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The Asperger's Defence in Digital Child Pornography Investigations

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A diagnosis of Asperger's syndrome (AS), an autism spectrum disorder, has been used as a defence in several recent child pornography cases. The repetitive behaviours, unusual interests, and inappropriate social interactions consistent with AS have substantial overlap with the behaviours of child pornography offenders. The available literature on the similarities of AS behaviours with child pornography offender behaviour is reviewed, and a framework is presented for incorporating digital forensics results and subject interview questioning into the investigative analysis to prevent inappropriate ex post facto diagnosis of AS and its use as a criminal defence.

Key words: child pornography; Asperger's syndrome; diminished capacity.

Introduction

Asperger's syndrome (AS), a pervasive developmental disorder, was first characterized by Hans Asperger (Asperger, 1944) and Leo Kanner (Kanner, 1943), who described individuals presenting with social deficiencies and repetitive behaviours that impacted their functioning compared to a neurotypical population. AS was recognized as a distinct disorder in the fourth revision of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM–IV*; American Psychiatric Association, 1994), but has been controversially grouped as part of the more general autism spectrum disorder in the fifth revision (*DSM–V*; American Psychiatric Association, 2013). It is still considered a separate condition by the World Health Organization's International Classification of Diseases (ICD–10; Wing, Gould, & Gillberg, 2011). Since its initial characterization, AS has been found to be associated with criminal behaviour, especially violent behaviour, though a direct causal link has not been proven and the statistical evidence weak. Additionally, AS characteristics, including a lack of empathy, age-inappropriate behaviour, and poor understanding of societal norms, have been cited as contributing factors to crimes committed by those with AS (Browning & Caufield, 2011).

Not unexpectedly given its correlation with criminal behaviour, a diagnosis of AS has been used as a defence in recent cases globally involving child pornography. In several cases, the diagnosis was made after the indictment of the offender. In some cases the characteristics of the offence were used to meet the diagnostic criteria for AS.

- Jonathan Excell, a 25-year-old previously diagnosed with AS, was convicted of downloading thousands of images of child pornography, including images of babies engaged in sexual activity. Excell was originally sentenced to 7 months' incarceration, but

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the sentence was overturned on appeal due to Excell's AS. The appeal cited Excell's "tendency to become fixated on one subject" related to his disorder, and instead imposed a supervised release with restriction on computer use and contact with minors. (Torrie, 2010)

- Jeremey Gatton, 35, was convicted of the possession of child pornography that he acquired over the course of several years on peer-to-peer networks. Gatton was found when he posted questions regarding the sexual discipline of minors to a message board, and was found to have sexually explicit images of children as young as 4 on his home computer. Previously diagnosed with AS, Gatton had his sentence reduced because of his diagnosis. The judge noted that Gatton's intense focus on a subject "might very well explain the number of images" found on his computer. (McGlynn, 2009)
- Jonathan Bristow, 21, was convicted of eight counts of producing child pornography and three counts of possession. Bristow was caught after providing credit card information to a commercial website that sold child pornography. The defence noted Bristow had an AS diagnosis, which produced a tendency to "act on impulse and become obsessive about collecting things". Bristow was convicted and provided a reduced sentence, with the judge stating "Undoubtedly there is a contribution made by your Asperger's syndrome in the commission of these offences". (Court Reporter, 2008)
- G.H., a 33-year-old male, was convicted of sexual assault against his nine-year-old daughter and her peer. G. H. was caught producing child pornography of the children, and was subsequently diagnosed with both AS and paedophilia. When describing his behaviour, GH "spoke in a naïve, primitive manner, as if the content of his discussion and thereactions he expected from listeners were entirely neutral". Murrie et al. describe deficient empathy, social naivete, and sexual frustration in addition to "restricted, repetitive patterns of behavior, interests, and activities" associated with G.H. and other sexual offenders with AS. (Murrie, Warren, Kristiansson, & Dietz, 2002)

Those diagnosed with AS share several traits in common with child pornography offenders, and behaviours often found during digital forensic analysis such as the accumulation of large collections with a rigid taxonomy may be present in both groups. The overlap of the commission of child pornography offences and an AS diagnosis has not been adequately defined. While definitive research is not available, McWhaw found that three of out 63 offenders that were being treated at the Royal Ottawa Mental Health Centre and who commited online child pornography offences had been previously diagnosed with AS. While a small sample size (and not representative of the AS community at large), the percentage of offenders with AS was significant. (McWhaw, 2011)

In this article, we examine the legal basis for an AS defence, the common characteristics of AS and child pornography offenders, and a framework for investigators in adequately preparing for an AS defence.

The AS Defence – A Legal Perspective

Although mental illness may be present with those collecting child pornography (most commonly paedophilia), even a formal diagnosis of AS in an offender may not meet the threshold for use in court as part of an insanity defence. Under federal law in the United States, for example, the insanity defence is codified in 18 USC §17 as follows:

(a) **Affirmative defence.** It is an affirmative defence to a prosecution under any Federal statute that, at the time of

the commission of the acts constituting the offence, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defence.

(b) **Burden of proof.** The defendant has the burden of proving the defence of insanity by clear and convincing evidence.

The key element for AS in the above is the inability "to appreciate the nature and quality or the wrongfulness of his acts". While a formal diagnosis is neither necessary nor sufficient for an insanity defence, it is often used to buttress behavioural factors that may show that an individual with AS did not comprehend the wrongfulness of their acts. To be used as a defence, the AS behaviours particular to the individual have to be related to the elements of the criminal act – an individual that cannot understand personal property rights may still exhibit an understanding of age-appropriate sexual behaviour. A distinguishing characteristic of AS that differentiates it from other forms of autism is a lack of an intelligence deficit. As such, the lack of understanding would need to arise from a lack of social comprehension rather than a lack of general mental acuity.

In addition to its use as part of an insanity defence, AS has been used as a basis for a downward departure in sentencing under US Sentencing Guidelines (§5K2.13), which state:

> A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense. . . .
>
> For purposes of this policy statement –
>
> "Significantly reduced mental capacity" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

In US v. Lighthall (389 F 3d 791), the court found that the subject, Jason Lighthall, was guilty of possession and distribution of child pornography. While not diagnosed with AS, Lighthall's AS-like behaviour resulted in a downward departure from sentencing guidelines due to psychologists citing his "obsessive-compulsive disorder that's reflected in the perfectionist way that he went about collecting all of [his] erotica" and their noting that his "naiveté, immaturity concerning issues of sexuality, poor self-esteem, and poor social skills . . . contributed greatly to [his] retreat into the world of his computer as a . . . desperate effort to understand his emerging sexuality". Lighthall's psychologists based their opinions on self-reporting, and the government failed to provide contrary evidence beyond cross-examination.

In an unpublished child pornography case, US v. Dubin, Dr. Nicholas Dubin was convicted of possession of child pornography. Following evaluations by both private and government-appointed psychologists, the government recommended a sentence of probation, citing "In the instant case, consistent with Asperger's Syndrome, the Internet became a way to accomplish sexual gratification without suffering the laborious and uncomfortable contact with real people." The court agreed with the sentence, and Dr. Durbin wrote a book on his experience and the impact of AS on sexuality. (Atwood, Henault, & Dubin, 2014).

The Asperger's defence has been deemed insufficient in other child pornography cases. In US v. Lange (445 F 3d 983), the defendant, Glenn Lange, was convicted of possessing and distributing approximately 20,000 images of child pornography, including images of sadism, depicting children between five and

12 years of age. Lange told investigators that he had been "obsessed with child pornography" and admitted to sexual fantasies about a nine-year-old relative. Psychologists testified that Lange suffered from an AS-like disorder that "impaired his ability to control his compulsion to amass his large collection of child pornography". A government psychologist concluded that Lange's strong non-verbal communications skills and cognitive testing results were inconsistent with AS. The court upheld the sentence, concluding that this issue is not whether or not Lange "suffers from a defined disorder, but whether he was impaired in his ability to control his actions", which the defence was unable to show.

Based on the legal cases noted, investigators can obtain forensic information to address an AS defence prospectively. The expert information can include details on socialization, information on past mental health treatment, contemporaneous understanding by the offender of the nature of their actions, and consistency of the offence behaviours with common AS characteristics.

Behavioural Commonality

While collecting child pornography in and of itself is not a mental disorder (though there is some overlap between child pornographers and paedophilic disorder), the offender population has been researched well enough to establish certain common traits and behaviours. Several behavioural aspects associated with child pornography offenders have corollaries with those associated with those having AS. Insight into the commonalities that may be brought up by defence counsel can be found in the work of Mark Mahoney, who cites the following factors:

- Unbridled curiosity of AS individuals
- AS individuals' interest is not necessarily deviant
- Child pornography's mere existence on the internet sends the message of legality to the AS teen or young adult
- AS individuals' inability to intuit social mores and legal rules
- Empathic deficits
- Unless explicitly explained, AS individuals fail to see the harm in merely viewing or receiving child pornography
- Distinction between of-age and underage females is intentionally blurred by the media and pop culture and legal "adult" porn (Mahoney, 2009)

Because these factors are likely to be brought up in a court context as rationalizations for behaviour, they need to be further understood by forensic psychologists and others working with law enforcement to ensure that they are addressed as part of the investigative process.

The first common characteristic generally cited is a lack of victim empathy. Baron-Cohen presents the case of a 21-year-old who repeatedly assaulted his 71-year-old girlfriend. Baron-Cohen noted the inability of the offender to appreciate the mental states of his victims as a contributing factor (Baron-Cohen, 1988). A lack of victim empathy has similarly been shown to be present in Internet-based child offenders, though not to the same degree as contact offenders. Child pornographers will frequently rationalize that the minors being abused are enjoying the sexual activity to further their own fantasies about the depiction, though they have fewer cognitive distortions as a group than contact offenders (Elliott, Beech, Mandeville-Norden, & Hayes, 2009).

A second characteristic that is commonly attributed to both groups is a lack of intuition regarding social norms. Wing described AS offenders as follows:

> Some have a purely intellectual interest in the result of their crime and are coldly detached from the effects on the victims. In some cases there is an intellectual acknowledgement that the offence was wrong but no real comprehension of what this means in social and emotional terms – a state of mind that is difficult to describe in legal terms. (Hare et al., 1999)

Similar cognitive distortions have been applied to child pornographers. While there is a recognition that the act itself is illegal and

that there are social implications, many will self-justify their actions and show no emotional remorse, using rationalizations like "It must be OK it's all over the net" and "Child pornography is legal in some countries" (Burke, Sowerbutts, Blundell, & Sherry, 2002).

A third commonality found is the engagement in repetitive behaviour. AS has been associated with many repetitive behaviours, including the excessive viewing of and interest in pornography (Murrie, Warren, Kristiansson, & Dietz, 2002). Child pornographers have similarly shown not only an interest, but an excessive interest. Krone defines the secure collector typology and cites multiple instances where collections in the hundreds of thousands of images have been gathered over time (Krone, 2004).

There are definitive behavioural commonalities present between child pornography subjects and those diagnosed with AS, but this does not prove any causal relationship, and to date there has been no empirical evidence of causal actions.

Investigative Framework

Eliciting the behavioural factors associated with a child pornography offence through a subject interview and through digital forensics can assist in refuting a later AS defence claim. Investigators conducting a child-pornography-related inquiry can examine specific characteristics of the offender's actions related to the offence and collect information relevant to addressing a future AS defence. The goal of the investigative framework is not to assess whether or not a subject has AS, but to look at the actions taken by the subject at the time of the offence to gather evidence to address the legal criteria for a potential future diminished capacity argument related to an AS defence.

Investigative Interviews

The investigative interview of a child pornography offender is a chance to collect the most contemporaneous responses from the subject regarding their behaviour. The interview responses not only provide details about the crime itself, but can provide behavioural clues about the psychological state of the subject when they committed the act. Just as behavioural responses can be elicited to evaluate a subject's truthfulness, information about the subject's state of mind at the time of the offence can be obtained.

Investigative interviews are not mental health interviews, they are generally not performed by individuals with degrees in clinical and/or forensic psychology, and the end goal is not a diagnostic evaluation. Elements of clinical interviews can be incorporated, however, to form a better investigative assessment of behaviour. The Asperger Syndrome Diagnostic Interview (ASDI), for example, provides a 20-question structured interview with high success rates in diagnosing AS (Gillberg, Gillberg, Råstam, & Wentz, 2001), and similar elements can be incorporated into all parts of the investigative interview from general rapport building for assessing behaviour to fact particularization of elements of the offence. The application of each stage of a typical law enforcement interview to an AS evaluation in child pornography cases is noted below, and additional questions that can be incorporated are included.

Taylor et al. recommend choosing a neutral environment for potential AS subject, with no unnecessary distractions, which is consistent with the preferred environment for any subject interview. Additionally, they recommend the investigators employ a calm demeanour and understand that questions may require clarification. The investigators should show patience and not necessarily interpret behavioural observations as signs of deception (Taylor, Mesibov, & Debbaudt, 2009). Because the approach for subjects known a priori to have AS is consistent with general best practices for subject interviews, they can be incorporated as allowable by the case into all subject interviews in child pornography cases.

Generally, investigators present their credentials and introduce themselves at the start of an interview. As part of the introduction,

the investigator should extend to shake hands with the subject. While not all subjects will shake hands with an investigator (AS or not), if the subject looks confused at the gesture, uncomfortable with it, or has difficulty with the interaction it should be noted.

The introduction is followed by the rapport-building stage of an interview. Rapport building is used to baseline the behaviour of a subject and reduce their anxiety prior to engaging in direct questioning. The behavioural baselines are generally not noted in memoranda of interview by investigators, but can be noted by the investigator for future testimony as needed. Both typical and atypical responses should be noted. Specific behaviours related to AS that can be assessed include:

- *Eye contact*. It is customary to make eye contact (in most Western cultures), but not to have an unbreaking stare. Subjects with AS may have no eye contact or appear uncomfortable with normal period of eye contact.
- *Facial expressions and gestures*. The use of the hands to express concepts and the changing of facial expressions to match the topic is neurotypical. Additionally, some mirroring of the interviewer's expressions and tone should be expected. Subjects with AS may fail to change expressions (or change them inappropriately), use unusual gestures, and show no mirroring response.
- *Responsiveness to prompts*. Normal behavioural response to cues would include laughing at a joke, smiling or thanking a person when complimented, or asking "what's this about" when confronted by investigators. Subjects with AS may react unusually or not at all to standard social cues.

The investigator should spend additional time on the rapport stage in all child pornography cases, whether or not AS is suspected. Specific to AS, specific questions by the investigator can help address any past mental health encounters and to assess the social development of the subject related to child pornography. The rapport questions will lead directly into the main interview questions and should be directed at general areas – questions related to the specific offence will be asked following these. General questions to ask include the following:

- *Have you ever been diagnosed with a mental illness or seen a mental health professional?* While this question may seem direct, it can be incorporated into early questions regarding the interviewee's suitability for the interview, including questions about any prescription drugs they are presently on, any medical conditions they may have, or any other factors (such as proximal alcohol consumption) that would preclude an interview.
- *What types of social activities to you participate in?* This can be asked in the context of computer-related activities (e.g., "What types of things do you do on the Internet?"), or as a general rapport-building question. Details should be elicited for any response provided, including negative responses.
- *How do you generally communicate with your friends?* In addition to providing further details on a subject's social interactions, this question will provide digital forensics pointers to potential information of interest if the subject talks about electronic methods.

The general interview questions will be driven by the details of the offence, but specifics related to AS defences should be added to the questioning. The questions should focus on the age appropriateness of conduct, the subject's understanding of the illegality of their actions, and any steps taken to hide the offence. The investigator should ask the question "When looking at pornography online,

what age ranges do you look for?" Most subjects will provide an age range over 18 as their initial response. If they do so, the follow-up questions of "Have you ever looked for pornographic pictures of people under 18?" and "Why wouldn't you look for pictures of people under 18?" will provide behavioural prompts for the interview as well as provide the subject's understanding of their activities. If the subject indicates they would not search for people under 18 because it is illegal (or because it is wrong), that can be used later to refute a claim that they did not understand the wrongfulness of their behaviour. Any false statements on the part of the subject (e.g., that they never downloaded images of individuals under 18) can be documented as potential indicators of deception to hide behaviour they knew was wrong.

Other behavioural questions that require theory of mind interpretations of others can be effective in assessing AS also. Questions such as "Why would someone download child pornography?" can require the subject to put themselves inside the mind of another – something difficult for those with AS. Similarly, asking what the victims in the images are feeling can provide insight into the mental thought processes of the subject. While cognitive distortions may be present in non-AS subjects, those with AS are likely to have more difficulty in assigning any state to the depicted children (Heavey, Phillips, Baron-Cohen, & Rutter, 2000; Leslie, 1987).

The final stage in interviewing is generally the interrogation stage. In any subject, including those with AS, the interrogation should not be overly lengthy and should focus on themes that allow the investigator to bridge the cognitive dissonance between the subject's actions and their self-image. Counterintuitively, those with AS are likely to have less of a distance to bridge. AS subjects have been known to confess prior to interrogation in some cases. Investigators should avoid harsh tactics (a good practice for any subject) and pay particular attention to any alternative questions provided to the subject that may be misinterpreted by them in a desire to please and elicit false confession.

Digital Forensics

Digital forensics can provide indirect behavioural insight into the actions of an offender. Unlike interviews, most digital forensics work does not need to be contemporaneous with the offence – it can be performed at any point if the data were properly preserved. Digital forensics areas to focus on that can assist in combatting an AS defence are social interactions, countermeasures used, and activity timelines.

Social interactions are one of the key areas of differentiator between AS and other autism spectrum disorders. While those with AS may be characterized as aloof or may interact in odd ways, they will generally not disdain social interaction to the degree of other autism disorders. Examining the subject's emails and chat interactions may provide evidence of communications that are consistent with an AS diagnosis (such as one-way interactions), or it may provide contrary evidence based on advanced theory of mind interactions and numerous friendships discussing appropriate topics (Ghaziuddin, 2008).

Child pornographers may communicate via instant messages, chat rooms, emails, or forum postings. Records of these interactions are frequently obtained during a digital forensics examination. There are a few key areas that investigators should pay particular attention to if an AS defence is expected. Specifically:

- *Quality and quantity of engagements*. Individuals with AS are likely to have differing engagements with other individuals. The interactions may be more likely to be more professional in nature, or to be topic-oriented (e.g., as part of a special interest forum). While not an absolute, the quantity and nature of the interactions can provide context to other factors.

- *Compartmentalization*. Subjects claiming to have a circumscribed interest in child pornography and suffering from AS are not likely to compartmentalize that interest to the level of other child pornographers. Child pornographers without AS are aware of the likely social response to their actions and will not discuss child pornography with other nonoffenders in general interactions. Those with AS may discuss the issue more broadly or may discuss other unrelated interests with those seeing to trade child pornography.
- *Impersonation*. Effective impersonation requires an individual be able to understand how another individual would respond in a particular situation as well as to engage in a level of pretend behaviour that is difficult for those with AS. Subjects who have multiple personas with individual backstories or those who target minors in chat rooms pretending to be a peer have behaviour inconsistent with that of most individuals diagnosed with AS.

Because the analysis of communications can be performed at a slower pace, investigators are encouraged to consult with a forensic psychologist as part of their examination.

Computer users implement countermeasures for two reasons – to protect their computers and the associated data and to hide their actions. Implementing the first type of countermeasure, which includes things like installing antivirus software and backing up files, is not behaviourally interesting. The second type, however, indicates that an individual has the presence of mind to understand that their actions are wrong and to take active steps to conceal them from others. Actions of interest include:

- *Selective encryption*. Using encryption in general is not of interest, but exclusively encrypting images and movies containing child pornography shows that the subject differentiates that content from other content.
- *Selective in-private browsing*. In-private browsing (and other private browsing modes) were created to limit the evidence of a web session by keeping the sites visited out of the Internet history and cache files. Use of these features exclusively when viewing child pornographic material and not other content is consistent with knowledge that the material is unacceptable.
- *Content renaming*. Hiding child pornography under innocuous file and folder names is a way of keeping other individuals from finding it. Naming other files accurately differentiates the child pornography as something to be ashamed of or to be hidden from view to avoid legal repercussions.

All of the above, and other evidence of counterforensics measures, are steps taken by an individual who knows that their activities are inappropriate and recognizes that there are consequences if their actions are uncovered. This is inconsistent with AS behaviours and shows mens rea necessary for criminal intent.

Finally, the creation of forensic timelines of activity can provide context for any child pornography identified. Timelines allow digital forensic analysts that ability to show how an individual came upon illicit material (e.g., what search terms were used), how the material was viewed or acquired, and any subsequent actions taken. In the metatimeline case, showing that an individual only browses child pornography when they are alone or unlikely to be detected shows a deep understanding of legal and social custom that may not be present in those with AS.

Conclusions

Mental illness is a serious issue, but is not a catch-all that excuses criminal conduct. In one illustrative case, a 51-year-old was charged with downloading child pornography

following neurosurgery to control epilepsy. The surgery caused damage to the amygdala, resulting in Klüver–Bucy syndrome and associated hypersexuality. The subject readily admitted to downloading the material when confronted by law enforcement and had prominent neurologists testify to his inability to control his impulses following his surgery. There was no evidence of similar behaviour prior to the surgery. The court ultimately convicted the subject, based in part on his viewing patterns. No child pornography was found on his work computer, and the court found that, if the subject had sufficient impulse control to not view child pornography at work, he exhibited the requisite knowledge that his activities were unacceptable and that he could control them to some degree when required (Devinsky, Sacks, & Devinsky, 2010). Though not an AS patient, the same principles applied by the court should be applied by the prosecution when confronting an AS defence.

Individuals with AS have included Nobel laureates, Pulitzer Prize winners, and Fortune 500 chief executive officers (CEOs). The use of Asperger's syndrome as an excuse for criminal conduct does a disservice to all of the law-abiding individuals with AS in the community and represents a misapplication of psychology. By conducting a thorough investigation, with sensitivity to the potential of an AS defence being raised, the investigative team can head off the use of a postoffence diagnosis as a mitigating factor for the conduct.

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