Principles for Prosecutors Considering Child Pornography Charges Against People with Asperger Profiles

Position paper from a number of Autism research and support organizations

ARTICLE

Preface

Among the difficulties faced by young persons afflicted with Asperger's Syndrome (AS) and their families is the misinterpretation of the atypical behavior of the AS patient as dangerous and criminal. AS, defined in DSM-IV, is an "Autism Spectrum Disorder" (ASD) typified by extreme social and emotional immaturity, the inability to "read" others or respond appropriately in social settings, lack of intuitive awareness of social/moral/legal constraints, and intense and narrowly directed repetitive activities. These features combine to create a risk of engaging in behavior offensive toward others but with no offensive purpose. These individuals tend to have the technical skills for computer use, to which they gravitate because, unlike social interactions which are unpredictable, whimsical, and semantic-guided, computers are predictable, logical, and syntax-guided. 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. Accessing child pornography is not currently known to be a frequent behavior of young persons with AS, but enough cases have arisen to demonstrate the need for prosecutors to inform themselves of the condition and adopt a policy of restraint in the investigation and prosecution of such cases. Given the lack of social adaptation on the part of AS patients, interest in pornography as a means to explore ideas of sexuality and romance is expected.

The exploration of this material on the internet or peer-to-peer networks will expose AS patients to child pornography which may arouse their curiosity. At these times AS is directly involved in the individual's obliviousness to the social and legal taboos surrounding child pornography, and the inability to intuit that the visual depictions are the product of any kind of abusive relationships. This behavior is not predictive of future involvement with child pornography or offenses against children. There is nothing inherent in Autism Spectrum Disorders, such as Asperger's, to make individuals inclined to sexual deviance of any kind. Their apparently deviant behavior is perhaps best understood within the diagnosis of "counterfeit deviance," as defined in the DM-ID. ("Diagnostic Manual — Intellectual Disability (DM-ID): A Textbook of Diagnosis of Mental Disorders in Persons with Intellectual Disability") Persons with AS are far less likely to be predators than victims, because of their naivete and ineptness in interpreting or deflecting the advances of others, and their inability to initiate social contact with others or effectively direct or manipulate any social encounter.

Asperger's Syndrome is a lifelong disability which on its own creates substantial hurdles for the patient. Criminal prosecution, conviction and the typical sanctions imposed in such cases are not necessary to protect the public in the case of an AS patient, but they are imponderably harsh, cruel and debilitating to persons with AS and their families on whom they are dependent. Generally these individuals are not a threat to society: it's the other way around. AS patients are frequently the target of abuses, such as bullying, often from poorly chosen "friends."

With this in mind, we suggest that prosecutors adopt the following principles when confronted with those who suffer from Asperger's Syndrome are found to be involved with child pornography.

Principles

1.
Young persons with Asperger's Syndrome (AS), despite average or higher intelligence and academic performance, have the social and emotional skills of children well below their own chronological age, and well below the minimum age for criminal prosecution in federal and state courts. AS individuals are neurologically impaired in their ability to appreciate the social/moral/legal unacceptability of their conduct or to intuit why the conduct is unacceptable; these are capabilities which state legislators and Congress presumed to inhere in the general population to whom the criminal laws apply.
2.
In an interrogation setting the AS individuals may appear deceptive because of deficits in communication skills, such as the inability to make normal eye contact. At the same time they may in fact be over compliant with suggestions made by police officers. AS impairs the ability of offenders to respond with expressions of remorse to which prosecutors and judges typically look for reassurance in considering alternate dispositions of criminal matters.
3.
AS is not a condition related to any sexual paraphilia (e.g. pedophilia) and is not a precursor thereto. Usually little more than giving explicit instructions is needed to prevent recurrence of the behavior. As persons with AS age, they may become better adapted and may present different behaviors than in their youth.
4.
Prosecutors should take AS into account in determining whether to target, prosecute or seek a conviction in an apparent case of possession of child pornography.
5.
Persons with AS experience lifelong difficulties. Young persons with AS are not able to live independently, and need to live with their families – their parents and siblings. Therefore the sex offender registration and residency restrictions arising from a child pornography conviction would have a cumulative and disastrous effect in these cases, and on more uninvolved person, than in other cases involving neuro-typical adults.
6.
Prosecutors should be encouraged to defer criminal prosecution in cases involving young first offenders with AS who have no history of directly offending against children, or having produced or distributed child pornography, no clinical indications of pedophilia (other than accessing child pornography) , nor history of prior offenses involving child pornography.
7.
Prosecutors should encourage therapeutic intervention in cases of suspected child pornography use by such individuals, and utilize probationary periods and deferred prosecutions to monitor compliance before considering actual prosecutions in such cases.
8.
The Department of Justice and state prosecutors should keep data on the incidence of criminal investigations involving persons with AS and the manner in which such cases are resolved.
9.
Expert AS resources should be sought out in local communities to assist law enforcement officers and prosecutors in understanding AS and evaluating the appropriateness of such cases for prosecution.

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