

# Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography

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# Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography

## Introduction

For years parents of children with Asperger's Syndrome (AS) struggle and sacrifice in the simple hope that their child can lead a "normal" life – get an education, have a satisfying career, and raise a family. The child has such hopes, too. Finding the right schools, curriculum, and therapists, and struggling constantly to teach the child the social conventions and interpersonal skills which neurotypical youth learn on their own, is an exhausting and expensive venture. Mostly parents and their child fear that the symptoms typical of this condition will present a barrier to social acceptance and meaningful adult relationships. They also fear that the child's social naivete will lead to the child's victimization or the child being lured into dangerous situations. At worst, these parents suppose the individual's obliviousness to social mores may result in misinterpretation of their behavior as offensive or criminal.

For a few, however, encounters between the child — at any age — and law enforcement prove to be horrific beyond their ability to imagine. The aptitude and comfort of AS individuals with computers, and the prevalence of pornography as a vehicle for AS individuals to try to learn about sexuality and romance, what neurotypical youth learn from their social interactions, has exposed more than a few AS male individuals to child pornography. Their curiosity, unrestrained by social or legal taboos, of which they are unaware, leads them to view images of "underage" (i.e., younger than 18-years old) girls who are nearly their own age and years older than the level of their own social adaptation skills. This has resulted in criminal convictions, lengthy mandatory prison sentences, and a lifetime of reporting, ostracization, and residency restrictions as "sex offenders."

For the offense of possession of child pornography, it is no defense that the person lacks knowledge of wrongdoing or has no evil purpose. The only thing that can spare the AS individual and his family from prosecution, conviction, and civil disabilities is the exercise of discretion by the prosecutor to forego criminal prosecution. Unfortunately, the enforcement of laws against child pornography is highly pressurized with well-intentioned sentiments arising from the real, though never understated, need to protect children from abuse. The point here is that AS individuals who wander into child pornography do not present the danger that inspires the harsh laws and treatment of those who ordinarily produce, traffic in, or purchase child pornography, nor do these AS individuals have any awareness that the secret

rummaging of the internet in this fashion is itself a crime or that it is any more socially or morally disapproved than viewing regular “adult pornography.” And yet, if prosecuted and almost unavoidably convicted, these individuals face a life of insurmountable civil disabilities superimposed on a very challenging developmental disability. Prosecutors need to appreciate how AS individuals may unwittingly engage in criminally sanctioned conduct and need to respond by exercising humane caution in deciding whether or not to prosecute such a putative offender. In the event of a prosecution and conviction, courts, corrections, and probation/parole supervising authorities must be cognizant of the very significant impact the AS disability has on analyzing legal and moral blameworthiness, future dangerousness, appropriate conditions of confinement, if any, and therapy.

## **Autism Spectrum Disorders (ASD)**

Asperger’s Syndrome, a “severe and chronic developmental disorder,” much like autism and Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS), lies together with these other disorders along a “continuum referred to as the autism spectrum disorders (ASD).” ASD “are characterized by marked and enduring impairments within the domains of social interaction, communication, play and imagination, and a restricted range of behaviors or interests.”<sup>1</sup> “Autism spectrum disorders are considered to be the result of a neurological disorder that affects the functioning of the brain,” and not a social pathology.<sup>2</sup> As the term “spectrum” indicates, “ASD refers to a group of syndromes falling along a continuum of severity hallmarked by deficits in social interaction.”<sup>3</sup> Psychologists diagnose ASD based on behavioral characteristics in three areas: 1) qualitative impairments in social skills, 2) qualitative impairments in communication, and 3) ritualistic, repetitive activities and

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<sup>1</sup> Klin, Ami, James McPartland, and Fred R. Volkmar, “Asperger Syndrome.” HANDBOOK OF AUTISM & PERVASIVE DEVELOPMENT DISORDERS, 3rd Edition. Vol. 1: Diagnosis, Development, Neurobiology, & Behavior. Ed. Fred R. Volkmar, Rhea Paul, Ami Klin, and Donald Cohen. New York: Wiley, John & Sons, Inc. (2005), 88-124, at 88.

<sup>2</sup> Sicile-Kira, Chantal. ADOLESCENTS ON THE AUTISM SPECTRUM: A PARENT’S GUIDE TO THE COGNITIVE, SOCIAL, PHYSICAL, AND TRANSITION NEEDS OF TEENAGERS WITH AUTISM SPECTRUM DISORDERS. New York: Penguin Group (2006), at 7.

<sup>3</sup> McPartland, James and Ami Klin, “Asperger’s Syndrome.” 17 ADOLES MED 771-778, 771 (2006).

interests.<sup>4</sup> Symptoms of ASD vary from individual to individual, from “very severe (Kanner type) to mild (Asperger type).”<sup>5</sup> Five distinct, albeit related, neurological conditions lie along the autism spectrum or Pervasive Developmental Disorder (PDD) spectrum<sup>6</sup>: autism, AS, Rett Syndrome, Childhood Disintegrative Disorder, and PDD-NOS.<sup>7</sup> These disorders are distinguished by, among other characteristics, differences in the degrees of communication skills which are exhibited by individuals with ASD. AS differs from other ASD in the AS individual’s “relative preservation of linguistic and cognitive abilities despite characteristic social disability and circumscribed interests.”<sup>8</sup> Autistic individuals’ symptoms may range in severity from those who are very handicapped (nonverbal, totally aloof, and highly repetitive) to those who suffer from “High-Functioning Autism Spectrum Disorders,” often denoted as “hfASD” (those ASD children who have normal cognitive and learning abilities).<sup>9</sup>

## Asperger’s Syndrome (AS)

### A. Introduction to Asperger’s Syndrome

Two-thirds to three-quarters of ASD children are “High-Functioning.” HfASD include 1) High-Functioning Autism and 2) Asperger’s Syndrome. The term Asperger’s Syndrome was coined in 1981 by Lorna Wing, an English psychiatrist, after Dr. Hans Asperger, an Austrian psychiatrist and pediatrician. In 1944, Dr.

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<sup>4</sup> Bruey, Carolyn Thorwarth. DEMYSTIFYING AUTISM SPECTRUM DISORDERS: A GUIDE TO DIAGNOSIS FOR PARENTS AND PROFESSIONALS. Bethesda, Maryland: Woodbine House (2004), at 49.

<sup>5</sup> Sicile-Kira, *supra* note [2](#), at 7.

<sup>6</sup> ASD and PDD are synonymous. Mesibov, Gary B., Victoria Shea, and Lynn W. Adams, “Understanding Asperger Syndrome and High-Functioning Autism.” THE AUTISM SPECTRUM DISORDERS LIBRARY 1. Kluwer Academic / Plenum Publishers (2001), at 8. *See also*, Klin, Ami, et al., “Social and Communication Abilities and Disabilities in Higher Functioning Individuals with Autism Spectrum Disorders: the Vineland and the ADOS.” 37 J. AUTISM DEVELOPMENTAL DISORDERS 748 (2007), at 749; Bruey, *supra* note [4](#), at 48.

<sup>7</sup> Klin, Ami. “Autism and Asperger Syndrome: An Overview.” 28 REV BRAS PSIQUIATR (Supl I, 2006), S3-11, at S-4. *See also*, Mayes, Thomas A. “Persons with Autism and Criminal Justice: Core Concepts and Leading Cases.” 5 J. OF POSITIVE BEHAVIORAL INTERVENTIONS 92 (Spring 2003), 92-100, at 92.

<sup>8</sup> Mc Partland and Klin, *supra* note [3](#), at 771.

<sup>9</sup> Mesibov, et al., *supra* note [6](#), at 8-9.



Asperger observed and documented the unusual behavior of four children who lacked nonverbal communication skills, failed to demonstrate “empathy,” and were physically clumsy despite normal intelligence levels.<sup>10</sup>

AS is a neurobiological “brain-based” disorder,<sup>11</sup> characterized by social isolation, odd and pedantic speech, poor nonverbal communication, and preoccupation with certain idiosyncratic interests.<sup>12</sup> AS differs from autism in its relatively better preserved verbal skills but relatively worse motor development.<sup>13</sup>

At the time it was included in the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1994, AS was not well known.<sup>14</sup> For example, physicians and psychiatrists were unsure of AS’ prevalence in the general population, the male/female ratio, or to what extent there may be genetic links increasing the likelihood of finding similar conditions in family members.<sup>15</sup> Scientific research and service provision for individuals with AS was still in its infancy.<sup>16</sup> In the past decade, however, our understanding of these characteristics has improved. In critical areas, including criminal justice, however, this understanding lags, often tragically, far behind what is necessary.

## **B. Typical AS Behaviors**

A child with AS is similar to the High Functioning Autistic child because he is usually of normal or above-normal intelligence,<sup>17</sup> but he may have fewer symptoms

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<sup>10</sup> Asperger, H., “Die ‘autistischen Psychopaten’.” in *Kindersalter ARCH PSYCHIATR NERVENKRANK* 117 (1944), 76-136. *See also*, Katz, Nachum and Zvi Zemishalny, “Criminal Responsibility in Asperger’s Syndrome” 43 *ISRAEL J. PSYCHIATRY & RELATIVE SCIENCE* 166 (2006), at 166.

<sup>11</sup> Tantam, D. “The Challenge of Adolescents and Adults with Asperger Syndrome.” 12 *CHILD ADOLESCENT PSYCHIATRY CLINIC OF NORTH AMERICA* 143 (2003), at 147.

<sup>12</sup> Klin, McPartland, and Volkmar, *supra* note 1, at 89.

<sup>13</sup> *Id.*

<sup>14</sup> Klin, Ami and Fred R. Volkmar, “Asperger’s Syndrome: Guidelines for Assessment and Diagnosis.” *LEARNING DISABILITIES ASSOCIATION OF AMERICA* (Pittsburgh: June 1995).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Klin, McPartland, and Volkmar, *supra* note [1](#), at 92.

than does an Autistic child and he may have experienced little or no difficulty developing language at the normal age.<sup>18</sup>

The commonly described clinical and diagnostic features of the syndrome include: 1) qualitative impairments in social interaction;<sup>19</sup> 2) failure to understand and appreciate proper, socially expected behavior and mores;<sup>20</sup> 3) pedantic and monotonic

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<sup>18</sup> *Id.* at 98. See also Mesibov, et al., *supra* note 6, at 9. On parallel with this is the Diagnostic and Statistic Manual of Mental Disorders definition of AS:

The essential features of Asperger's Disorder are severe and sustained impairment in social interaction (Criterion A) and the development of restricted, repetitive patterns of behavior, interests, and activities (Criterion B). In contrast to Autistic Disorder, there are no clinically significant delays or deviance in language acquisition . . . although more subtle aspects of social communication (e.g., typical give-and-take in conversation) may be affected. . . . In contrast to Autistic Disorder, Mental Retardation is not usually observed in Asperger's Disorder.

In fact, "variability of cognitive functioning may be observed, often with *strengths* in non-verbal areas (e.g., visual-motor and visual-spatial skills)" (emphasis added).

<sup>19</sup> Klin, McPartland, and Volkmar, *supra* note 1, at 89. Difficulties in nonverbal and verbal communication impair AS individuals' abilities to have meaningful social interactions. There is a conspicuous lack of facial expressions or a reduction in diversity of expressions and limitations in the use of gesture and difficulties in understanding others' nonverbal cues. Verbal communication is characterized by "highly circumstantial utterances," "long-winded and incoherent verbal accounts failing to convey a clear message or thought," and "one-sidedness." Even the AS speaker's delivery and tone are off-putting and pedantic.

<sup>20</sup> *Id.* at 99. Individuals with AS exhibit marked difficulty in social circumstances where, as intelligent and high-functioning individuals, they are expected to naturally intuit social customs. Individuals with AS may

react inappropriately to, or fail to interpret the valence of, the context of the affective interaction, often conveying a sense of insensitivity, formality, or disregard for the other person's emotional expressions. They may be able to describe correctly, in a cognitive and often formalistic fashion, other people's emotions, expected intentions, and social conventions; yet, they are unable to act on this knowledge in an intuitive and spontaneous fashion, thus losing the tempo of the interaction. Their poor intuition and lack of spontaneous adaptation are accompanied by marked reliance on formalistic rules of behavior and rigid social conventions. This representation is largely responsible for the impression of social naivete and behavioral rigidity that is so forcefully conveyed by these individuals.

speech<sup>21</sup> but no clinically significant delay in language;<sup>22</sup> 4) intense absorption in circumscribed topics;<sup>23</sup> 5) clumsy and ill-coordinated movements and odd posture;<sup>24</sup> 6) no clinically significant delay in cognitive development;<sup>25</sup> and 7) the criteria for another ASD or Schizophrenia is not met.<sup>26</sup> Each of the first six symptoms or behaviors can contribute to the misinterpretation of the AS individual's conduct by strangers, or law enforcement officials.

1. *Qualitative impairments in social interaction (and consequent social isolation)*

Several features fall within this category:

**Difficulty understanding others' perspectives**

Some clinicians describe the AS individual as lacking in "empathy." By this they do not suggest that AS individuals are callous or sadistic. This feature is not reflective of a personality disorder. It is a "brain-based" disorder. "Lacking in sympathy" is merely a reference to the fact that many individuals with hfASD or AS have difficulty viewing the world through the eyes of others. Some persons with AS "don't even notice when parents, siblings, or other children are hurt, sick, or sad. . . . or they may horribly misunderstand others' feelings."<sup>27</sup>

Research has shown that the AS individual simply does not *see* crucial social cues which neurotypical individuals depend on to assess and adapt to social

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<sup>21</sup> Id. at 89.

<sup>22</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TEXT REVISION 568 (4th ed.2000), 299.80 [hereinafter DSM-IV-TR]. Asperger's Disorder. For instance, toddlers with AS use single non-echoed words by 2 years of age and spontaneous communicative by 3 years of age.

<sup>23</sup> Klin, McPartland, and Volkmar, *supra* note [1](#), at 89. Individuals with AS tend to display "egocentric preoccupations with unusual and circumscribed interests that absorb most of the person's attention and energy, thus precluding the acquisition of practical skills necessary for self-help and social integration."

<sup>24</sup> Id.

<sup>25</sup> DSM-IV-TR, 299.80 Asperger's Disorder.

<sup>26</sup> Id. *See also*, People v. Youngerman, 838 N.E.2d 103, 105 (Ill. Ct. App. 2005).

<sup>27</sup> Mesibov et al., *supra* note [6](#), at 10. *See also* Klin, *supra* [7](#), at S9.

situations.<sup>28</sup> These “cues” can be facial expressions, or physical gestures, or the reaction of other persons to what one persons says or does, or things occurring in the “background.”<sup>29</sup> The AS individual simply does not see these things, and, therefore, does not learn anything from them about how to respond to such cues.

### **Mind blindness**

Taking another approach to this phenomenon, Barbara Haskins and J. Arturo Silva describe “Theory of Mind” (“ToM”), meaning the ability to “estimate the cognitive, perceptual, and affective life of others as well as of the self.”<sup>30</sup> AS individuals are severely disabled in this ability. People with AS “are unable to perceive other peoples’ needs, desires or distress due to their inability to interpret correctly other people’s behavior.”<sup>31</sup> Haskins and Silva describe this deficit as “mind blindness.”<sup>32</sup>

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<sup>28</sup> Klin, Ami et al., “Defining and Quantifying the Social Phenotype in Autism.” 59 AM J PSYCHIATRY 895 (June 2002), at 899.

<sup>29</sup> Dr. Ami Klin et al., studied the gaze patterns of moviegoers with AS and a control group of neurotypical moviegoers. In close-up scenes, the AS individual focused entirely on the mouth and lower portion of the actor’s face, whereas the neurotypical viewer focused primarily on the eye region. The AS individual missed the scene’s meaning which was exhibited in the actress’s facial expression, particularly in her gaze. In Dr. Klin’s study, the AS viewer seemed not to understand the inviting, flirtatious nature of the actors’ interaction—or the impact of these behaviors on the third actor, who played the flirtatious woman’s husband, in the back of the scene, since the AS viewers did not once glance at the action in the background. In contrast, the normal comparison viewer’s visual scanning delineated a rather loaded social triangle. *Id.* at 900-902. Adequate interpretation of social situations also requires assessing others’ reactions to the speaker to make sense of the social dynamics unfolding in the conversation. The AS individual, however, is unlikely to do so, resulting in a very partial, overly literal, or mistaken interpretation of a social situation. *Id.* at 900.

<sup>30</sup> Haskins, Barbara G. and J. Arturo Silva, “Asperger’s Disorder and Criminal Behavior: Forensic-Psychiatric Considerations.” 34 J AM ACAD PSYCHIATRY LAW 374 (2006), at 378. Klin et al., describe “theory of mind” as the individual’s “ability to impute mental states such as beliefs, desires, and intentions to others and to themselves or to have a theory of other people’s (and their own) subjectivity.” Klin, Ami, James McPartland, and Fred R. Volkmar, *supra* note [1](#), at 104. Although Klin et al., note the significant deficit in ToM skills in individuals with AS, the authors believe individuals with AS may improve their ToM skills through proper training: certain “cognitive characteristics provide individuals with AS with an advantage in that they may be able to succeed on ToM tasks by means of well-reasoned responses based on logical inference, rather than true social intuition.”

<sup>31</sup> Katz and Zemishalny, *supra* note [10](#), at 171-172.

<sup>32</sup> Haskins and Silva, *supra* note [30](#), at 378.

### **Lag in social and emotional development**

AS children (most often boys) are years behind their non-AS peers in social and emotional development.<sup>33</sup> In fact:

one team of experts contend that between the ages of nine and nineteen, a child with AS has the emotional maturity of someone two-thirds his age. . . . Compared to same-age peers, they may seem more naive, more emotionally volatile, and less in control of themselves.<sup>34</sup>

Many teens and young adults with AS still have obsessions or special interests in subjects or objects that are not appropriate for their age and reflect their immaturity, such as *Sesame Street* or Disney movies, resulting in increased social ostracization.<sup>35</sup>

### **Painful cognizance of their difference**

Typically, autistic persons are withdrawn and may seem to be unaware of, and disinterested in, other persons.<sup>36</sup> Individuals with AS, on the other hand, are often keen, sometimes painfully so, to relate to others, but lack the skills to successfully engage them.<sup>37</sup> Individuals with AS are often socially alienated and self-described “loners,” though they have a great interest in making friendships and meeting people.<sup>38</sup> These wishes are invariably thwarted by their awkward approaches and insensitivity to other person’s feelings, intentions, and nonliteral and implied communications (e.g., signs of boredom, haste to leave, and need for privacy).<sup>39</sup> As a result, AS individuals are often surprised, upset, and remorseful when told that their

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<sup>33</sup> GALE ENCYCLOPEDIA OF NEUROLOGICAL DISORDERS. Eds. Stacey L. Chamberlin, Brigham Narins, and Rebecca Frey. Database updated November 2006.

<sup>34</sup> Hendrick, Joanne and Patricia Weissman. *THE WHOLE CHILD: DEVELOPMENTAL EDUCATION FOR THE EARLY YEARS*, 8<sup>th</sup> Edition. New York: Prentice Hall (2005). *See also*, United States v. Kamen, 491 F. Supp. 2d 142, 146 (D. Mass. 2007).

<sup>35</sup> Sicile-Kira, *supra* note [2](#), at 39.

<sup>36</sup> Klin, McPartland, and Volkmar, *supra* note [1](#), at 99.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* *See also*, Edwards v. State, 200 S.W.3d 500, 507 (Mo. 2006).

<sup>39</sup> Klin, McPartland, and Volkmar, *supra* note [1](#), at 99. *See also* Klin, *supra* note 7, at S9.

actions are hurtful or inappropriate.<sup>40</sup>

Many of the children and adults diagnosed with general ASD in the past seemed lost in their own world. They seemed not to register pain or danger, as if they did not have sufficient sense of themselves to be able to be concerned about their own welfare or survival. In comparison, people with AS do not live in their own *world* so much as their own *island*, floating in a sea of humanity. They do have projects and plans for themselves, and, unlike their other disordered counterparts, they do compare themselves with other people, often painfully.<sup>41</sup>

Not being an effective social agent is something that people with AS feel often, engendering a sense of social powerlessness. This is commonly a factor for AS adolescents who find themselves in trouble at school or in the community.<sup>42</sup> Opportunistic peers often take advantage of vulnerable AS individuals' lack of social agency, combined with their inability to properly gauge others' intentions and trustworthiness, and either bully AS teens or convince them to take part in mischievous acts:

We have heard of cases from around the country where a person with AS was left holding the bag, so to speak, after being involved by more savvy companions who then convincingly denied any involvement. In these cases, peer pressure, a need to feel accepted, and a lack of social understanding conspired to create a setup.<sup>43</sup>

Thus, life is already very difficult for AS individuals, but especially so for adolescents. Peers are much more judgmental than either older or younger people, and so adolescents, for whom peer relationships are paramount, face the greatest challenge in this respect.<sup>44</sup>

## 2. *Failure to understand and appreciate socially expected behavior and mores*

Most individuals tend to naturally exhibit and respond to nonverbal cues in social settings. Individuals with hfASD and AS, however, see the concrete and do not

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<sup>40</sup> Klin, *supra* note [7](#), at S9.

<sup>41</sup> Tantam, *supra* note [11](#), at 145.

<sup>42</sup> *Id.* at 150.

<sup>43</sup> Hendrick and Weissman, *supra* note [34](#), at 424.

<sup>44</sup> Tantam, *supra* note [11](#), at 150.

seem to grasp or “appreciate these unwritten rules of social engagement.”<sup>45</sup> “Everything that is not explicit, everything that is unstructured, everything that is not defined and expressly supported is a difficulty for individuals with Asperger Syndrome.” Rather, their behavior may appear “inappropriate or embarrassing when, in addition to failing to use these social niceties, they violate clear social conventions,” which often times results from an unawareness of other people’s feelings or point of view.<sup>46</sup> They often engage in behavior that is completely alien to, and therefore usually misunderstood by, mainstream society which expects adolescents or young adults exhibiting normal intelligence and language abilities to “act their age.”

For example, individuals with AS tend to answer questions very literally, which may be annoying, especially to police officers. They may express their opinions or facts without screening for other peoples’ feelings, for social propriety, or for common sense.<sup>47</sup> An AS individual may, without any ill will, exclaim that his neighbor’s arms look like “fat sausages.”<sup>48</sup> Or they might stand outside a public restroom in a park at night or follow a woman walking down the street too closely.<sup>49</sup>

### 3. *Pedantic and monotonic speech but no clinically significant delay in language*

Children with AS learn to form words at the usual age, using single words by two years of age and communicative phrases by three years of age.<sup>50</sup> Problems occur, instead, in the content and delivery of verbal communication.<sup>51</sup> Speech may be marked by poor prosody, without the range of intonation that tells the listener that “this is fact” or “this is serious” or “this is funny.”<sup>52</sup> Speech may often be tangential

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<sup>45</sup> Mesibov et al., *supra* note [6](#), at 10.

<sup>46</sup> *Id.*

<sup>47</sup> Hendrick and Weissman, *supra* note [34](#), at 425.

<sup>48</sup> Mesibov et al., *supra* note [6](#), at 10.

<sup>49</sup> Hendrick and Weissman, *supra* note [34](#), at 424.

<sup>50</sup> DSM-IV-TR definition of AS.

<sup>51</sup> Klin, McPartland, and Volkmar, *supra* note [1](#), at 99.

<sup>52</sup> *Id.*

and circumstantial, conveying a sense of looseness of associations and incoherence.<sup>53</sup> The lack of coherence and reciprocity in speech results in one-sided, egocentric conversational style (*e.g.*, unrelenting monologues about the names, codes, and attributes of innumerable TV stations in the country), failure to provide the background for comments and to clearly demarcate changes in topic, and failure to suppress the vocal output accompanying internal thoughts.<sup>54</sup> The AS child or adult may talk incessantly, usually about their favorite subject, often in complete disregard to whether the listener might be interested, engaged, or attempting to interject a comment, or change the subject of conversation.<sup>55</sup> Despite such long-winded monologues, the individual may never come to a point or conclusion.<sup>56</sup> Attempts by the interlocutor to elaborate on issues of content or logic, or to shift the interchange to related topics are often unsuccessful.<sup>57</sup>

#### 4. *Intense absorption in circumscribed topics*

AS is characterized by restricted, repetitive, and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following: 1) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus, 2) apparently inflexible adherence to specific nonfunctional routines or rituals, 3) stereotyped and repetitive motor mannerisms, and 4) persistent preoccupation with parts of objects.<sup>58</sup> Repetitive behavior and restricted interests appear to be the most frequently observed clinical symptoms of AS.<sup>59</sup> The AS individual develops unusual interests in topics “such as the weather, facts about TV stations, [or] railway tables or maps, which are learned in rote fashion and reflect poor understanding, conveying the impression of

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> DSM-IV-TR definition of AS.

<sup>59</sup> Individuals with AS usually engage in repetitive, almost obsessive, patterns of behavior to pursue their all-absorbing interests. Klin, McPartland, and Volkmar, *supra* note [1](#), at 100.



eccentricity.”<sup>60</sup> The interests and corresponding behavior are remarkable “in the sense that often times extraordinary amounts of factual information are learned about very circumscribed topics (e.g., snakes, names of stars, maps, TV guides, or railway schedules).”<sup>61</sup> “[I]ndividuals with AS may collect volumes of detailed information on a relatively narrow topic such as dinosaurs or deep fat fryers[] without necessarily having genuine understanding of the broader topic.”<sup>62</sup> For instance, an AS individual might obsessively memorize and collect camera model numbers without caring much about photography.

AS individuals tend to throw themselves headlong into the circumscribed interests and become utterly obsessed with their new pastime.<sup>63</sup> Although teens with AS may share interests with other non-disordered teens, like computers video games, they pursue them to the exclusion of almost everything else. Many parents report that their child will stay at the computer for hours pursuing such interests, not breaking to go to the toilet, to eat, or to sleep unless pressured, and even then with much resistance.

The intensity with which the AS teen pursues his interests often alienates him from his peers. So, too, does his choice of interests. Unlike neurotypical teens, teens with AS obsess over matters as odd and varied as the intricacies of the stock market, the seven deadly sins, sprinkler systems, or botanical classifications.

##### 5. *Clumsy and ill-coordinated movements and odd posture*

Delayed or impaired motor skills is another associated, albeit not required, feature of an AS diagnosis.<sup>64</sup> AS individuals often have a “delayed acquisition of motor skills such as pedaling a bike, catching a ball, or opening jars.”<sup>65</sup> They tend to be visibly awkward, exhibiting rigid gait patterns, odd posture, poor manipulative

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> McPartland and Klin, *supra* note [3](#).

<sup>63</sup> Some have described such obsessive absorption as “tunnel vision.” *People v. Macklem*, 149 Cal. App. 4th 674, 680 (Cal. Ct. App.2007).

<sup>64</sup> Klin, McPartland, and Volkmar, *supra* note [1](#), at 100.

<sup>65</sup> *Id.*

skills, and significant deficits in visual-motor coordination.<sup>66</sup>

6. *No clinically significant delay in cognitive development or in the development of age-appropriate self-help skills, adaptive behavior (other than in social interaction), and curiosity about the environment in childhood*

Despite problems with social interaction and communicative deficits, AS individuals have normal or above-normal intelligence<sup>67</sup> and the ability to feed or dress themselves and take care of their daily needs.<sup>68</sup> To the uninformed individual, an AS individual's intelligence and high-functioning capabilities often mask their neurodevelopmental disorder. Of course this is the engine of misunderstanding. The observer presumes that with normal intelligence comes normal maturity and normal appreciation of social and legal conventions — that by engaging in any conduct they have the intent and purpose that “normal” people have when they engage in that conduct.

### **C. AS and Criminal Law**

The reader with experience in the criminal justice system will already have understood how the AS individual can end up in contact with law enforcement. And so it is, at an apparently escalating rate in the U.S.

#### *1. AS individuals accused of crimes*

A person with AS will sometimes engage in what can be objectively viewed as anti-social behavior, yet without any subjective understanding or appreciation whatsoever of its inherent impropriety, let alone criminality. The features of AS combine to create a risk of engaging in behavior offensive toward others but with no offensive purpose.<sup>69</sup> The inability to

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<sup>66</sup> *Id.*

<sup>67</sup> Klin, Ami et al. “Validity and Neuropsychological Characterization of Asperger Syndrome: Convergence with Nonverbal Learning Disabilities Syndrome.” 36 J CHILD PSYCHOL 1127 (1995), at 1133.

<sup>68</sup> GALE ENCYCLOPEDIA OF NEUROLOGICAL DISORDERS, *supra* note [33](#).

<sup>69</sup> “Deficient social awareness of salient interpersonal and social constraints on behavior” coupled with the AS individual's inability to appreciate others' feelings and nonverbal social cues may result in apparently criminal acts. Haskins and Silva, *supra* note [30](#), at 374.

associate actions with their results and “to assess social situations and appreciate others’ point of view, constitute the main cause for” criminal accusations against AS individuals.<sup>70</sup>

Thus, confrontations with the criminal justice system on the part of AS adolescents are usually the result of the misunderstanding of societal norms, as well as the misinterpretation of the behavior of the AS individual by others, and not the product of a criminal mind-set. “What appears as anti-social behavior” involving criminal or malicious intent “to the ‘regular’ world, is often simply the manifestation of the ASD person’s social misunderstandings.”<sup>71</sup>

## 2. *Odd behavior*

Though many people with AS are, “as a rule, extremely law-abiding and truthful, they often are unduly lacking in any level of sophistication which would allow them to appreciate the possible implications of their actions” or “to fully foresee how certain types of behavior (for example, standing outside the public restroom in a park at night or following a woman walking down the street too closely) or topics of conversation (for instance, an AS individual may describe aloud in an inappropriately frank way his or her sexual fantasies without screening speech for a proper audience or environment)<sup>72</sup> may seem to others.”<sup>73</sup>

## 3. *Odd interests*

Some AS teens’ circumscribed interests may be the problem. For instance, an AS teen with an interest in chemistry, but without any intention to hurt anyone or cause property damage, bought explosives and brought them to school to see how they explode in a locker. His actual intent was not to cause damage to the school, but simply to test the explosives. Unlike that of a non-disordered teen, his childlike curiosity was unbridled by

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<sup>70</sup> Katz and Zemishalny, *supra* note [10](#), at 166. The AS adolescent’s or adult’s deficit in abstract thought limits the “ability to properly assess the consequences of her or his actions or comprehend and be governed by criminal law concepts and prohibitions.” Mayes, *supra* note [7](#), at 93.

<sup>71</sup> Debbaudt, Dennis, “Beyond Guilt or Innocence.” ahaNY.org (available at, <http://www.ahany.org/Debbaudt.htm>, last accessed 7/10/08).

<sup>72</sup> Ashley, Susan . THE ASPERGER’S ANSWER BOOK: THE TOP 300 QUESTIONS PARENTS ASK. Illinois: Sourcebooks (2007) , at 258.

<sup>73</sup> Hendrick and Weissman, *supra* note [34](#), at 424.

societal and legal norms absorbed by the typical youth over the years.<sup>74</sup> Those with AS are “not motivated to hurt others, since doing so requires ‘an active theory of mind’ which they ‘conspicuously lack.’”<sup>75</sup>

In other cases the peculiar interests may have nothing to do with the actual behavior but may be portrayed as informative of some aspect of a charged offense. For instance, in *State v. Boyd*, 143 S.W.3d 36 (Mo. App. Ct. 2004), where a young man was on trial for first degree murder, the defense sought to introduce evidence of the murder defendant’s AS to suggest an innocent explanation for the accused’s interest in violent books, which was being used against him. The trial court kept the evidence out, and defendant was convicted. On appeal, the court found that the AS evidence was relevant to understanding AS, determining whether the defendant had AS, as well as assessing the defendant’s assertions regarding his interest in violent books, and ordered a new trial.

### **Encounters with police**

The typical AS behaviors listed above combine to impair an AS individual’s ability to effectively negotiate the criminal law system. For instance, while most non-disordered teens and adults would recognize that “in dealing with police officers and other authorities the ‘right’ answer is not always the literal truth,” the AS individual lacks this common sense and instead of using his answer to demonstrate the expected degree of respect, the AS individual pulled over for speeding may unwittingly “communicate defiance and lack of respect in the mind of the officers.”<sup>76</sup> An AS individual may simply respond, “Yes,” when a police officer pulls him over and asks, “Do you know how fast your were going?”<sup>77</sup>

Dennis Debbaudt, an Autism expert and author of several articles on Autism and encounters with law enforcement, explains,

His difficulty maintaining eye contact or his insistence on changing the subject of conversation to a topic of his choice – all typical diagnostic behaviors of a person with AS – can mislead the untrained investigator. The investigator may see someone who seems to lack respect and observe a ‘rude, fidgety, belligerent kid’ who by nature of his lack of eye contact and evasive conversation,

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<sup>74</sup> Ashley, *supra* note [72](#), at 261.

<sup>75</sup> Murrie, Daniel C. “Asperger Syndrome in Forensic Settings.” *INTERNATIONAL JOURNAL OF FORENSIC MENTAL HEALTH* 1 (2002). 59-70, 60.

<sup>76</sup> *Id.*

<sup>77</sup> Hendrick and Weissman, *supra* note [34](#), at 425.

appears to have something to hide. Standard interrogation techniques that utilize trickery and deceit can confuse the concrete thinking adolescent with AS into producing a misleading statement or false confession. The teen can become overly influenced by the friendly investigator. Isolated and in a never-ending search for friends, the teen can easily be led into saying whatever his new friend wants to hear.<sup>78</sup>

A good example of this is the 2008 case in which a Minnesota court was found to have erred in convicting a young man with AS of driving under the influence of a controlled substance because both the judge and the arresting officers misinterpreted the defendant's facial expressions, movements, and reactions to police questioning.<sup>79</sup>

The AS individual's desire to please the investigating officer or an officer's statement to "just admit it and it would all be over" may lead the detained AS individual to inadvertently confess to a crime, as defense counsel in *State v. Santiago*, 634 S.E.2d 23, 29 (S.C. App. Ct. 2006) unsuccessfully argued, as the issue had not been preserved for appeal. In *Santiago*, the defendant stated that he believed simply issuing a confession would stop what he perceived to be the investigating officer's maltreatment. Similarly, in *United States v. Kamen*, 491 F.Supp.2d 142,152 (D. Mass. 2007), a case of knowing receipt of child pornography, in determining that the defendant deserved a new trial, the court held that:

a jury could have found that Defendant's Asperger's Syndrome could have led to an overeagerness to please the postal inspector with an apology or embellishment of his culpability at the time of the confession, or to a lack of understanding of what he actually ordered until he viewed it, or both.

### **In court**

Debbaudt goes on to note that "left unexplained, the teenager's courtroom displays of laughing or giggling, his 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

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<sup>78</sup> Debbaudt, *supra* note 71. In *State v. Suber*, 2008 WL 942622 (Minn. Ct. App. 2008), the Court of Appeals of Minnesota reversed the driving under the influence of a controlled substance charge. The lower court based its decision in large part on AS symptoms: lack of eye contact, odd posture, and robotic movements during the traffic stop.

<sup>79</sup> *State v. Suber*, 2008 WL 942622 (Minn. Ct. App. 2008).

remorseless young man.”<sup>80</sup> Here, the example of the Minnesota case, p. 16 above, is fitting. Misperception of the accused figured into both the arrest and prosecution.

#### 4. *AS individuals accused of sexual offenses*

AS individuals clearly experience problematic relations with the opposite sex because of social ineptitude. An AS individual may have difficulty indicating his or her interest toward another person in a socially acceptable way, which may lead to touching, kissing, or “stalking” a stranger, which could easily result in trouble involving the police.<sup>81</sup>

AS individuals have also been known to undress in public, touch others, and relentlessly follow a romantic interest around. The AS individual has not absorbed the social mores, naturally intuited by most neurotypical individuals, which are reflected in the legal codes.<sup>82</sup> Unaware of the social taboos, an AS individual does not find these behaviors to be strange or off-limits unless they are clearly explained as such. A person with AS is unaware of how his or her thoughts, fantasies, feelings, or behavior might be misinterpreted by others.<sup>83</sup>

Consider, for example, the case of Mr. B, an ASD individual and substitute school teacher accused of touching numerous adolescent female students in public, as described by Haskins and Silva in *Asperger’s Disorder and Criminal Behavior: Forensic-Psychiatric Considerations*. Mr. B did not meet the DSM-IV-TR criteria for any

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<sup>80</sup> Debbaudt, *supra* note 71. This was actually a point on appeal in *State v. Santiago*, 634 S.E.2d 23, 29 (S.C. Ct. App. 2006), for an AS individual who was denied the opportunity to have his AS symptoms explained to the jury. The defendant ultimately was unsuccessful because South Carolina does not recognize the defense of diminished capacity and because any exclusion of testimony on AS was a harmless error due to the other evidence of the defendant’s guilt.

<sup>81</sup> Mouridsen, Sven Erik et al., “Pervasive Developmental Disorders and Criminal Behavior: A Case Control Study.” 52 INTL J OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 196 (Apr 2008), at 197.

<sup>82</sup> For instance, in *State v. Burr*, 948 A.2d 627, 632 (N.J. 2008), the defense wished to introduce clinician Dr. Robert Kleinmann’s testimony that the Court of Appeals agreed would have helped explain why the defendant did not perceive any problems with allowing his young students sit on his lap during piano lessons. The Court of Appeals held that because the “Asperger’s Disorder testimony was intended to show that defendant might not have understood that his conduct could have been perceived as socially unacceptable,” the testimony of Dr. Kleinmann should have been admitted.

<sup>83</sup> There are several cases in which defense counsel have called experts to testify to the defendant’s acute social difficulties stemming from Asperger’s Syndrome. See generally, *State v. Burr*, 948 A.2d 627 (N.J. 2008) and *People v. Alcazar*, 2005 WL 236533 (Cal. Ct. App. 2005).

Paraphilia. He was reported to have inappropriately touched the shoulder area of many of his adolescent female students over a period of about four months in full view of other students.<sup>84</sup> Mr. B failed to appreciate the impropriety of touching female adolescents. His inappropriate conduct in the full view of others, typical of AS individuals, demonstrates his inability to appreciate socially appropriate behavior, rather than sophisticated criminal sexual behavior.<sup>85</sup> Mr. B was not a savvy sexual predator; rather, he was unschooled in correct social interaction between adult males and adolescent females.

In a similar case, a defendant with AS, accused of molesting his piano student, raised suspicion by allowing young children to sit on his lap during lessons. The defense's psychiatric expert, Dr. Richard Kleinmann, confirmed that some disordered individuals may not understand the social impropriety of an adult male allowing prepubescent girls to sit on his lap during piano lessons: "I can say that in a pool of individuals with Asperger's Disorder with significant impairment there will be some individuals that could conceivably allow the child to remain on their lap, unaware of the social implications of that behavior." *State v. Burr*, 921 A.2d 1135, 1145 (N.J. 2008).

We might also expect problems for the AS teen or young adult who uses pornography as a socialization tool. AS individuals take most of what they see at face value and can only interpret sayings or situations very literally. Thus, an AS individual who views pornography may "presume intimate acts occur very quickly in a relationship and will be less aware of any concerns regarding consent."<sup>86</sup> While we therefore expect to see cases of stalking or offensive touching involving AS individuals, we do not expect to see cases of forcible compulsion or sexual violence. For instance, participation by people with AS in pedophile rings, indecent assault of children, or other serious sexual offense against children is extremely rare.<sup>87</sup>

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<sup>84</sup> Haskins and Silva, *supra* note [30](#), at 379.

<sup>85</sup> *Id.* at 381.

<sup>86</sup> Attwood, Tony. *THE COMPLETE GUIDE TO ASPERGER'S SYNDROME*. Gateshead: Athenacum Press (2007), at 88.

<sup>87</sup> Tantam, *supra* note [11](#), at 161.

## Counterfeit deviance

An extremely useful way to conceptualize this phenomenon is in the terms “counterfeit deviance.” First used by Hingsburger, Griffiths, and Quinsey in 1991,<sup>88</sup> 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.”<sup>89</sup> Instead the behavior is explained by “experiential, environmental, or medical factors rather than of a Paraphilia.”<sup>90</sup> The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders Text Revision (DSM-IV) 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.<sup>91</sup> However, the DSM-IV does not officially adopt the “counterfeit deviance” nomenclature.

Under the Diagnostic Manual-Intellectual Disability, which is also published by the American Psychiatric Association like the DSM-IV, but in conjunction with the National Association for the Dually Diagnosed, 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.”<sup>92</sup> Individuals with an intellectual disability (ID) 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.<sup>93</sup> “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

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<sup>88</sup> Hingsburger, D., D. Griffiths, and V. Quinsey. “Detecting Counterfeit Deviance: Differentiating Sexual Deviance from Sexual inappropriateness.” *The Habilitative Mental Healthcare Newsletter*. 10 (1991) : 51-54.

<sup>89</sup> Dorothy Griffiths et al., *Sexual and Gender Identity Disorders*, in *DIAGNOSTIC MANUAL-INTELLECTUAL DISABILITY: A TEXTBOOK OF DIAGNOSIS OF MENTAL DISORDERS IN PERSONS WITH INTELLECTUAL DISABILITY* 424, 427 (2007) [hereinafter DM-ID].

<sup>90</sup> *Id.*

<sup>91</sup> DSM-IV-TR. Washington, D.C.: American Psychiatric Association, 2000. At 568.

<sup>92</sup> *Id.*

<sup>93</sup> Griffiths et al., *supra* note [89](#), at 427.



medication effects.”<sup>94</sup>

While AS is not categorized as an ID because of the presence of average to high intelligence, there is significant overlap between those with ID and AS, including similar deficits in adaptive functions and socialization skills. For example, when compared to neurotypical individuals, those with ID exhibit a “lack of sociosexual skills and knowledge, decreased opportunities for sociosexual behavior, sexual victimization, difficulties projecting consequences, and difficulties recognizing and expressing emotions.”<sup>95</sup> The same is true of individuals with AS, who are more likely to be victims than victimizers, and who also have difficulty understanding the social cues and emotions that area all around them.<sup>96</sup> This overlap makes the concept of counterfeit deviance equally applicable to both ID and AS because IQ has no real bearing on this adaptive deficit.<sup>97</sup> According to Dorothy Griffiths, Ph.D., one of the authors of the concept of counterfeit deviance and an expert in the field of developmental disabilities and sexual abuse or offense, who is an Associate Dean for the Faculty of Social Sciences at Brock University in St. Catharines, Ontario, and who has treated individuals with AS accused of sexual offenses, counterfeit deviance is a differential diagnosis for individuals with AS who are accused of deviant behavior and sexual offenses.

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 AS 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,<sup>98</sup> or if the differential diagnosis of counterfeit deviance applies.

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 428.

<sup>96</sup> Klin, Ami et al., *supra* note 28, at 899; Mesibov et al., *supra* note [6](#), at 10.

<sup>97</sup> Griffiths, Dorothy and J. Paul Fedoroff. “Persons With Intellectual Disabilities Who Sexually Offend.” *Sex Offenders: Identification, Risk Assessment, Treatment and Legal Issues*. Ed. Fabian M. Saleh, et al. New York: Oxford University Press, 2009. 353-378. At 362.

<sup>98</sup> *See* Griffiths et al., *supra* note [89](#), at 427.

### Assessment of individuals with AS

There can also be problems in the assessment of individuals with AS who are accused of sexual offenses, as the sexual assessment protocols ordinarily used in neurotypical populations may not properly translate to individuals with AS for the same reasons that such protocols may not be exactly accurate for individuals with ID.<sup>99</sup> In a general statement about special considerations in assessing and diagnosing individuals with ID, it is stated that “[i]ndividuals with ID will generally be concrete, [and] [t]hey cannot be expected to understand contextual implications.”<sup>100</sup> Clearly, the same is true of individuals with AS, who do not see crucial social cues;<sup>101</sup> and thus revisions in the tests for individuals with ID suggest revisions are also needed for individuals with AS.

No organization that creates tools for the assessment and treatment of sex offenders has created any guidelines specifically addressing assessment and treatment of offenders with ID.<sup>102</sup> Studies have indicated that individuals with ID “may score uniformly higher on various measures of the [Sex Offender Risk Appraisal Guide]” due to their unique life experiences resulting from being labeled “disabled.”<sup>103</sup> Differences that require modification in assessments include “a lack of sociosexual skills and knowledge, decreased opportunities for sociosexual behavior, sexual victimization, difficulties projecting consequences, and difficulties recognizing and expressing emotions.”<sup>104</sup> These differences, and thus modifications, are obviously equally applicable to individuals with AS.

Intelligence tests are also often given to individuals who present with “challenging sexual behaviors.”<sup>105</sup> These tests are not predictive of the individual’s ability to function in all aspects of life,<sup>106</sup> and “[do] not provide information regarding adaptive functioning

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<sup>99</sup> Griffiths & Fedoroff, *supra* note [97](#), at 356; Griffiths et al., *supra* note [89](#), at 428.

<sup>100</sup> Anne D. Hurley et al., *Assessment and Diagnostic Procedures, in DM-ID, supra* note 88, at 11, 13.

<sup>101</sup> Klin et al. *supra* note 28, at 899; Mesibov et al., *supra* note 6, at 10.

<sup>102</sup> Griffiths & Fedoroff, *supra* note [97](#), at 356.

<sup>103</sup> *Id.* at 364.

<sup>104</sup> Griffiths et al., *supra* note [89](#), at 428.

<sup>105</sup> *Id.*

<sup>106</sup> Griffiths & Fedoroff, *supra* note [97](#), at 361.

or what adaptations need to be made to support the person's functioning."<sup>107</sup> Also, as was stated above, IQ is not predictive of the presence of counterfeit deviance.<sup>108</sup> The specific area where this is problematic is in determining a diagnosis and predicting future dangerousness.

Thus, the study of this so far suggests that a person with AS deficits may score significantly but erroneously higher on many tests due solely to these symptomatic impairments.<sup>109</sup> Thus, absent the creation of special assessment tools, there will continue to be challenges and difficulties in assessing individuals with ID and AS accused of sexual offenses.

## AS Epidemiology

Making the case for diversion of criminal prosecution of AS individuals in general, or in the particular case of receipt and possession of child pornography, requires a brief side trip into the published reports relevant to the question of whether AS individuals are, on that account, at greater risk of committing crimes in general or sexual or violent crimes in particular. They are not. Indeed, the very features of AS make it less likely that an individual with AS would knowingly violate any criminal provisions.

### A. Prevalence of AS in General Population

The prevalence of AS is often understated in the general population because there is no quick or definitive way to determine if a child has an ASD. Therefore, a certain amount of unavoidable subjectivity is involved in diagnosing individuals.<sup>110</sup> AS is also difficult to diagnose because there are several psychiatric disorders that present with features similar to AS.<sup>111</sup> Though the currently available screening tests are more

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<sup>107</sup> Griffiths et al., *supra* note [89](#), at 428.

<sup>108</sup> Phone conversation with Dorothy Griffiths (July 23, 2009).

<sup>109</sup> See Griffiths & Fedoroff, *supra* note [97](#), at 364-65.

<sup>110</sup> Bruey, *supra* note [4](#), at 47-48.

<sup>111</sup> Routines and rituals can be the consequence of a combination of anxiety and social isolation. Thus, they may occur as a result of other conditions, such as avoidant personality disorder, schizoid personality disorder, and early onset obsessive-compulsive disorder. Rituals also can be the result of social privation. Tantam, *supra* note [11](#), at 154.

sensitive to AS,<sup>112</sup> they are time-consuming to administer.<sup>113</sup>

AS was not officially included as a subcategory of ASD until the 1994 revision of the DSM (DSM-IV). This explains why relatively few adults have been diagnosed with AS, though they may have been diagnosed with some other ASD label.<sup>114</sup> There is no doubt that the rapid increase in the incidence of AS diagnoses over the recent years merely reflects that clinicians are improving in their ability to diagnose the condition.<sup>115</sup>

Recent studies suggest that 1 in 150 children have an ASD disorder. Estimates of the prevalence of AS or PDD-NOS range from 1:350 to 1: 500.<sup>116</sup> If this is so, there may be half a million American adolescents and adults who are living with AS.<sup>117</sup> A University of California-Davis report found that among a sample of 100 Californian children diagnosed with an ASD and born between 1983 and 1985, 15.4% had AS.<sup>118</sup> The University of Michigan Health System believes the UC-Davis report's findings in California to be indicative of nationwide statistics as well.<sup>119</sup>

## **B. Prevalence of AS Among Criminal Offenders in General**

The relative recency of the addition of the diagnosis of AS to the DSM-IV is surely one of the reasons that researchers have not fully explored the nexus between AS and criminality as thoroughly as they have the intersection of criminality and other disorders.<sup>120</sup> The probable reasons are the difficulty of making the diagnosis in any event,

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<sup>112</sup> *Id.* at 155.

<sup>113</sup> *Id.*

<sup>114</sup> Bruey, *supra* note [4](#), at 48.

<sup>115</sup> *Id.*

<sup>116</sup> Tantam, *supra* note [11](#), at 151.

<sup>117</sup> *Id.*

<sup>118</sup> "Report to the Legislature on the Principal Findings from the Epidemiology of Autism in California: A Comprehensive Pilot Study" (Oct. 2002). M.I.N.D. Institute, University of California-Davis. 1-80, at 30.

<sup>119</sup> "Your Child: Autism and Pervasive Developmental Disorders (PDD)." University of Michigan Health System (*available at*, <http://www.med.umich.edu/1libr/yourchild/autism.htm> (last accessed 7/10/08)).

<sup>120</sup> Ashley, *supra* note [72](#), at 261. "The proportion of persons with autism in juvenile and adult facilities, like the prevalence of the diagnosis in the general population, does not appear to be well

and the fact that often when AS individuals are arrested, on account of their typically odd or annoying behavior, the arrests are for minor offenses and result in few jail sentences and therefore fewer opportunities for organized study.

The initial studies which bear, to some degree, on the involvement of AS individuals in criminal prosecutions are of a genre called “case studies” in which the researcher reports on cases in which AS individuals were convicted of criminal offenses. There are several methodological problems with such studies, and with attempting to draw any conclusions from them about the relationship between AS and risk of engaging in actual criminal activity.

Many AS persons convicted of offenses have never been evaluated for AS either because of the recency of the existence of the diagnosis, or the difficulty in making the diagnosis. While exploring the basis for behavior is second nature to most defense lawyers, too often, perhaps because of the minor nature of the offenses, attorneys failed to seek a diagnosis. For this reason, there is low likelihood that the unique characteristics of AS – as we have explored here – were brought to bear by defense counsel or considered in the adjudication of criminality. This, no doubt, resulting in, for example, convictions for “stalking” where the accused had no actual criminal state of mind.

This is a variable which seems not to have been considered by the researchers, who generally assume that a criminal adjudication has to be taken at face value. They therefore do not question whether the “criminal” population they are examining is itself skewed by the very phenomenon they are studying. In fact, there is every reason to believe that many of those identified as both AS and “criminal” might never have been adjudicated as criminal if the implications of their AS had been fairly taken into account. This might have been as a result of a lack of diagnosis and/or lack of effective advocacy.

Additionally, certainly with studies of nominally “AS” individuals in “secure hospitals” in other countries, it must be assumed that AS was not the primary reason for confinement, and from many of the studies it is apparent that this is so. Therefore, AS may be quite incidental to more serious psychological difficulties.

Additionally, as the location of the AS diagnosis in DSM-IV indicates, AS is a disability properly diagnosed in childhood and adolescence. One has to question whether detection of “Asperger's like” symptoms now diagnosed in adults is a valid basis for inclusion. Many of the reported criminal cases, for example, refer to defendants “diagnosed” with both AS and Schizophrenia, whereas under the correct diagnostic

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understood." Mayes, *supra* note 7, at 98.

criteria, AS is not a proper diagnosis if Schizophrenia is also present.<sup>121</sup> Nevertheless, research does show that the AS individual is less likely to commit crimes than a neurotypical person.

When AS individuals are convicted of criminal acts, they “generally present with significant deficits in their abilities to know that another person has a different emotional cognitive experience of a shared event.”<sup>122</sup> Scholars have found that most often criminal offenders with AS were not incarcerated for sexual offenses, which are extremely rare for AS individuals.<sup>123</sup>

Finally, one who has the impression that case reports discussing patients with “Asperger’s-like” symptoms who are convicted of a violent crimes suggests a connection between the two needs to consider that it may have been the anomalous nature of the

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<sup>121</sup> See *People v. Youngerman*, 838 N.E.2d 103 (Ill. Ct. App. 2005); *People v. Alcazar*, 2005 WL 236533 (Cal. Ct. App. 2005).

<sup>122</sup> Haskins and Silva, *supra* note [30](#), at 378. Some psychologists have suggested AS individuals find themselves in legal trouble for what appears to be inappropriate sexual behavior because of sexual preoccupation and fetishistic desires. Newman, Stewart and Mohammed Ghaziuddin, “Violent Crime in Asperger Syndrome: The Role of Psychiatric Comorbidity.” 5 *AUTISM DEV DISORD* (2008). They have arrived at this conclusion, however, simply because they have determined that some convicted sexual offenders have AS. Though no one can claim AS inoculates the AS individual from sexual deviance, simply identifying offenders with AS does not suggest a causal relationship between AS and a propensity to sexually offend. For instance, Kohn et al. (1998) described a 16-year old male with AS who had the habit of grabbing and fondling women in an attempt to make them his “girlfriends.” Kohn, Y., T. Fahum, G. Ratzoni, A. Apter, “Aggression and Sexual Offense in Asperger’s Syndrome.” 3 *ISR J PSYCHIATRY RELAT SCI* 293 (1998). Kohn and his fellow researchers believed this behavior was indicative of perverse sexual desire rather than a simple misunderstanding of the socially acceptable ways of initiating and pursuing romantic interests. However, the researchers provided no evidence to suggest that the AS itself *caused* the sexual offense. Moreover, though this behavior may not be socially acceptable, it is certainly not perverse for a 16-year old boy to sexually desire same-aged or older women. Also, the researchers did not investigate where the young man learned such behavior. If he used pornography for sexual education purposes, as many AS individuals do, he may have believed that such sexual behavior is acceptable. Author Tony Attwood notes this as a possible problem with pornography: AS teens and adult who view pornography may “presume intimate acts occur very quickly in a relationship and will be less aware of any concerns regarding consent.” Attwood, Tony. *THE COMPLETE GUIDE TO ASPERGER’S SYNDROME*. Gateshead: Athenacum Press (2007), at 88. Similarly, Milton et al. described the case of a young adult male with AS who had a history of recurrent sexual offenses, such as, touching the private parts of young women and watching women in public toilets. Milton, J., C. Duggan, A. Lathan, V. Egan, D. Tantom, “Case History of Co-Morbid Asperger’s Syndrome and Paraphilic Behavior.” 42 *MED SCI LAW* 237 (2002). Milton et al. believed these seemingly illicit acts were due to the AS individual’s Paraphilia, despite a conspicuous lack of data to suggest so, rather than his misunderstanding of social mores and legal rules regarding sexuality. *Id.*

<sup>123</sup> Haskins and Silva, *supra* note [30](#), at 377.

incident that attracted the researcher, and that such studies are not supposed to be epidemiological at all.

## 1. *Statistics*

In fact, studies of the incidence of AS among criminal offenders have found that AS individuals are *less* likely to commit crimes than are neurotypical individuals. For instance, Woodbury-Smith and colleagues (2006) compared the rates of offending behavior in a sample from the local general population with persons with high-functioning forms of ASD and found those with hfASD or AS are not at an increased risk of criminal conviction.<sup>124</sup> Mouridsen et al. found that criminal behavior among individuals with AS, in particular, was somewhat lower than that among the control group from the general Danish population, 18.5% versus 19.6% respectively.<sup>125</sup> Given the behavior of AS individuals that create a greater risk of offensive seeming encounters to begin with (something not mentioned in the studies), this is an impressive result.

In reality, because of the very rigid way in which many people with AS tend to keep to rules and regulations, they may well be more “law abiding” than the population generally as long as they know the “law.”<sup>126</sup> The most impressive review of the studies to date suggests that the rate of offending in AS is quite low.<sup>127</sup>

This is reinforced by a review of the literature from 1944 to 1990 in which 132 published case studies of people with AS were identified. This analysis revealed that only 2.27% had a clear history of violence, compared to 6-7% of Americans in the general population.<sup>128</sup> The authors thus concluded that the percentage of violent crime among AS individuals was too low to suggest a correlation between AS and criminality.<sup>129</sup>

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<sup>124</sup> Newman and Ghaziuddin, *supra* note [122](#).

<sup>125</sup> Mouridsen et al., *supra* note [81](#), at 203.

<sup>126</sup> *Id.* at 202.

<sup>127</sup> Allen, David et al., “Offending Behavior in Adults with Asperger Syndrome” 38 *Journal of Autism Development Disorders* 748 (2008), at 749. Allen et al., concluded that while “there was little evidence to support the notion that offending was a significant problem in people with Asperger, most people with this diagnosis who do fall foul of the law clearly struggle to negotiate the criminal justice system.”

<sup>128</sup> Allen et al., *supra* note [127](#), at 749.

<sup>129</sup> Ghaziuddin, M., Tsai, L. & Ghaziuddin, N. “Brief Report: Violence in Asperger Syndrome—A Critique.” 30 *J AUTISM DEV DISORD* 349 (1991), at 352.

## 2. *AS and apparently criminal behavior*

Though AS individuals may be arrested and convicted of crimes and their criminal activity may result in harm to people or property, it is usually not their intent to do so. Instead, their criminal behavior is often motivated by their special interest (like in the aforementioned example of the AS teen's unrestrained curiosity about the explosiveness of chemicals). In other cases, the criminal behavior may be related to a coexisting disorder rather than AS, such as a depressed teen who assaults a schoolmate who relentlessly teases him. Other criminal behavior may be the result of misunderstanding appropriate rules of behavior, such as following a romantic interest home repeatedly. What seems to the AS adult to be a display of interest appears to be stalking to the victim. Teens with AS may naively engage in criminal activity at the urging of their peers.<sup>130</sup>

There are several cases that serve as examples of how an AS individual may be arrested, and in some cases convicted of a crime, for behavior that is apparently criminal, but in reality is simply a manifestation of the defendant's AS, and lacking in any true criminal intent or understanding of the harm caused. For example, Michael Blattner, an eighteen year old college freshman with AS, had an interest in what his parents referred to as "fireworks."<sup>131</sup> Federal authorities had another name for Michael's interest - destructive devices, including pipe bombs;<sup>132</sup> but Michael never intended to harm anyone, as the judge recognized when sentencing Michael to five years probation rather than incarceration.<sup>133</sup> According to Lynn DiMarzio Bertollini, a psychologist who testified on behalf of Michael, his obsessions began with Legos and eventually ended with making

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<sup>130</sup> While there is no correlation between violent crime and AS, having a diagnosis of AS does not insulate an individual from committing violent crimes. There are cases where individuals exhibiting AS symptoms have been convicted of violent crimes, including first degree murder and attempted murder, although some of these individuals may have been mis-diagnosed or suffering from comorbidities, such as chronic depression, alcoholism, or ADHD. *E.g.*, *People v. Macklem*, 149 Cal. App. 4th 674 (Cal. Ct. App. 2007); *People v. Alcazar*, 2005 WL 236533 (Cal. Ct. App. 2005); *Schoenwetter v. State*, 931 So.2d 857 (Fla. 2006); *People v. Youngerman*, 838 N.E.2d 103 (Ill. Ct. App. 2005); *Marlett v. State*, 878 N.E.2d 860 (Ind. Ct. App. 2007); *State v. Santiago*, 634 S.E.2d 23 (S.C. Ct. App. 2006).

<sup>131</sup> Torsten Ove, *Hearing Postponed for Student Accused of Making Pipe Bombs*, PITTSBURGH POST GAZETTE, Dec. 22, 2006, available at <http://www.post-gazette.com/pg/06356/748159-55.stm>.

<sup>132</sup> *Id.*

<sup>133</sup> Jason Cato, *Bombs Net Man 5 Years' Probation*, PITTSBURGH TRIBUNE-REV., July 29, 2008, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s\\_579925.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_579925.html).



pipe bombs.<sup>134</sup>

An additional example of an individual with AS whose actions were mistakenly construed as criminal, when in actuality they were the result of an AS fixation, is John E. Robison, Jr. (“Jack”), who was only seventeen years old when his home chemistry lab and experiments, including controlled explosions in areas such as his backyard and the town landfill, were brought to the attention of state and federal officials.<sup>135</sup> According to Jack’s father, John E. Robison, Sr., who wrote the book *Look Me In the Eye*, which chronicles his own life with undiagnosed AS, his son’s interest in chemistry is an “Aspergian special interest” that stems back to his son’s childhood interest in rockets.<sup>136</sup> Jack himself has said that he was very careful with his experiments, ensuring that no one would be hurt.<sup>137</sup> The jury in Jack’s trial for malicious explosion and possession of explosives with the intent to harm people or property agreed that he did not intend to harm anyone or anything, and found him not guilty of the charges.<sup>138</sup>

While AS individuals have been convicted of crimes, most of these arrests and subsequent convictions have resulted from either others’ misinterpretation of the AS individual’s behavior as criminal or the AS individual’s childlike ignorance of proper socially accepted behavior or laws.

### 3. AS and “sex” offenses

Though AS teens and adults are not criminally predisposed, because of their lack of “commonsense” in social situations and weird demeanor, their behavior may seem offensive to some, and criminal to others, specifically when this comes to sexually charged behavior which may appear deviant. As was discussed above, there is a diagnosis of “counterfeit deviance,” which can be applied to persons with AS.<sup>139</sup> This is

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<sup>134</sup> *Id.*

<sup>135</sup> S.P. Sullivan, *Action/Reaction: How Jack Robison’s Chemistry Lab Led to an Indictment from the DA*, MASSLIVE.COM, June 10, 2009, available at [http://www.masslive.com/localbuzz/index.ssf/2009/06/actionreaction\\_how\\_one\\_teens\\_c.html](http://www.masslive.com/localbuzz/index.ssf/2009/06/actionreaction_how_one_teens_c.html).

<sup>136</sup> *Id.*

<sup>137</sup> Fred Contrada, *John Robison of Amherst Found Innocent of Malicious Explosion Charges*, MASSLIVE.COM, May 27, 2009, available at [http://www.masslive.com/news/index.ssf/2009/05/jury\\_weighs\\_case\\_against\\_john.html?cat...](http://www.masslive.com/news/index.ssf/2009/05/jury_weighs_case_against_john.html?cat...)

<sup>138</sup> *Id.*

<sup>139</sup> Hingsburger, Griffiths, and Quinsey, *supra* note [88](#).

“behavior which topographically is deviant, but which, upon investigation is a result of some other unidentified factors,” which include “a lack of information about sexual expression,” “poorly developed social skills,” “lack of assertiveness,” and a “limited opportunity for sanctioned ‘age-mate relationships.’”<sup>140</sup> This should be regarded as a differential diagnosis which must be ruled out before a diagnosis of a Paraphilia (e.g. pedophilia) can be reached.<sup>141</sup> For those with AS, their lack of social skills and sociosexual knowledge, naivete, and vulnerability to manipulation combine to create a perfect storm of counterfeit deviance.<sup>142</sup>

Of course it is not impossible for an individual with AS to also present with an actual Paraphilia. There are two categories of sexual offenders with AS.<sup>143</sup> One category of offenders are those who clearly do not understand social and sexual norms.<sup>144</sup> These offenders tend to commit less serious, more naive crimes, and generally are not repeat offenders.<sup>145</sup> There are also individuals with AS whose sexual offenses are deviant and caused by a Paraphilia.<sup>146</sup> It is important to carefully evaluate and assess individuals with AS who are accused of sexual offenses to differentiate between the two groups, as the underlying causes and treatment required are different.<sup>147</sup> An individual with AS whose apparent sexual offense is really counterfeit deviance requires education while an individual with AS whose sexual offense is caused by a Paraphilia requires treatment addressing that specific Paraphilia.<sup>148</sup> Thus, while in many individuals with AS’ sexual offenses are due to counterfeit deviance rather than an actual Paraphilia, it is important to

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<sup>140</sup> Matich-Maroney, Jeanne, Pamela S. Boyle, and Michael M. Crocker, “The Psychosexual Assessment & Treatment Continuum: A Tool for Conceptualizing the Range of Sexuality-Related Issues and Support Needs of Individuals with Developmental Disabilities.” 8 MENTAL HEALTH ASPECTS OF DEV DIS 1 (July/Aug./Sept. 2005), at 8.

<sup>141</sup> Griffiths et al., *supra* note [89](#), at 427.

<sup>142</sup> *See id.*

<sup>143</sup> Phone conversation with Dorothy Griffiths (July 23, 2009).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

remember that it is possible for an individual to present with both a Paraphilia and AS. The point here, developed further in the next section, is that it is not the norm.

## **Asperger's Syndrome is Not Associated With Sexual Perversion**

There is nothing inherent in Asperger's Syndrome to make individuals likely to develop sexual fantasies of one kind or another or to make individuals inclined to sexual deviance of any kind. Their offbeat behavior and inappropriately frank speech, especially relating to romantic or sexual matters, sometimes leads to the perception that persons with AS are hyper-sexual. Though "persons with ASD are sexual beings, [their] individual interest in sex or in developing an intimate sexual relationship with another person varies widely across individuals at all ability levels."<sup>149</sup>

AS is not a predictor of pedophilia or any other Paraphilia. Rather, the syndrome is a neurodevelopmental disorder (brain disorder of early onset) impacting a person's ability to meet the demands of everyday life, including having "street smarts." Those with AS are much more likely to be victims rather than victimizers,<sup>150</sup> although their behavior may give the impression of the latter for those who don't know them or their disability. It is plausible that the adolescent and young adult AS male individual may have erotic interests focusing below his chronological age because of their seriously delayed social maturation level. It is also plausible that his focus of interest will mature as the individual matures. However, there has been no scientific study of these questions.

Even if an AS individual was erotically interested in "underage" females, he is very unlikely to be involved in any actual offense against a child. First, as expert witness and psychiatrist Dr. Kleinmann claims, "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 (N.J.

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<sup>149</sup> Gerhardt, Peter F., "Sexuality & Sexuality Instruction with Learners with Autism Spectrum Disorders and Other Developmental Disabilities." THE ORGANIZATION FOR AUTISM RESEARCH, at 3.

<sup>150</sup> Examples of cases where the AS individual was a victim rather than a victimizer include *People v. Abercrombie*, 161 Cal. App. 4th 68 (Cal. Ct. App. 2008); *People v. Walker*, 2005 WL 2143952 (Cal. Ct. App. 2005); *State v. D.M.*, 958 So. 2d 77 (La. Ct. App. 2007); *In re Santini*, 2008 WL 2068288 (Mich. Ct. App. 2008); *State v. Brown*, 2008 WL 2587050 (Ohio Ct. App. 2008); and *State v. Hofmann*, 2004 WL 2848938 (Ohio Ct. App. 2004).

2008). Second, their social deficits render most AS individuals unable to strike up conversations with strangers, even children.

## A. AS and Sexuality

Concerning issues of sexual sophistication and behavior, what might appear to be extremely inappropriate conduct to the uninformed observer, remains—at least before it is explained to be otherwise—wholly appropriate to the AS individual. Researchers have found that AS teens, typically delayed five years in their sexual and social-emotional maturity but right on schedule with puberty, 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 deficit.<sup>151</sup> AS and hfASD experts suggest parents

not just broach the subject of sexuality with your child but also to revisit it periodically to ensure that your child thoroughly comprehends the social rules surrounding sexuality . . . . In a worst-case scenario, misunderstandings in this area could lead to individuals with AS-HFA becoming either unwitting sexual offenders or vulnerable to sexual victimization.<sup>152</sup>

What gets AS young adults 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 AS, this problem is generally solved. This is the reason why many clinicians and advocacy groups conduct sexual education and socialization training.<sup>153</sup> While observing social norms does not come intuitively, they can learn well.

Unfortunately, most parents and teachers merely react and correct inappropriate social behavior rather than taking a preemptive approach. AS children most often “receive sexual education only after having engaged in sexual behavior that is considered inappropriate, offensive or potentially dangerous” because sexual education of AS teens is “complicated by language and communication problems and social deficits.”<sup>154</sup>

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<sup>151</sup> Ashley, *supra* note [72](#), at 257.

<sup>152</sup> Mesibov et al., *supra* note [6](#), at 225.

<sup>153</sup> Debbaudt, *supra* note [71](#).

<sup>154</sup> Gerhardt, *supra* note [149](#), at 4.

Even when parents or schools do provide sexual education for AS teens, this tends to be in the form of medical or scientific information to teach individuals the mechanics of sexual interaction and prevention of unwanted pregnancies or sexually transmitted diseases. “Parents reporting that they provided their child with sexual education” still report “concerns that their teen does not know sexual behavior” - the social aspects of sexual encounters.<sup>155</sup> Sexual education devoid of social instruction leaves the AS teen confused and unable to “read the subtle cues of” others to “tell whether or not physical affection will be welcomed. The unspoken language of dating and sexuality is incredibly difficult” for AS teens, and even adults, to read.<sup>156</sup>

Experts suggest teaching Asperger’s teens and young adults central concepts and basic information that may seem redundant or inherently understood by society at large. The nature of this training illustrates the deficits from which AS individuals suffer when it comes to sexuality. For instance, AS teens must be taught “public versus private behavior,” “good touch versus bad touch,”<sup>157</sup> “reality versus fantasy,”<sup>158</sup> and the definitions of sexual consent.<sup>159</sup> Furthermore, laws regarding sexuality must be explicitly taught to AS adolescents<sup>160</sup> because they cannot translate cues about socially acceptable behavior. Where neurotypical teens can evaluate social mores at large and accept them in place of learning strict legal codes, AS teens must be taught specific rules because they cannot understand what makes an action socially appropriate or not.

Murrie et al. suggest

social skills training may be helpful to Asperger Syndrome patients (many of whom are quite conscientious about following rules) and should certainly be made available, in addition to other appropriate interventions and monitoring, to those who have committed sexual offenses. Though the patients may continue to appear socially awkward, they may be less likely to violate boundaries and harm

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<sup>155</sup> Ashley, *supra* note [72](#), at 258.

<sup>156</sup> *Id.*, at 258-259.

<sup>157</sup> Gerhardt, *supra* note [149](#), at 5.

<sup>158</sup> *Id.* at 9.

<sup>159</sup> *Id.* at 8.

<sup>160</sup> *Id.* at 5.

others.<sup>161</sup>

AS individuals are in dire need of explicit instruction. Once rules are explained and understood, the individuals are loathe to violate the rules.

A sexual education devoid of such frank discussion may inadequately prepare the AS individual for normal every day interactions. Consider, for instance, the aforementioned case of Mr. B, an ASD individual and substitute school teacher accused of touching numerous adolescent female students. Mr. B would have benefitted from sexual education that addressed both the mechanics and medical aspects of sexual intercourse *and* the social rules regarding such interactions.

## **B. AS and Pornography**

More and more people with AS are discovering alternative methods to empowerment.<sup>162</sup> AS individuals desire intimate relationships and friendships, “yet they lack the appropriate skills and knowledge to initiate such relationships successfully.”<sup>163</sup> With no friends and largely misunderstood by others, this is a population that often turns to and, indeed, withdraws into the computer as an ostensibly safe refuge. The internet has enabled people with AS to engage in social interaction via email, discussion groups, or through web pages.<sup>164</sup> AS individuals tend to have the technical skills for computer use, to which they gravitate because computers are predictable, logical, and syntax-guided, unlike social interactions, which are unpredictable, whimsical, and semantic-guided. People with AS indicate that the internet allows them the “opportunity to meet like-minded individuals who accept the person because of their knowledge rather than their social persona” and

that they often have a greater eloquence to disclose and express their inner self and feelings through typing rather than conversation. In social gatherings, the person is expected to be able to listen to and process the other person’s speech (often against a background of other conversations), to immediately reply, and simultaneously analyze non-verbal cues, such as gestures,

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<sup>161</sup> Murrie, *supra* note [75](#), at 69.

<sup>162</sup> Tantam, *supra* note [11](#), at 147.

<sup>163</sup> Stokes, Mark and Naomi Newton and Archana Kaur, “Stalking, and Social Romantic Functioning Among Adolescents with Autism Spectrum Disorder.” 37 J AUTISM DEV DISORD 169 (2007), at 1969.

<sup>164</sup> Tantam, *supra* note [11](#), at 147.

facial expression, and tone of voice. When using the computer, the person can concentrate on social exchange using a visual rather than auditory medium.<sup>165</sup>

These are intellectually intact people, with good computer skills but extraordinary brain-based naivete, acting in social isolation, compulsively pursuing interests which often unknowingly take them into forbidden territory. The internet provides a means of communicating with others that emphasizes technology know-how and de-emphasizes the subtleties of social interaction, both of which are advantages for people with AS.<sup>166</sup> Thus, the world of computers is both safe from the complexity of social interaction, as well as safe from social judgment, because it has no apparent impact on others.

People with AS often use the internet as an instructive tool to discover how to approach basic social skills which come so naturally to their non-disordered peers. The AS teen's or young adult's "interest in pornography can be a way of trying to understand about relationships and sexuality."<sup>167</sup> The desire for such material oftentimes becoming excessive and compulsive, as are most activities and interests of AS individuals.<sup>168</sup>

Of course, the abrupt and impersonal sexual encounters depicted in pornography are hardly an authoritative guide book for romantic encounters. As a result, the misunderstood and isolated AS young adult who has schooled on this material and acts accordingly "can be labeled a pervert or sexual deviant, and face the possibility of charges of sexual assault."<sup>169</sup>

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<sup>165</sup> Attwood, Tony, "Frameworks for Behavioral Interventions." 12 CHILD ADOLESC PSYCHIATRIC CLIN N AM 65 (2003), at 72.

<sup>166</sup> Tantam, *supra* note [11](#), at 147.

<sup>167</sup> Attwood, *supra* note [122](#), at 88 and 193.

<sup>168</sup> Tantam found men with AS may become addicted to adult internet sites, and a few have attracted police attention by downloading pictures of children. Young adolescents with AS may relate better to younger children than they do to their peers, and may occasionally make inappropriate sexual approaches to them. Tantam believes older adolescents and adults with AS may idealize childhood, and may be sexually attracted to children for that reason. Tantam, *supra* note [11](#), at 161. In *United States v. Kamen*, 491 F.Supp.2d 142, 146-147 (D. Mass. 2007), however, the defendant with AS convicted of knowing receipt of child pornography contended that though he did lag behind in social maturity, he was not in fact attracted to young children. A battery of psychological tests indeed showed sexual interest in adult, mature males and females, but no sexual interest in children.

<sup>169</sup> Attwood, *supra* note 109, at 337.

## 1. *Asperger's Syndrome and child pornography*

Exploration of the online world of pornography inevitably leads some AS individuals to exposure to child pornography. Where the line between pornography and child pornography demarcates a transgression against societal mores and criminal laws for the non-Asperger individual, for the AS individual, the demarcation is blurred and they are completely unaware they have crossed a moral and legal line. Unfortunately, most parents would not think to discuss *child* pornography with their AS teen.

While erotic interest in underage females (at least post-pre-pubertal) is normal in the male population – as recognized by Madison Avenue as well as the adult pornography industry – young adults with AS might be more interested in looking at younger teens because of their social and emotional immaturity.<sup>170</sup> AS individuals see themselves as younger than their calendar age<sup>171</sup> and their severe social limitations with same-aged peers confirm their perception. Looking at “child pornography” featuring younger teens, then, is rational for the AS individual who considers himself to be their peers, and hardly deviant. Furthermore, Tantam explains, young adults and adolescents with AS may relate better to younger children than they do to their peers.<sup>172</sup>

### **Unbridled curiosity of AS individuals**

AS teens' and young adults' curiosity, like that of a child's, remains uninhibited by an appreciation of social mores or an understanding of law. They want to know about sex. They do not know what is “normal.” Non-disordered individuals may be able to satisfy their curiosity about a topic through a rather superficial search on the computer. The AS individual may become obsessive about it. Thus, an AS individual's extensive collection of child pornography may not really be about the sexually explicit depictions at all, but simply about collecting similar images.<sup>173</sup>

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<sup>170</sup> As noted previously, this is highly plausible, but not empirically established. Nonetheless, this interest is hardly deviant.

<sup>171</sup> Hendrick and Weissman, *supra* note [34](#).

<sup>172</sup> Tantam, *supra* note [11](#), at 161.

<sup>173</sup> As attractive as it might be to construe an interest in pornography in general, or child pornography in particular, as one of the “circumscribed interests” of the AS individual, there has been no real study of the question. Interest in *erotica* is so broad, so much a fabric of human nature, it seems silly to account for it in our specific population as a symptom of the disability. While these individuals could become “addicted” to pornography, and presumably child pornography, short of that my review of cases of AS individuals who have been arrested for child pornography does not suggest that the function of viewing child pornography remotely approximated the role of their consuming interests of the type



### **AS individuals' interest is not necessarily deviant**

An AS teen who downloads child pornography may not be in any way sexually attracted to children, but simply curious about what the images contain. Indeed, AS individuals may describe the sexually explicit material as repulsive. While non-disordered individuals may be similarly curious, their commonsense and knowledge of social and legal codes inhibits them from following their curiosity. An AS teen, however, has no such social or legal filter and, once he starts to gather a few depictions, he may become obsessed with collecting more images. Like the AS individual collecting information about cameras, with no interest in photography, the collection of images of children, however intended by the producer, does not indicate an AS individual's erotic interest in the material.

### **Child pornography's mere existence on internet sends the message of legality to the AS teen or young adult**

Because AS individuals interpret the world around them extremely literally, someone with AS may not believe that something readily available on the internet would also be illegal and considered morally reprehensible. Child pornography and adult pornography are both easily accessible on the internet. Unless someone explains to the AS individual exactly why - despite their shared spheres in the internet world - the adult pornography is socially acceptable and legal but the child pornography is not, an AS teen or young adult is not going to know the difference.

### **AS individuals' inability to intuit social mores and legal rules**

The internet and AS users can often result in a "lethal combination." The AS individual "has a tremendous amount of technical skills in regards . . . to technological things such as computers combined with an immense naivete about culture, about the impact of one's behavior and about cultural values that are basically available to all who absorb those quite effortlessly and yet those are things that are often implicit," and the internet is replete with websites that are "created in order to embrace, engulf, involve others particularly those that are naive."<sup>174</sup> The internet can be especially dangerous for those with AS because they lack the sense of "too good to be true offers" and do not have "a clue as to the implications of what [they are] doing and about the cultural value assigned to images that [they are] seeing." Moreover, while non-disordered individuals

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generally devised in the literature.

<sup>174</sup> *Connecticut v. Casciato*, FBT-CR-08-2308568 (Superior Ct. 2008) (sentencing transcript), Klin testimony, at pg. 28-9, lines 9-27, 1-10.

easily intuit that an image implies or depicts the victimization of a child onscreen, “a young man whose idea about other people’s intentions, about other people’s beliefs, about people’s motivations; a young man for whom all those concepts that we take for granted are just not there” faces a tremendous amount of difficulty in implementing such senses on the internet. Having the technical skills yet not having the sophistication to understand what they are doing is a “terrible combination” for AS internet users.<sup>175</sup>

Individuals with AS explore the internet in ways that may appear incriminating in regards to topics of interest. For instance, someone with AS might be interested in explosives and follow web tracks to incriminating sites, others to religion, or others to sex, more out of curiosity rather than with any criminal or improper purpose. Similarly, while a non-disordered male of any age might be erotically attracted to explicit images of an underage female, he may understand the social stigma of doing so. However, an 18-year old or 19-year old teenager with AS will not inherently understand the social hysteria surrounding pornography depicting someone less than a year or two younger than himself or even be able to tell the difference in many cases.

AS teens lag behind significantly in social age. Thus, prosecution of an AS young adult for possession of child pornography is morally equivalent to the prosecution of a 10-year old for the same crime.<sup>176</sup> Much like a 10-year old, a young adult with AS may not fully appreciate the moral reprehensibility and illegality of downloading such images,

“[T]here is no understanding whatsoever on the AS subjects’ part of the implications and repercussions of their actions.”<sup>177</sup> Though pedophiles or individuals with antisocial personality disorder “understand very well the repercussions of their . . . criminal actions, people with AS have a hard time grasping this.”<sup>178</sup> Unless explicitly told, people suffering from AS do not understand that the mere viewing of child pornography, or even the mere act of clicking on an internet “link” to apparent child pornography, has resulted in criminal prosecution, conviction, and imprisonment, as well as the requirement to register as a “sex offender.”

Notions of “over-“ or “under-age,” appropriateness of websites and their contents,

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<sup>175</sup> *Id.* at pg. 29, lines 9-10.

<sup>176</sup> While it would be problematic to try to limit criminal prosecution according to developmental (versus chronological) age, in general, in this area, with conduct involving little more than looking at pictures by persons who simply do not represent the threat anticipated by Congress or state legislators, consideration of developmental age is most appropriate.

<sup>177</sup> Katz and Zemishalny, *supra* note [10](#), at 172.

<sup>178</sup> *Id.*

an intuitive sense of the acceptable and the unacceptable, and most of all, a sense of rules and regulations of social behavior, are all implicit in the criminalization of child pornography. Unfortunately, it is exactly these domains in which people with AS experience extreme difficulties.

### **Empathic deficits**

A crucial premise in prosecuting child pornography cases is that the person viewing such images understands that the depicted children are being exploited and psychologically and physically harmed, and are not capable of consenting to what is being depicted. In many of these child pornography images the children appear upset or anxious. While neurotypical individuals would normally easily be attuned to such nonverbal expressions of discomfort, the AS teen or adult lacks the empathic capacity or the “theory of mind” required to do so. The AS individual does not make the connections between 1) the apparent age of depicted persons and legal rules, or 2) the creation of child pornography and the abuse of children. People with AS have difficulty with the concept of consent because it entails exactly that which Asperger’s individuals are incapable of doing – evaluating and processing the nonverbal cues of other individuals.

It is no surprise, then, that AS individuals fail to recognize the abused children’s anguish or anxiety; after all, experts suggest AS individuals must be *taught*, first, to recognize others’ non-verbal cues, second, the definition of consent, and finally, that consent is a necessary precursor to socially acceptable sexual encounters.<sup>179</sup>

### **Unless explicitly explained, AS individuals fail to see the harm in merely viewing or receiving child pornography**

The AS individual does not understand the link between mere possession of such images and the perception of the possessor as a likely pedophile, or the accessing of child pornography and any “market” for the production of child pornography.

Using his commonsense, a non-disordered individual can easily understand that sexually explicit material of children involves the abuse of a child and viewing these images may make the observer morally and legally culpable for that abuse. The AS individual, however, lives in a very literal world. He cannot detect the abuse – he assumes the child is in the picture because the child desires to be there. But even if he detected the abuse or unhappiness of the depicted child, the individual with AS may not understand why he, a mere observer, should be held responsible for someone else’s abuse of a child. After all, he is simply receiving the images, not producing or further distributing them. And he has probably received them for free, so he has not materially

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<sup>179</sup> Gerhardt, *supra* note [149](#).

assisted the producer. Not only does the AS individual have difficulty recognizing child sexual abuse and coercion, but he also has difficulty understanding that the law views receiving an already existing image of child abuse as the perpetuation of child abuse.

**Distinction between of-age and underage females is intentionally blurred**

The difference between legality and severe criminality depends on the subtlest of determinations – guessing the age of a female. While this is difficult enough in the normal case, it is especially difficult for the AS individual who additionally has no clue as to the legal ramifications of the determination.

*By the media and pop culture*

American culture reflects a very hypocritical approach to the sexuality of underage subjects. While production, distribution, and possession of child pornography or images of minors under the age of eighteen (federal) or sixteen (most states) are harshly criminalized, underage female “celebrities” are readily marketed in mainstream media as erotic objects. The media’s hyper-sexualization of pre- and early teen celebrities has eroticized underage females.<sup>180</sup> Mainstream retailers market clothing to adolescents with highly suggestive images of young teenage models of both sexes. In the meantime, older models are made to look as young as possible.

*By legal “adult” porn*

Adult pornographic magazines and videos capitalize on the youth-obsessed culture by photographing and recording young women who are *barely* 18-years old or women who are made to look like younger teenagers. Moreover, the widespread practice of presenting erotic models with glabrous genitals and/or minimal physical development, explicitly referencing the prepubescent stage of development with “adults” thus depicted as “children,” it becomes harder to say that what appears to be a “child” is not really an adult. This would be baffling to an AS individual.

**AS individuals are not dangerous**

The tragedy for AS individuals and their families lies in the misinterpretation of their conduct. While it might objectively appear offensive or dangerous, this does not correlate with any criminal mindset, as we have demonstrated. There is nothing inherent in the ASD to make individuals with them inclined to sexual deviance of any kind. Also, as expert witness Dr. Richard Kleinmann testified in *State v. Burr*, AS individuals lack

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<sup>180</sup> Readers may remember the flurry of count-down-until-legal calendars featuring the underage Olsen twins, Mary-Kate and Ashley. The calendars pictured the twins in seductive poses and counted down the days until the they were 18-years old.

the pedophile's

certain abilities in order to take advantage of the child— . . . certain behaviors, isolate the child away from the caregiver, build up a trusting relationship, look for a child who is in a vulnerable situation and then inculcate certain behaviors, stand back, watch to see if there's an objection to the behavior and if there's no objection to continue on that course. [The AS individual] would be unable to do those things. That's not to say a sexual offense is impossible . . . but in terms of manipulation of a child in order to get sexual gratification, I would say that's very unlikely.<sup>181</sup>

#### *Low likelihood of re-offending*

Once the legal rules and the social stigma surrounding child pornography are clarified explicitly, the AS individual is unlikely to visit such links again. Individuals with ASD are extremely reliable because they are so rigid. They do not represent a risk to society.

#### *Inability to reach out and gain trust*

As has been stated, individuals with AS are not charismatic and are perceived, even by children, as different and bizarre, and thus unlikely to entice children even if so inclined. Also, their social deficits render most AS individuals unable to strike up conversations with strangers, even children. The individual with AS is less likely than the vast majority of the population to engage in any acting out of these fantasies involving children because he is usually a loner, has never had any intimate contact with anyone, and sits in his room with a computer. As has been stated, when it comes to sexual victimization, it is the AS individual who is more likely to be victimized due to their naivete and inability to pick up on social cues.<sup>182</sup>

### **C. Child Pornography Statutes**

Sections 2252 and 2252A of 18 U.S.C. criminalize activities relating to child pornography. The federal statutes penalize simple possession of child pornography, even if it was obtained for free. Both federal statutes make it a more serious offense to have “received” child pornography by mail or the internet, or distributed it, calling for a five

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<sup>181</sup> *State v. Burr*, 921 A.2d 1135, 1145 (N.J. 2007).

<sup>182</sup> *See, e.g., State v. Brown*, 2008 WL 2587050 (Ohio Ct. App. 2008); *People v. Abercrombie*, 161 Cal. App. 4th 68 (Cal. Ct. App. 2008); *State v. D.M.*, 958 So. 2d 77 (La. Ct. App. 2007); *State v. Hoffman*, 2004 WL 2848938 (Ohio Ct. App. 2004).

year mandatory minimum period.<sup>183</sup>

Most importantly, these and other child pornography statutes only require that the accused have acted “knowingly.” That is, aware that they have such “visual depictions” or “child pornography.” There is no requirement that the person know that it is unlawful or have a purpose to do anything contrary to law. The statutes do not require that the accused be aware that what he is doing is wrong or prohibited. All that is required is that the person “know” the content of the material – that it depicts persons under the age of eighteen (or sixteen) in sexual display. Behind this is the assumption that a person at age sixteen (most states) or eighteen (federal) or older should have absorbed the social taboos that are reflected in the criminal law, or are aware of the law itself, or that the actor is so dangerous that his mental culpability is immaterial. The Asperger’s teen or young adult, however, unless someone has taken the time to explicitly explain the law, or why child pornography is detrimental to the children depicted and, thus, socially unacceptable, is unaware of the illegality or moral reprehensibility of the images.

Even simple possession of child pornography is considered a “sex offense.” This means that the person convicted will be required to register as a sex offender for ten to twenty years, or for life.<sup>184</sup> It also means that they may be exposed to residency restrictions.

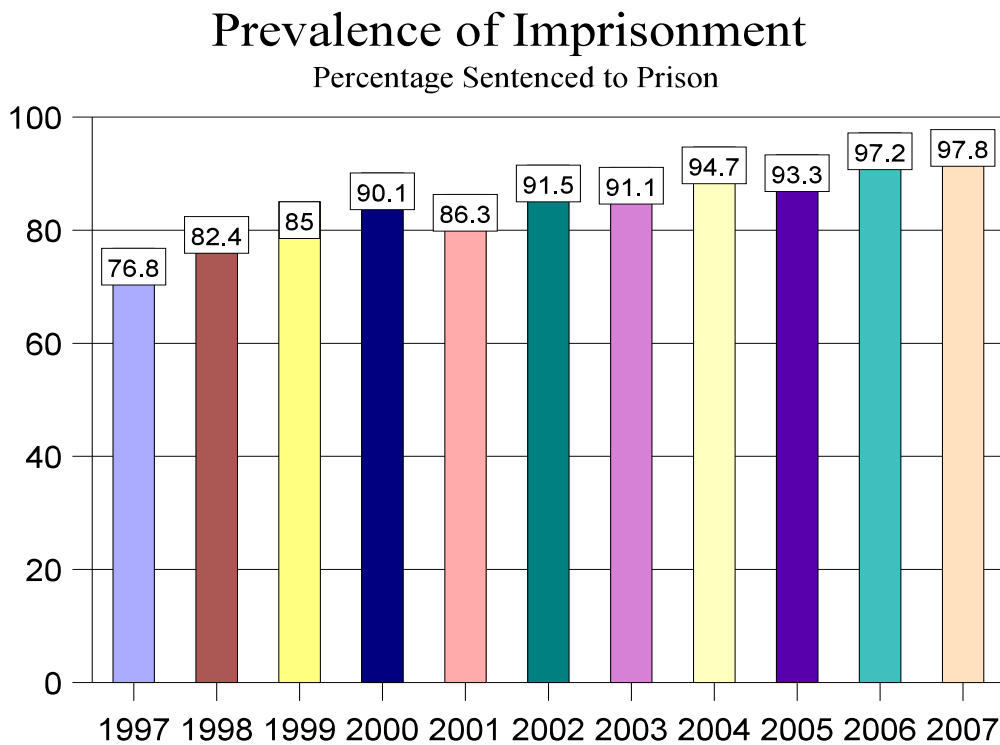
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<sup>183</sup> There is little difference between “possession” and “receipt.” Each usually involves the other. But this means that prosecutors are free in most cases to charge the accused with an offense requiring a 5 year mandatory prison term for potentially arbitrary reasons.

<sup>184</sup> In 1994, Congress enacted 42 U.S.C. § 14071, entitled the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program. The act empowers the Attorney General to establish guidelines for state programs that require a person who is convicted of a criminal offense against a victim who is a minor, which includes §§ 2252 and 2252A, or who is convicted of a sexually violent offense to register a current address for a given time period. Each state then reports the information collected to a national sex offender database. If a state fails to implement the registry programs, the state shall not receive 10% of the funds that would otherwise be allocated to the state. Under the act, offenders convicted of §§ 2252 or 2252A violations are required to report as sex offenders in a national sex offender registry until ten years have elapsed since the offender was released from prison or placed on parole, supervised release, or probation. If the offender has one or more prior convictions under §§ 2252 or 2252A, the offender must report for the duration of his life. In addition to reporting residency, the offender must also submit a set of fingerprints in registration. The offender must register not only in the state of primary residence but also the state in which the offender is employed, carries on a vocation, or is a student. Any offender who knowingly fails to register and keep such registration current shall be subject to criminal penalties in any state in which the offender has so failed. Megan’s Law, PL 104-145, enacted by Congress on May 17th, 1996, expands the Jacob Wetterling Act to allow registry information to be disclosed to the public.

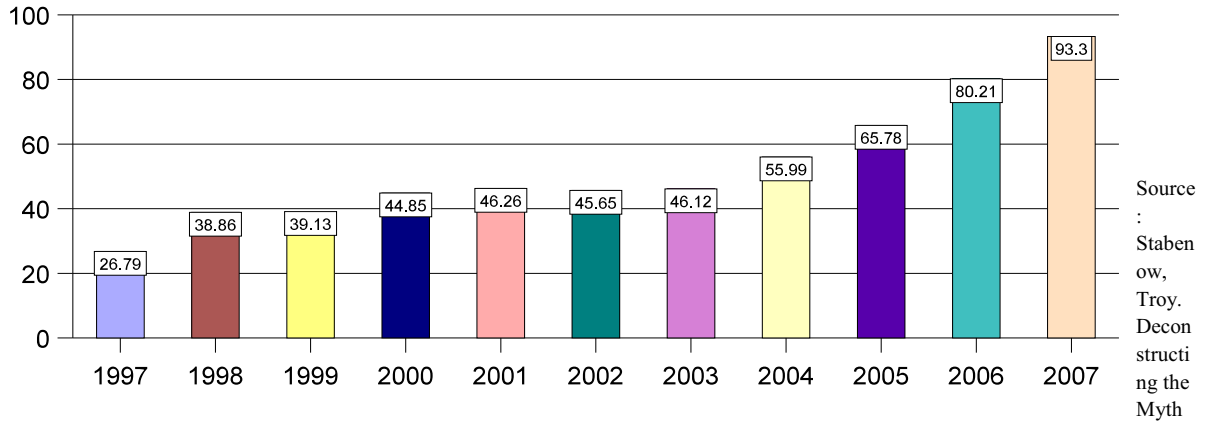
## D. Punishment

Since the Sentencing Guideline Commission began issuing annual reports and statistical data in 1995, the Commission has reported an increasing number of prosecutions and convictions for child pornography offenses each year. Increased also are the length of imprisonment and the percentage of offenders receiving only imprisonment rather than, or in addition to, probation or community service. This was the result of many political and social factors. Primarily this is the result of the high priority given to child pornography prosecutions and increased arrests fueling the perception that the problem is increasing, which in turn fuels more punitive measures.



# Prison Terms

Average Term Excluding Sentences of Probation



of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines. 1 January 2009, at 1. The charts above represent defendants convicted of possessing, receiving, or distributing child pornography under 18 U.S.C. §§ 2252 or 2252A; but who were not involved in the production or attempted production of child pornography.

One of the additional reasons for the increase in sentences for child pornography is that in the Guidelines that became effective in November of 2004, the base offense level set for guideline 2G2.4, simple possession of child pornography, went from ten (six to twelve months) to eighteen (twenty-seven to thirty-three months).<sup>185</sup> The maximum period of imprisonment had also been raised from five years in 1991 to ten years in 2003.<sup>186</sup> After November of 2004, the offense level for the average child porn

<sup>185</sup> Stabenow, Troy. *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*. 1 January 2009, at 31. [http://www.fd.org/pdf\\_lib/child%20porn%20july%20revision.pdf](http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf)>. These levels were enhanced by factors present in almost all cases – for use of a computer, depiction of children under twelve, and images displaying “sado-masochism,” which has generally been interpreted to include any sexual intercourse. The number of images also figures in to elevate the guideline level. The base offense level maximum guideline range without acceptance for simple possession of child pornography jumped from ten to sixteen months on November 1, 1991 to twenty-four to thirty months on November 27, 1991. The range increased again in November 1996 to thirty-seven to forty-six months, and then again on April 30, 2003 to seventy-eight to ninety-seven months, and finally, on November 1, 2004, the range increased to one-hundred eight to one-hundred thirty-five months. The base offense level maximum guideline range with acceptance started in November 1, 1991 at six to twelve months. It increased to fifteen to twenty-one months on November 27, 1991 and jumped to twenty-seven to thirty-three months on November 1, 1996 where it stayed level until April 30, 2003 when it increased to fifty-one to sixty-three months. On November 1, 2004, the range increased to seventy-eight to ninety-seven months.

<sup>186</sup> *Id.*



possession case is near or above maximum statutory sentence of ten years.<sup>187</sup>

This back drop highlights the severity with which child pornography offenses are treated, even for a neurotypical individual. We are concerned here with the horrific consequences for the AS individual of what is calculated to be so harsh on the neurotypical individual.

### **Confinement of individuals with AS**

Though imprisonment may be an appropriate form of punishment for neurotypical individuals, “sentences based on confinement with many others, such as jail sentences, are simply not appropriate for a person with Asperger’s.”<sup>188</sup> Incarceration can be especially cruel and dangerous for AS individuals, particularly for those convicted of “child pornography.” There are no special prisons for people with AS and they would not be eligible for housing in a psychiatric facility based on AS alone. Furthermore, because their offense involves child pornography, they would be ineligible for placement in a camp or minimum security prison. The aforementioned peculiar manifestations of AS symptoms make incarceration with other offenders problematic:

Incarceration will be fraught with risk for the ASD youth and anyone in contact with him. His direct manner, offbeat behaviors and characteristics will be read by other inmates as an invitation to exploit and control. Uneducated correctional workers, as those in law enforcement, will see a rude, incorrigible youth.<sup>189</sup>

Furthermore, individuals with AS are likely to be victims in prison. Their failure to interpret or deflect others’ manipulations, combined with their social anxiety and inability to defend themselves or effectively manipulate any social encounter, leaves AS individuals particularly vulnerable.

In prisons, where domination and manipulation among prisoners plays a pivotal role in inmate survival, a socially fragile individual such as an AS individual would be an easy target for physical and sexual abuse. There was one specific case where a young man with AS was sentenced to imprisonment for sharing child pornography over the internet.

Beginning at about fifteen years of age, this individual was drawn to internet chat rooms where, for the first time, he felt accepted. His poor spelling and social immaturity,

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<sup>187</sup> *Id.*

<sup>188</sup> Patrick, Sharon. “Adults and Adolescents with Asperger’s Syndrome.” 14 WISCONSIN DEFENDER 1 (Winter/Spring 2006).

<sup>189</sup> Debbaudt, *supra* note [71](#).

even online, made him susceptible to child predators who urged him to join child pornography chat rooms. Once there, he found the key to chat room acceptance was simply sharing child pornography images. He did not understand the social implications or legal ramifications of his behavior until the police came to his parents' home. Only then was it explained to him that what he had been doing was illegal, socially and morally reprehensible, and that the pornography was unstaged and depicted real victims.

This young man faced extreme hardship in federal prison. He lived in constant fear of his health, sanity, and life as a result of poor communication. The guards and other prisoners frequently misinterpreted his actions and statements, and he theirs; and the treatment he received did not properly address his AS. Fellow inmates preyed on his vulnerability and consistently threatened his life, planting contraband on him, breaking into his locker, and stealing his personal belongings. He was placed in solitary confinement at least five times. Sometimes it was at his request and for his protection, while at other times it was due to the problems he encountered with his fellow inmates. He was not eligible for placement at a special facility during his incarceration because he was, and still is, a convicted sex offender.

Criminal prosecution, conviction, and imprisonment are not necessary to protect the public in the case of an AS individual, but they are imponderably harsh, cruel, and debilitating to persons with AS and their families on whom they are dependent. But, a judge faced with a conviction under §2252(a)(4) or §2252A(5) would have no choice but to impose five years imprisonment.

## **E. Treatment**

There is also a question of what constitutes appropriate treatment for individuals with AS who have been accused of or convicted of a child pornography offense. Most individuals convicted of a child pornography offense are required to participate in a traditional sex offender treatment program as part of their sentence. Unfortunately for individuals with AS, traditional sex offender treatment programs are often completely inappropriate for them, and could actually be harmful. Any treatment ordered for an AS individual must take into account the individual's AS and the specific strengths and deficits of the individual. A treatment program that offers concrete rules and explicit instructions, and that is tailored to an individual's life-style and environment, is needed.

### *1. Types of Treatment*

There are accepted treatment methods for AS that are effective in insuring that

individuals with AS who have viewed child pornography do not do so again.<sup>190</sup> There are also several aspects of traditional sex offender treatment programs that make the programs problematic and inappropriate for individuals with AS. According to Dr. Dorothy Griffiths,<sup>191</sup> individuals with AS, who are not sexual predators and who do not have a paraphilia, require “habilitation” rather than rehabilitation.<sup>192</sup> Traditional sex offender treatment is generally rehabilitative, seeking to “return sexual expression to a state of dignity,” which is often not appropriate for individuals with AS who may not “understand and experience their sexuality as normative.”<sup>193</sup> Alternatively, habilitation uses “active education and training” in a supportive environment.<sup>194</sup> Dr. Griffiths has stated that individuals with AS need education about appropriate behaviors. Any treatment for an individual with AS must be adapted to take into account the learning of the individual, and must include training on social norms using multiple exemplars that can help them generalize across situations.<sup>195</sup> Dr. Griffiths has gone so far as to say that for an individual with AS who does not present with a paraphilia, a traditional sex offender treatment program would be damaging, and that it would create greater confusion for the individual.<sup>196</sup>

Echoing this is *Developmental Theory and Developmental Deficits: The Treatment of Sex Offenders With Asperger’s Syndrome* by Winifred Bolton, a clinical

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<sup>190</sup> When discussing theories of treatment generally, individuals with AS who do not have a paraphilia and are not pedophiles are being referenced. But, as has been noted, it is possible for individuals with AS to suffer from a paraphilia or to act out in sexually abusive ways. When treating an Asperger’s individual with a paraphilia or other sexually abusive behavior, treatment other than the traditional sex offender treatment program is likely required because the individual with Asperger’s Syndrome sees the world differently than a neurotypical individual, as discussed in *Challenges to Treating Adolescents with Asperger’s Syndrome Who are Sexually Abusive*, by Frances Ray, Christina Marks, and Helen Bray-Garretson, published in *Sexual Addiction & Compulsivity* (2004). This will be discussed in further detail, but it is important to remember as this section is considered.

<sup>191</sup> For more information on Dr. Griffiths and her background, see page [20](#).

<sup>192</sup> Griffiths & Fedoroff, *supra* note [97](#), at 366.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Griffiths, *supra* note [108](#).

<sup>196</sup> *Id.*

psychologist.<sup>197</sup> Bolton notes that the traditional sex offender treatment program used in England focuses on enhancing empathy for the victim and on recognizing cognitive distortions, among other goals.<sup>198</sup> The program is inappropriate for individuals with AS because it is “designed to remedy past learning deficits,” which “might not be adequate for the Asperger’s group, whose difficulties may include a failure to benefit from any experience, rather than learning on the basis of socially deviant experiences.”<sup>199</sup> Additionally, Bolton notes that specific aspects of the treatment, such as recognizing cognitive distortions and promoting empathy, are unlikely to be effective in individual’s with AS, even though it is effective in neurotypical individuals, as these are areas that are especially challenging to individuals with AS, and individuals with AS require specialized treatment.<sup>200</sup> Her recommendation is that individuals with AS be provided with very explicit sex education, with an emphasis on behavioral, rather than cognitive, interventions.<sup>201</sup>

While it is not common, it is possible for individuals with AS to be sexually abusive. But whether the diagnosis is counterfeit deviance or a true paraphilia, the treatment an individual with AS requires is different from a traditional sex offender treatment program, in part because an individual with AS sees the world differently and thus requires different intervention styles than a neurotypical individual. In *Challenges to Treating Adolescents with Asperger’s Syndrome Who are Sexually Abusive*, Ray, Marks, and Bray-Garretson state that the National Task Force on Juvenile Sex Offending identified concepts and behaviors that adolescent sex offenders must integrate, such as understanding his offending pattern, learning about thinking errors, practicing empathic responses to victims, and stopping deviant thoughts and fantasies, among other criteria.<sup>202</sup>

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<sup>197</sup> Bolton, Winifred. “Developmental Theory and Developmental Deficits: The Treatment of Sex Offenders with Asperger’s Syndrome.” *Sex, Mind, and Emotion*. (2006) : 41.

<sup>198</sup> *Id.* at 43-44. While individuals in traditional sex offender treatment programs work to enhance empathy, the difference between these individuals and individuals with Asperger’s Syndrome is that these individuals do not think of the consequences of their actions or how others may be affected, whereas individuals with Asperger’s Syndrome are actually unable to pick up on others’ emotions.

<sup>199</sup> *Id.* at 45.

<sup>200</sup> *Id.* at 58.

<sup>201</sup> *Id.* at 58-59.

<sup>202</sup> Ray, Frances, Christina Marks, and Helen Bray-Garretson. “Challenges to Treating Adolescents with Asperger’s Syndrome Who Are Sexually Abusive.” *Sexual Addiction & Compulsivity: The Journal of Treatment & Prevention* 12 (2004) : 265-285, 278.

They noted that these criteria must be modified when treating adolescents with AS, finding ways to make them more concrete and tangible.<sup>203</sup>

Additionally, they state that “[t]raditional sex offender treatment also requires that the client replace deviant behaviors with pro-social coping strategies.”<sup>204</sup> 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.”<sup>205</sup> The authors have noted specific problems and poor outcomes with this approach when used to treat adolescents with Asperger’s Syndrome, including aversive reactions when problematic behaviors and attitude distortions are directly identified, as individuals with Asperger’s Syndrome may have a very difficult time accepting criticism.<sup>206</sup> Some suggestions that have been offered for treating individuals with Asperger’s Syndrome 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,” and making lists and providing clear overviews of treatment to create structure.<sup>207</sup>

Ray, Marks, and Bray-Garretson also approvingly reference an article by Dr. Ami Klin and Dr. Fred R. Volkmar—*Asperger’s Syndrome: Guidelines for Treatment and Intervention*—when discussing effective treatments for adolescents with Asperger’s Syndrome.<sup>208</sup> According to Dr. Klin and Dr. Volkmar, general intervention strategies include 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,” teaching “[a]daptive skills intended to increase the individual’s self-sufficiency . . . explicitly with no assumption that general explanations might suffice nor 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

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 279.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 280.

<sup>208</sup> *Id.* at 281.

a pre-planned, well rehearsed list of steps to be taken,” among others.<sup>209</sup> Communication and behavioral interventions should also occur, and should include explicit 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.”<sup>210</sup>

In correspondence, Dr. Klin has also stated that for many individuals with AS who are convicted of a child pornography offense, all that is needed to avoid re-offense is “to be instructed very concretely, very literally, and very firmly, that this behavior is unacceptable,” along with instruction on the concept of underage females, instruction on how to distinguish between “pornography” that is everywhere and child pornography, instruction on the explicit sanctions for viewing child pornography, and, most of all, instruction on how to avoid violating the rules he has been taught.<sup>211</sup> AS individuals need “very explicit instruction on how to avoid [child pornography] sites were [they] to be navigating the internet,” and “[i]n most situations, such explicit teaching is more than sufficient to stop the behavior.”<sup>212</sup>

## 2. *A Comparison of Treatment Programs*

As the above demonstrates, a traditional sex offender treatment program is not effective for individuals with AS because individuals with AS learn information differently than do neurotypical individuals. In a traditional sex offender treatment program, an individual with AS, who likely has no sexual interest in children, would be grouped with actual pedophiles—individuals who have a sexual interest in children, and who, in some cases, have sexually abused children. The common modality of treatment in traditional sex offender treatment programs involves challenges to the distorted thoughts and justifications individuals put forth for their sexually deviant behavior. It is about relearning appropriate sexual behaviors and rehabilitation of deviant thoughts, which involves group treatment and often group pressure. There is also a requirement for group participation, which requires speaking in front of fellow group members and

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<sup>209</sup> Klin & Vokmar, *supra* note [14](#).

<sup>210</sup> *Id.*

<sup>211</sup> Klin, Ami. Letter to Terrance P. Flynn. December 2007.

<sup>212</sup> *Id.*

challenging the statements made by group members—things that individuals with AS are very uncomfortable doing or incapable of doing.

In contrast, an individual with AS requires an individualized assessment of how he sees the world and an assessment of what he needs to avoid the dangers that are ever present for an individual with Asperger's, rather than group treatment. For an individual with Asperger's there was no learning at all, so there is nothing to relearn or rehabilitate. Materials must be presented in a concrete fashion and learned by rote. Explicit directions must be given. The lessons taught must be tailored to the individual's life situation because Asperger's individuals are not good at applying abstract rules to unfamiliar situations. Furthermore, because individuals with AS are not inherently able to empathize with others, aspects of traditional sex offender treatment programs that are meant to teach participants to empathize with victims and to recognize cognitive distortions are unlikely to work, specifically because the lessons are not being taught in a manner that individuals with AS can comprehend.

An example of how ineffective and difficult traditional sex offender treatment programs can be for individuals with AS is the young man whose experiences while incarcerated were shared above. As a condition of his probation, that young man was ordered to attend a traditional sex offender treatment program. He has said that the stories he hears at his group treatment make him feel nauseous. He does not understand how or why the others in the treatment program did what they did, and he believes that everything that is said as part of his sex offender treatment program is the opposite of what he is told by his private psychologists. Overall, he seems to find the traditional sex offender treatment program unhelpful and upsetting. Instead of helping him learn appropriate behavior, it is confusing him and placing him in contact with individuals who actually are sexual predators.

Individuals with AS who are not pedophiles or sexual predators should not be placed in a traditional sex offender treatment program with pedophiles and sexual predators. As the above story illustrates, all a traditional sex offender treatment program is likely to do is horrify, confuse, and frustrate individuals with AS. A traditional sex offender treatment program could actually be damaging for Asperger's individuals.

Instead, individuals with AS need habilitative treatment, using active learning and education that is very explicit and concrete. Treatment must include individualized education that recognizes the individual's special needs and the unique ways in which the individual's brain functions, rather than seeking to return the individual's sexuality to a state of normalcy, as these individuals often have no sexual experiences to normalize. Asperger's individuals, who are very rule bound and reason in black-and-white, need concrete rules and explicit instructions because once they know the rules, they will abide

by them; but because they cannot generalize across unfamiliar situations, it is very important that any treatment program for an individual with AS is tailored to the individual's needs and life situation.

## **Sex Offender Registration and Housing Restrictions**

### **A. Consequences for Sex Offenders Generally**

In response to well-publicized child abductions and murders, committed by convicted sex offenders, jurisdictions all over the United States have enacted exclusionary zone laws prohibiting sex offenders from residing within close proximity to a school, park, daycare center, or school bus stop.<sup>213</sup> Since their enactment, the housing restrictions have increased these buffer zones, often ranging from 1,000 to 2,500 feet.<sup>214</sup> As of 2007, twenty-two states had enacted laws restricting housing opportunities for sex offenders.<sup>215</sup> These sex offender zoning laws have essentially banned sex offenders from urban areas where schools, parks, and other prohibited zones overlap.<sup>216</sup>

The obvious focus of these restrictions is naturally on sex offenders who have been convicted of actual offenses against children. Indeed, some states do limit their sex offender zoning laws to those offenders convicted of a sexual offense against a child. However, other states include all “sex offenders” in the same category.<sup>217</sup> Under this latter approach residency restrictions would equally apply to an eighteen-year-old convicted of statutory rape for engaging in sexual conduct with his sixteen-year-old girlfriend or one convicted of mere possession of child pornography, to the same extent as the repeat child molester. These laws have been criticized as ill-conceived, over broad,

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<sup>213</sup> Levenson, Jill S. “Sex Offender Residence Restrictions: Sex Offender Law Report.” CIVIL RESEARCH INSTITUTE, at 2.

<sup>214</sup> *Id.*

<sup>215</sup> Levenson, Jill S. and Andrea L. Hern. “Research Note: Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry.” 9 JUSTICE RESEARCH AND POLICY 59 (2007), at 60.

<sup>216</sup> Levenson, *supra* note [213](#), at 3.

<sup>217</sup> Levenson and Hern, *supra* note [215](#), at 68.



and self-defeating.<sup>218</sup>

Critically, the proximity of the offender's residence to a school, park, or other location where children may congregate is unrelated to re-offending.<sup>219</sup> Many sex offenders do not feel the buffer zones help them abstain from re-offending or protect neighborhood children.<sup>220</sup> In response to such studies, Minnesota and Colorado indicated that the possible negative consequences far outweighed any potential benefits of residency restriction laws for sex offenders.<sup>221</sup>

Housing restrictions are based largely on the misconception that anyone who views child pornography will also physically approach and abuse a child.<sup>222</sup>

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<sup>218</sup> Requiring uniform residency reporting and restrictions for all sex offenders "diminished the ability of the public to ascertain the truly dangerous sex offender in the community" from an offender convicted of an isolated incident unlikely of repetition. BUREAU OF JUSTICE STATISTICS. "Recidivism of Sexual Offenders Released from Prison in 1994." (Nov. 2003). *See also*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. "Report of the Sex Offender Policy Task Force." Adopted by the Board of Directors, Feb. 24, 2007, at 7. While the zoning laws are well-meaning, they have greatly diminished housing options for sex offenders, edging out newly released and vulnerable offenders to rural areas far away from familial supports and mental health facilities crucial to preventing re-offending.

<sup>219</sup> COLORADO DEPARTMENT OF PUBLIC SAFETY. "Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community." (2004) <http://dcj.state.co.us/odvsom>; MINNESOTA DEPARTMENT OF CORRECTIONS. "Level Three Sex Offenders Residential Placement Issues." (2003). While an Arkansas study found that child molesters appeared to live closer to schools, day care centers, or parks than did rapists of adults, the authors could not establish an empirical relationship between sex offender housing and recidivism. In other words, the study's results do not indicate that those molesters within close proximity to schools, etc. have a higher rate of re-offending than do molesters who live farther away. Walker, J. T., J. W. Golden, A. C. VanHouten, "The Geographic Link Between Sex Offenders and Potential Victims: A Routine Activities Approach." 3 JUSTICE RESEARCH AND POLICY 15 (2001).

<sup>220</sup> Levenson and Hern, *supra* note [215](#), at 66.

<sup>221</sup> Levenson, Jill S. and Leo P. Cotter. "The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step from Absurd?" 49 INT'L J OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 168 (2005), at 176.

<sup>222</sup> The housing restrictions are also based on three other common misconceptions: that 1) all sex offenders re-offend; 2) treatment does not work; and 3) children are sexually abused by strangers. According to the United States Department of Justice's Bureau of Justice Statistics, only 5.3% of sex offenders released from prison are rearrested for a new sex crime and only 3.3% of persons convicted of a child molestation will be arrested for another sex crime against a child. These recidivism rates are very low compared to the 68% recidivism rate for all offenders released from United States prisons. Levenson, *supra* note [213](#), at 3. *See also*, "Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community", *supra* note [219](#); NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, INC. "Sex Offenses: Facts, Fictions, and Policy Implications." January

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2006, at 6. Proper mental health treatment and supportive familial and social networks can work to prevent future re-offense. Residency restrictions threaten this by forcing offenders to live on their own in rural areas far from their communities or in socially disorganized, economically depressed neighborhoods that have fewer resources for mobilizing community strategies to deter crime and protect residents. Levenson and Hern, *supra* note [215](#), at 63. Cognitive-behavioral treatment can reduce sex offense recidivism by nearly 40%. Hanson, R. K., A. Gordon, A. J. R. Harris, J. K. Marques, W. Murphy, V. L. Quinsey & M. C. Seto, “First Report of the Collaborative Outcome Data Project on the Effectiveness of Treatment for Sex Offenders.” 14 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 169 (2002). *See also*, Levenson, *supra* note [213](#), at 3. Denying sex offenders residency in metropolitan areas where such treatment is available may “inadvertently [] increase risk by aggravating the stressors (e.g., isolation, disempowerment, shame, depression, anxiety, lack of social supports) that can trigger some sex offenders to relapse.” Edwards, W. & C. Hensley. “Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws.” 45 *INT’L J OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY* 83 (2001). *See also*, Levenson and Cotter, *supra* note [221](#), at 169; Freeman-Longo, R.E. “Prevention or Problem?” 8 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 91. Levenson and Cotter reported that of the 135 sex offenders released from Florida prisons in 2004, about 50% were forced to relocate due to housing restrictions (at the time, a 1,000 foot buffer, which has since increased) and 44% were unable to live with family members. Levenson and Cotter, *supra* note [33](#), at 173. In a sample of 148 adult male sex offenders in Indiana in 2007, about 30% reported that a landlord refused to rent to them or to renew their existing lease due to their status as a registered sex offender. Levenson and Hern, *supra* note [215](#), at 65. The restrictions inadvertently “increase transiency and homelessness amongst sex offenders thereby decreasing the ability of law enforcement authorities to keep track of offenders and probation officers to supervise offenders.” “Report of the Sex Offender Policy Task Force,” *supra* note [218](#), at 9. For instance, in Orange County, Florida (the Orlando metropolitan area), researchers found that combined multiple restrictions (schools, daycare centers, etc.) reduced the number of dwellings available for sex offenders from a total of 137,944 residential properties to 4,233 with 1,000-foot buffer zones and 37 with 2,500-foot buffer zones. Zandbergen, P. A. and T. C. Hart. “Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restrictions Laws Using GIS.” 8 *JUSTICE RESEARCH AND POLICY* 1 (2006). Even victims’ advocacy groups like the California Coalition Against Sexual Assault and the National Alliance to End Sexual Violence have expressed disapproval with housing restrictions, “noting their potential to jeopardize public safety by creating transience and thereby making sex offenders more difficult to track and monitor.” CALIFORNIA COALITION AGAINST SEXUAL ASSAULT. “Opposition to California’s Jessica Lunsford Act” (2006), *available at* <http://www.calcasapublicpolicy.org/>. *See also*, Levenson and Hern, *supra* note [215](#), at 68; NATIONAL ALLIANCE TO END SEXUAL VIOLENCE. “States with Sex Offender Residency Restriction Laws” (2006). Offenders are not usually strangers. The image of the unkempt sex offender, lurking in the shadows of the schoolyard playground has become especially popular because it affords the public a false, but comforting, sense of security that abuse occurs only outside the home and by an evil stranger. In reality, however, 93% of child sexual abuse victims knew their abuser, and the “vast majority of sexual assaults on children below the age of 12 occur in a residence.” “Sex Offenses: Facts, Fictions, and Policy Implications,” *supra* note [222](#), at 2. *See also*, BUREAU OF JUSTICE STATISTICS. “Sex Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics” (2000); Levenson, *supra* note [213](#), at 4. Minors and children are rarely victimized by strangers (7%). “Sex Offenses: Facts, Fictions, and Policy Implications,” *supra* note [222](#), at 2. *See also*, BUREAU OF JUSTICE STATISTICS. “Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault” (1997);

Whatever weight criticisms of residency restrictions may be entitled to, even in the case of simple possession of child pornography, they have little weight in the case of the AS individual who does not have the socially manipulative skills or sexual sophistication of a non-AS pedophile. While it is nearly impossible to obtain a proper sample to test this theory, the probability that an AS individual charged with possession would harm a child is very low. As expert witness Dr. Kleinmann testified in *State v. Burr*, 921 A.2d 1135, 1142 (N.J. 2008), “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.”

## **B. Impact of Residency Restrictions on AS Individuals Forced to Register as Sex Offenders**

Oftentimes, innocent family members must either relocate with the offender or be separated from the offender and not provide the familial support he needs. Denied the support of their family members and friends, forced to relocate, and oftentimes asked to leave places of employment because of their status as a registered sex offender, newly released prisoners find themselves in a whirlwind of destabilizing forces, which research has shown may act together to cause a re-offense.<sup>223</sup>

Young adult offenders are particularly impacted by residency restrictions. Often forced to move out of their shared homes with supportive family members or friends because of sex offender housing laws, young offenders have difficulty finding affordable housing on their own. Authors of a 2007 Indiana sex offender registry program found that “younger offenders were more likely than older offenders to be unable to live with family members (presumably parents), probably because their families resided in residential neighborhoods near schools.”<sup>224</sup> Moreover, because “young adults are usually less prepared developmentally and financially for independence,” these “offenders seemed to have particular trouble securing affordable housing.”<sup>225</sup>

Persons with AS experience lifelong difficulties. Young persons with AS are

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Levenson, *supra* note [213](#), at 4.

<sup>223</sup> Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community, *supra* note [219](#); Kruttschnitt, C. et al. “Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls.” 17 JUSTICE QUARTERLY 61 (2000); Levenson and Cotter, *supra* note [221](#).

<sup>224</sup> Levenson and Hern, *supra* note [215](#), at 67.

<sup>225</sup> *Id.*

often unable to live independently, and need to live with their parents and siblings.<sup>226</sup> As researchers have demonstrated, sex offender registration and zoning laws have wreaked havoc on the lives of young neurotypical offenders because these offenders, more so than the older offenders, tend to live with their parents and younger siblings in school- or park-populated areas.

Sex offender registration and residency restrictions would have even a greater cumulative and disastrous effect in AS cases than in those involving neurotypical young adults because AS individuals often are not even capable of living independently because they are extraordinarily vulnerable to anything taxing their poor common sense, improvisational skills, understanding of social context, etc. Adolescents with AS often “exhibit ongoing difficulty with self-care, organization and disturbances in social and romantic relationships” for the duration of their lives, and, “despite high cognitive potential, most remain at home.”<sup>227</sup> AS individuals already face social ostracization because of their misunderstood behavior, making independent living difficult and lonely. Although AS individuals are usually of average or above-average intelligence, they are often underemployed because they have trouble with the interview process and “fitting in” at the workplace.<sup>228</sup> The difficulties neurotypical young offenders face, like affordable housing on their own, would be compounded for AS young offenders who need familial support to carry on day-to-day existence in society.

## Solution

There are several remedial approaches to this problem, including the use of prosecutorial discretion in commencing criminal charges against individuals with AS, as well as the use of discretion in sentencing of individuals with AS. The most consistent and broad based solutions though are legislative solutions, such as amending federal legislation to include an element of “willfulness,” and creating a new affirmative defense for individuals with developmental disabilities.

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<sup>226</sup> McPartland and Klin, *supra* note 3. See also Klin, Ami and Fred R. Volkmar, “Asperger Syndrome: Diagnosis and External Validity.” 12 CHILD ADOLESC PSYCHIATRIC CLIN N AM 1 (2003), at 10.

<sup>227</sup> McPartland and Klin, *supra* note 3.

<sup>228</sup> Fast, Yvona. EMPLOYMENT FOR INDIVIDUALS WITH ASPERGER SYNDROME OR NON-VERBAL LEARNING DISABILITY: STORIES AND STRATEGIES. London: Jessica Kingsley Publishers, 2004.

## A. Prosecutorial Discretion in Commencing

One solution to these cases is for prosecutors to use a “Pretrial Diversion” program or Defense and Prosecution Agreement which diverts certain offenders from traditional criminal justice processing into a supervision and services-orientated program, such as the one administered by the U.S. Probation Service.<sup>229</sup> The U.S. Attorney can defer prosecution of any individual against whom a prosecutable case exists where the accused is not a person with two or more prior felony convictions, an addict, a public official or former public official accused of an offense arising out of an alleged violation of a public trust, accused of an offense that, under existing Department guidelines, should be diverted to the State for prosecution, or accused of an offense related to national security or foreign affairs.<sup>230</sup> Participants who successfully complete the diversion program are either not charged, or, if they have already been charged, participants will have the charges against them dismissed.<sup>231</sup> Participants who are unsuccessful are returned for prosecution.<sup>232</sup>

Diversion programs are intended to save prosecutive and judicial resources for concentration on major cases and to provide, where appropriate, a vehicle for restitution to communities and victims of crime.<sup>233</sup> The period of supervision may not exceed 18 months but may be reduced.<sup>234</sup> If the U.S. Attorney determines that diversion is appropriate for a particular offender, the diversion program should tailor supervision to the offender’s needs.<sup>235</sup> The supervision may include employment, counseling, education, job training, psychiatric care, etc.<sup>236</sup> Courts strongly encourage innovative approaches.<sup>237</sup> Of the 270 18 U.S.C. § 2252 cases in New York State where prosecution was declined

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<sup>229</sup> United States Attorney Manual (USAM), 9-22.000, Pretrial Diversion Program.

<sup>230</sup> USAM, 9-22.100.

<sup>231</sup> USAM, 9-22.010.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> USAM, Title 9, Criminal Resource Manual, 712 Pretrial Diversion.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

between 2004 and 2008, 2.9% were declined because pretrial diversion was completed.<sup>238</sup> Additionally, 14.8% were declined due to an agency request, due to instructions from the Department of Justice, or due to department policy.<sup>239</sup> Thus, diversion and prosecutorial discretion are being used in federal child pornography cases in New York State, even if on a small scale.

Diversion is an ideal win-win situation for both the government and the fragile AS individual charged with possession of child pornography. On the one hand, the government, having doubts about the innocence of an AS individual's exploration of child pornography, will have the time to be assured that the subject is not dangerous while demonstrating a truly enlightened approach to AS individuals in general and the AS offender facing prosecution in particular. Yet, if the AS individual should fail, the government would still be able to reinstate the charges and place the individual back in status *quo ante*.

Such a period of review would be especially probative because AS is characterized by a diminished ability to conceal thoughts; thus, an experienced consultant can reliably assess the progression of an AS individual's sexual interests and any possible risk. Rather than imprisonment, an experienced mental health professional would simply explain the social mores and legal rules regarding internet usage and pornography because such explicit teaching is more than sufficient to stop inappropriate behavior.

Despite this, resources are stretched thin to prosecute the neurologically disordered individual who downloads child pornography out of childlike curiosity, but who did not have the wherewithal to appreciate the illegality or the moral reprehensibility of his actions and presents no danger to children. In prosecuting AS individuals for possession of child pornography, the government is wasting precious time and money on offenders who lack the malicious intent presumed in the downloading of child pornography. In these cases, the government is going after the lowest hanging fruit in the entire orchard of child exploitation and abuse. Other federal agencies, aware of this, have taken steps to educate their investigators to recognize AS individuals whose behavior does not present the real threat with which they are concerned. Although the government is free to put its resources where it wants, prosecuting someone with AS must, assuredly, be the lowest priority of all.

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<sup>238</sup> TRACfed, Syracuse University, <http://www.tracfed.syr.edu/> (subscription required).

<sup>239</sup> *Id.*

## B. Sentencing

There is also evidence that federal judges are using discretion in sentencing individuals charged with child pornography offenses, especially when the individual is diagnosed with AS. Generally, many federal judges question the validity of the Federal Sentencing Guidelines for child pornography offenses, claiming that the punishments are too severe in many situations and not based on any empirical evidence or expertise.<sup>240</sup> Alternatively, there are those who vigorously defend the validity of the Federal Sentencing Guidelines for child pornography, stating that the guidelines appropriately address the seriousness of the crime and the scale of victimization that occurs. An increasing number of judges are issuing and upholding below guidelines sentences for child pornography offenses.<sup>241</sup> This is especially true with younger offenders, for whom prosecution is rare.<sup>242</sup>

Additionally, judges are recognizing that treatment or drastically reduced incarceration is the best way to handle child pornography cases involving a defendant with AS. There are five cases that have been identified as involving child pornography offenses where an individual was diagnosed with AS:<sup>243</sup> one state charge as well as four federal charges brought under 18 U.S.C. § 2252A.

Of the five cases, two resulted in no prison sentence, and three resulted in drastically reduced prison sentences. Edwin Carpenter's guidelines' sentence range was

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<sup>240</sup> See Hansen, Mark. "A Reluctant Rebellion." ABA JOURNAL. June 2009. See also the response, Gelber, Alexandra. U.S. DEP'T OF JUSTICE. "Response to *A Reluctant Rebellion*." (2009).

<sup>241</sup> See, e.g., *United States v. Duhon*, 541 F.3d 391 (5th Cir. 2008); *United States v. Prisel*, 316 Fed. App'x 377 (6th Cir. 2008); *United States v. Rowan*, 530 F.3d 379 (5th Cir. 2008); *United States v. McBride*, 511 F.3d 1293 (11th Cir. 2007); *United States v. Pauley*, 511 F.3d 468 (4th Cir. 2007); *United States v. Polito*, 215 Fed. App'x 354 (5th Cir. 2007); *United States v. Baker*, 445 F.3d 987 (7th Cir. 2006); *United States v. Lighthall*, 389 F.3d 791 (8th Cir. 2004); *United States v. Phinney*, 599 F. Supp. 2d 1037 (E.D. Wis. 2009); *United States v. Baird*, 580 F. Supp. 2d 889 (D. Neb. 2008); *United States v. Grober*, 595 F. Supp. 2d 382 (D.N.J. 2008); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa 2008); *United States v. Stern*, 590 F.Supp. 2d 945 (N.D. Ohio 2008).

<sup>242</sup> Aside from two anomalous cases where it seems likely that other factors came into play, offenders under twenty years old regularly receive below guidelines sentences. Rush Consulting Report. 27 July 2009.

<sup>243</sup> *United States v. Carpenter*, 6:08-CR-06256-001 (W.D.N.Y. 2009); *United States v. Munson*, 07-CR-443 (D. Md. 2009); *United States v. Joy*, 1:07-CR-000187-001 (N.D.N.Y. 2008); *Connecticut v. Casciato*, FBT-CR-08-2308568 (Superior Ct. 2008); *United States v. Saidman*, 0:05-CR-60296-001 (S.D. Fla. 2006).

fifty-one to sixty-three months, and instead he received five years probation.<sup>244</sup> Wayne Joy is a young man whose AS obsessions included orchestra music, Harry Potter, and the complete works of Shakespeare.<sup>245</sup> The guidelines' sentence range for Wayne was fifty-seven to seventy-one months.<sup>246</sup> The court sentenced him to time served, which consisted only of the day he was arrested—a 99.9% reduction.<sup>247</sup> Shane Munson, a young man with AS who pleaded guilty to possession of child pornography, was given a three month sentence of incarceration, despite the guidelines calling for a sentence of fifty-one to sixty-three months, after the judge learned about the difficulties an individual with AS would face while incarcerated. This was a 94% reduction from the sentencing guidelines' recommendation. Seth Saidman, another young man with AS who pleaded guilty to possession of child pornography, received a thirty month sentence when the guidelines' range was one-hundred and eight to one-hundred and thirty-five months—a 72% reduction. While this entire paper raises the question of whether these cases belong in the criminal courts at all, it also validates that in many cases, incarceration is not the right answer to treat and rehabilitate these young men who already face so many challenges in life and who, if incarcerated, are very likely to be victimized.

### **C. Legislative Solutions**

#### *1. Amend Federal Statutes to Include Element of “Willfulness”*

Alternatively, Congress and state legislatures could amend the federal statutes, such as 18 U.S.C. §§ 2252 and 2252A, to include an element of “willfulness” in addition to the existing “knowingly” element. There is some evidence that federal prosecutors in New York State occasionally refuse to prosecute 18 U.S.C. § 2252 cases due to a lack of evidence of criminal intent,<sup>248</sup> but explicit language requiring willfulness in addition to the existing knowingly element would clarify the requisite mental state required under 18

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<sup>244</sup> *Carpenter*, 6:08-CR-06256-001, Judgment at 2.

<sup>245</sup> *Joy*, 1:07-CR-000187-001, Sentencing Memo at 3.

<sup>246</sup> *Joy*, 1:07-CR-000187-001, Criminal Sentencing Minutes at 2.

<sup>247</sup> *Id.*

<sup>248</sup> Of the 270 18 U.S.C. § 2252 cases that the government declined to prosecute between 2004 and 2008, 21% were declined due to a lack of evidence of criminal intent. TRACfed, Syracuse University, <http://www.tracfed.syr.edu/> (subscription required).



U.S.C. §§ 2252 and 2252A, and more effectively target the offenders for whom such laws were passed. Ultimately, it is the public that will benefit.

## 2. *Affirmative Developmental Disability Defense*

Alternatively, the affirmative defenses contained in 18 USC §2252(c) and 18 USC §2252A(d) should be modified to add that it is an affirmative defense “that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a mental disease or defect, or a developmental or intellectual disability, was unable to substantially appreciate the nature and quality or the wrongfulness of his acts.”

## **Conclusion**

There is no tragedy without hope. Individuals with AS and their families hope for a “normal” life, but they have great difficulties in achieving that dream. In part this is due not to the inherent nature of the disability, but the misunderstanding of the individual by those who cannot understand how a person with apparently normal intelligence could not appreciate the oddness, or the apparently deviant appearance of their behavior. There cannot be a more tragic example of this than the AS individual who, because of his greater skill and comfort and trust in the world of his computer and the internet, and because of his obliviousness to legally-created taboos, wanders into child pornography. He is a victim of a marketing scheme to which his disability makes him he most susceptible and he is at the same time most easily caught because of his naivete as to how his computer has been opened to the world. At that point he is exposed to criminal conviction and the harshest civil disabilities devised which can literally ruin his entire life.

While prosecutors and judges “have heard it all before” when it comes to people “excusing” misbehavior, including the possession of child pornography, the unique features predominant in AS, together with the backdrop of hysteria, sentiment, and fervor concerning child pornography, create a “perfect storm” in which AS individuals and their families are engulfed. This unique diagnosis calls upon prosecutors and courts to draw distinctions between dangerous and non-dangerous offenders and between those who may access offending depictions because they need to as opposed those who simply do not know better. Generally the AS individual should not be charged at all, it is totally unnecessary. If they are charged every effort should be expended to avoid civil disabilities or incarceration, and to insure treatment suitable to the AS diagnosis.

In order to avoid such “perfect storms” the “experts” and advocates in the field, trying to bring hope to these individuals, need to help inform the legislators, prosecutors, and judges, so that they can make informed decisions in this area so ripe for tragedy.

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