made eye contact with us, the direction of another’s gaze, or that we and they are giving “sharing attention” to some other thing, there are in fact cells in our human brain dedicated to these and other social tasks. Indeed, our survival as a species depended on our living in groups, and for that our brains had to develop tools to “understand and participate in complex social interactions” and did so over millions of years as our frontal lobes tripled in size to perform these advanced social tasks (Baron-Cohen, 1995). And this, Tooby and Cosmides tell us, gives us at birth a wide array of neurological tools

designed to solve adaptive problems endemic to our hunter-gatherer ancestors. Each of these devices has its own agenda and imposes its own exotic organization on different fragments of the world. There are specialized systems for grammar induction, for face recognition, for dead reckoning, for construing objects, and for recognizing emotions from the face. There are mechanisms to detect animacy, eye direction, and cheating. There is a "theory of mind" module, and a multitude of other elegant machines.

Thus, just as our brain paints the world with color to give us a richer life, it is enabled by “battalions of evolved, specialized neural automata,” each of which “makes its own distinctive contribution to the cognitive model of the world that we individually

experience as reality.” We have “theory of mind,” a mind-reading skill, to “a universal, evolved language of the eyes, which is mutually intelligible to all members of our species [and] can bring two separate minds into an aligned interpretation of their interaction.” But these neural tools operate so automatically that we are not aware of them, and

we mistake the representations they construct (the color of a leaf, the irony in a tone of voice, the approval of our friends, and so on) for the world itself – a world that reveals itself, unproblematically, through our senses.

“Yet,” Tooby and Cosmides write, “even well-designed machinery can break down.” And those who are impaired in neural areas of the brain which enable us to speak this “language of the eyes,” become

blind to the existence of other minds, while still living in the same physical, spatial, visual, and many-hued world as unimpaired people do. For beings who evolved to live woven into the minds of mothers, fathers, friends, and companions, being blind to the existence of others' minds is a catastrophic loss.

This then is the key neurological problem of autism: impairment in evolved neurological tools designed to allow us to perceive, understand, and survive in the social world. The practical problem for the advocate is to understand how this conflicts with the “common sense” view that the world “reveals itself, unproblematically, through our senses” and that those who are both percipient and intelligent can figure the social world out on their own.

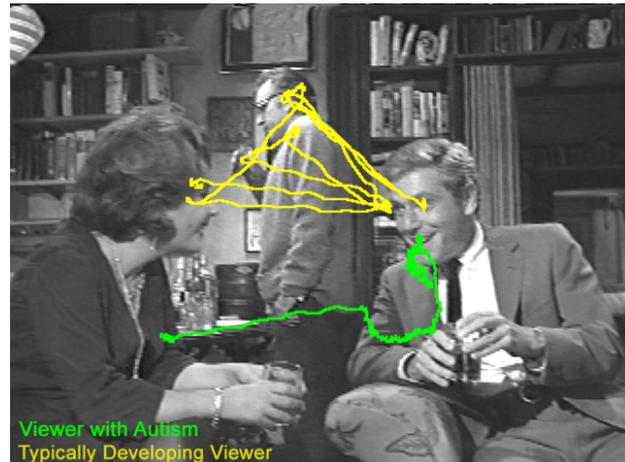
Because attorneys, and forensic clinicians unfamiliar with this specialized area, have to know why this is not so, and exactly how this “mindblindness” in autism actually comes about, findings of other seminal research will be detailed below.

2.2. Failure to “see” the social world

The most salient consequence of the disruption of our inherited social tools is that the person with autism simply does not see the countless cues in expressions, intonation, and body language that give meaning to social interactions and social

scenes. In his pivotal studies using eye tracking technology, Dr. Ami Klin demonstrates this concept by comparing the gaze patterns of persons with autism to those of typically developed individuals while looking at a movie scene from “Who’s Afraid of Virginia Woolf” (Klin, 2002).

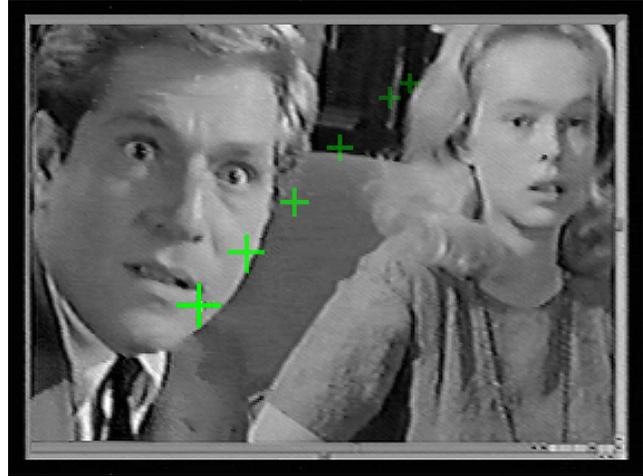
The typically developed viewers looked at the faces of the actor speaking, George Segal, the person spoken to, Elizabeth Taylor, and the actor playing her husband, Richard Burton, in the background. Their gaze patterns are not surprising; since the impact of the scene derives from the inviting, flirtatious nature of Elizabeth Taylor’s interaction with George Segal, we expect the viewer



to have natural curiosity as to how Richard Burton will react. In contrast, the viewers with autism focused on the mouth of the person speaking, with only a glance toward the body of the person spoken to. Thus, the individuals with autism did not seek out the nonverbal information which would be key to the scene’s meaning and an understanding of the movie’s dynamic plot. Instead, they were trying to capture the words of the speaker to understand what was going on.

Similarly, in another scene, where two of the actors remain silent but display visibly shocked expressions with their mouths open and their eyes wide, persons with autism still looked at the mouths – even with no words coming out to interpret – and disregarded the balance of the actors’ wide-eyed facial expressions.

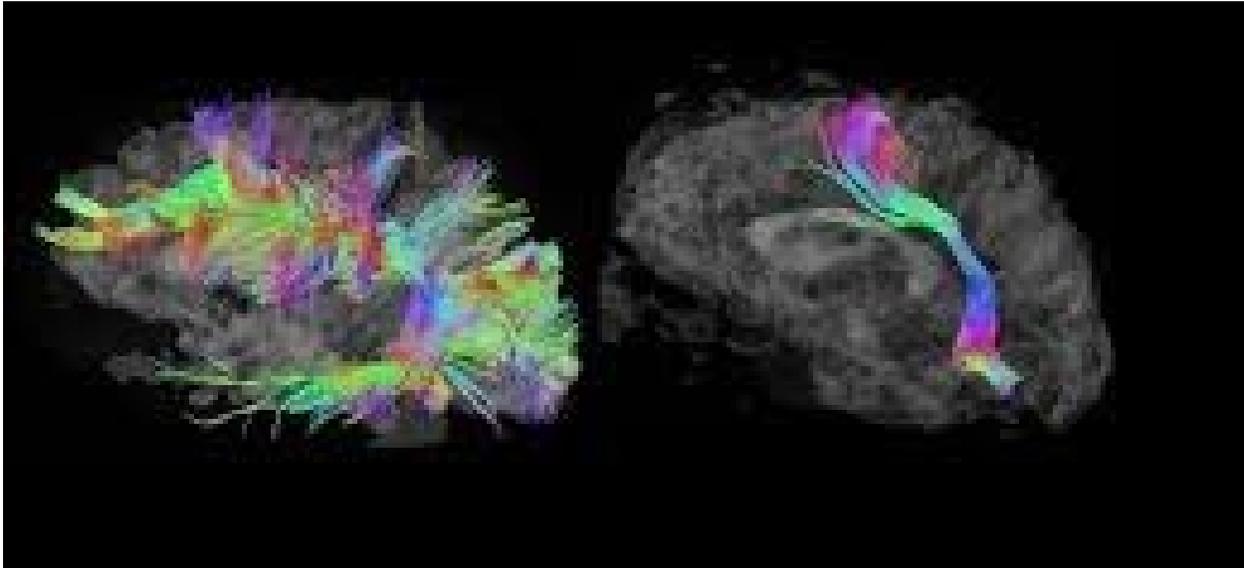
Numerous studies replicating this tracking of mouths over eyes confirm that something happens in the brain of individuals with autism that prevents their eyes from seeking out the social meaning of what they watch (Pelphrey,



Sasson, Reznick, et al., 2002; Constantino, et al., 2017). As a result, those with ASD are significantly worse than controls in recognizing emotions in others, a predictor of impairment in perceiving and learning from the social world (Baron-Cohen, 2006; Chilvers & Skuse, 2008). Similar research shows marked difficulty in identifying emotions and mental states in pictures or from context (Baron-Cohen, 2006; Rattazzi, Gonzalez-Gadea, Torralva, et al., 2012).

Arising out of this same phenomenon is the difficulty those with ASD have in recognizing and distinguishing faces, holding memory of faces, and being able to tell gender and age from faces (Behrmann, Thomas & Humphreys, 2006; Njokiktjien, 2001). Autistic individuals tend to see faces as objects, made up of parts; they show less than normal deterioration in performance when matching upside-down faces when compared to matching right-side-up faces (Schulz, et al., 2000).

What this research shows is the effect of the autistic brain's difficulty in processing the critical nonverbal information which typically developed brains process effortlessly and unconsciously. A variety of brain-scanning research also shows that the typical autistic brain has a different structure when it comes to the white matter and passageways that normally would convey this type of information.



High Definition Fiber Tracking (HDFT) showing very different pathways in the brain's white matter of person with ASD on the left (Image of Temple Grandin's brain).

The effect is as if, in order to avoid utter confusion, the brain simply does not seek this information, just as in cases of amblyopia caused by slight cross-eyedness, the brain filters out the signal from the weaker eye to avoid the confusion of "seeing double" in the area of binocular vision.

2.3. Autism: a social learning disorder

How do these differences impact the individual with ASD? To address this question, we must first consider what the benefits are to typically developed persons of the reciprocal social interactions they experience.

2.3.1. Typical development of "moral reasoning"

For typically developing individual, social interactions teach our minds how to instantly read others from the countless nonverbal cues in their facial expressions,

intonations, and body language. We develop the intuitive ability to conceptualize how other people feel and what their intentions are. We can predict what others will do, and we can imagine, and do imagine, what their experiences feel like. In a reciprocal way, we also learn about our own feelings and how to express them. Collectively, these experiences give us a sense of how the social world works, and the ability to intuitively navigate social situations. We develop “social intuition.”

The question of how typically developing people develop a sense of “right” versus “wrong” is one that has perplexed philosophers and researchers since the dawn of history. Socrates famously challenged his ancient Greek society to examine their assumptions about what made certain behaviors “good” or “true” or “just,” often using his questioning to expose contradictions or unsound assumptions others had based on social norms.

This inquiry has continued into the present. Jonathan Haidt, in his book, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (2012) surveys decades of widely cited studies on moral values in different cultures and how moral codes seem to emerge from emotional impulses, “gut feelings” about what is right or wrong, rather than being arrived at through rational deduction. This concept is known as “moral intuitionism.” Haidt at 4-7.

Haidt contrasts studies of developing moral development in children, beginning with Swiss psychologist Jean Piaget and American psychologist Lawrence Kohlberg in the 1960s-1980s. Piaget and Kohlberg both concluded that children develop the ability to understand right from wrong in stages, corresponding to their level of exposure to others and the need to navigate more complex moral situations. As a person’s experience grows, so does their ability to understand increasingly complicated moral rules. This is what is generally known as “moral rationalism,” the notion that people reason through moral decisions with increasing effectiveness as they age and become more intelligent. *Id.* at 7-8.

Piaget and Kohlberg agreed that children actively learn moral reasoning skills by

interacting with and perceiving the real world, especially other peoples' perspectives, and especially other children:

Kohlberg's most influential finding was that the most morally advanced kids (according to his scoring technique) were those who had frequent opportunities for role taking—for putting themselves into another person's shoes and looking at a problem from that person's perspective. . . . If you want your kids to learn about the social world, let them play with other kids and resolve disputes; don't lecture them about the Ten Commandments.

Id. at 9-10. This, children come up with their own rules for social behavior on their own. These conclusions, Haidt notes, are compelling, but they are not the entirety of the picture. New insight was later brought by research done under the supervision of a former student of Kohlberg's, psychologist Elliot Turiel:

His [Turiel's] innovation was to tell children short stories about other kids who break rules and then give them a series of simple yes-or-no probe questions. For example, you tell a story about a child who goes to school wearing regular clothes, even though his school requires students to wear a uniform. You start by getting an overall judgment: "Is that OK, what the boy did?" Most kids say no. You ask if there's a rule about what to wear. ("Yes.") Then you probe to find out what kind of rule it is: "What if the teacher said it was OK for the boy to wear his regular clothes, then would it be OK?" and "What if this happened in another school, where they don't have any rules about uniforms, then would it be OK?"

Turiel discovered that children as young as five usually say that the boy was wrong to break the rule, but that it would be OK if the teacher gave permission or if it happened in another school where there was no such rule. Children recognize that rules about clothing, food, and many other aspects of life are social conventions, which are arbitrary and changeable to some extent.

Id. at 11. Turiel discovered that these responses differed, however, when the questions concerned physical harm to others.

But if you ask kids about actions that hurt other people, such as a girl who pushes a boy off a swing because she wants to use it, you get a very different set of responses. Nearly all kids say that the girl was wrong and that she'd be wrong even if the teacher said it was

OK, and even if this happened in another school where there were no rules about pushing kids off swings. Children recognize that rules that prevent harm are moral rules, which Turiel deemed as rules related to “justice, rights, and welfare pertaining to how people ought to relate to each other.”

In other words, young children don’t treat all rules the same, as Piaget and Kohlberg had supposed. Kids can’t talk like moral philosophers, but they are busy sorting social information in a sophisticated way. They seem to grasp early on that rules that prevent harm are special, important, unalterable, and universal. And this realization, Turiel said, was the foundation of all moral development. Children construct their moral understanding on the bedrock of the absolute moral truth that harm is wrong. Specific rules may vary across cultures, but in all of the cultures Turiel examined, children still made a distinction between moral rules and conventional rules.

Id. at 11-12. But this distinction between moral and conventional rules is also not all-encompassing. Haidt, citing comparative anthropological studies between different societies and cultures, notes that even what constitutes the “moral truth that harm is wrong” can vary wildly from one culture to another.

If Turiel was right that morality is really about harm, then why do most non-Western cultures moralize so many practices that seem to have nothing to do with harm? Why do many Christians and Jews believe that “cleanliness is next to godliness”? And why do so many Westerners, even secular ones, continue to see choices about food and sex as being heavily loaded with moral significance?

Id. at 15. The answer, Haidt suggests, is beyond rationalism. Different societies have such radically different impulses about hypothetical wrongs. Haidt considers research by University of Chicago psychologist Richard Shweder comparing answers given by Americans and citizens of India to different moral questions. Both Americans and Indians generally agree that it is wrong to kick a dog. But Indians felt it was acceptable for a man to beat his wife after she saw a movie without his permission, whereas Americans generally said this was wrong. Conversely, Americans saw no problem with a young child addressing his father by his first name, whereas in India, this was viewed as

severe disrespect. *Id.* at 19.

This illustrated a large flaw in Turiel’s approach. Turiel had suggested that children intuitively understood a “bright line” moral rule about harming others, but that “bright line” was cultural, not universal. Shweder’s study, even young children agreed that it was acceptable for a man to beat his wife if she saw a movie without his permission, irrespective of “harm” to the woman.

If Indians said that these actions were wrong, then Turiel would predict that they were condemning the actions merely as violations of social conventions. Yet most of the Indian subjects—even the five year old children—said that these actions were wrong, universally wrong, and unalterably wrong. Indian practices related to food, sex, clothing, and gender relations were almost always judged to be moral issues, not social conventions, and there were few differences between the adults and children within each city.

Id. at 18.

Haidt demonstrates that human beings unconsciously internalize social customs and norms as moral rules from a very early age, and that we internalize them so strongly that we usually make a moral decision *before* we develop a rational justification for it. He briefly summarizes his argument as follows:

- The moral domain varies by culture. It is unusually narrow in Western, educated, and individualistic cultures. Sociocentric cultures broaden the moral domain to encompass and regulate more aspects of life.
- People sometimes have gut feelings—particularly about disgust and disrespect—that can drive their reasoning. Moral reasoning is sometimes a post hoc fabrication.
- Morality can’t be entirely self-constructed by children based on their growing understanding of harm. Cultural learning or guidance must play a larger role than rationalist theories had given it.

Id. at 30.

Thus, it is true that children are learning rules from their interaction with their peers, and no doubt parents, etc., but these are not universally accepted harm-based moral rules constructed logically from these experiences. Rather, they are absorbing cultural rules that are accepted as universal moral codes, which can be oblivious to the harm, or lack of harm, in the behavior. And what passes as “moral reasoning,” is often “a *post hoc* fabrication.”¹

Thus, it is from thousands of reciprocal social interactions, from birth to adulthood, that we learn social mores and taboos, and develop common sense as to what is appropriate and inappropriate behavior. We develop intuition as to how the social rules we learn will be applied in novel situations.

2.3.2. Impaired social learning in autism

Next, we must consider, what we would be like if, instead of that life experience of processing the myriad social cues over thousands of social interactions that gave us our social common sense, we had none of that input, none of that reciprocity, and no developed intuition about the feelings and intentions of others, or the social rules that society sets, or how to apply those rules to every new social situation. This is the “catastrophic loss” described by Cosmides and Tooby. It is very hard to imagine. But it is from this perspective that one has to consider the problem at hand – judging one with ASD who appears to have engaged in proscribed social misbehavior. Mindblindness in autism is the result of the brain avoiding the social cues essential to the social competence we take for granted and mistakenly assume to be innate.

To really explain the scope of the problem for persons with autism, it is very useful to examine the mental operations on which typically developed individuals rely in their daily lives. As part of his Nobel Prize-winning work, Daniel Kahneman makes exactly the same connection as autism researchers between the ability to perceive social information and the development of intuitive thinking abilities about the social world. In his best-selling book recapping and expanding on his behavioral research with

¹Non-production child pornography laws are a good example, justified on (1) false economics – that downloading images “creates a market” for producing images, when it does not reduce the supply of images – or (2) psychokinesis, the idea that viewing an image of child pornography “revictimizes” the person depicted.

Amos Tversky, “Thinking, Fast and Slow,” Kahneman describes the natural human inclination to see the social, the mental, and the psychological everywhere in the world around us. He refers, at p. 76, to the work of psychologists Heider and Simmel in the 1940s:

They made a film, which lasts all of one minute and forty seconds, in which you see a large triangle, a small triangle, and a circle moving around a shape that looks like a schematic view of a house with an open door. Viewers see an aggressive large triangle bullying a smaller triangle, a terrified circle, the circle and the small triangle joining forces to defeat the bully; they also observe much interaction around a door and then an explosive finale. The perception of intention and emotion is irresistible; *only people afflicted by autism do not experience it*. All this is entirely in your mind, of course. Your mind is ready and even eager to identify agents, assign them personality traits and specific intentions, and view their actions as expressing individual propensities. Here again, the evidence is that we are born prepared to make intentional attributions: infants under one year old identify bullies and victims, and expect a pursuer to follow the most direct path in attempting to catch whatever it is chasing.

Kahneman’s observation, as matter of fact that, “The perception of intention and emotion is irresistible; *only people afflicted by autism do not experience it*,” identifies the core of the problem.

The centrality of the importance of social world perception for Kahneman is evidenced at the beginning of his book. The first chapter opens with a picture of the face of an obviously angry woman:



Your experience as you look at the woman's face seamlessly combines what we normally call seeing and intuitive thinking. As surely and quickly as you saw that the young woman's hair is dark, you knew she is angry. Furthermore, what you saw extended into the future. You sensed that this woman is about to say some very unkind words, probably in a loud and strident voice. A premonition of what she was going to do next came to mind automatically and effortlessly. You did not intend to assess her mood or to anticipate what she might do, and your reaction to the picture did not have the feel of something you did. It just happened to you. It was an instance of fast thinking.

This fast thinking is what Kahneman calls "System 1" or "Type 1" thinking. It is automatic, intuitive, effortless, and often unconscious and impossible to control, and applies to practiced tasks like driving or speaking. Contrasting with this is what Kahneman calls "System 2" or "Type 2" thinking, which involves orderly computation, doing things in stages, and remembering and applying rules; it is controlled, effortful, and logical. He describes how infants less than one year old have intuitive or Type 1 thinking and how this intuition derives from the perception of the social world.

But in describing Type 1 thinking, Kahneman is describing capabilities that a typical infant would have, but that *those with ASD do not have* – but that are essential to social survival. And without those perceptions of the other, and the intuitive thinking that can only grow out of that, the autistic person needs to find some other way to navigate the world. One such way is by grasping at taught or intentionally discerned rules:

In this context, individuals with AS were said to mediate their social and emotional exchange through explicit verbal and logical means cognitively, rigidly, and in a rule-governed fashion (Volkmar, et al., 2005).

The enormity of the problem for the autistic individual suddenly becomes apparent when Kahneman tells us that "most of the work" or 90% of what our mind does during the day is this easy, unconscious thinking arising from intuitions and predictive abilities that come from social perception. Clearly, he is talking about Theory of Mind here,

something the person with autism does not have. Because the rest of us have that intuition to get us by in most tasks, we expend only a relatively small amount of effort and time on the more difficult, deliberate, step-by-step logical thinking that is directed by whatever rules and evidence we have at hand.

For the individual with ASD, this mental workload stands on its head. Without those perception-based intuitions which typically developed people can get by with most of the day, for the person with autism, everything social can be an exhausting struggle.

2.4. Without social perception and intuitive social thinking, social norms and taboos are not evident to the person with ASD

It is widely understood and problematic that individuals with ASD see the concrete and do not grasp or “appreciate [the] unwritten rules of social engagement.” “Everything that is not explicit, everything that is unstructured, everything that is not defined and expressly supported, is a difficulty for individuals with Asperger’s Syndrome.” Their behavior may appear “inappropriate or embarrassing when, in addition to failing to use these social niceties, they violate clear social conventions” which oftentimes results from an unawareness of other people’s feelings or point of view. (Mesibov, Shea & Adams, 2001).

Lack of awareness of social norms and taboos, which figures into both domains of the diagnostic criteria for ASD, arises directly and inevitably from the absence of social intuition and its antecedent, “social visual engagement,” with its neurodevelopmental underpinnings. (Venter, Lord, and Schopler 1993; Loveland, 1991; Gutstein & Whitney, 2002). Social competence, including awareness of social norms, is simply a part of social intuition.

Since Hans Asperger’s initial study (1944), the disorder of Asperger syndrome (AS) has been synonymous with individuals who are challenged to attain even minimal social success, although they possess relatively unimpaired language and intelligence.

* * *

The inability to develop social competence is the leading factor in the

failure of most adults with autism to attain even a minimal level of quality in their lives (Howlin & Goode, 2000).

(Gutstein & Whitney, 2002). The authors demonstrate why it is so difficult for those with ASD to acquire intuitive social competence even with instructions on how typically developed persons acquire it.

The consequence of all this is that those with ASD have to be explicitly told these untaught social rules, as every expert and parent experienced with autism will tell you.

Takeda et al. found intact external (subject to predetermined rules) moral reasoning, but impaired internal (autonomous) moral reasoning, particularly higher-level autonomous-altruistic moral reasoning, among children and adolescents with HFASDs relative to typical peers.

* * *

Individuals with HFASDs appear to learn specific behaviors most effectively via explicit, rules-based instruction; this type of learning appears to apply to the domain of moral reasoning and behavior as well.

(Lerner, et al., 2012). Thus, say these authors, “the social and emotional deficits within ASDs may be salient during incidents of unintended criminal . . . behavior.” Clearly, the problem is not that these individuals do not “know right from wrong,” but rather that what is regarded as right and wrong is often unwritten, untaught, and implicit, and therefore not apparent to many of the most severely affected young men with autism.

2.5. Lacking in social intuition, young men with ASD are vulnerable to unwitting engaging in offensive behaviors

Researchers have noted for some time that, although young men with ASD are not more prone to criminality than their neurotypical peers, they seem susceptible to a range of sexually offensive behaviors such as “inappropriate courtship scripts, exposing one’s genitals and/or masturbating in public, touching others in a sexual manner, and downloading child pornography” (Mogavero, 2016). Researchers have noted that ASD itself “has a critical role among the minority who commit sexually-related offenses” because of its effects on understanding social norms (Mogavero, 2016; see also Lindsay, et al., 2014).

2.6. Without social intuition, the individual with ASD will not see the implication of social scenes, in life and in photographs.

Social competence for adolescents and adults involves not only knowing untaught social rules, but also how to interpret social situations in order to apply those rules. The problem for those with ASD is that the same neurological deficits which inhibit social visual engagement in personal encounters also impair the ability to interpret whole social scenes. These individuals are not just missing what we see in others' eyes or facial expressions; they are missing the entire social scene, in multiple social cognition domains (Baez, et al., 2012). This includes social scenes in photographs.

When Daniel Kahneman wrote that, "The perception of intention and emotion is irresistible; only people afflicted by autism do not experience it," he was not guessing. Using the same 1944 animation on which Kahneman commented, Dr. Ami Klin had demonstrated that those with ASD are significantly less able than their typically developed peers to recognize the social cues in the animation, even when prompted, and even with age. Frequently, they see none of them. (Klin, 2000)

The above research adds breadth to the fundamental eye tracking research by demonstrating that those with ASD do not just have a *brain* that avoids seeking the social cues in obviously social scenes. They also have a *mind* that does not attribute social meaning to things from which the minds of typically developed persons cannot avoid creating a social narrative – even moving geometric objects. For many prosecutors and judges, this stark demonstration of how differently those with ASD perceive the world, so directly tied to social experience and understanding, is a precipitate factor in reconsidering the reliability of the usual intuitions and heuristics of enforcement of child pornography laws.

We have two assumptions when it comes to persons who are viewing sexual images of underage persons: first, that they are aware of the social rules related to viewing such images and how that behavior is viewed by others; and second, that in viewing such images, persons are cognizant of the social implications of the scene and the perspectives of the persons therein. These assumptions simply do not hold true for those with autism in the face of autism research and clinical experience.

2.7. While autism makes young men vulnerable to unwittingly transgressing social norms, their autism renders them generally “rule bound” and assiduous at following the social rules they are told about

The pervasive effects of the inability to develop socially intuitive thinking leaves most of those with ASD desperate to figure out the important social rules they cannot intuit and which no one has expressly shared with them. DSM-5 observes that being rule-bound is a trait under both domains of diagnostic criteria. This is a trait which all clinicians, teachers, and others who work with those on the autism spectrum know well. Being rule-bound can be a problem for children with ASD and frustrate their efforts to play with others. They will insist on adherence to rules, whether or not they accurately understand them, and complain about others violating them.

But when it comes to assessing risk for future offending, being rule-bound is an asset which prosecutors and judges can rely on. Research shows greater compliance with conditions of supervision by persons with ASD, amplifying the very important point that, despite rendering affected individuals vulnerable to committing online offenses, autism also provides assurance against the risk of reoffending or worse. Based on the typical rigid adherence to rules by those with ASD, once they are told the rules, there is a strong assurance of future compliance with the law:

Youth with ASD were also less likely to be charged with probation violations. This may be due to several factors, including increased rule adherence in youth with ASD, the fact that youth with ASD are less likely to be prosecuted, and therefore less likely to serve probation, or because youth with ASD may be more closely supervised by adults than youth without a developmental disability.

(Cheely, et al., 2012). This same research notes the increased frequency with which cases involving those with ASD were diverted:

We also found significant differences in outcomes between youth with ASD and comparison youth, such that youth with ASD were less likely to be prosecuted and were more likely to have their charges diverted than comparison youth.

2.8. Other vulnerabilities of autism

A lack of visual social engagement leads to mindblindness. Which in turn leads to failure to develop social intuition, including the ability to intuit social norms. Individually and in combination this can be catastrophic. But mindblindness can also be associated with other important characteristics of autism. For this we return to "Theory of Mind" ("ToM") and how it occurs.

In his landmark work "Mindblindness" (1995), Simon Baron-Cohen demonstrates from the view of evolutionary biology and evolutionary psychology how "the inherited architecture of the human mind is the product of the evolutionary process" and how "the evolution of a mind-reading capacity" in typically developed individuals is best seen in contrast with autism, "a genetic pathology that causes certain individuals to be born mind blind."

Evolutionary psychology looks at the brain (and thus the mind) as an organ that, via natural selection, has evolved specific mechanisms to solve particular adaptive problems.

(See also Cosmides, et al., 1992). Baron-Cohen focuses on "one specific adaptive problem—the rapid comprehension and prediction of another organism's behavior," which is "mind-reading." (Baron-Cohen, 1995, p. 12). This problem should be viewed in the context of our prehistoric hunter-gatherer of many thousands of years ago, including the period of "massive neurocognitive evolution" in the Pleistocene epoch when the brain tripled in size to its current dimensions of about 1350 cc. This increase in large part was due to the need for greater "social intelligence," (Brothers, 1990; Byrne & Whiten, 1988; Cosmides, 1989; Humphrey, 1984), *i.e.* "the ability to process information about the behavior of others and to react adaptively to their behavior because the vast majority of non-human primate species are social animals, living in groups that range from as few as two individuals to as many as 200 . . ." and "making sense of the social behavior is staggeringly complex. One needs a powerful device—or set of devices—to make sense of actions, rapidly, in order to survive and prosper" (Baron-Cohen, 1995, p. 14).

The challenge for the primate was (and remains) to understand, predict

and manipulate the behavior of others in the group. . . . In primate groups it is this social intelligence that determines who wins higher status

(Baron-Cohen, 1995, p. 15). Baron-Cohen quotes paleontologist Richard Leakey:

The world of higher primates-of monkeys, apes, and humans-is quintessentially a game of social chess, a keen intellectual challenge. The challenge is keener yet than the ancient board game itself, because the pieces not only unpredictably change identity-knights becoming bishops, pawns becoming castles, and so on-they occasionally switch colors to become the enemy. . . . What each individual seeks, of course, is reproductive success: producing as many healthy, socially adept offspring as possible. . . . In higher primates, the greatest reproductive success (in both males and females) is shaped much more by social skills than by physical displays, either of strength or appearance. The complex interactions of the primate social nexus serve as an exquisite sorting system, in which the individuals with an edge in making alliances and monitoring the alliances of others may score significantly in reproductive success. (Leakey and Lewin 1992, pp. 191-293).

The metaphor of "social chess" came from Cambridge neuropsychologist Nicholas Humphrey. His idea was that "the chief role of creative intellect is to hold society together," distinguishing between social intelligence and other kinds of intelligence. Humphrey writes:

"Social intelligence" required, for a start, the development of certain abstract intellectual skills. If men were to negotiate the maze of social interaction it was essential, they should become capable of a special sort of forward planning. . . . In a complex society, such as those we know exist among higher primates, there are benefits to be gained for each individual member both from preserving the overall structure of the group and at the same time from exploiting and out-manoeuvring others within it. Thus social primates are required by the very nature of the system they create and maintain to be calculating beings; they must be able to calculate the consequences of their own behavior, to calculate the likely behavior of others, to calculate the balance of advantage and loss—and all this in a context where the evidence on which their calculations are based is ephemeral, ambiguous, and likely to change, not least as a consequence of their own actions. . . . The game of social plot and counter-plot cannot be played merely on the basis of accumulated knowledge, any more than can a game of chess.

. . . . [O]ver and above the cognitive skills which are required merely to perceive the current state of play (and they may be considerable), the social gamesman, like the chess-player, must be capable of a special sort of forward planning. Given that each move in the game may call forth several alternative responses from the other player this forward planning will take the form of a decision tree, having its root in the current situation and branches corresponding to the moves considered in looking ahead at different possibilities. . . . There may be, of course, strong and weak players—yet, as master or novice, we and most other members of complex primate societies have been in this game since we were babies.

(Humphrey, 1984, pp. 4, 20-21). Baron-Cohen points out (Baron-Cohen, 1995, p. 19) that “not all social interaction is competitive,” and “even cooperative social interaction requires considerable mind reading.”

Like the chess expert, we are social experts. Our social reasoning process has become automatic and effortless—possibly as a result of years of daily practice, possibly also because, right from the beginning of life, the human brain is programmed to automatically and effortlessly interpret social behavior in this way, as a result of millions of years of evolution. Perhaps we never go through a stage of finding social interaction an effort to decode. Rather, we are born understanding social chess, or at least we have many of the basic principles that we will need in order to make sense of and take part in the game. We have some key neural mechanisms that allow us to “see” the solution to a social situation intuitively.

(Baron-Cohen, 1995, p. 20).

ASD, at its core, is a disruption of these key neural mechanisms. Failure to understand implicit social norms can bring those with ASD into contact with the police. Other phenomena can then complicate these encounters: bullying, gullibility, credulity, difficulties in executive functioning, excessive candor, and inappropriate affect.

2.9. Credulity and gullibility

Mindblindness leads to credulity and gullibility in those with ASD. While it creates vulnerability to all kinds of victimization, this trait leaves those with ASD extremely susceptible to police “sting” operations, even for behaviors they would not otherwise ordinarily engage in. This is a major area where police nation-wide need greater training

in autism.

"Children or adults with Asperger's syndrome can be confused by sarcasm, and prone to teasing by others, as they are remarkably gullible and assume that people say exactly what they mean." (Attwood, 2007, p.116; Greenspan, Loughlin & Black, 2001). In this context, Attwood defines credulity as 'a tendency to believe something, usually a highly questionable statement or claim, despite scanty evidence' and gullibility as 'a vulnerability to being tricked or manipulated' (p. 102). He notes that people with developmental disabilities are more credulous and gullible than typically developing persons. Low social intelligence and specifically high credulity and gullibility lie at the heart of poor social outcomes for children and adults with ASD (Greenspan, et al., 2000; see also Sofronoff, et al., 2011). The luminary neurologist and author Oliver Sacks, in his assessment of Temple Grandin, "An Anthropologist on Mars" (Sacks, 1990), wrote:

In her ingenuousness and gullibility, Temple was at first a target for all sorts of tricks and exploitations; this sort of innocence or guilelessness, arising not from moral virtue but from failure to understand dissembling and pretense . . . , is almost universal among the autistic.

Research traces this dynamic to the ToM deficits in autism and the consequent lack of social intuition. Development of ToM requires appreciating that others may have different beliefs and intentions, and that those can change in various contexts, or imagining different mental states for oneself or others. This begins in the visual social engagement with caregivers in infancy, stories and experiences involving "make-believe," pretending, and deception.

Baron-Cohen observes several familiar ways in which typically developing infants and small children experience and develop ToM, where infants with autism do not. Reddy has shown that very young infants are sensitive to changes in an adult's goal. For example, they respond to the distinction between a give and a "tease" (Reddy, 1991).⁶ This means offering an object to a child but pulling it back just as the child reaches for it, rendering the action "ambiguous." Typically developing infants of 9 to 18 months, versus infants of the same age with a variety of mental handicaps, will immediately look

⁶Reddy also gives examples of 9-month-old infants themselves teasing – offering an object and then pulling away.

at the eyes of the giver to discern what their intent is. Only a small percentage of those with ASD will (Phillips, Baron-Cohen, Rutter, 1992). Typically developing children around the age of 18-24 months begin to pretend and recognize pretending in others (Dunn & Dale, 1984; Leslie, 1987). Between ages 3 and 4, these children begin to understand that people can believe things that are false, and “pretend” that something is true which they know is false. Thus, by this age, typically developing children have the ability to understand, using Baron-Cohen’s example, the deception at the heart of "Snow White" (Snow White did not know that the nice woman selling apples was really her evil stepmother) and other such fairy tales (Baron-Cohen, 2000).

This development lags in children with autism who are mindblind. They typically lack the visual social engagement essential to understanding the minds of others, and thus they are unable to detect pretense and deception. The autistic child's play is characterized by a lack of the usual flexibility, imagination, and pretense found in other children. A wide range of tests, called “false belief tests,” demonstrate that children with autism have a genuine inability to understand that others have different beliefs, or understand false beliefs (Baron-Cohen, 1995, pp.69-76). Returning to Baron-Cohen’s example, they would assume that Snow White knew *what they know*: that the woman selling apples was the evil stepmother.

As a result of this deficit, those with ASD do not have the ability to see when someone may be trying to mislead or trick them. Those with ASD endorse traits of credulity and gullibility:

Is easily fooled

Believes someone when they have lied to them in the past

Lent money or things to someone who is unlikely to repay

Been deceived by someone who has already deceived them before

Done something that has got them into trouble at the suggestion of others

Doing unreasonable favours with little chance of return

Tricked into buying another child's lunch or treats

Believe what s/he is told regardless of source reliability

Believe what s/he told regardless of prior deception by same person
Tricked into giving up objects of value
Believes things that other people would view as clearly untrue
Given in to suggestion to say something that could get into trouble for
Believes many things that sees/reads in advertisements/internet
Believes rumours even when come from unreliable source

(Sofronoff, et al., 2011, p. 362). Lack of protection from peers or close friends also leaves those with ASD particularly vulnerable to exploitation.

Even for individuals who are otherwise intelligent, the severity of social deficits offsets the supposed intellectual ability to intuit when one is being deceived. This is central to understanding the behavior of those with ASD who fall for “stings” or are put up to offensive behavior by others. It also relates to executive function.

2.10. Executive functioning

Executive functioning consists of those skills needed to assess one’s situation and manage oneself and one’s resources in order to achieve a goal. The concept includes use of a battery of neurological skills such as working memory, fluid reasoning, the ability to envision alternative outcomes from available choices, rationally weigh the risks and advantages of competing choices, the ability to consider different alternative goals or means, and mental control and self-regulation.

Executive functions (EFs) make possible mentally playing with ideas; taking the time to think before acting; meeting novel, unanticipated challenges; resisting temptations; and staying focused. Core EFs are inhibition [response inhibition (self-control—resisting temptations and resisting acting impulsively) and interference control (selective attention and cognitive inhibition)], working memory, and cognitive flexibility (including creatively thinking "outside the box," seeing anything from different perspectives, and quickly and flexibly adapting to changed circumstances).

(Diamond, 2013). The ability to engage in “social chess,” and to become competent in

navigating complex social situations is the developmental precursor to executive function. Mindblindness has a catastrophic effect on these precursors. Numerous researchers have examined this connection from a number of perspectives (Ozonoff, et al., 1991; Perner & Lang, 2000; Sabbagh, M.A., et al., 2006).

This correlation is very important in (1) understanding behaviors of those with autism and (2) evaluating competency in the criminal justice context. It can be bewildering to observers how a young man with ASD can persist in the pursuit of an objective, or in the use of certain means, without noticing otherwise obvious signals that the objective or the means, or both, are unwelcome, inappropriate, or illegal. This is most evident in cases of sexting or trolling behavior where which becomes obsessive and perseverative. This behavior always involves ToM deficits in understanding norms and social scenes.

Impairments in executive function also point directly to concerns about legal competence. Competence implicates the ability to utilize whatever knowledge the accused with ASD has about the legal process, or the facts of the case, and bring it to bear in properly assisting in his defense. It bears critically on the ability to autonomously make important choices, or even participate in making important choices, in the conduct of his defense, or any of the essential decisions that are his alone to make.

2.11. Online addiction

Modern society is generally familiar with the idea of online addictions – the most common perhaps being online computer games and gambling. Those with ASD seem very susceptible to obsessive pursuit of computer games and we generally understand this in terms of circumscribed interests and repetitive behaviors. In understanding seemingly compulsive or obsessive sexual online behavior, whether it is in the viewing and downloading of underage explicit images or indiscriminate seeking of sexual partners, we do not regard sex as a “circumscribed interest” as understood in the diagnosis of ASD. Interest in sex is a common denominator.

But there may be more going on with those with ASD who become “addicted” to seeking online social connections than meets the eye. First, social isolation and

loneliness can be a powerful driver of behavior. There is a TED Talk by Dr. Rachel Wurzman titled "How isolation fuels the opioid addiction." She describes how naloxone – an ingredient in Narcan® – which blocks opioid receptors in a part of the brain called the striatum, also disrupts persons' ability to socially connect. There are naturally occurring opioids in your brain and not having opioid-receptor binding makes it difficult for us to feel the rewards of social interaction. She then relates the deleterious effects on the brain of "loneliness," the disruption of our need as human beings, to be connected to one another through "authentic, reciprocal relationships" (Cacioppo, et al., 2014; Luo, et al., 2012). "Loneliness creates a hunger in the brain which neurochemically hypersensitizes our reward system. . . . If we don't have the ability to connect socially, we are so ravenous for our social neurochemistry to be rebalanced, we're likely to seek relief from anywhere. And if that anywhere is opioid painkillers or heroin, it is going to be a heat-seeking missile for our social reward system. Is it any wonder people in today's world are becoming addicted so easily? Social isolation [caused by chemical treatments like naloxone] contributes to relapse." Her answer to the opioid problem is that "we need to practice social connective behaviors instead of compulsive behaviors, when we're lonely, when we are cued to remember our drug."

Persons with autism are by nature starved for interpersonal interaction on an authentic level and desperate to discover their own sexuality. They experience the same urges everyone feels. Dr. Tyler Whitney draws the comparison to ASD: "Individuals with ASD have such long histories of social failure. *Desiring to be a sexualized being is a one of the drives in all of us, but people on the autism spectrum don't know how to appropriately meet that need.* Being deprived of this reward, we are neurochemically unbalanced and are likely to seek balance anywhere it appears we can find it," like Dr. Wurzman's "heat seeking missile."⁷

Typically developed persons can easily experience "authentic, reciprocal relationships" with others, even strangers. Even persons addicted to opioids have experienced emotional reciprocity in their development and daily lives – it is still accessible to them. This is not so for some with ASD. Without therapy, some are going

⁷ Personal correspondence from Dr. Whitney, of Alpharetta, GA

to be especially susceptible to obsessive pursuit of emotional or sexual arousal experiences they are only able to enduringly pursue online.

2.12. Bullying

Children with ASD are often bullied in school and other social situations. Their social awkwardness makes them a target for this just like those with physical disabilities. Without essential mind reading skills, they lack the ability to see the malicious intentions of their tormentors and frequently mistake their intentions as “friendly,” as indeed they tend to see any attention at all as being “friendship” (Jawaid, et al., 2012). They often do not get how the joke is on them, and tend to be compliant or unresponsive, which can inspire further bullying (Wainscot, et al., 2008). A child with ASD has difficulty understanding teasing and can neither reciprocate good natured teasing nor distinguish it from malice (Heerey, et al., 2005; Sofronoff, 2011, p. 368). This research showed that those with ASD endorsed victimization directly related to their social naivete, such as:

Been victim of physical bullying

Tricked into telling secrets

Tricked into taking the blame when not their fault

Been taunted or insulted by other children to point of distress

Subject of practical jokes when been tricked before by the same person

Victim of provocation and retaliated and only one that gets into trouble

Treated unkindly by a teacher because of difficulties

Excluded from activity by teacher because of difficulties

Sofronoff, 2011, p. 362). “Social vulnerability was found to be strongly and positively correlated with bullying in children with AS” (Sofronoff, 2011, p. 369).

Young man with ASD are subjected to bullying in every social environment.. The history of bullying can have an effect on their brains, including the memory, and it is a factor which must be explained in connection with any threat of incarceration. In jails

and prisons, it is the norm for those with ASD to be bullied, psychologically and physically, and spend inordinate periods of time in solitary confinement for their own protection.

2.13. “Not learning his lesson”

Even parents are bewildered when their son with ASD engages in the same inappropriate behavior, with similarly catastrophic results, a second time around – or even repeatedly. And the interpretation of this by those who do not routinely work with autism is that the repetition of inappropriate behavior shows willfulness and disregard for the feelings or safety of others, and antisocial traits. Especially where the prior incident(s) resulted in some outcry or law enforcement intervention, it is natural to say, “he should have *learned his lesson.*”

There are several problems with this reflexive thinking. The learning method for persons with autism is very different. Persons with ASD have diminished capacity to abstract from one experience to another arguably similar experience, and to abstract from the application of a “social rule,” in one instance to an arguably similar instance, and difficulties in executive function in applying what they have learned. Also, what typically developed persons think are similar situations may be very dissimilar to the person with autism, or in fact.

2.13.1. Learning with ASD

While persons with autism may be very good at rote learning of facts, when it comes to learning social roles and how they apply in any particular circumstance, very explicit, step-by-step instruction is required.⁸ It cannot be supposed that the “lesson”

⁸ “For older or higher-functioning children, the core of the educational program should be an intensive focus on social and communication skills training. Positive actions in frequently troublesome situations may have to be rehearsed and scripted. Concrete social and communication skills—including eye gaze, voice modulation, gestural communication, posture, proximity, greeting behaviors, rules of conversation, and social expectations—may have to be taught in a very explicit fashion. Children whose vocalizations are just emerging and for whom vocal communication is a realistic goal. The setting for the social and communication skills therapy may have to alternate between small group instruction (in which appropriate behaviors can be practiced and supportive feedback can be gained) and naturalistic settings (in which the newly acquired skill can be put to practice or additional problematic behaviors can be identified for practice in the small setting). Successful techniques used for this purpose include modeling of behaviors by an instructor, self-observation, role playing, and the use of individualized social stories. The advent of numerous computer interventions and applications adaptable to the individual's situation and levels of functioning are now available” (Volkmar, et al., 2017).

we would take from an adverse experience will be a lesson for a person with autism. Every aspect of the “rule” must be broken down and addressed, and the person has to be tested on his understanding of the principle.

2.13.2. Abstracting from one situation to the next

A substantial component of our social intuition has to do with understanding the differences between social settings, from very formal to very casual, and from very public to very private. Within this we also understand whether a social rule that is clear in one social setting applies, or applies differently, in a different social setting. This in turn involves a calculus of what social settings are similar in relation to the behavior that is the subject of the rule. This kind of multi variate thought process, intuitive for us, is simply not accessible for one with autism, for whom each social scenario, in each possible setting, with respect to each behavior at issue, must be considered explicitly and anew.

2.14. “Candor”

We have noted that children with autism who are “mindblind” have difficulty understanding the minds of others, and hence are unable to detect pretending and deception. For decades studies show that in children with autism spontaneous pretend play is severely impoverished or altogether absent. (Baron-Cohen, 1995 p.77). But, for typically developing children, what comes with understanding pretending and deception is also the ability to deceive others (Sodian, 1991; Sodian, et al., 1992). Here, too, autistic children are lacking. And so, it is frequently observed that persons with ASD are “candid to a fault.”

This can appear as “rudeness” in the unfiltered expression of thoughts which may be embarrassing or offensive to others, owing to the failure of the person with ASD to be thinking of or discerning the feelings or sensibilities of others. “Your arms are very fat.” “Your skin is black.” But this lack of filtering can also appear in lack of filtering in giving a narrative. Here, again, the person with ASD is not thinking about the feelings or sensitivities of the listener, and therefore does not choose words or content to avoid being offensive. By the same token, the individual with ASD is unlikely to be able to tailor a narrative, or “spin” it to suite the expectations of the listener, to achieve an

emotional effect, to distort or deceive, to make an account more interesting or fantastic or believable, or most important, to put themselves in a favorable or even fair light. All such tactics require understanding how others think, and a lifetime of practice at influencing thoughts.

Thus, it is not uncommon to hear parents say that their autistic child “does not know how to tell a lie.” Indeed, polygraph examiners often confront the problem when preparing control questions for those with ASD based on the assumption that people lie all the time. This is not necessarily the result of being extremely moral, but more simply not having habits and “theory of mind” skills essential to conjuring up a deception with a view toward affecting what another is thinking.⁹ This is not to say that a child or adult with autism are not capable of saying something that is not true. They are just as susceptible to giving reflexive denial when accused of doing something wrong, to avoid consequences, as small children in response to “Did you steal the cookies?” This involves no calculation of the mental states of the other, or how to alter such states, and requires only childish communication skills. Persisting in such reflexive denials, or giving an exculpatory narrative is usually unattainable.

2.15. Inappropriate affect

Inappropriate facial expressions, including smiling or laughing inappropriately, are diagnostic indicators for ASD. The original set of diagnostic criteria, outlined by Gillberg and Gillberg in their seminal publication (Gillberg & Gillberg, 1989) refers to “non-verbal communication problems” including “inappropriate facial expression.” This is also a diagnostic criterion under DSM V¹⁰ and is described as “incongruent” or “inappropriate” “affect.” It has long been noted that such non-verbal communication

⁹Nevertheless, it is also said very frequently that persons with autism tend to be very moralistic, and prone to “black and white” thinking. “Black and white” thinking is a component of rigid thinking patterns, which is a specific indicator in section B.2. of the DSM-5 Autism criteria. To “think of issues as being black and white” was expressly referred to in DSM-IV as a characteristic of AS in Section B. As a result, persons with autism can be very upset in the extreme if they learn that someone has lied to them, even if the lie was a “white lie” or for a good reason. This is as much tied to rigid thinking as it is to the lack of ability to take the perspective of others.

¹⁰DSM V refers to “2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.”

deficits are a serious problem in encounters with police, because inappropriate facial expressions suggest to police many negative things *other than* the actual developmental disability that is its cause, such as lack of remorse, sadism, psychopathy, mental illness:

The perceived lack of empathy or remorse is legally significant because it might be mistaken as an indicator of psychopathy. Psychopaths are human predators, while AS individuals are socially naive and immature. While both give the impression of a lack of empathy, the psychopath actually has no remorse, whereas the AS individual's outward communicative cues simply do not express remorse in expected and anticipated ways.

(Wauhop, 2009).

An article jointly authored by a judge, psychologist, and a law enforcement consultant describes the problem: “Attorneys and judges must avoid misinterpretation of behaviors and characteristics typical of those with ASDs since these behaviors and characteristics could be misinterpreted as evidence of guilt, indifference, or lack of remorse.”

People with AS often get into trouble without even realizing they have committed an offense. Offenses such as making threatening statements; personal, telephone, or internet stalking; inappropriate sexual advances; downloading child pornography . . . would certainly strike most of society as offenses which demand some sort of punishment. This assumption, though valid at face value, may not take into account the particular issues that challenge the AS individual. Problems with sensory overload, poor social awareness, semantic misunderstandings, inability to deal with changes in routine or structure, and limited to absent understanding of non-verbal communications are the very kinds of things that make more appropriate responses to society very difficult for someone with AS.

* * *

What are AS dilemmas for prosecutors, defense attorneys, probation officers and judges? Left unexplained, the person's courtroom displays of laughing or giggling, loud vocal tone, and aloof body language—also inherent to the condition of AS— could lead many judges to conclude that this is, indeed, a guilty and remorseless person. Everything in the suspect's demeanor says so. The person may very well have no idea of the effect his/her behavior is having

on a judge, jury, or even his/her own defense attorney. Even the best defense attorney might see guilt in his/her client's display of behaviors.

(Taylor, Mesibov, & Debbaudt, 2009). Also,

Web sites dedicated to autism and Asperger's syndrome, like Wrong Planet, are loaded with personal stories about the prevalence of problematic smirking and laughing at the most inappropriate times like when being reprimanded by a supervisor or teacher or confronting police officers. Parents of children with autism frequently complain about their children smirking or laughing when the parent is angry at them or at other inappropriate times. Books by individuals with autism have described this phenomenon. (Robison, 2008). Almost a quarter of persons with ASD have a "tic" disorder (Canitano & Vivanti, 2007). Tourette Syndrome is one of the tic disorders, but it's not the only one. This can also include laughing or smiling and "smirking" at socially inappropriate moments."

The failure of the police or a court to consider the extent to which the behavior of the accused is accounted for by his autism, has resulted in reversals, on pure evidentiary sufficiency grounds. *E.g. State v. Suber*, 2008 WL 942622 (Minn.2008) (failure to rule out ASD as the cause of indicia of impairment in operating motor vehicle, as opposed to marijuana); *United States v. Cottrell*, 333 F. App'x 213 (9th Cir. 2009)(reversal for failure to consider evidence of Asperger's condition in determining the specific intent required for conviction).

2.16. Intelligence is not an antidote to social learning deficits

One of the primary challenges for those with ASD caught in the criminal justice system is the difficulty for those in the criminal justice system in understanding how those with ASD who are "higher functioning" – intelligent enough to graduate from high school, or capable of earning a college, or even graduate degree – might not on their own have perceived the cultural, social and legal taboos underlying child sexual exploitation offenses and other sex crimes. These include taboos regarding viewing child pornography, and age difference and "age of consent" when it comes to sexual communications and sexual contact between an adult and a minor.

As discussed above, it is just generally assumed that intelligence is all that is

needed for developing social intuition and competence. But, in fact, our ability to perceive and understand the social world is an evolved skill which utilizes areas of the brain dedicated to making sense of social interactions. When these social “modules” are disrupted by autism, intelligence alone cannot make up for the difference.

That the deficits in social understanding typical of autism can be just as severe for those who are also highly intelligent may be evidenced in a number of ways: the consensus of the scientific community expressed in the DSM, clinical experience, the personal experience of “high functioning” autistic persons, and survey data.

2.17. DSM-5

DSM recognizes the core social learning problem in autism, and that this operates independent of intelligence. We see this in the first domain of diagnostic criteria for ASD in DSM-5:

A. Persistent *deficits in social communication and social interaction* such as:

1. Deficits in social-emotional reciprocity, *e.g. abnormal social approach*

* * *

3. . . . difficulties *adjusting behavior to suit various social contexts*

Later in the commentary to ASD this is explained further:

Even those with average or high intelligence have an uneven profile of abilities. The gap between intellectual and adaptive functional skills is often large. . . . Cultural differences will exist in norms for social interaction, nonverbal communication, and relationships, but individuals with autism spectrum disorder are markedly impaired against the norms for their cultural context.

Nowhere is this socialization deficit tied to lack of intelligence. Rather, it is tied to the neurological effect of autism: the failure of the autistic brain to seek and process the social information from which typically developed persons derive the social intuition on which we depend for social competence (Constantino, et al., 2017).

2.18. Epidemiological data and the “misnomer” of “high functioning autism.”

The diagnostic features of autism are not limited to any range of intellect. Of children who qualify for the diagnosis of ASD, 31% have an intellectual disability (intelligence quotient (IQ <70), and 25% are in the borderline range (IQ 71–85). But 44% have IQ scores in the average to above average range (IQ >85) (Baio J, Wiggins L, Christensen DL, et al., 2014).

The inevitable question, “where is he on the spectrum?”, fundamentally misconceives the problem. There is no single point in any conception of the autism condition which represents the distinctive pattern of differences in the affected areas of development. It is typical for persons with autism to have average IQ but significant variations across “multiple intelligences” (math, language, music, computers, etc.) (Krasny et al. 2003; Gardner 1999). This is referred to as “asynchronous development” or, better, “developmental discontinuity.” (Wetherby, Schuler & Prizant, 1997). They may have social skills at a level of a small child. This is why the term “mild autism” makes no sense to people who have autism, but only to people who have no idea what it is like to have autism.

The problem can be that the mental graphic image of the autism “spectrum” is that of a linear horizontal range or intensity, like the spectrum of visible light: red - yellow - green - blue – indigo – violet.

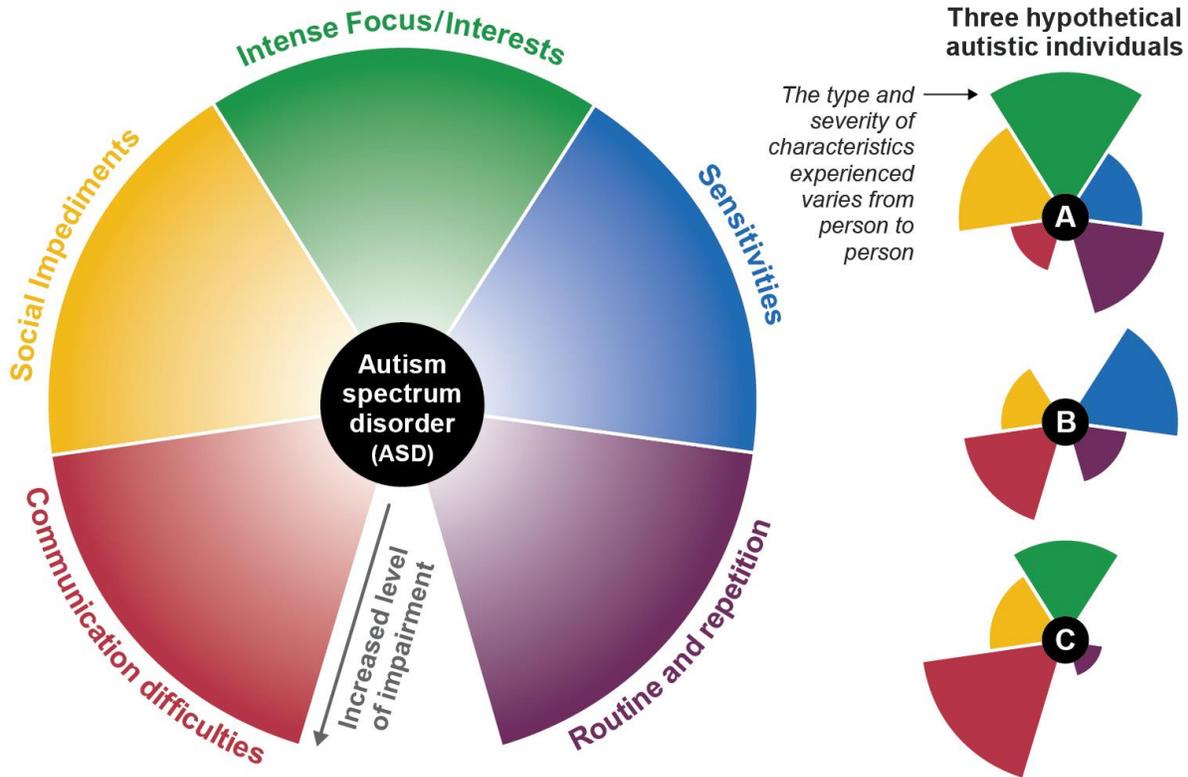


Very autistic < -----> A little autistic

This is a scale that is sensitive to only one thing, wavelength. But the autism spectrum is really made up of a matrix of characteristics which can present in differing degrees and asynchronous with each other. Imagine rather a color wheel, where the color violet then becomes adjacent to red with purple in between, and with different intensities of color from the outside of the wheel to the inside. In this conception, the autism characteristics and effects are in different colors and can be represented by differing

intensities.

GAO grouped the characteristics associated with autism into five broad categories, with some overlap between categories.



Source: GAO analysis of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). | GAO-17-109

Individuals with autism are more prevalent in regions that are rich in jobs in Information Technology (IT) (Roelfsema, et al., 2012). A survey of almost half a million people in the general population using the AQ test for autism traits revealed that being in a STEM (i.e. “Science, Technology, Engineering, Math”) career showed a likelihood of having ASD, with an AQ score above a 32 cutoff (Ruzich, et al., 2015). Another study in 2015 confirmed a likely genetic link between autism and genius—families that were more likely to produce autistic children were also more likely to produce geniuses. (Rommelse, et al., 2015) More to the point, those with above average intelligent with ASD have greater problems for *social cognition* than those with lower intelligence, relative to TD peers of similar intelligence. (Klin et al., 2007; Tillman, et al. 2019) Moreover, the social deficits for those with ASD increase *with age*. (Tillman, et al. 2019; Matthews et al. 2017).

So, actual research concerning intelligence and autism, in very large robust studies, refutes the suspicion that those with “higher functioning” ASD are not going to have severe deficits in social competence. Hence, it is appropriate to call “high functioning autism” a “misnomer” (Alvares, Bebbington, Cleary, et al., 2020; Tillman, et al. 2019; Prizant, 2012; Saulnier & Klin, 2007).

2.19. Personal and clinical experience

There are many, many stories of extremely intelligent individuals, especially in the areas of science and math, who lack fundamental social skills, who are known to be, or probably were autistic, as we now understand the condition. Steve Silverman’s popular book, “Neurotribes,” provides many portraits of historical figures of considerable accomplishments who are presumed to have had Asperger’s precisely because of the kind of social ineptitude we associate with “higher functioning” autism, including Henry Cavendish and Nikola Tesla. (Silverman 2015).

Seminal research, aimed at evaluating the experience of accomplished persons actually diagnosed with autism, observed that even as adults they all experienced “social impairment, withdrawal, difficulties in grasping emotions and understanding implicit rules and social conventions . . .” (Chamak, et al., 2008).

The story of Nick Dubin is that of a man with a doctoral degree who was a prolific writer on autism, especially on bullying in the context of autism. Because of his autism condition, however he was oblivious to the social opprobrium regarding viewing underage images. (Attwood, Hénault and Dubin, 2014).

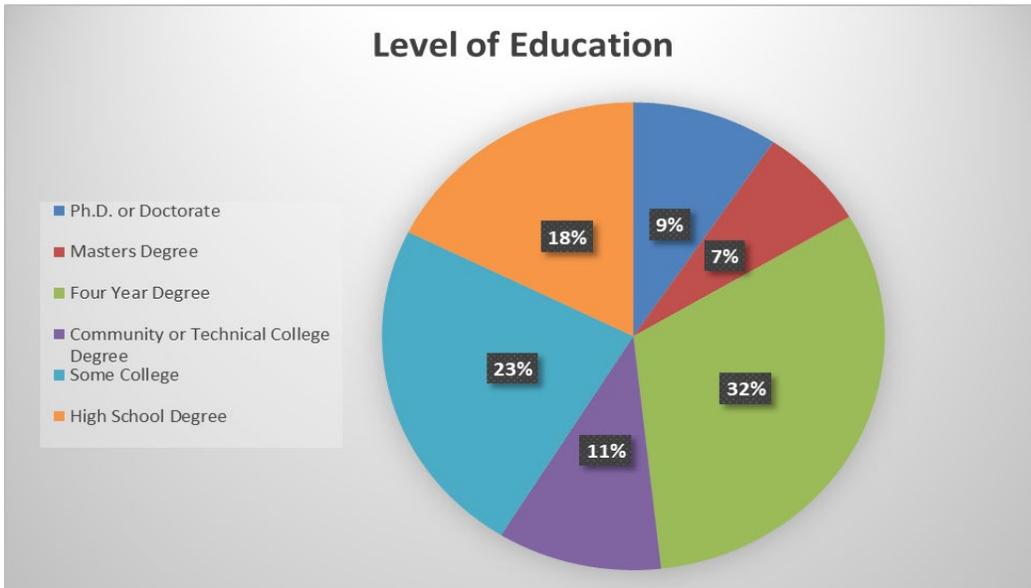
Any therapist experienced in the treatment of adults with autism can recount many stories of individuals with ASD possessed of very high intelligence, and significant academic achievement or professional standing, who have just as much difficulty intuiting social taboos. Most of these men do not land in the criminal justice system. They are luckier in that their curiosity and interests led them a different way, or they had learned these taboos explicitly, or that they simply had not gotten caught.

2.20. Research

Because it is so well understood that deficits in understanding social norms are

prevalent among higher functioning persons with autism, this is not an area where it is easy to find actual research dedicated to giving examples of this. However, in response to the skepticism of a federal judge in one case on this issue, in early 2019, we created a Google Forms survey to obtain data about awareness of males with ASD of critical sexual taboos. The link to the questionnaire was circulated on Facebook pages for autism groups and was sent out by autism organizations, and by Twitter accounts of well-known persons with ASD who had substantial followings.

Overall, there were 351 people who responded to the questionnaire over a two-week period. Of these, 90 were facially qualified as males with an actual ASD diagnosis from all over the US and Canada. 22% had an education level above high school, with nearly half having a bachelor's degree or higher. 14% had advance degrees. They listed a

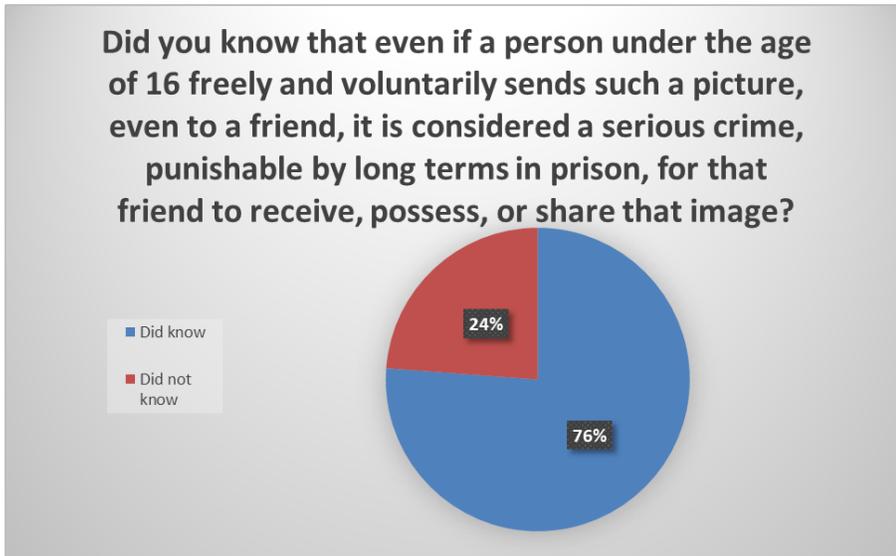


wide array of professions.¹¹

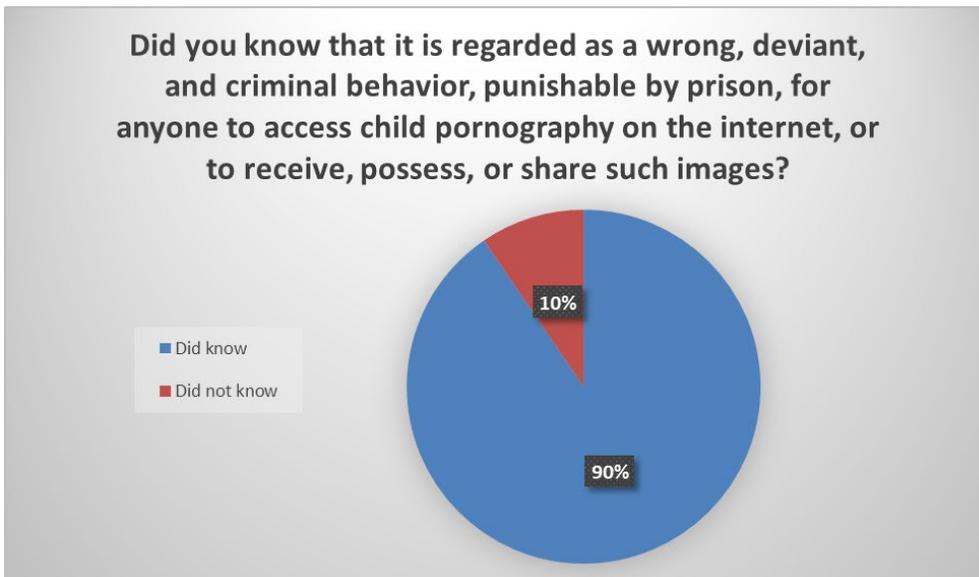
The first “taboo” we asked about involved “sexting” involving exchange of sexually explicit pictures with minors. One quarter of these respondents did not understand the serious inappropriateness of receiving an explicit sexual photograph

¹¹ Healthcare, chemistry research and development, network engineering, management, accounting, copy editor, data scientist, attorney, interfaith minister, educator, psychology researcher, university math professor, foreman, professor, full-time museum docent, stock trader, digital marketing, gunsmith, software developer, video editor, supervising cashier in New York City Criminal Court, web developer, data analytics, pharmaceutical scientist.

from an underage person.

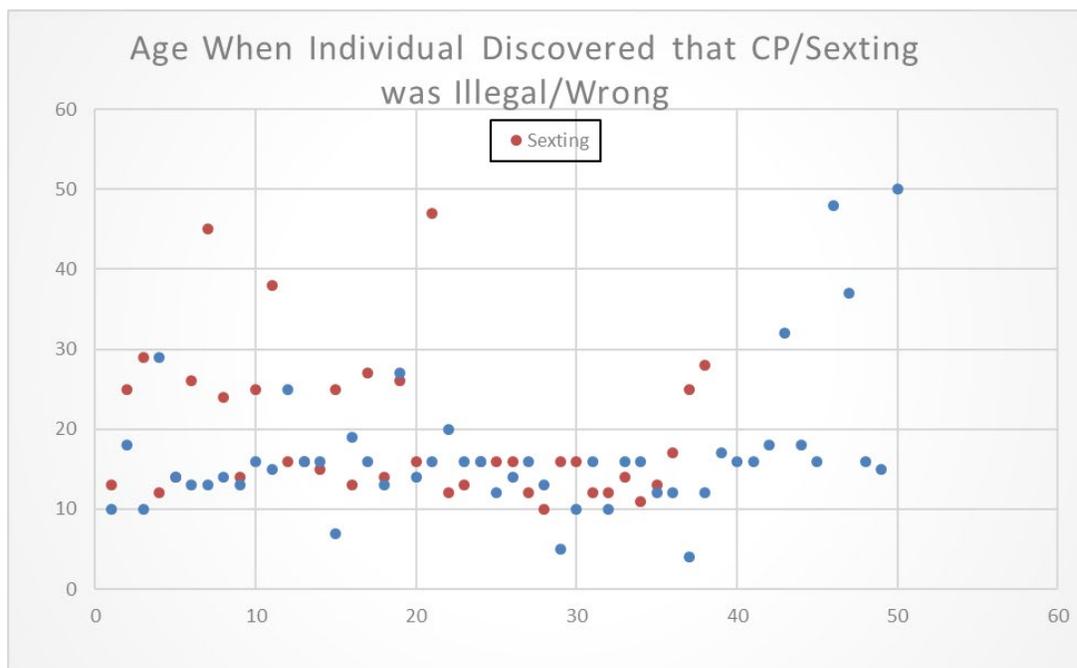


10% of the male respondents with ASD admitted they were not aware of the strong social taboo against viewing child pornography or the harsh criminal prohibition of such conduct. This is based on self-reporting, so it is likely a conservative number.



These responses were distributed fairly evenly over all educational levels, except no

Ph.D. level respondent acknowledged not knowing the taboo related to child pornography. While these data alone validate the point that even very intelligent individuals with ASD may not be aware of strong sociosexual taboos, the obvious follow-up question revealed that many of those who stated they *did understand* these taboos at the time of responding to the questionnaire, acknowledge that they learned this either *in the questionnaire itself* or substantially later than adolescence, when their typically developed peers would have understood this.



74% of the respondents agreed or strongly agreed that “autism involves social learning difficulties that can leave individuals with autism unaware of social taboos, despite being intelligent.”

2.21. Counterfeit deviance

An extremely useful way to conceive of the problem presented in some cases where an individual with ASD faces sex offense charges is in the term “counterfeit deviance,” first used by Hingsburger, Griffiths, and Quinsey in 1991. (Hingsburger et al., 1991) Counterfeit deviance occurs when an individual engages in behavior that “topographically look[s] like a Paraphilia but lack[s] the recurrence of and the

pathological use of sexual fantasies, urges, or behavior.” Rather, the behavior is explained by “experiential, environmental, or medical factors rather than of a Paraphilia.” (Griffiths et al., 2007). The fourth edition of the DSM acknowledges that in certain individuals “there may be a decrease in judgment, social skills, or impulse control that, in rare instances, leads to unusual sexual behavior” that is distinguishable from Paraphilia and considered a differential diagnosis. DSM-IV did not adopt any name for this differential diagnosis. This phraseology is not continued in DSM-5.

Under the Diagnostic Manual-Intellectual Disability (DM-ID-2), “counterfeit deviance” is a differential diagnosis for Paraphilia. This differential diagnosis must be “based on an evaluation of the individual’s environment, sociosexual knowledge and attitudes, learning experiences, partner selection, courtship skills, and biomedical influences.” Individuals with an intellectual disability who are alleged to have committed sexual offenses may engage in unusual sexual behavior due to challenges in judgment, social skills, or impulse control, which is diagnostically different than Paraphilia. “Such misbehavior can result from a lack of privacy (structural), modeling, inappropriate partner selection or courtship, lack of sexual knowledge or moral training, a maladaptive learning history, or medical or medication effects” (Griffiths, et al., 2007).

While ASD is not categorized as an Intellectual Disability (“ID”) because of the usual presence of average to high intelligence, there is significant overlap between those with ID and ASD, including similar deficits in adaptive functions and socialization skills, such as “lack of sociosexual skills and knowledge, decreased opportunities for sociosexual behavior, sexual victimization, difficulties projecting consequences, and difficulties recognizing and expressing emotions.”(Griffiths, et al., 2007) This overlap makes the concept of counterfeit deviance equally applicable to both ID and AS because the person’s IQ has no real bearing on this adaptive deficit (Griffiths & Fedoroff, 2009; Kellaheer, 2015).

The autism research literature is loaded with depictions of inappropriate sexual behavior by those with ASD, supporting the common conclusion that this is a problem of the disorder, and not malice, antisocial tendencies, or deviant mindset (Mogavero, 2016).

Counterfeit deviance looks at what is causing the behavior that superficially appears deviant. It is necessary to look at the way in which individuals process the world and what the intention was behind the apparently deviant actions. Individuals with ASD exhibit many of the same factors that influence sexual conduct in individuals with ID. Therefore, when an individual with AS is accused of deviance or a sexual offense, a careful assessment must be conducted to determine if a paraphilia is indeed present, which is not impossible, or if the differential diagnosis of counterfeit deviance applies.

Chapter 3: ASD and sexuality

Adolescents with ASD physically mature with their peers. However, typical aspects of ASD will influence sexual experience and behavior. This includes sensory interests, hyper or hyposensitivity, compulsiveness, social deficits and naivete about anatomy, sex, sexuality and sociosexual norms. “On both explicit and implicit levels, information about sexuality and sexual codes might not be clear to people with ASD” (Dewinter, et al., 2015).

Young men with ASD are often severely naive sexually, and sorely lacking in sociosexual information with delayed social maturity (Peterson, et al., 2007). Their typical social rejection and isolation reduce opportunities to obtain sexual knowledge from peers (Brown-Lavoie, et al., 2014). Studies that compared the sexual knowledge among those with ASD and neurotypicals revealed that those with ASD had less sexual knowledge, and received less sexual education from social sources (parents, teachers) and more from non-social sources (television, internet) (Mehzabin and Stokes, 2011; Brown-Lavoie et al., 2014; Ousley and Mesibov, 1991). This can result in inappropriate behavior with regard to courtship and dating since they do not have peers to teach them or to share their experiences with (Mogavero, 2016).

Teens with ASD are significantly delayed in their sexual and social-emotional maturity, but they are right on schedule with puberty, and often engage in behavior perceived to be inappropriate (such as touching others, touching their own private body parts in public, and publicly talking about sex in ways that are inappropriate compared

to the ways their peers talk about sex) because of their social skills deficits (Ashley, 2007, p. 257). Thus ASD experts express the need for parents to explicitly “broach the subject of sexuality” repeatedly “to ensure that your child thoroughly comprehends the social rules surrounding sexuality,” lest they become “unwitting sexual offenders or vulnerable to sexual victimization.” (Mesibov, Shea, & Adams, 2001).

What gets young adults with ASD into legal trouble is not abnormal sexual desires, but their tendency to express or pursue normal interests in a manner outside social conventions. In fact, once social and legal rules governing sexual conduct and interests are explicitly explained to the individual with ASD, this problem is generally solved. This is the reason why many clinicians and advocacy groups conduct sexual education and socialization training (Debbaudt, 2018). While grasping social norms does not come intuitively, important rules, and strategies for understanding how they apply in different situations, can be learned in therapy that takes into account their learning abilities.

3.1. ASD is not related to sexual deviance

There is nothing inherent in ASD to make individuals likely to develop sexual fantasies of one kind or another or to make individuals inclined to sexual deviance of any kind. “A person with AS is intrinsically naive in terms of sexual knowledge and experience. This naivety increases his or her vulnerability, his or her risk of becoming a victim, and the chance that he or she may display inappropriate sexual behaviors.” (Henault 2014)

Thus, ASD is not a predictor of pedophilia, or any other paraphilic disorder or sexual offending. Those with ASD are much more likely to be victims rather than victimizers (Klin, 2005). As psychiatrist Richard Kleinmann testified, “having this disorder actually makes improper sexual behavior less likely because individuals with Asperger’s Disorder are not charismatic and are perceived, even by children, as different and bizarre,” and thus, unlikely to entice children even if so inclined. *State v. Burr*, 921 A.2d 1135, 1142 (App. Div. 2007). Their social deficits render most men with ASD unable to strike up conversations with strangers, even children.

Chapter 4: The theory of “defense”

There is enormous pressure on prosecutors to prosecute and seek harsh penalties for child exploitation cases. The general view is that there are no “excuses” to be had when it comes to these offenses. Partly this derives from the assumptions that prevail in law enforcement that everyone who views child pornography or engages sexually with minors is a threat to children. Judges also respond to a seemingly unlimited public appetite for harsh treatment and ostracization of “sex offenders” presumed to be child predators.

Thus the primary task in defending these cases is to remind prosecutors, and if necessary, judges, that not everyone engaged in these behaviors is dangerous, and some are morally blameless, particularly those with autism spectrum disorder and other neurological differences which have similarly impaired their ability to intuit the pertinent social taboos or the potential harm from their behavior. As it happens, in a significant number of cases, appreciation of the empirical facts about the nature of ASD, and how it undercuts moral blameworthiness for such conduct, on the one hand, and counters concerns about risk of future offending, on the other hand, has led prosecutors, and judges, to support dramatic deviations from the typical results in the ordinary child pornography case and other cases, including diversion, pleas to offenses not involving sex offender registration, or significantly lower sentences and conditions of supervision tailored to the individual needs of those with ASD.

4.1. A problem of time

Getting the client released pending the prosecution is absolutely critical and hopefully there will be some diagnostic evaluations already in existence that can be used to explain the condition, and address all these issues. Time before the decision on release may allow for testing of adaptive functioning, such as the Vineland Adaptive Behavior Scales which can be done quickly and gives sometimes shocking information about the severity of deficits related to social competence.

The big problem with defending these cases is that it is very difficult for the attorney to learn what he or she has to know, before making important decisions about

the direction in which to take the case. Moreover, the clinical evaluations that are needed are going to take much more time to complete and they need to be done by clinicians experienced in the diagnosis and treatment of adults with autism who may have a difficult schedule to begin with.

So, one of the very first tasks is to take every step possible to ensure that the case proceeds along a slower track than might ordinarily be the case. Typically, this will require disclosing why the case is unusual, how autism renders young men with ASD vulnerable to such conduct without awareness of its wrongfulness, and how autism explains that the accused is not dangerous nor likely to offend again. While the first appearance may present an opportunity for this, later opportunities to do this should be pursued as an ongoing effort to get the judge on board with a lengthier timetable.

4.2. Not all child exploitation offenders are dangerous

It is well understood that that viewers of child pornography are not monolithic. The Department of Justice identified three different psychological “typologies” of viewers of child pornography, including “Recreational users” who were not considered problematic, and “At-risk users” who would never have looked at child pornography but for the Internet, and “sexual compulsives.” Only the last category was identified as “hav[ing] a specific interest in children as sexual objects.” (Wortley, Smallbone, 2012). The U.S. Sentencing Commission observed that “not all child pornography offenders are pedophiles, and not all child pornography offenders engage in other sex offending,” (U.S. Sentencing Commission, 2012). The discredited “Butner Report” noted that it “is indisputable that certain factors (e.g., psychiatric disorders, developmental and psychological vulnerabilities)” may be at work in some cases, but that “the influence of these factors on child pornography offenders is unknown.” But it recognizes that a “small minority” of child pornography offenders “are motivated by non-sexually deviant interests.” (Bourke & Hernandez, 2009).

Very little research has been done on the actual size of that “small minority” but the best research available, (Babchishin, et al., 2015), indicates that those offenders most likely to be in the completely nonproblematic “child pornography only” viewers

are the developmentally disabled.¹² And autism especially provides an especially strong and scientifically based explanation as to why individuals in this group might be looking at child pornography without being motivated by deviant sexual interests. They are just looking at a continuum of sexually oriented images without appreciating the socially and culturally inculcated boundaries that are reflected in the child pornography laws or concepts like “age of consent” age of development and age-appropriateness of interests.

Notwithstanding all of this, there is generally no legal structure and no internal policies aimed at diverting those who present no danger, and perhaps have no knowledge of wrongdoing, from the harshest consequences. Part of the reason for this is that, even if prosecutors were to accept, in principle, the idea that some putative offenders should be diverted from the system, they are very concerned about the Type II error of believing that offender is not dangerous when in fact they are, and thus do not trust themselves to decide, in effect what “excuses” are good and what “excuses” are not, in general, and in individual cases.

Secondly, prosecutors and judges have the bias of thinking that the diagnosis of autism is subjective, and “everybody is a little autistic,” and therefore diagnoses, especially those attained after the arrest, are not persuasive.

4.3. Educating the prosecutor and the judge

Therefore, the task is to help prosecutors and judges educate themselves. This begins with ensuring that clinical evaluations thoroughly establish the diagnosis of autism and address all of the problematic behaviors in the case from the viewpoint of autism. Essential to this is measuring the severity of the autism related deficits in the individual case to provide support for the view that the accused might not have understood the wrongfulness of his actions.

Additionally, prosecutors and judges naturally think that if autism is not a curable

¹² The study identifies a number of “meta-variables” detected in the source studies that very likely correlate to or rule out autism: cognitive distortions, “victim empathy deficits, callous, emotional identification with children, antisociality, employment problems, hostility, internet preoccupation, loneliness, etc. However, these data have not been analyzed with a view to correlation of ID/DD to the lowest risk category.

condition, and that if those defendants have intense interests and engage in repetitive behaviors, then it is expected that they will continue in this behavior, or in some other inappropriate or dangerous sexual behavior. So here it is essential to explain the therapies which are available, how different they are from the therapies which are appropriate to typically developed offenders, and relatively much more successful, and how other aspects of autism, such as adherence to rules and the capacity for emotional empathy provide assurance of future compliance.

As this volume and chapter demonstrate, there is far more to learn about autism and its effects than a clinician is going to be able to put into a report. It is never sufficient or wise to simply hand over clinicians reports and test results, no matter how thoroughly done. Even if the clinical report identifies seminal books, treatises, and research articles, the prosecutors are unlikely to seek out this material. Therefore defense counsel need to produce materials for the prosecutor telling the rest of the story of autism, and explaining the research and experience outlined in this volume, and presenting policy statements from autism organizations and researchers that will help in the education process. Community support from autism organizations should be sought, and brought to bear. Anything which can be done, such as videos of the client, to assist the prosecutor, and possibly the court, to understand the mind of the accused, and his disability from the perspective of the parents and clinicians and teachers, must be considered.

4.3.1. Meeting the prosecution

At the initial stage of a case effort should be made to get a commitment from the prosecutor to sit down with defense counsel and the clinician after all this material has been provided. Often more than one meeting is necessary, later meetings including supervisors or elected prosecutor or the United States Attorney for that district. On a moral level is the question of how we treat people who, because of a neurological disability, did not understand the wrongfulness of what they have done. On a policy level there is an obligation of all government officials to take disabilities into account in exercising their discretion. These are compelling reason to explain why the elected prosecutor or the appointed U.S. Attorney or otherwise top level prosecutor must be

involved.

It is important that these meetings not be negotiations about the strength of the evidence, the possible exclusion of evidence, the applicability of sentencing enhancements, and so on. Rather, the focus of such a meeting should principally be to supplement the written submissions on the science related to autism and the empirical evidence of how severely it has affected this individual's perception of the social world and its taboos. The availability and success of treatment and the inappropriateness, dangerousness, and tortuousness of incarceration for one with autism spectrum disorder are important topics. The disproportionate impact of sex offender registration on those with disabilities and their families is important.

The only limit to what is presented is the imagination. But it is important not to just duplicate what has been provided to the prosecutor previously.

It is essential in preparing for such a meeting and at such a meeting, to actually listen to the concerns of prosecutors and law enforcement and address those concerns with empirical evidence related to the defendant's autism condition. The pervasiveness of the effect of autism, in the decades of research available, all but assures that there is an empirical or experienced based answer to every concern raised in most cases. This is why it is essential to have an expert psychologist or psychiatrist with significant clinical and diagnostic experience with adults with autism in attendance.

There is now significant experience, contrary to all expectation, that prosecutors and judges and probation officers are capable of responding humanely and appropriately when thoroughly and systematically informed about ASD and its effect on a particular accused: how individuals with ASD may unwittingly engage in criminally sanctioned conduct, with no interest in sexual contact with children, and how their condition makes them less likely to reoffend in the future, they. Results have included cases of non-prosecution, pretrial diversion, reduced pleas not requiring sex offender registration or incarceration or at least sentences that are dramatically reduced compared to the norm – most often to probation.

Let us turn to specific issues in encountered in cases of online offending by

persons with ASD.

4.3.2. Child Pornography issues

As noted at the outset, the challenge here is demonstrating persuasively to prosecutors and judges that autism explains why those with ASD, and with specific social learning deficits and other deficits associated with ASD, are particularly vulnerable to engaging in objectively offensive behavior without any deviant sexual interest or awareness of wrongdoing, and very unlikely, with appropriate therapy, to be similarly involved in the future. This is not a *legal defense*. But it is a precursor to the favorable exercise of discretion by the prosecutor or judge to accommodate the disabled accused with diversion from the criminal process, or avoiding sex offender registration, or at least imprisonment.

Implicit in this is the view that it is very unlikely that much will be accomplished at the trial of a child pornography case. This is not to say that it might be necessary in some cases, for example where the highest charge is one of “distribution” based upon unwitting sharing of images in a shared directory on one’s computer which participates in a “peer to peer” filesharing network. This is will arise where the prosecution leaves the defense with no choice but to try the case, perhaps with the hope of an acquittal on the basis of lack of criminal responsibility, something exceedingly difficult to accomplish.

The focus here is on the majority of cases where the best hope is prosecutors and judges coming to understand that a particular accused with ASD is substantially lacking in moral blameworthiness and future dangerousness and may safely be spared the typical harsh treatment. This begins with ensuring that the prosecutor is fully educated about the features of ASD and the severity of its presentation in the accused.

It has been described already how those with ASD can be severely lacking in social intuition and the understanding of social taboos. It is easier for prosecutors and judges to believe that a young man with ASD might not appreciate the taboo against underage sexual images if they understand how completely naïve they can be sexually.

4.3.3. The path to viewing child pornography

“It is important to state that an interest in illegal pornography is not an

anticipated characteristic of adolescents and adults who have Asperger's syndrome." (Attwood, Henault and Dubin, 2014 p. 130). Nevertheless, there are different ways a young man with ASD is vulnerable to entering paths that may lead a person with ASD to child pornography. Experience with many of these cases shows that for those with ASD, the path to child pornography does not begin with pursuit of sexual images of children on the internet. The exception is for children simply seeking naked pictures of other children when they are children themselves. While typically developed children do this too, the problem for those with ASD is that they may not "grow out" of this habit.

In many cases the developmentally disabled child has been lured by an older person with these curious images that may seem fascinating rather than revolting. Or these images might be posted in chat rooms about computer games or topics attractive to those with ASD, such as Japanese style animations (anime, hentai, manga) or "furries" or "My Little Pony," etc. Most often it seems that it is the exploration of the online world of pornography that inevitably leads some AS individuals to exposure to child pornography.

Put aside any illusion that because these young men with ASD are so naïve sexually that they are only looking at photos and videos of naked teenagers posing seductively. As observed before, such cases are not investigated or prosecuted. In practical terms, it is almost unheard of for a child pornography prosecution to be brought without for online viewing of explicit and sexualized images prepubertal children, except for the sexting situation.

But here is the important thing. While browsing the internet for sexual material, even perhaps knowing that mere possession of sexual images of post pubertal children is unlikely to result in prosecution, and is not "deviant," typically developed males are still likely to see a "yellow flag," if not a "red flag," when coming upon this material. He may hesitate, because he knows that he is nearing a boundary.

The young man with ASD, socially isolated, sexually naïve and yet intensely curious about sex and romance turns to the Internet for his education. The problem is that when it comes to these boundaries, he is not going to see these flags. He is likely to be aware of the problems of age difference in relation to personal contacts with

younger persons. But a certain percentage of young men with ASD will be completely unaware they have crossed any moral or legal line when it comes to looking at sexual images of under 18-year olds.

Young adults with AS might be more interested in looking at photographs of younger individuals because of their own social and emotional immaturity, resulting in AS individuals seeing themselves as younger than their calendar age. Their severe social limitations with same-aged peers confirm this self-image. These boundaries are unknown to them unless they have specifically been told. They simply do not have the social awareness to intuit the rules that others have learned from social interactions. “The lack of sociosexual knowledge is always the major issue.” (Henault 2014 p. 200) Unfortunately, most parents would not think to discuss these boundaries or child pornography with their son with ASD either because they see him as asexual or are afraid that informing him of the existence of such images will spark his curiosity and lead to an obsessive pursuit of such images.

When it comes to pre-pubescent or younger individuals, these same factors come into play. The individual with ASD is no more likely to see a boundary based on developmental stage – pubescence and attendant stages of breast and physical development, the social (and possibly even biological) implications of which they typically do not understand - than the arbitrary ages of 16 or 18 used to define the upper child pornography boundaries. Individuals with AS typically show very poor anatomical and sociosexual knowledge. Pubescence is deliberately masked in so much online material by removing pubic hair, that this is a very blurry distinction. Whatever the significance the lack of pubic hair means to the average person viewing it in images or in real life, this tendency further blurs age-based distinctions for the individual with AS. However, interest in prepubescent images is where suspicion of deviance arises.

4.3.4. What are they looking at?

Most frequently, when questioned about what actually interests them in such images, young men with ASD, who are not often good with such questions, will simply say that it is the sexual body parts they’re looking at, more or less the common denominator of all viewing of erotica. They do not, it seems, as a pedophile might, see

the child in these images as a child. As several defendants with ASD have reported when asked, they just see sexual “body parts.”

This should not be surprising in light of what we now know about how differently those with ASD actually “see” the world. The most salient deficit in autism is in the capacity for “social visual engagement” (Constantino, et al. 2017). Even with seemingly appropriate “social gaze” those with ASD are still not processing social information (Georgescu, et al. 2013). With such a huge difference in the way persons with autism see the world, why would we even suspect that a young man with autism “sees” the same thing in an erotic image that a typically developed persons sees?

It is important to repeat in this context that persons with autism for example have difficulty telling age or gender from faces or identifying “pleasant” or “attractive” faces (Behrmann, et al., 2006; Njokiktjien, et al., 2001; Murakami, et al., 2018; Roy, et al., 2016). If persons with autism see faces in parts, not the whole face (Schulz, et al., 2000) and are “mindblind” to the social cues in images or social scenes (Klin, 2000; Baez, et al. 2012) it seems far less likely that they see the *gestalt* of the child in social context in these images.

Stark evidence of this difference in perception arose in a case where the defendant with autism had been chatting on Instagram with a person purporting to be a 16-year-old girl who promised a photo of herself and a friend. After receiving an explicit photo showing a full image of two girls no more than seven years old, he responded, “are you the one on the right or the left?”

4.3.5. Critical issues

This last feature is critical, because it is not enough to explain why those with autism may not understand the social taboos related to viewing child pornography. That explains why a “red flag” would not go up when encountering this material and viewing it. But when typically developed persons actually see child pornography, which in the ordinary case now includes images of infants and toddlers, feelings of disgust and revulsion are the rule. This makes it very hard to understand that one who appears to be seeking out this material (which most likely came in a mass download of files from a “peer-to-peer” network) is not attracted to it, nor pathologically callous to the abuse,

pain and harm it depicts.

The explanation lies in the fact that, hard as it is to grasp, those with ASD whose social learning is so affected that they are unaware of these taboos to begin with, are simply not seeing the social attributes and implications of what is presented in these images. Time after time in these cases the answer is the same: until asked about it after arrest, these young men rarely gave a thought to how these images came about or why they were made or how the children in them might feel about this or be hurt by it. Often, when they gave it a thought, they did not think it was real, or that these were actors or some variety of “selfies.” When it is all explained to them they are generally horrified at what they have done, even though they do not naturally display this.

Correlatively, a very important point must often be reiterated. The disgust and revulsion of the typical viewer over these images is the product of a brain that seeks social information, in fact cannot shut it out, and the resulting socialization that occurs in the cultural context. It is not somehow innate. The typically developed viewer cannot fail to think about the social story behind the images and have the sense of viewing something actual. But this is simply not the case naturally with individuals with ASD who are so seriously affected in their social learning that they are oblivious to these taboos to begin with.

Chapter 5: Social media, chatting, sexting soliciting and the internet context

Cases involving online communications with minors exchanging photographs are more challenging than simple cases of possession of child pornography. Requesting that a minor send sexual photographs, however common among children, can be charged as “production” of child pornography or also “solicitation” under U.S. federal laws, carrying mandatory minimum sentences of 15 and 10 years respectively. However common “sexting” may be among minors, when it involves an adult encouraging a minor to send photographs it is considered predatory and a precursor to “hands on” offending. If the children seeking sexual experience on the internet have underlying emotional, social, and psychological problems, things these defendants do not intuit or understand, their

behavior can be seen as even more egregious.

Defending such cases requires explaining the Internet environment in which this occurs and the effect of that environment on the youth who spend so much time there, both typically developed or developmentally disabled. It is also necessary to objectively evaluate not only the behavior of the accused but also the behavior of his minor counterparts. While any discussion of the behavior of children evokes reflexive accusations of “victim blaming,” the ultimate point is that both the defendant and those minors with whom he is engaging are the victims of the Internet environment.

At alarmingly young ages, many children are seeking sexually charged experiences on the Internet. Emotionally identifying with these younger individuals, and unable to socially connect to their peers, young men with ASD seek to participate in this online environment, generally oblivious to how seriously this is viewed and the potential harm to these children. While their older age exposes them to criminal prosecution, they are less mature, as a result of their autism condition, than the children and teenagers they communicate with. Other aspects of their autism condition are pertinent to understanding their obliviousness, and their sometimes-unfathomable persistence in these online pursuits.

The challenge here is to help prosecutors and judges to consider the matter from the viewpoint of the developmentally disabled person who is extremely immature and perceives these children as equal, willing participants in widespread activity that is most akin, in their minds, to online computer games. As they remain “mindblind” to the social implications of these encounters, until explicitly brought to their attention.

5.1. Teenagers, Sex, and the Internet

Today’s teenagers have never known a world without the internet. They spend an enormous amount of time each day using entertainment media (e.g., computers, smartphones, electronic devices, television, etc.). This dramatic shift toward this technology has had an equally dramatic impact on sexual exploration among teens, and on what is considered by them to be acceptable sexual behavior, at least on their phones and the Internet.

Parents are unable to effectively supervise the online presence of their children and teenagers, many of whom see the Internet and cellular world as a free range where they can find and exchange sexually explicit photos, videos, and text messages. Sexting (sending a sexually explicit text or nude photo via text message) is ubiquitous, and not considered to be a “big deal” by adolescents. Some teenagers even use sexting for as mundane a purpose as countering boredom (McEachern, et al., 2012). But virtually none of these children would engage in the same or equivalent activity openly. Why they are doing this should help one to appreciate why those with autism, who attempt to participate in this activity, are also so oblivious to how seriously inappropriate their behavior would be viewed.

5.2. The Online Disinhibition Effect

Typically developed people say and do things on the internet that they would not ordinarily say or do in person. The explanation for this is what is called the “Online Disinhibition Effect,” coined by John Suler. (Suler, 2004). Suler’s explanation for why people engage in behavior online that they would likely not even consider in their offline life boils down to this: the Online Disinhibition Effect creates the sense of an anonymous environment where “anything goes,” nothing matters, everyone is equal, and if trouble does arise, it is easy to escape. While this is true for all Internet users, it is especially true for adolescents whose underdeveloped brain does not fully grasp the impact their online sexual behaviors. Suler's framework is most useful in understanding why even preteens would be involved in explicit sexual role play or sexting, thinking they were probably never going to meet the person they are "flirting" with online.

This all applies forcefully, but slightly differently, for those with ASD. They do not have culturally fostered “inhibitions” needing to be dulled. They are not escaping the rules of the social world, which they do not “get.” But, like their typically developed peers, they also see no limitations on the internet, where there are none, and where all of Suler’s principles apply, especially that “everyone is equal.” So, it is no surprise that those with ASD are significantly more likely to talk about sex on the internet (46% v. 27%), four times as likely to show their genitals or bottom to others, more likely to send naked pictures or movies of themselves (6% v. 0%), twice as likely to send naked

pictures or movies of others (8% v. 4.2%), and almost doubly likely to engage in Cybersex (12% v. 2.2%) (Dewinter, et al., 2015).

This translates to huge risk for these individuals which is not mitigated by any organized efforts to ensure that the developmentally disabled are educated as to issues of sexuality and risk on the Internet. The Internet is a place where they feel comfortable without the stress or much of the confusion entailed in personal interaction, and it is a trap for them to fall in to. We have to understand what they see here and how they interpret what is happening in this virtual context.

5.3. Sexting prevalence

Among 606 high school students in Utah in 2013, almost twenty percent reported that they had sent a sexually explicit image of themselves via cell phone. Double that admitted to having received them. Among those who received a sext, over 25% had forwarded the picture to someone else (Strassberg, et al., 2013). This is a big jump from a similar study of 800 twelve-to-seventeen-year old's in 2009 where still 4% sent sexually suggestive images of themselves by phone while 15% received sexts also containing images of someone they knew (Lenhart, 2009). The report's author contends that these images are shared as a part of, or instead of, sexual activity, or as a way of starting or maintaining a relationship with a significant other. And the images are also passed along to friends for their entertainment value, as a joke or for fun. Though typically developed they do not foresee how badly this can go for them, or for those to whom they send pictures.

A national telephone survey of 1560 internet users between the ages of 10 and 17 in 2012 found lower overall numbers, perhaps for reasons of methodology, but found that even children as young as 10, though in relatively small numbers, admitted appearing in, creating, or receiving nude or nearly nude images (Mitchell, et al., 2012).

5.4. Cybersex

Cybersex is generally understood to refer to an online interaction between two or more people who exchange sexually explicit message, photos, or video footage for the purpose of self-gratification. Cybersex is like sexting except that it is not restricted to

text messages.

Cybersex can occur through public and private online chatrooms, online video games, email, cellphone applications, telecommunication programs, Instagram, SnapChat, interest groups and “fandom” sites.

Cybersex includes an array of “random chat” sites, like Omegle. These sites randomly pair strangers for text or video meetings where explicit sexual conversations are a common thing, from which participants can migrate to other meeting places where they can intentionally continue communicating, like Skype or cell phone messenger applications like Kik or WhatsApp.

While what happens routinely on Omegle is shocking to any adult, adolescents take it in stride as simply a place where they can anonymously explore sexual interests in a way that they would not, or can not, pursue in their “real” worlds. This is where many young men with autism encounter minors who appear to them as willing and equal participants in whatever follows.

Different forms of “role play” commonly occur on the Internet, and may follow from the above types of encounters. Some are structured around existing online games like World of Warcraft where players create their own characters. Also, some engage in “fandom” role play, where the players create an improvised, original storyline for an already existing character they have adopted from a fictional source. Often these games become sexually explicit. Other role play is explicitly sexual, but often with players adopting scripted roles such as “Submissive/Dominant,” and “Master/Slave” or “Daddy/Baby.” This may involve playing games such as “Truth or Dare.” These are all vehicles for explicit sexual fantasy sometimes about meeting personally, which rarely happens, and the exchange of explicit photographs.

The problem for young men with autism in this kind of role play is primarily that they do not see how inappropriate it is for them to be involved with minors in this fashion. They are also not good at it, and this leads to another problem that requires explaining terms used earlier “social scripting” and “mimicry” in the context of autism.

While individuals with ASD do not have the capacity to learn the social skills we

acquire from productive and reciprocal social exchanges, they do have other skills with which they try to overcome this. One skill those with ASD learn is to mimic the expressions of neurotypical individuals. They are very quick to pick up on the wording and expressions and gestures of others that seem to work in the environment. This is related to what is generally called “social scripting,” Tony Attwood, describes as “borrowed phrases.” (Attwood, 2007 p 39-40) Calculated mimicry of these successful representations of what is considered socially acceptable in a particular milieu helps mask their social confusion. (Ormond, et al., 2018)

The young man with ASD has spent countless hours observing or experiencing others play these games and seeing the Dom or Sub get the prize of a photo from the other. As those with ASD learn to do, he borrows “scripts” from this experience and tries to mimic the behaviors he has seen in order to play the game. However, he still lacks the ability to take the perspective of the other. He does not understand the psychosocial dynamics, the irony, or the humor or teasing that can keep this interesting for others. So, the game deteriorates into tireless and sometimes mean or threatening requests for pictures or videos until the other person gets bored and moves on.

A big problem here is that in mimicking behaviors of skillful role players, and adapting their scripts, however ineptly, the young man with ASD will come off as far more clever and manipulative than he really is. That has used “sophisticated language” or had been “manipulative’ or “aggressive” and therefore must have as social capabilities, or antisocial tendencies, above what the evaluation or testing suggests. On close examination, they are not really understanding their individual situations and the mistakes that show up often expose the childishness of it. The tireless repetition over what can be tens of thousands of lines of chat exhibit the inability to adjust the approach to each different person.

Roleplay can be liberating for those with autism who lack personal social connections in “real life.” Such encounters and efforts to connect on social media like Instagram can be pursued obsessively with very little capability to assess the utility or appropriateness of the behavior, or understand how short it falls from typical social interaction. While this persistence can appear pathological, it needs to be interpreted in

light of autistic traits of obsessiveness and lack of executive function.

Sometimes, these encounters can become intense in these cases where someone is encountered who expresses feelings of alienation, depression, or self-loathing, or who is abused or engages in self-harming behavior. This can be very attractive for the autistic person who does not experience this emotional exchange offline. Despite true concern for the welfare of the other person and mutual expressions of “love,” the young man with ASD may not be able to resist using these exchanges also to request explicit pictures, again using “scripts,” like telling a girl she is beautiful – which he really might think is so even if others may not – to persuade. This too can be interpreted as antisocial behavior. In reality, the young man with autism most probably has less understanding of the social context and implications of the situation than the younger person does.

5.5. Trolling

Internet “trolling” is very complicated social behavior, heavy on irony, ambiguity, and inside jokes, with bad behavior hinted at or shielded in plausible deniability. It existed on this form on the Internet even before the World Wide Web. (Donath, J., 1996). Trolling behavior on the internet seems to have a strong attraction for some young men with ASD, to observe and attempt to emulate this behavior, even though, as with sexual role play, its subtleties and dependence on understanding the perspective of others, guarantees that they will fail and their ineptness will be discovered and lead to their rejection. But their persistence, “scripting” what they have learned from others, as in “role play,” can give the appearance of more skill and understanding than they have.

Young men with ASD, “trolling” may partially supplant the lifetime experience of being bullied and give a sense of control never before experienced, or feeling of being accepted by a group appearing to defy norms, and their upholders (“normies”). In any event young men with ASD have attempted to attach themselves to these groups, sometimes to very troublesome ends (e.g., trolling families of victims of mass shootings or suicides). However, pertinent here, they have at times conflated their rendition of different kinds of trolling behavior with incomprehensible “games,” the object of which, like much of sexual role play, is to get sexual pictures from the people they encounter.

The logic of these games can be quite baffling. And since trolling behavior is by design very obnoxious, and devoid of meaning to “normies,” this behavior does not lend itself to easy explanations. But it is not malicious, especially compared to the genuine article, and the young men with ASD do not see the serious wrongfulness of it with which it is viewed by others, given their age and the object of their game.

Moreover, many of the typically developed persons who engage in trolling are not that clever, and often their behavior consists of simply copying or mimicking what they see others do. (Cheng, et al. 2017) Of course, this is the precise *modus operandi* of the person with autism, as described in the previous section, again with the same lack of appreciation of the social dynamics and especially the necessary understanding of the perspective of the persons being “trolled.”

Still, this is behavior which, upon thorough clinical exploration, can be helpfully explained in terms of autism, and generally here as well the lack of understanding of the wrongfulness of the behavior can be evident. Those with ASD are quick to recognize the wrongfulness and harm of this behavior once it is explicitly pointed out to them, something that it is well to demonstrate in the clinical setting.

5.6. Enticement by others

One of the most frustrating traps for those with autism on the internet occurs when minors, for various reasons, have reached out to the “adult” with ASD to strike up a relationship. This can automatically absorb him because of this extraordinary interest shown in him. This interest can be fueled in different ways and catastrophe is almost inevitable.

More than one case has arisen where the young man with autism encounters a minor who attracts him with a story of suffering or abuse. Some recent cases stem from claims by a teenager of being abused by her father, which encouraged the defendants to attempt a “rescue.” These gestures turned catastrophic with charges based on receipt of explicit images the girl had sent, and allegations of attempted kidnapping. In these cases, the defendants flew off – two internationally – to rescue the girl, with absolutely no plan of what to do after the rescue.

Another recurring pattern is similar without the claims of abuse. Cases where young girls or boys will “friend” an autistic person on Facebook, or on a “fandom” site or chat area. Again, for individuals with ASD, who have difficulty discerning that bullies are not their friends, these approaches have strong traction. In one case, young teenage girls decided to entertain themselves by “messing with pervs.” This involved reaching out on a gaming chat area to befriend a stranger, a young man with autism who had never spent a day in his life away from his mother. They pretended to be a beautiful 19-year-old college student flirting with this man, who has never had a sexual experience. They sent him pictures of themselves, after revealing their true age. When they tired of this, and stopped sending pictures, he got upset like a child. He demanded they send more pictures, making impossible threats about “hacking” them in one form or another if they did not. (The threat of “hacking” someone to get what one wants is frequently “scripted” on chat sites). Hearing one of the girls joking about this in the schoolyard, a teacher intervened and the events were exposed. The defendant received a 135-month prison sentence.

Other examples are minors who “friend” young men with autism and offer explicit pictures for money, iPhones or, in one case, Play Station 4 gift cards.

5.7. Practice considerations

The challenge in these cases is having to squarely address the conduct of the minors who were involved in order to have the context of the conduct of the accused fairly considered from his perspective as a person with impaired social understanding. This may be assailed as “blaming the victim.” However, this must be done if the defendant’s perspective is to be taken into account. Moreover, the concept of “age of consent” does not remove all agency from children, even if the accused was aware it.

Another serious challenge is that in most of these cases the prosecutor has live victims and their parents to answer to. Here, again the point must be made that there are many victims of the internet, and the developmentally disabled are among them when they fall into social situations they do not sufficiently understand, bound by rules they do not know.

In these cases, it can be suggested that the parents of these children be also “at

the table” in some fashion so they also can possibly understand the perspective of the disabled person and his family. Prosecutors should be encouraged to share the defense memoranda and clinical reports with the parents of the victims. The parents may actually be more ready than the prosecutors to consider the defendant’s disability and its effects, and give permission to the prosecutor to be merciful. Here the defense clinician can possibly take a central role in mediating the views of all.

Chapter 6: Childhood Sexual Experimentation

In a small percentage of cases, young men with ASD charged with online offending have also admitted to having sexual contact with children, usually when they were children themselves but sometimes continuing beyond adolescence. This almost exclusively involves relatives, cousins or siblings, or very familiar neighborhood children. Usually it involves contact with significantly younger children. Invariably, these involved cases where the information came only from the accused, often volunteered to police (Sugrue, 2017).¹³ By associative coherence this powerfully supports an intuition, however mistaken, that the young man is a child predator. Therefore, it is essential that such conduct, whether charged as part of the offense or not, be considered in the contexts of normal childhood behavior and ASD. This provides a rational basis to differentiate, for those with ASD, between what is essentially “normal” child sexual experimentation, and something more concerning.

6.1. Normative child sex play

Child sexual experimentation, including child-on-child play, only began to be formally studied four decades ago. Even now, after numerous studies, few recognize how prevalent it is among normal, healthy children without a history of abuse. Child sexual experimentation, beginning as early as toddler-age, is a normal part of sexual development (Lamb & Coakley, 1993; Hugaard, 1996; Finkelhor, 1980). As children learn about their bodies and observe sexual behaviors, they experiment with their own bodies and are curious about those around them and may experiment with each other.

¹³ As Dennis Sugrue observes, when accused of wrongdoing by anyone in authority, persons with ASD may tend to be self-condemning.

For the present discussion, “child sexual experimentation” or “child-on-child sex play” is considered to be episodic, and not a preromantic relationship, occurring once or a few times over a relatively short period of time and then ceasing, and not focused on sexual gratification. Eventually, socially defined romantic rituals take over for typically developed individuals.

Up to 85% of children have engaged in some sort of childhood sexual play experience where the level of physical involvement was related to perceptions of normality, if not for sexual pleasure (Kellogg, 2010). Results differ with different methodologies. In one study 82.5% of the respondents had sexual experiences with another child that entailed kissing and cuddling, showing and touching of genitalia, and looking at pornographic videos (Larsson & Svedin, 2007). A study of child self-reports found that 5-6% of urban children aged 11-12 had touched another child’s penis or vagina. (Pluhar, et al., 2005). Retrospective research involving college women in the US found 85% had engaged in sexual play in childhood: one quarter had shown their genitals to another child; 15-17% had touched another child’s genitals while clothed and while unclothed; 6% had used some object around the genitals in their play; and 4% engaged in mouth–genital contact (Lamb & Coakley, 1993).

Boys experience more sexual experimentation than do girls. However, girls are more likely than boys to engage in same sex sexual experimentation. Explanations for this include more prevalent perception of homophobia among prepubescent boys (Finkelhor 1980). Two thirds of children who have engaged in child-on-child sexual experimentation stated it occurred before adolescence and it peaked across the ages of 6-12 years old (Finkelhor 1980). This age range could be affected by access to sexual materials (i.e., media, print, etc.), observations, observation of parents’ behavior and reactions, etc. (Kellogg, 2010).

Child sexual experimentation is seen as part of normal development. A child “discovers” their genital areas and tends to repeat the act of touching and rubbing because it creates a sense of pleasure. Boys often touch or hold their penis in public. Boys and girls often engage in “child on child” sexual experimentation. They begin mimicking adult affectionate behaviors such as kissing, hugging, and holding hands.

Preschool staff have reported observing children looking or showing each other's genitals (Wurtele & Kenny, 2011).

The mere fact that childhood sex play is normal may not ensure that it is always healthy. The engagement in sexual play does not appear to be a predictor of early commencement of adolescent sex, paraphilic disorders, or sexual orientation. These early childhood sexual experiences do not appear to correlate particular effects on adult adjustment (Okami, et al., 1997; Leitenberg, et al., 1989). Some consider them beneficial in terms of typical sexual development into a healthy adult (LeVay, Baldwin & Baldwin, 2015). While worries about sexual abuse of children may lead adults to reinterpret memories of mutual play as abusive, abusive experiences might also be remembered fondly as early sexual play and games because they were experienced that way or because they were re-envisioned as a means of coping (Lamb & Plocha, 2014).

Of particular interest, in a study of 1,000 college students, those who played in childhood with friends or relatives, as opposed to unfamiliar children, viewed their sexual encounters as more positive. Counterintuitively, the type of sexual acts, like kissing, exposing or fondling genitalia, oral sex, or intercourse, was not associated with the response. Rather, the atmosphere surrounding the sexual experience was what had the greatest influence on the response to it (Haugaard & Tilly, 1988). Women asked about their sexual experiences and sexual play and games in childhood revealed that the type of sexual behavior engaged in had very little to do with the effect associated with it (Lamb, 2002). The takeaway from this and similar research is a lesson to investigators in the frailty of adult intuitions about the impact of childhood experiences:

Although adults may differentiate between lesser and more serious sexual acts, a child, it appears, can feel every bit as guilty and stressed about something an adult might consider minor and feel positive and casual about something an adult might feel is fairly adult and substantially sexual.

(Lamb and Plocha, 2014, pp. 421-22).

It is usually a friend, cousin, or sibling with whom the child has their first sexual experimentation. Presumably this is due to the level of comfort or familiarity with the

family member or friend (Finkelhor, 1980). Thus, where a report of child sexual behaviors involves contacts with such close relations, normal child, sexual experimentation should be explored as a differential explanation from more reflexive, and concerning, characterization of the behavior “molesting.”

6.2. ASD and child’s sexual experimentation

While there appear to be no studies specifically of the prevalence of child sexual experimentation among those with autism, there is no reason to believe that it happens any less with this population. Rather, since the cessation of child sex play correlates with appreciating social norms and learning socially acceptable paths to dating and romance (Kellogg, 2010) – distinct weaknesses for those with ASD – we expect the window for such behavior to be longer in duration for those with ASD. Supporting this is the common observation that those with ASD are years delayed in social maturity.

6.3. Autism and “age discordant” sexual experimentation

While there is much research on the greater sexual victimization of the developmentally disabled child, there is nothing on their “normal” sexual development stages in childhood. So, we see no studies focusing on the prevalence, characteristics or age of sexual experimentation. Unfortunately, adolescents with disabilities are often deliberately excluded from studies of adolescent sexuality (O’Sullivan & Thompson, 2014).

In a small percentage of cases arising from online activities there are examples of young men with autism having sexual contact with younger siblings or cousins just like what one would see in child-on-child sexual play. Typically, the sibling or cousin might be four to five years younger and well aware of the social deficits and awkwardness of their older relative, and accustomed to his easier engagement with them as opposed to his inability to associate with his age peers. This includes same sex or opposite sex contact that is episodic and not forced. In all these cases, though the individual with ASD is older, they are far less mature than their younger relative.

Young adults with ASD are typically delayed five years in their development and can often engage in behavior seen as inappropriate, including touching others. Because

of the inherent deficit in social skills, often these behaviors are engaged with younger children who are seen as peers by the individual with ASD (Ashley, 2007). Accordingly, clinicians warn parents of teens with ASD to repeatedly educate their child about inappropriate touch in order to avoid "becoming either an unwitting sexual offender or vulnerable to sexual victimization" (Mesibov, Shea & Adams, 2001).

These encounters are categorized as "age discordant sexual play," and not "molestation" because when this experience ends, there is no more experience with younger minors, or, very often, anyone else, thereafter. In other words, this behavior does not represent the beginning of a pattern of seeking out sexual or romantic experiences with minors, which might typically be validated by polygraph testing.

"Age discordant sex play" is familiar in the sexual therapy literature (O'Sullivan & Thompson, 2014; Bruce, et al., 2012; Lee, et al., 2003).¹⁴ The Arc advises that "Sex Offenses by a person with I/DD are often not the result of

sexual deviance. . . . Often, sex offenses are the result of counterfeit deviance" and "ignorance of what is considered appropriate," and that persons with developmental disabilities "may engage in acceptable sexual behaviors but with someone who is not an appropriate age—this is called 'age discordant sex play'."¹⁵

Therefore, when it comes to reports or allegations of a young man with ASD involved in sexual contact with minors that might, but for the age differential, fall into the category of "child sexual experimentation," it is essential to determine whether this might more accurately be considered to be a case of age discordant sex play, rather than molesting behavior.

6.4. Practice considerations

Similar to "sexting" type cases, the prosecutor is going to be highly sensitive to having a live victim, and that child's parents, to be concerned about. However, unlike

¹⁴ See also the Declaration of Nancy Thaler in *Markelle Seth v. District of Columbia, et al.*, 18-cv-01034-BAH, Document 29-3, 10/26/18 ("In some cases, individuals with IDD engage in sexual activity with individuals who are not of an appropriate age, which is sometimes called "age discordant sex play").

¹⁵ "5 Facts Attorneys Need to Know When Representing or Working with Citizens with Intellectual and Developmental Disabilities (I/DD)" https://thearc.org/wp-content/uploads/forchapters/NCCJDTipSheet_Attorney_CopyrightBJA.pdf

the “cybersex” cases, where the victim may be in another state, or another country, here the victim is close at hand. So, defense counsel has to pay seriously attention from the very beginning to minimizing inter- or intra-family tension, which can be the source of trauma for everyone and will not help obtaining the pretrial release of the accused or favorable resolution of the case.

Chapter 7: Sting Operations

While undercover operations may be conceived to provide an opportunity for the target to commit a crime, and the target’s acquiescence as intent to commit a crime, the reality is quite different in the case where the target is a person with autism. Those with autism have trouble catching the switch from fantasy to reality in online discussions. They may have great difficulty seeing and processing how the terms of an encounter change from what they thought it was about to what the undercover agent is actually proposing. They are literal and cannot “read between the lines” in spoken and written language in order to detect deception (Engel, et al, 2012). They are credulous and gullible and unable to turn down “too good to be true” offers. Once the “bait” is taken, they lack the executive function or self-assertiveness needed to change course even if they smell a trap.

All these factors combine to make those with ASD particularly vulnerable to “sting” operations. And, unfortunately, criminal investigators are well aware of the propensity of “sex predator” stings to trap those with autism, but fail to alter their own methodology or take steps to divert these individuals from prosecution rather than subject them to often horrific punishments and lifetime sex offender registration.

In one sting operation in Florida, investigators posted on Craigs List this simple “Personal” advertisement: “Get me pregnant.” The “bait” was that a female person wanted to have sex with an ulterior desire to have the benefit of a child. After the bait was taken there was a “switch” in that the undercover would ask if the target thought it was a problem that she was 15 years old. Numerous persons arrested were thought to be developmentally disabled and certainly more than one had autism.

In Kentucky investigators placed a personal advertisement in the “women seeking men” section of a web page. It consisted simply of the number “18” and a photo of a well-developed young woman—revealing her body but not her face – with a phone number. Typically developed individuals would see this as a “too good to be true” offer, or some kind of sting, or an advertisement for prostitution. To this young man with ASD this woman was indiscriminately willing to have sex with him, social skills or not, and nothing was inappropriate about it

Age: 18

Contact:
(502) 947-6163



In that case, the first “switch” was that, when he called the number, he asked the undercover agent if she was “legal,” expressly indicating he did not want to have sex with someone who was “under age,” a “rule” that he knew. The undercover agent said she was almost 18. The age of consent being only 16, the target was happy. But the second “switch” came when she asked for a “donation” to have sex with him. He neither understood that this then became prostitution, a crime, and a serious felony because she was not 18.

Rules for “entrapment” differ, but autism may well fuel a successful defense by demonstrating excessive susceptibility to police suggestion, or the lack of “predisposition” to commit the offense, or the outrageousness of police practices which fail to protect the disabled. These cases require complete exploration of the defendant’s problems with processing, receptive language, rigid thinking, and executive function. Difficulty in any of these areas affects the ability to appreciate obvious connotations of the deal or how the “switches” may change the fundamental character of the deal – what he is getting himself into – or to read into the switches themselves the need to be more cautious because of the reality that this was a case of false

advertising to begin with. Problems with executive functioning can make it exceptionally difficult to evaluate the wisdom of the course of action or change it even if he begins to suspect that it's not going in an appropriate direction.

Even homespun sting operations like this, to be fair and tolerable in our neuro-diverse society, have to be structured *and executed* in a way which does not make them so clearly a trap for the disabled. With a net cast this broadly, the police and prosecutors must be willing to cut loose those who are not there because of genuine criminal desires or tendencies.

Chapter 8: Interrogation of persons with ASD

Reasons to avoid "litigating" issues like suppression of evidence have been discussed already. Added to this is the fact that in most cases there is plenty of evidence to convict without regard to statements made by the accused. Moreover, even statements by the accused were suppressed, and inadmissible at trial, admissions to things like having physically touched a sibling become an indelible part of any non-trial settlement of the case.

However, issues relating to the reliability or interpretation of statements made to the police by the defendant with autism can be very important in settling on what the actual behavior or understanding of the accused was, or at least countering misinterpretations. Moreover, if it comes to the question of competency, it may be important to demonstrate that the defendant did not understand his rights in the interrogation process, even if there is no motion to suppress. And developing issues related to *Miranda* can assist the judge understanding autism and the defendant's deficits, which can help in many ways. Of course, it goes without saying that it is very unlikely that these defendants truly understand the rights read to them, or that by acknowledging their rights and deciding to talk to the police that they are waiving their rights. (Salseda et al. 2011)

According to leading scholars in the area of wrongful convictions and false confessions (Drizin & Leo, 2004), up to 25% of all wrongful convictions are the result of false confessions (see also Scott-Hayward, 2007). Thus, this is one of the leading causes

of actual false confessions.¹⁶ According to the National Registry of Exonerations, between 1989 and 2019, there have been 147 mentally ill or intellectually disabled persons who have been exonerated from their supposed crime(s). Of those 147 exonerees, 102 of them—a staggering 69%—were originally convicted because of a false confession (National Registry of Exonerations, 2009). Individuals who are mentally impaired are simply, and predictably, like juveniles, more susceptible to making false confessions than the average person (Scott-Hayward, 2007).

The sad record of proven false confessions is filled with stories of the police taking advantage of those with disabilities and juveniles to get them to endorse what the police officer incorrectly thinks he “knows.” This is partly the product of widely used psychological interrogation techniques that encourage suspects to agree with the suggestions of interrogators, whether or not they reveal the truth. This is partly as a result of coercion, or implicit promises that agreeing with interrogators will result in benefits which never happen, including more lenient sentencing or release from custody of youth and disabled persons desperate to go home.

In any case of a police interview of the accused with ASD it is necessary to evaluate the result from the perspective of autism.

Individuals with ASD may be more susceptible to interrogative pressure during formal interviews known as interrogative suggestibility (Gudjonsson, 1984). If they give into interrogative pressure, they may provide misleading statements. Standard interrogation techniques utilize deception that may confuse those with ASD who tend to be “concrete-thinkers” into providing false confessions (Debbaudt, 2004). North et al. (2007) measured interrogative suggestibility among a sample of 26 individuals with ASD and demonstrated that they were more susceptible to compliance and were more eager to please to avoid conflict or confrontation. This is important when opting for a MH defense to determine whether ASD is a mitigating factor, as forensic psychiatrists/psychologists must ascertain the reliability of suspect statements to police (Mogavero, 2016).

¹⁶ When the term “exoneration” or “false confession” is used here, this is reference to exonerations of innocent criminal defendants and admission/confessions proven in that context to have been false.

Those with “higher functioning autism” “are at risk for false confession and manipulation during interrogation, especially when techniques such as deception are used, which they are considerably less likely to comprehend” (Lerner, et al., 2012). The Arc, the national organization supporting those with intellectual and developmental disabilities, in its position statement on criminal justice, cautions that, among the unique problems facing those with developmental disabilities like ASD, is the problem of “Giving incriminating statements or false ‘confessions’ because the individual is manipulated, coerced, misled, confused by either conventional or inappropriately used investigative techniques, or desires to please the questioner.”¹⁷ One cannot pretend that false confessions do not exist in a significant number of cases.

Over 90% of police have had no training to recognize and understand the behavioral symptoms of ASD (Adams-Spink, 2005). This is dangerous for individuals with ASD because it means that most police may not recognize how susceptible these individuals are to suggestion, how literal they are, how poorly they understand questions, despite sometimes pedantic and seemingly sophisticated expressive language, and how prone they are to saying what they believe the person in authority wants to hear. On the other hand, even officers who are unaware of the features of autism will often quickly realize that the suspect is forthcoming and compliant and will “acknowledge” almost any fact or conclusion suggested to them with enough pressure and skill.

Those with ASD have learned that agreeing with a person, especially a person in authority, is an effective way to mask their lack of interpersonal skills. They are also very quick to accept any official perspective. This is another dimension to the “rule – bound” nature of those with ASD. When confronted by the police they are noticeably compliant and courteous to requests from the police (North, Russell, & Gudjonsson, 2005). And, when accused of wrongdoing by anyone in authority and rules then being explained, they are very quick to internalize that rule and express guilt. Sugrue explains:

To further complicate matters, people with ASD often have a very rigid conscience. They are guilt prone and often truthful almost to fault. They

¹⁷ <https://www.thearc.org/who-we-are/position-statements/rights/criminal-justice>

are prone to be what some polygraphers informally term a “guilt grabber”—an innocent person who fails a polygraph test not because he or she is actually guilty of having done anything wrong, but because he or she feels guilty at the mere thought of doing something wrong (Sugrue 2017).

In a very typical case involving a young man with ASD a few years ago in Iowa, the police executed a search warrant at this young man’s house and questioned him about his viewing of child pornography. When it was apparent that he was not sure, still, why they were there, they explained to him that his viewing child pornography is bad because it “creates a market” for child pornography, which creates incentive for people to abuse children to produce more. Later, when he was being questioned at the police station, the interview turned to the question of “distribution,” which really only was the question of whether he was aware that he was making files available to others in a peer-to-peer network. After indicating that he was unaware of this, he added that he would not do that because he “would not want to make a market for child pornography.” While this was a concept he had no knowledge of prior to talking to the police that day, it now incorporated as part of his “memory” of earlier events. This phenomenon is often a challenge for psychologists and defense attorneys needing to understand what his thinking was *a priori*.

Often it is simple enough to realize that the defendant with ASD has just “put it together” from the police raid itself, and initial discussions with the police, which are rarely recorded, from which they learned about the criminality of their behavior. This, combined with this tendency to self-accuse and to please the police, can come off as suggesting that they knew all along that their conduct was wrongful, when this was far from the case. This is another question that needs to be carefully explored in the clinical interviews.

Those with ASD, despite being intellectually able to understand questions and provide articulate responses, may be more compliant and deferential than other interviewees (North, Russell, & Gudjonsson, 2005). That can make them more susceptible to manipulative interrogation techniques, which in turn leads individuals with ASD to answering the questions incorrectly or giving inadvertent confessions to

escape situations causing them distress.

But the techniques employed are not the only issue in interrogating someone with ASD. Memory also plays a significant role in the interrogation process. Over the last half a century, there have been a growing number of studies which have found that individuals with ASD experience specific memory impairments which ultimately influence the way they perceive, understand, interpret and also reconstruct everything around them. There is a unique memory profile of individuals with ASD in that some memory processes are impaired while others appear to be spared (Maras & Bowler, 2014). So while some of the memory processes are intact including: cued recall (Bennetto, et al., 1996), priming (Gardiner, et al., 2003), recognition (Bowler, et al., 2008a), and memory for facts (Bowler, et al., 2008b), others are impaired such as source monitoring (Bowler, et al., 2004), episodic recollection, and the ability to recall personally experienced events (Bowler, et al., 2000; Bowler, et al., 2007).

One study found an impaired ability to consciously recollect events in individuals with ASD and that this group tends to guide their memory based on feelings of familiarity (Bowler, et al., 2000). This may lead to something being incorrectly judged to have been witnessed when that suggested detail creates a feeling of familiarity. A predisposition towards complying with the interviewer in order to please them may also be more likely in individuals with ASD (Maras & Bowler, 2012) as a result of, for instance, their potential increased social anxiety stemming from their impaired social skills.

Thus, interrogations have especially great potential to lead to false statements on behalf of those with ASD, all of which has to be carefully examined and deconstructed in the clinical interview. In this sense, the interrogation itself may assist in demonstrating the cognitive, communication, and social deficits of the accused.

Chapter 9: Competency and Criminal Responsibility

Problems with receptive language, rigid thinking, abstract thinking, memory, working memory, intellectual or reasoning impairments, emotional regulation, tics and repetitive motions and sensory processing problems, and especially executive function,

all may give rise to obvious concerns about the ability of a person with ASD to “understand the nature and consequences of the proceedings against him or to assist properly in his defense.” 18 USC 4241(a).¹⁸ These may impair understanding the attorney, providing useful narrative of events, being able to be attentive or follow court proceedings, and understanding the import of testimony or what the lawyers say in court. Difficulties in working memory and executive function especially impact on the necessary ability to make autonomous decisions that the accused needs to make. ToM deficits and working memory and literal and concrete thinking may impact on the ability to give a narrative as a witness or follow questions or see traps being laid by a cross-examiner, or avoid being led into inconsistent or damaging answers that are not correct.

The difficulty here is that forensic psychologists or psychiatrists rarely have significant experience diagnosing and treating adults with ASD. Without such experience the forensic examiner may not anticipate these typical defects in autism or how they affect genuine competence. It is all too common for clinical or forensic psychologist or psychiatrists to miss the diagnosis altogether, or being aware of the diagnosis, give it no attention in their analysis. Professional articles on evaluating competency sometimes omit to consider developmental disabilities entirely.

9.1. Theoretical framework incorporating autism

Methodologically, the view has been expressed by forensic psychologists and psychiatrists that, in assessing competence, the diagnosis is not relevant, only functioning relevant to the tests for competency. Treating the individual’s mental status as something of a “black box” with the only question being the individual’s functional capabilities has its attraction, especially for a forensic specialist who may never have diagnosed or treated an adult with autism. However, a syndromal condition like ASD points to a very specific set of probable deficits that can impair competence in ways needing to be explored, and thus the diagnosis of ASD provides a critical roadmap of

¹⁸ “[T]he tests must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402 (1960). “An inability to make any meaningful contribution to his defense marks a defendant as incompetent to stand trial.” *United States v. Gigante*, 982 F. Supp. 140, 166 (E.D.N.Y. 1997). The issue is “whether the defendant has sufficient competence to take part in a criminal proceeding and make the decisions throughout the course.” *Godinez v. Moran*, 509 U.S. 389, 403 (1993; Kennedy, J. concurring).

things to suspect or rule out as affecting competence.

Psychologists Daniel Murrie and Heather Zelle describe the question of legal competence as "open-textured" in the sense "that competence may vary across contexts, is subject to a variety of operational definitions, and can probably never be adequately captured by one set of facts." Competence is therefore "both functional *and contextual*." They propose a series of basic abilities, based on extensive studies by other researchers, which are central to the determination of competence. These are: (1) understanding relevant information; (2) appreciating the situation and its consequences; (3) manipulating information rationally (i.e. reasoning); (4) assisting the defense; and (5) decision making (Murrie and Zelle 2015)

One of the luminaries in the field, University of Virginia Law Professor R.J. Bonnie, described the holistic nature of the question of competence, suggesting that the legal framework of competence, as rooted in due process, is to ensure the basic dignity, reliability, and autonomy of the individual being evaluated (Bonnie, 1992). This is most apt in the case of those with autism, and the insight of the autism clinician is needed to guide any possible examination of the question.

This is why it is so important, before having a forensic evaluation, to already have a thorough autism evaluation pertinent to the charges, that also highlights all the relevant deficits and illustrating how they might impair function in the areas that are important to competence. That evaluation of autism can become a template for what must be addressed by a forensic psychologist or psychiatrist hired by the defense. This is why it is not likely to be appropriate, in the case of the defendant with ASD or suspected of having ASD, without such an evaluation in hand, to request a competency determination, if this may result in the court appointing a forensic examiner unlikely to be sufficiently familiar with the autism condition to fairly assess how it may affect competence.

9.2. Question of timing

But even if there is a thorough autism evaluation in hand, and issues of competence are identified, there are compelling reasons to forego formally raising the issue of competence with the court as soon as issues of competence are apparent. First

of all, making a motion for a competency determination in most jurisdictions sets the case on an automatic roller coaster of litigation, and perhaps several rounds of litigation. This will divert attention from a focus on educating prosecutors and a possible meeting of the minds to an “I win, you lose” battle. Rather, concerns about competency may serve best as a backdrop for discussions about the suitability of the defendant with ASD for being prosecuted criminally, or some other favorable outcome. Generally, it seems that it is advisable to avoid litigating issues of competency until it becomes clear that the prosecutors are unbending in achieving the best possible outcome by agreement.

9.3. Practice considerations

Because of the multiple issues of competency which may arise, it may be best, as part of this evaluation, to have the clinician observe earnest efforts by defense counsel, or perhaps “stand-in” defense counsel to work through real scenarios that require an understanding of the charges and the consequences, or meaningfully assisting the attorney preparing the case, giving a narrative, appropriately answer questions, and otherwise assist in his defense. Most importantly, because this is the area which most often is the problem, the clinician should observe the attorney engaging with the accused on the various decisions he is going to have to make, to test the capacity of the accused to autonomously make a rational decision of the kind that realistically reflects the kind and complexity of choices in the case, such as whether to go to trial or not, or whether to take a plea or whether to take the stand and testify.

Pandemic experience has led us to accomplish this with video recording of attorney interviews with the client, to evidence efforts to educate the accused regarding the nature of the charges and the legal process and the decisions to be made and what the accused can do to productively assist in his defense. These sessions can migrate from the purely educational to actual testing of the client’s relevant capabilities in these areas. Such recordings can be used for other purposes as well, for example to illustrate for prosecutors what the accused is really like, as opposed to how he presented himself in the offense conduct or police interviews.

This takes quite a bit of preparation to do, but it’s clear pertinence to the actual

question at hand is such that it lends tremendous support for the clinician's conclusions. If there is a conclusion that the accused is not competent to proceed, and that derives in material respect from his ASD, this will assist prosecutors and the Court ultimately in focusing on the unique circumstances of his permanent mental disability, rather than conflating disability with mental illness, which often bears the prospect of "restoration" of competence.¹⁹ Only then is it appropriate to make a motion for a competency determination.²⁰

9.4. Lack of Criminal Responsibility

The arguments on behalf of the ASD defendant regarding his lack of "moral blameworthiness" closely parallels the argument that the person lacks criminal responsibility. The argument is that as a result of his disability he was unaware of the nature (in its cultural context) or wrongfulness of his conduct.

However, the person with ASD, who is not also intellectually disabled, is *capable* of understanding the nature of his conduct or its extreme wrongfulness if it is explained to him at that time. Rather, because of his ASD he was substantially impaired in intuiting on his own the social norms and taboos that pertain to the conduct. Thus, absent having received explicit instruction on these rules, he was incapable of knowing them on his own. Nevertheless, the issue does not ever appear to have been tested. Still, the psychosis in a colorable case of "insanity" may be a fleeting, condition, just as much as the sociosexual ignorance of the accused with ASD, and so the two should not be treated differently.

The main argument for caution in raising lack of criminal responsibility if one is forced to trial is that one found not responsible by reason of a mental disease or defect for a sex offense will presumably still have to register as a sex offender once discharged

¹⁹ A finding of lack of competence based on deficits directly tied to autism is not likely one which is susceptible to the accused attaining competence.

²⁰ One can imagine a sort of ethical conundrum where counsel, seeing obvious deficits which call into question certain aspects of competency, fears that it is inappropriate to proceed without a determination of competency by the court. First, a premature determination of the question is unlikely to succeed. Moreover, since the primary aim of the representation is diversion of the case, very little "competence" is required for that. Diversion also being better in many respects than the uncertain "roller coaster" of competency litigation, it is clearly in the client's best interest to hold off the question of competency until it is ripe and necessary.

(Weiss & Watson, 2008). That may be less of a concern where the alternative is a lengthy prison sentence.

Raising a question of criminal responsibility is, it seems, a last resort.

Chapter 10: The Role of Treatment

Knowing options for appropriate treatment for clients with ASD is essential to effective advocacy in these cases. Accessible and effective treatment provides prosecutors and judges reassurance that the defendant will not reoffend. Explaining the differences between appropriate therapy and typical sex offender treatment programs can help ensure that conditions for pretrial diversion, probation, or post release supervision are actually appropriate and effective, at the same time enhancing the quality of supervision.

10.1. Treatment for Individuals with Asperger's Syndrome

Individuals with intellectual and developmental disabilities convicted for sex offenses, as pointed out so persistently by Dorothy Griffiths, does not require “rehabilitation.” It requires “habilitation.” Offending, based on blindness to social norms, or the social implications of what is looked at online, or what is said in online communications, calls for treatment that supplants the intuitive socialization and sexuality learning processes experienced by typically developed individuals. This must be in a program that can present this explicitly to those with autism in a way they can understand it. “Habilitation” uses active education and training about social norms and appropriate behaviors. It must be adapted to take into account the learning capabilities of the individual and the difficulty of those with ASD in generalizing how social rules apply across situations. For an individual with ASD who does not present with a paraphilia, a traditional sex offender treatment program would be damaging and, more importantly, would create greater confusion for the individual. (Griffiths & Fedoroff, 2009).

Marks and Garretson observe that “[t]raditional sex offender treatment also requires that the client replace deviant behaviors with pro-social coping strategies.” These coping strategies require the client to “accurately interpret the environment and

situations, label and express feelings appropriately, . . . be able to make choices for behavior, self-evaluate those actions, . . . [and] tolerate difficult emotions, among other factors.” While suitable to typically developed offenders, the authors identify specific problems and poor outcomes with this approach when used to treat those with ASD. These include aversive reactions when problematic behaviors and attitude distortions are directly identified, as individuals with ASD may have a very difficult time accepting criticism. Some suggestions that have been offered for treating individuals with ASD include providing the information piecemeal, “us[ing] an adapted style of communication (visual aids),” using concrete descriptions, “being mindful of the reality that talking about feelings too much and for too long may only make them more confused,” making lists, and providing a clear overview of the overall treatment plan to create structure. (Marks & Garretson, 2004)

Proven, effective treatments for individuals with ASD involve teaching “skills, concepts, [and] appropriate procedures . . . in an explicit and rote fashion using a parts-to-whole verbal teaching approach, where the verbal steps are in the correct sequence for the behavior to be effective.” This requires teaching “[a]daptive skills intended to increase the individual’s self-sufficiency . . . explicitly with no assumption that general explanations might suffice or that he/she will be able to generalize from one concrete situation to similar ones,” and teaching “how to identify a novel situation and to resort to a pre-planned, well-rehearsed list of steps to be taken,” among others. Communication and behavioral interventions are needed, with instructions on “how to interpret other people’s social behavior . . . taught and exercised in a rote fashion,” setting specific guidelines to deal with frequent, problematic behaviors, and discussing these guidelines with the individual in “an explicit, rule-governed fashion, so that clear expectations are set and consistency across . . . settings and situations is maintained.” (Klin & Volkmar, 1995).

Very explicit sex education is needed for individuals with ASD. Such education should be concrete and literal, with an emphasis on behavioral rather than cognitive interventions (Bolton, 2006).

So, the consensus of clinicians in this area is that what individuals with ASD who

have sexually offended actually need is sociosexual information and communication skills. This supports the understanding that the condition being addressed is not one rooted in deviance or sociopathy. The cure is telling us something about the condition. These methods of treatment are successful because they give these individuals an ability that make up for what they missed due to their neurologically-based social learning deficits.

This evidence of what is appropriate and effective treatment provides powerful support for the understanding that these individuals are not typically deviant or likely to reoffend if treated appropriately.

10.2. Comparison to sex offender treatment programs

Traditional sex offender treatment focuses on enhancing empathy for the victim and on recognizing cognitive distortions, among other goals.²¹ The program is based on learned socially deviant experiences whereas for those with autism the difficulties come from “a failure to benefit from any experience, rather than learning on the basis of socially deviant experiences.” The focus of the treatment, i.e. recognizing cognitive distortions, and promoting empathy, are unlikely to be effective in individuals with ASD, even though it is effective in neurotypical individuals, who need behavioral rather than cognitive interventions. (Bolton, 2006).

Specifically, the problem with those with ASD is not “cognitive distortions” because they are not aware of the social norms that such mechanisms serve to circumvent. While those with ASD have issues of “empathy,” their issues are very different from what sex offender treatment programs are aimed at. These are designed for individuals who know very well the physical and psychological impact of sexual aggression on victims, but care little about it. This is the technique suitable to the person with anti-social features. The anti-social person is not only aware of the feelings and fears of the other person, they readily take advantage of these feelings and fears to manipulate the other person. They lack “emotional empathy.”

²¹ Cognitive distortions include the kinds of rationalizations or “thinking errors” that are used by antisocial persons to justify their manipulation and taking advantage of others.

Individuals with ASD are completely the opposite. Because of their condition, their brain simply does not pick up on the feelings of others, so they lack “cognitive empathy.” If the true feelings of others are pointed out to them, they are then very concerned about the other person’s feelings and will try to act appropriately.

Traditional sex offender treatment programs generally involve group sex offender therapy with serious hands on offenders and often involve pressure from other group members. These are things that young men with autism are very uncomfortable doing or incapable of doing. For an individual with ASD, who does not present with a paraphilia or antisocial traits, traditional sex offender treatment program would be pointless and damaging. (Griffiths and Fedoroff 2009). Effective treatment of an individual with ASD requires an individualized treatment program focusing on sexuality training and education on sociosexual boundaries and tools he can use to assess social situations.

The difference between what is required for typically developed sex offenders and those with ASD who have offended points to how different the causes and cure is for these different types of offender.

Chapter 11: Clinical evaluations in cases of online offending

In the case of an individual with ASD charged with a criminal offense, more than a workmanlike, or even exemplary diagnostic evaluation is necessary. The audience is not a treating therapist, or a school attempting to meet a student’s needs, or an employment program, all of whom have the relevant experience and knowledge needed to take such a report at face value. Here the primary audience is law enforcement and prosecutors. In some of the toughest cases, these prosecutors are dealing exclusively with offenses involving child exploitation. From their viewpoint, “everybody has an excuse.” So, they are especially resistant to the notion that an intelligent person engaging in this behavior might not understand its serious wrongfulness, or would not have an interest in sex with children and be at imminent risk of doing so, given the opportunity. Their constituents are advocates for victims of the production of child pornography, parents whose children have been predated upon on the Internet, and

they have seen real and horrific sexual exploitation of children.

Of course, child pornography is a scourge, and the abuse of children and the harm caused is egregious, and children must be protected from abuse of any kind. Empirically, however, it is beyond dispute that some individuals who engage in this behavior are not interested in having sex with children or a threat to them, and the protection of society does not depend upon their annihilation. Within this group are individuals with a neurological difference, the most salient consequence of which is the lack of the social intuition necessary to discern, on their own, the implicit social mores and taboos being violated by their conduct, or the ability to actually “see” the criminality, abuse, and pain evident in images of child exploitation.

Thus, whether we are talking about sex offense or other offenses involving transgression of implicit social boundaries or other offenses where ASD has blinded the defendant to the harmful prospective consequences of their actions, they are, in degrees, morally blameless.

Thousands of parents, special education teachers, clinicians, researchers and autism advocates understand this perfectly well. That understanding, and the knowledge it is based on, has to be shared effectively with those making decisions about whether or how to prosecute or judge individuals with autism who sexually offend. It must be remembered that the premise of this monograph is that, when well informed of the undisputed scientific facts about autism, and the manner in which it can so severely affect even intelligent individuals, very experienced prosecutors, even ones considered “hardened” by their experience, have indeed made extraordinary accommodations in cases of defendants with autism. The clinical evaluation has to carry a great deal of the load in this process.

Consequently, the evaluation in these cases has to be expansive, empirically supported, and address the concerns of victims, law enforcement, prosecutors and judges. The report should explain exactly how the social learning deficits at the core of autism come about, their severity in the individual, how that impaired his learning of social norms, and otherwise his understanding the wrongfulness of his behavior or the harm that might result. The report must directly address the appropriateness of possible

prosecutorial decisions to the extent that this knowledge and expertise allows. If the person who knows the most about autism and its affects is not making it clear if their opinion is that diversion from the criminal process needs to happen, the prosecutors will never come to this conclusion on their own. The report has to compellingly advance its conclusions.

11.1. Different from a “forensic” report

Forensic psychiatrists and psychologists may hesitate on the invitation to the clinician to essentially advocate for the consideration of autism in the criminal justice process, and to opine on the blameworthiness of the accused. This may be felt as a threat to the objectivity to which forensic psychiatrists and psychologists aspire (AAPL, 2005). But the underlying concern for objectivity here is not that the clinician be neutral, or have no stake in what determination is made, but simply that they “not distort their opinion in the service of the retaining party.” Even for forensic psychiatrists and psychologists testifying as to competency or insanity, there is nothing inappropriate about insistent, passionate, “partisan,” and even emotional advocacy *for understanding of the scientific facts* about autism and zealous advocacy for the *examiner’s opinion* in the case (AAPL, 2013).

Forensic examiners are in a position to help improve the law. In these cases, there is a struggle to get the criminal justice system to meaningfully and substantially take into account developmental disabilities and disability laws in relation to the accused. Zeal is not only appropriate, it is necessary.

The kind of report needed in these cases is not the typical “forensic” psychological evaluation. The examiner in this case is not primarily testifying to a legal mental state or competency. The primary audience is not the judge or the jury. The examiner is not appointed by the court, so there is no risk of accusations of “dual agency,” *i.e.* obligation as a court-appointed examiner conflicting with the appearance of championing the cause of the particular accused. Rather, the report contemplated here is directed to the prosecutor, an independent executive officer, whose discretion is bound by disability laws and moral principles, and is therefore dependent on an empirical understanding of disabilities. The examiner in these cases helps fulfill that

need at the same time as advocating for their conclusion as to how the autism condition of the accused bears on the question of the moral, if not legal, culpability, and what should be done with him.

While lack of understanding of the “wrongfulness” or harmfulness of the conduct is not a “defense” to a crime, it is a fact on which a prosecutor can rest a decision to forego or “defer” prosecution, to allow a plea to a reduced charge not requiring sex offender registration, or to not charge an offense with a mandatory minimum sentence.

11.2. Empiricism

Clinicians cannot expect to be taken at their word. The following language has been quoted by judges in criminal cases excluding evidence of an autism diagnosis:

That the expert failed to subject his [undisclosed analytic] method to peer-review [sufficiently to explain his methodology] . . . is not dispositive, but if these guarantees of reliability are not satisfied, the expert 'must explain precisely how he went about reaching his conclusions and point to some objective source to show he has followed the scientific method, as its practiced by at least a recognized minority of scientists [or mental health experts] in his field

Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594, 598 (9th Cir. 1996). Thus, even though it would be unusual in normal clinical practice, it is essential to cite available authority for conclusions, including treatises, publications of seminal research in peer-reviewed journals, in support of even the most basic premises. In connection with testing, there should be references to the validation studies and error rates for the tests. Authoritative guides on rendering a diagnosis, including, of course, diagnostic criteria and relevant commentaries in DSM-5 and DM-ID-2 and ICD should be specifically referenced.

11.3. Comprehensiveness

When the defense is advancing the proposition that the defendant was impaired in intuiting or perceiving the wrongfulness of his conduct, is essential for the clinician to explain how this might be so in respect to every material aspect of the defendant’s conduct. The relevant conduct may not be limited to the actual charges, but to things that investigators or prosecutors or judges might misinterpret. Defense counsel needs

to help identify these things and have the clinician address them. Often what seems like a very bad thing is simply an innocuous symptom. (Allely and Cooper, 2017). One defendant who was “smirking” during police interrogation was taken to be sociopathic. Police thought that all the Disney videos in another defendant’s bedroom were devices to lure children.

Familiarity with the defendant’s history of Internet practices and how he was first exposed to pornography or child pornography is essential. Often there is victimization there, or clues to explaining future problematic behavior. Familiarity with the contents of images and videos is required, not because it is of particular significance,²² but so the examiner does not later appear naïve as to exactly what the defendant had done, or in suggesting that he might not process the social implications of what he has looked at or solicited.

In cases where there are “chats” with minors, sometimes very extensive, the prosecutor need only focus on a handful of worst things said by the defendant to make the point. This evidence can only be addressed objectively and effectively in the context of the chats overall, which are always instructive. There may be incessantly repeated routines, stark indications of inability to tell age or differentiate stages of sexual development from photographs, evidence of ToM problems (“mindblindness”) even in text chats, signs of real empathy for others, absence of antisocial traits, the defendant being taken advantage of without knowing it, and so on. Critical in these cases is to identify the extent of reliance on “social scripting” and mimicry, and the absence of intuitive response: this will counterbalance the implication of social competence in the language and methods used by the defendant in “chats.” It has appeared that the defendant cannot identify or recall huge portions of the chats, having been on a kind of perseverative or dissociative “autopilot” for hours on end.

It is essential to investigate in a structured way exactly what the defendant was

²² Even for typically developed individuals, some of the most highly regarded researchers in the field, using the most extensive data ever, have determined that the number or content of the images (related to the age of the child or the kind of activity depicted) has no relationship to dangerousness, or risk of recidivism or even actual sexual interest of the accused. Seto, M., & Eke, A., " Predicting Recidivism Among Adult Male Child Pornography Offenders: Development of the Child Pornography Offender Risk Tool (CPORT)," *Law and Human Behavior* (2015).

thinking at the time of the relevant events. In the course of arrest alone most defendants with ASD become quite aware that they must have done something seriously wrong. Being deferential to police and quick to condemn themselves, these sensations often take firm hold. It can be a challenge to get them to try to remember how they understood their conduct before their arrest. Careful probing is needed to test the degree to which, and how, their actual appreciation of the wrongfulness of their conduct was impaired.

Note that the significant question is not whether or not the defendant was aware that there might be something *illegal* about the conduct, although that is most often the case also. If the defendant had the idea that there was something illegal about his behavior, it is well to find out what exactly he thought was illegal about it, and how serious did he think it was compared to other things that are illegal (speeding, smoking marijuana, stealing, assault, actual sexual abuse as depicted in child pornography). Most defendants with autism turn out not to have considered how or why or under what circumstances child pornography is made. As noted previously, those few that seem to have thought about it have very “autistic” (in contrast to cognitively distorting) things to say, for example that the children were probably just actors, or these were probably “selfies” taken by children, or that these were not real children.

Statements during interrogations need to be evaluated. For those who told the police that they knew that what they were doing was wrong, probing is needed to test the quality of this statement. Can they discuss *why* the behavior was wrong in their minds, or *how seriously* it might be wrong (wrong like looking at adult pornography?), or how they learned this or what the harm of the behavior might be. In many cases the police very well understand that the arrestee has a developmental disability or autism specifically and focus for that reason on getting the defendant to say that he was aware that his behavior was wrong. Clinicians should consider relevant research, referenced previously, on the vulnerabilities of those with autism in the interrogation setting.

In the case of a second arrest, the first arrest also has to be contextualized in the framework of autism. The failure of the defendant to have “learned his lesson” from that prosecution heavily affects the attitude of the prosecutor and the judge. It may

seem that the most that can be done in these cases is to somehow avoid sentencing enhancements that may ordinarily apply to a second offense. But this is not necessarily so. Prosecutors are able to appreciate that the effects of the defendant's autism may not have been taken account, even by defense counsel in the first case, which by all rights maybe never should have been prosecuted or should have been resolved very differently. This almost certainly will trace back to not having had a correct diagnosis at the time, or the failure to have received appropriate therapy. This is as much a "system failure" as a strike against the accused. Also, where the defendant is already registered as a sex offender, there is significantly less pressure – at least if there is no present live victim – on the prosecutor to get a conviction for a sex offense.

Reference should be made to resources from the autism community helping to reinforce the points made, including appropriate policy statements by experts and organizations. (Klin, et al. 2008; The Arc 2014, 2015, 2017).

The report should also address the kinds of therapy that are appropriate for the accused with autism, and how successful the therapies are. Such programs should be compared with the typical sex offender treatment program, whose appropriateness or efficacy for those with autism in general or the accused specifically should be addressed. The report should address ways in which the defendant's autism characteristics help ensure that he will not reoffend and research tending to support his. The report should address what the prison experience is like for persons with autism and his vulnerabilities in that environment. The report should suggest what kind of accommodations would be appropriate for the defendant in the criminal process, and in the prison setting (especially for safety and mental health) and on supervision.

11.4. Testing the brain

In one case, after substantial live testimony regarding different kinds of neuroimaging studies showing marked differences in the brains of persons with autism, one judge said, "But they didn't go inside and do brain wave tests. . . . in other words, nobody went in, took a look at his brain and said, 'Here is a physical manifestation of Autism'." The judge disregarded the evidence of autism and sentenced the young defendant to over 11 years in prison.

In another case, the U.S. Magistrate Judge had recommended that the accused was not competent to proceed, and the government objected to the finding. The extremely thorough defense evaluation observed that the accused had “obvious neurodevelopmental disabilities involving frontal brain function.” All the neurological deficits were well documented. The U.S. district judge seized upon the fact the psychologist did not perform tests “routinely employed by neuropsychologists to correlate deficits to regions of the brain.” He specifically named five tests or batteries of tests supposedly fitting this description,²³ none of which are routinely used in autism evaluations. On this and equivalent complaints about the psychologist’s report, this judge rejected the Magistrate Judge’s recommendation. He did this without a hearing where the defense clinician could easily have answered these concerns. This same judge also declared, “If [the defendant] can learn organic versus hard surface computer modeling, he can be taught how the criminal justice system functions from the perspective of an accused.”

The comments by these federal judges illustrates a persistent problem certain prosecutors and judges have in considering autism. They find it very difficult to accept that archetypal characteristics those with autism *actually apply to the accused* merely on the basis of an autism diagnosis, no matter how well it is supported in the developmental history, clinical observations, or typical testing, or the volumes of research verifying the pertinence of all that to the diagnosis. This begs the question of whether or not it might be necessary in some cases, or appropriate in every case, to do whatever testing that can identify any brain abnormality that can be associated with the particular defendant’s deficits, however unnecessary for diagnostic purposes.

It would be wonderful to show that in fact the defendant’s gaze followed the same patterns identified in the seminal “eye tracking” studies (Klin, et al., 2002) or that he performed similarly to the persons with autism in protocols used in the “Social Attribution Task” (Klin 2000), or that his neural pathways look more like that of Temple

²³ “the Halstead-Reitan Neuropsychological Test; the Cambridge Neuropsychological Test Automated Battery (CANTAB); the Finger Tapping (Oscillation) Test; the Luria-Nebraska Neuropsychological Battery; the Word Memory Test.”

Grandin's when observed using High-Definition Fiber Tracking (LRDC).²⁴ More pointedly, since the fundamental question in these cases seems to be whether the defendant is autistic or antisocial, perhaps we should replicate studies using MRI and fMRI to differentiate between the neural correlates of the lack of emotional empathy in persons with antisocial character and the neural correlates of the lack of cognitive empathy in autism to detect the neurological correlates for the condition of the accused (Wallace, 2012). Perhaps genetic tests could be developed for the same purpose (Jones, 2009).

While the reality is that a highly accurate and optimally useful autism diagnosis can be achieved with very little testing (Monteiro, 2010), getting the science of autism credited in the criminal justice system requires more. Any kind of validated and empirical testing that can support the conclusions of the clinician needs exploration.

Chapter 12: The Americans with Disabilities Act and Rehabilitation Act

At the outset of this monograph, it was observed that the issue of the treatment of persons with developmental disabilities in criminal courts is in fact a human rights issue. Reference was made to conventions and treaties and domestic statutes. It does not appear that any of these international or individual country laws have been brought to bear in criminal courts in any jurisdiction to provide substantive or procedural protections. Indeed, it is not clear how such principles can be brought to bear.

Nevertheless, whatever uncertainty there may be about how these principles may be enforced, there is no uncertainty that a duty is imposed upon prosecutors and judges from these enactments, a duty to meaningfully and substantially take developmental disabilities into account in exercising their discretion in relation to the developmentally disabled accused person.

Disability laws requires that government officials take disabilities into account and accommodate those who are disabled when performing their functions. The principles of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794)²⁵ are applicable to

²⁵ The same standards apply to claims under the "Americans with Disabilities Act" ("ADA" 42 USC 12101-12113) as under the Rehabilitation Act and case law construing the latter generally pertains equally to claims under the

federal actions. The Americans with Disabilities Act (“ADA”) applies to states. Discrimination under either statute generally includes: (1) intentional discrimination; (2) discriminatory impact; and (3) a refusal to make a reasonable accommodation to the disabled. *Alexander v. Choate*, 469 U.S. 287, 295-96, 105 S.Ct. 712 (1985). In *Choate*, the Court reiterated that disparate impact of otherwise non-discriminatory actions can violate the disability laws and that “reasonable accommodations” may have to be made for the disabled. Thus, treating the accused “like anyone else,” the results, even if unintended, still establish discrimination because of the disproportionate effect such a “neutral” approach is having and will have on him because of his disability.

Disability laws apply to those enforcing the criminal law. (Dinnerstein and Wakschlag, 2019).²⁶ It is well that police officers are obliged to take an apparent disability into consideration when making the decision to arrest an individual, and in making post-arrest accommodations. See *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1217 (9th Cir. 2014)(joining the “majority of circuits” holding that ADA applies to police interactions), rev’d in part on other grounds, 135 S.Ct. 1765 (2015); *Seremeth v. Bd. of Cnty. Comm’rs of Frederick Cnty.*, 673 F.3d 333, 338-40 (4th Cir. 2012) (“[t]he ADA applies to the investigation of criminal conduct”); *Waller ex rel. Estate of Hunt v. City of Danville, Va.*, 556 F.3d 181, 175 (4th Cir. 2009); *Gorman v. Bartch*, 152 F.3d 907, 912-13 (8th Cir. 1998) (police department is a public entity and an arrest is a program or service); *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999); *Lewis v. Truitt*, 960 F.Supp. 175, 178 (S.D. Ind. 1997)(denying officer’s motion for summary judgment because a genuine question of material fact existed as to whether the defendants “knew [the plaintiff] was deaf but refused to take steps to communicate with him and then arrested him because he did not respond to them appropriately”); *Sacchetti v. Gallaudet Univ.*, 181 F.Supp.3d 107 (D.D.C. Apr. 20, 2016)(denying officers’ motion for summary judgment because genuine question existed as to whether defendants knew

former. *Bradley v. England*, 502 F.Supp.2d 259 (D.R.I. 2007). The Rehabilitation Act, the precursor to the ADA, applies to federal agencies, contractors, and recipients of federal financial assistance. *Calero-Cerezo v. U.S. Dept. of Justice*, 355 F.3d 6 (1st Cir. 2004) *Calero-Cerezo v. U.S. Dept. of Justice*, 355 F.3d 6 (1st Cir. 2004).

²⁶ E.g. *Lewis v. Truitt*, 960 F.Supp. 175 (S.D. Ind.1997); *Lewis v. Truitt*, 960 F.Supp. 175 (S.D. Ind.1997); *Calloway v. Boro of Glassboro Dept. of Police*, 89 F.Supp.2d 543 (D. N.J. 2000); of *Calloway v. Boro of Glassboro Dept. of Police*, 89 F.Supp.2d 543 (D. N.J. 2000); *McCray v. City of Dothan*, 169 F.Supp.2d 1260 (M.D. Ala. 2001).

that plaintiff's decedent was autistic and mentally ill but arrested him over a minor altercation with his roommate).

Prosecutors in the U.S. are nominally obligated to take the defendant's disability into account, both as a consequence of these laws, and as a moral proposition.

It should be noted that mental illness is not a crime. Prosecution and incarceration are inappropriate responses to symptoms of mental illness. Law enforcement agencies have a responsibility to distinguish criminal behavior from conduct that is the product of mental illness but has no criminal intent. . .

Paula N. Rubin and Susan W. McCampbell, "The Americans With Disabilities Act and Criminal Justice: Mental Disabilities and Corrections," p.2, *Research in Action*, (NIJ July 1995). The paper made clear that the reference also was to developmental disabilities involving "substantially diminished capacity for coping with ordinary demands of life."

It might be supposed that the ADA and Rehabilitation Act would apply with lesser force to discretionary decisions about whether to arrest or what to prosecute for, if at all. But this is not so. The Disability Rights Section of the Civil Rights Division of the Department of Justice has asserted:

By its plain terms, Title II applies to all governmental entities, including law enforcement agencies. The statutory text contains no "exception that could cast the coverage of" law enforcement entities "into doubt."

Robinson v. Farley, et al., CA № 15-803-KBV (DC) ECF #38. The U.S. DOJ has put out technical guides on the applicability of disability laws to law enforcement (U.S. Department of Justice, 2006). (Dinnerstein and Wakschlag, 2019).

"Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act." USDOJ, Civil Rights Division, Technical Assistance Publication, January 11, 2017, p.2, stated the goal of nondiscrimination requirements is to "avoid[] unnecessary criminal justice involvement for people with disabilities" and the importance of "assessing individuals for diversion programs" on the basis of developmental disabilities. It later gives as an example of compliance with the ADA the setting of "eligibility criteria for diversion programs such as community

services, specialty courts, or probation programs,” and “[r]equir[ing] court staff to explore reasonable modifications to allow qualified individuals with these disabilities to participate in diversion and probation programs and specialty courts” as “reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination.”

This guidance goes further to insist that

governments must prevent unnecessary institutionalization of people with disabilities. Governments have complied with this obligation by using community-based treatment services to keep people with disabilities out of the criminal justice system. These governments have recognized that the responsibility for effectively serving people with mental health disabilities or I/DD cannot fall to law enforcement alone. Therefore, they ensure that their disability service systems offer sufficient community based services and support criminal justice entities to coordinate with, and divert to, community-based services.

These policies were reinforced in a later bulletin entitled “Ensuring Equality in the Criminal Justice System for People with Disabilities,”(U.S. Department of Justice Civil Rights Division) which again speaks to “avoiding unnecessary criminal justice involvement for people with disabilities,” as well as in policy speeches by Deputy Assistant Attorney General Eve Hill of the Civil Rights Division given at the White House Forum on Criminal Justice Reform and People with Disabilities on July 18, 2016, (U.S. Department of Justice, 2016) echoing the head of the Civil Rights Division, Vanita Gupta, in Baltimore on June 16, 2016, speaking at the National Disability Rights Network’s Annual Conference.

Because even 17 years after *Olmstead* and more than 25 years after passage of the ADA . . . we see this gap in our justice system, as too many people suffer from policies that criminalize mental illness or other disabilities. . . . Because make no mistake: the community integration mandate in *Olmstead* applies not just to some, but to all public entities. And that includes public entities in our criminal justice system. . . . In our courts, where appropriate, we want to divert individuals with mental illness from incarceration and connect them with community-based treatment. (Gupta, 2016).

These powerful statements from the Department of Justice hold that prosecutors should primarily be considering diversion, as a policy for I/DD individuals, unless it “would fundamentally alter the nature of the service, program, or activity.” Since it is not a fundamental feature of federal criminal prosecutions to criminalize those who are not aware that they are doing anything wrong, and present no cognizable danger to others, this proviso is no obstacle.

Second, this guidance holds that “governments must prevent unnecessary institutionalization of people with disabilities,” which would militate against seeking pleas to offenses requiring mandatory minimum sentences which can be so very arbitrarily sought in the U.S., and where the question whether jail is “necessary” is best left to a due process determination by a judge.

It is not clear what can be done to force prosecutors to follow these authoritative directives. However, attorneys representing defendants with autism spectrum disorder have every right to insist they do, and that judges likewise insure that prosecutors are cognizant of this duty, and acknowledge that they too have a duty as judges to understand disabilities and meaningfully and substantially take them into account.

It is proposed that, just as a judge might be obligated to insure that the prosecutor has abided by the requirements of discovery, or the rules of Equal Protection under *Batson v. Kentucky*, 476 U.S. 79 (1986), the judge might also conduct an inquiry into whether the prosecutor has meaningfully and substantially taken the disability of the accused into account in exercising discretion as to whether, or how to prosecute the case.

Chapter 13: Sentencing

The approach to sentencing may be something of a replication of the presentation to the prosecutor. In each case we are trying to inform the discretion of government officials, hoping that they will meaningfully, and substantially, take into account the pervasive developmental disability of the accused. Hopefully the defense has taken advantage of earlier opportunities to inform the judge about the defendant’s autism condition and its consequences. Such a head start can be helpful because the

amount of time a judge has to consider sentencing is typically not enough to learn what he or she needs to know about ASD, and how it is presented in this individual.

In the sentencing presentation, there will be more emphasis on prison, and how tortuousness, harmful, and counterproductive it is for those with autism spectrum disorder. As the alternative, focus must be on the success of community treatment actually suited to the young man with ASD, and so much more effective for him and the safety of the community than if delayed by years of gratuitous incarceration devoid of habilitation. The issue of blameworthiness remains the same: to what extent was the accused, because of his neurological difference, unaware of the wrongdoing and potential harm involved in his behavior? This, and the “rule bound” tendency of those with ASD to follow important social rules, once they understand them, are critical factors in imposing sentence.

13.1. A Human Rights issue

Sentencing, where the judge does have the choice not to imprison, squarely involves a choice about treatment of persons with disabilities, and the human rights concern addressed at the outset of this chapter. But the backdrop for this exercise is not a pretty one. The criminal process, as every experienced criminal lawyer understands at some level, is ritualistic. And in this ritual the imposition of sentence is largely symbolic. And the more symbolic it is, the less concern is seen for the actual blameworthiness of the accused. As Rene Girard has demonstrated, in every human culture rituals of human sacrifice were used as an organizing principle to create social cohesion in the face of existential fears of enemies, epidemic, drought and the wrath of gods, and to quell cycles of retributive violence and blood feuds within. The evolved neurological modules for “mind reading,” were necessary, but not sufficient for holding social groups together, it seems. Those ritual practices evolved into religions, in which sacrifice, human or otherwise, or representations of sacrifice continued to serve this organizing principle. Religions formed ecclesiastical courts which in turn evolved into civil courts, which continue to use the same mechanism, but cloaked in legalistic justifications (Girard 1977). The victims for sacrifice need not have been tied to the phenomena which provoked fear, nor to be guilty of any transgressions, and were often

explicitly innocent. Scapegoats typically were different, but not too different from the norm. Jews, ethnic and religious minorities, poorly integrated groups, those with a physical or moral 'abnormality', and the marginal insider (person of privilege), women, children and old people were the ones chosen as scapegoats.

In every culture, and in every generation of humanity we have seen the scapegoat mechanism at work: ritual human sacrifices of primitive societies, the killing of the *pharmakos* in Ancient Greece, the Christians killing of Jews by who they blamed for deaths caused by plague, the burning and hanging and torturing of witches and heretics, and lynching of blacks in the United States. All these examples of collective scapegoating violence serve the same underlying function of attempting to unify the community against an individual (or group) which has been made the object of the community's fears of crisis and violence within. The nominal effort of the state to supplant and hegemonize violence only masks the fact that scapegoating violence is "that enigmatic quality that pervades the judicial system when that system replaces sacrifice" with a "violence that is holy, legal, and legitimate." (Girard, 1977, p.23). The criminal trial is, essentially, a ritual, at its core no different than the earliest prehistoric events at the root of culture, where the group descended on one person to sacrifice, for the betterment of the community. Indeed, that value is served even where the convicted person is innocent. *Herrera v. Collins*, 506 U.S. 390 (1992).²⁷

Nothing evokes the need for scapegoats like panic. As demonstrated at the outset of this chapter, especially in a few countries, we remain enmeshed in an enduring and cultivated moral panic over the fear of sexual exploitation of children by strangers. The sex offender against children is the ultimate societal pariah. The developmentally disabled are the perfect scapegoat: their noticeable difference has made them a target of fear and a subject of abuse. This is exemplified by the fact that in the US the vast majority of young persons with autism are, almost pathognomonically, bullied. The combinant *developmentally-disabled-sex-offender*, is therefore the best victim of scapegoating – so easy to incriminate, technically guilty, no agency to defend himself,

²⁷ In *Herrera v. Collins*, 506 U.S. 390 (1993), the U.S. Supreme Court rejected the effort to avoid execution for murder on a claim that new evidence demonstrated the factual innocence of the Mr. Herrera. His legal guilt, and the interests of "finality," required his execution.

and because of his difficulty perceiving and adapting to the social world, seen as something less than “human.”

The belief in witches was fervent, and the persecution of witches was approved by sober community leaders. We find it hard today to take seriously their beliefs. But if we find laughable the beliefs of earlier generations which were used to excuse the sacrifice of human beings, how laughable in the future will appear our efforts to rationalize our massive use of incarceration, and annihilating civil stigmatization, upon those with autism, for merely looking at pictures of horrible crimes committed by others, but with no concept of the opprobrium and fears this arouses among others, and presenting no cognizable risk of harming a child?

An important thing to remember in all of this is that it is no use to simply denounce the prosecutors or the judges who are essential partners in these convictions. They are doing what they think is expected of them. Indeed, scapegoating processes only work best when the participants do not perceive the sacrificial nature of the process that lies below the superstructure of legality. It is the banality of this that we have to deal with.

A core premise for Girard is that scapegoating can be destroyed by the simple revelation that the victim is a scapegoat, and innocent of what drives the fears underlying the community’s panic. He even refers to the role of the one who defends the prisoner, alluding to the Biblical “Paraclete” who “dissipates the fog of mythology” in protecting the scapegoat (Girard 1986). This theme is implicitly understood by the lawyers experienced in representing persons against whom the death penalty is sought who try to neutralize the legalistic mechanisms of moral disengagement on which prosecutors rely to legitimize their pursuit of death, if only simply by talking to jurors about them (Haney 1997).

13.2. Actual sentencing practices in online offending by those with ASD

Of course, judges everywhere are required to take individual characteristics into account, especially factors would which affect blameworthiness of the individual or the degree to which incarceration is needed to protect society. There is every reason to believe that they will understand the need to take developmental disabilities into

account, out of simple fairness. There is good evidence that this will be so in four studies by Colleen M. Berryessa, and colleagues,²⁸ discussed in detail by Claire S. Allely and Penny Cooper, who also catalog the particular traits of persons with autism likely to affect how they are viewed, and important tactical considerations that attorneys must address in any proceeding involving an accused person with ASD (Allely and Cooper 2017).

This author has attempted to identify and track state and federal criminal cases in the U.S. involving defendants with ASD, and especially where a significant effort was made to educate the judge about the role of ASD in the offense and its significance for estimating the risk of reoffending. Most of the cases involve online sexual offenses. Of those cases, excluding the dismissals, and pretrial diversion, but including cases involving reduced charges not implicating sex offender registration, there are 33 cases. Of these cases, the following observations apply:

- In federal cases, average downward departure by judges from the bottom end of the federal Sentencing Guideline range – 84%
- In federal cases, for those defendants not subject to a mandatory minimum, the defendants not sent to prison -- 54%
- In federal cases, for those defendants not subject to a mandatory minimum who were sent to prison, the average sentence – 32 months
- In 17 state cases, defendants sent to prison – 0%

These results, despite the limited number of cases,²⁹ reflect extraordinarily different results than would be expected in similar cases involving typically developed defendants. This is not to say that there are not plenty of cases where horrific results have occurred. But it is evident that many judges in the U.S. will respond positively to efforts to edify them concerning autism and its effects.

13.3. Disability rights in the sentencing context

In addition to the antidiscrimination provisions in disability statutes and international conventions and resolutions, there is a particular provision in the U.S.

²⁸ (Berryessa, C.M. 2014a), (Berryessa 2014b), (Berryessa, 2015), (Berryessa 2016).

²⁹ Please inform the author of any cases involving a criminal defendant with Asperger's or Autism Spectrum Disorder.

statutes that is called the “integration mandate.” Section 504 of the Rehabilitation Act requires agencies to conduct their programs and activities in “the most integrated setting” appropriate for the individual with a disability. 29 U.S.C. § 794(a).

Describing the problem of mass incarceration of persons with intellectual and developmental disabilities, Robert Dinerstein and Shira Wakschlag demonstrate how the integration mandate applies to state and federal prisons and the criminal justice process. This not only relates to the conditions of confinement, but the need for diversion from incarceration entirely, stopping the “school-to-prison-pipeline” for those with intellectual and developmental disabilities, and avoiding unjustified imprisonment (Dinnerstein and Wakschlag, 2019). These authors suggest that *Olmstead v. L.C.*, 527 U.S. 581 (1999) supports our argument that, in certain instances, individuals with mental disabilities who are serving penal sentences must be placed in community-based programs in lieu of jails or prisons

One comes across pronouncements that the ADA and Rehabilitation act “do not apply to sex offenders.” On its face this notion is not relevant to the accused prior judgment – he is not a sex offender until sentence is imposed. So, all the argument for diversion or other dispositional accommodations are well-founded in these disability statutes. In the sentencing connection, any such limitation, if real, would be concerning. However, this rubric does not survive close examination.

Of course, “status as a sex offender does not qualify as a disability” even though it is very disabling. See, e.g., *Shaw v. Smith*, 206 Fed. Appx. 546 (7th Cir. 2006); *Sears v. Kentucky*, 77 F.3d 483 (6th Cir. 1996). And the statute excludes things like pedophilia from being considered as disabilities. 28 C.F.R. § 35.104(5)(I) stated, “disability does not include... sexual behavior disorders.”

However, no cases suggested that a person who otherwise qualified as disabled would lose whatever benefits to which they might be entitled under the ADA and Rehabilitation Act merely because they became a sex offender.

Chapter 14: Conclusion

Representing persons with ASD presents an extraordinary challenge for the advocate. We must mediate between two worlds: a punitive world overcome with fear for the sexual exploitation of children, and which tends to demonize those who exhibit any potential sexual interest in children; and another world that struggles on a daily basis to assist those with ASD to adapt to a social world they do not naturally understand. A big part of success for the defense of these cases is having the faith that prosecutors and judges will respond appropriately to the consensus of the scientists, researchers, and organizations about the realities of ASD and the evidence of how directly that relates to the blameworthiness of the accused. .

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