

Autism Spectrum Disorders and Psychopathy: Clinical and Criminal Justice Considerations

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This paper acts as a corrective to Fitzgerald (2011), which conflated autistic disorder with Asperger's disorder when exploring the small portion of this population that engages in serious criminal activities. Fitzgerald suggested that autistic psychopathy and Asperger's syndrome are one and the same and implied that individuals on the autism spectrum are likely to exhibit psychopathic behavior and commit antisocial criminal activities. We expand upon and modify Fitzgerald's work, distinguishing between autism spectrum disorders (ASD) and psychopathy. We assert that individuals with ASD do not perform acts with the same malice, intent, and deception as psychopaths. Our ultimate goal in the paper is to provide possible future direction for research in the issue of criminality in individuals diagnosed with ASD.

Key words: Asperger's, Autism, Autism Spectrum Disorders, Clinical Treatment, Communication Disorders, Criminal Behavior, Criminal Justice, Comorbidity, Psychopathy

Introduction

Recently, Fitzgerald (2011) focused on the diagnosis and treatment considerations for a specific subset of this population: ASD individuals who also feature psychopathic behavior. Our goal in this paper is to provide a counterpoint to Fitzgerald's work and offer additional, clarifying information for those who seek to treat this subset of a particularly vulnerable and often misunderstood population.

Fitzgerald (2011) used the terms autism and Asperger's interchangeably. However, from the beginning, autism and Asperger's have been considered two distinct disorders, and the DSM-IV-TR clearly distinguishes autism from Asperger's due to a lack of delay in early language development in the Asperger's population (American Psychiatric Association, 2000). These distinctions remain even as the DSM-5 combines various developmental disorders into a single category, autism spectrum disorders, comprising the previous DSM-IV autistic disorder, Asperger's disorder, childhood disintegrative disorder, and pervasive developmental disorder (American Psychiatric Association, 2013). The distinction is, however, removed for people with high functioning autism, a subset of the ASD population. In fact, the DSM-5 also features a separate diagnostic category for children with communicative disabilities who do not have the repetitive behavioral aspects of autism (American Psychiatric Association, 2013). Nevertheless, quantitative distinctions remain between Asperger's patients and most of the ASD community.

A review of 125 studies comparing Asperger's and ASD found that 95 of these studies "found quantitative and qualitative differences between" these conditions (Tsai and Ghaziuddin, 2014); therefore, there is strong and recent evidence that it is necessary for researchers to maintain these distinctions.

Central to Fitzgerald (2011) was the argument that "Hans Asperger's autistic psychopathy be retained for persons with autism who engage in serious criminal activity" (p. 301). Aside from failing to describe "serious criminal activity," Fitzgerald also neglected to discuss behaviors distinguishing (a) psychopathic and autism spectrum individuals, (b) points of co-morbidity where autistic individuals may also be psychopathic and how to identify these persons, (c) how the patterns of criminal activities

differ between these groups, and (d) clinical criteria in a criminal justice setting for diagnosing individuals who manifest autism spectrum disorders. We attempt to overcome these omissions. We do so, in part, because recent work (Felder, 2014, p. 404) showed that when tested, Asperger's patients are not generally diagnosed with psychopathy although some do score higher on some, but not all, of the facets of the psychopathy checklist. Thus, it cannot be said that comorbidity between these disorders is the norm or that it should be expected.

Literature Review

Distinguishing between ASDs and Psychopathy

Fitzgerald (2011) relied on Asperger's findings from 1944. Asperger, a pediatrician in Vienna, described what he called "autistic psychopathy in childhood" (Wolff, 2004). To summarize, Asperger found that these children were intelligent and highly sensitive to their own feelings while disconnected from the emotional states of others. They were also very gifted in mathematics but had isolated niche interests and had trouble with physical coordination. Moreover, Asperger presented patients who he considered to be less sensitive to emotions and more rational; handicapped by an inability to feel what others feel, Asperger's patients are compelled to interpret everything literally. Given the passage of time and additional research done on autism spectrum disorders since Asperger, it is worthwhile to put these findings into proper perspective.

Firstly, Fitzgerald (2011) relied heavily on Asperger's theory of autistic psychopathy in his discussion of dangerousness and propensity for criminal action in individuals with autism/Asperger. Fitzgerald (2011) noted that while the majority of the autistic population is not prone to criminality, a small subset—those with autistic psychopathy or Asperger's syndrome (Fitzgerald conflates the two)—tend to have morbid pre-occupations with chemistry, specifically poisons and homicide via the same, while demonstrating a set of callous-unemotional behavioral traits that predict future offenses.

We contend, on the contrary, that Asperger's autistic psychopathy diagnosis be discarded as excessively broad and imprecise. This conclusion

is buttressed by the fact that Miller and Ozonoff (1997) reexamined the autistic psychopathy cases described by Asperger (1944) and found that the diagnostic criterion that applies to them is actually autism disorder, in that each of these children demonstrated at least six symptoms of autism as per the DSM-IV. Additionally, Miller and Ozonoff (1997) had seven professionals independently evaluate the case files at hand and all seven found that autism would be the proper diagnosis.

Indeed, further examination of Asperger's work has demonstrated that the intention to do ill to others was not common to the majority of his patients. Hippler and Klicpera (2003) examined 74 files in Dr. Asperger's career (including the works of his protégé Dr. Kusen and his colleague Dr. Wurst, and spanning several institutions throughout Austria), with 46 of those files being sufficiently detailed to permit full examination. Hippler and Klicpera (2003, p. 294) concluded that seven of those forty-six cases exhibited "autistic malice," whereby they engaged in "intentional acts of malice, with malicious pleasure and apparent pride in what they had done." In later work, Hippler, Viding, Klicpera and Happe (2010), noted that in examining the records of 177 patients diagnosed with autistic psychopathy, they found that only eight patients in this sample sustained subsequent criminal convictions. This minority is an insufficient basis for the broad generalizations put forth by Fitzgerald (2011), who wrote that it is "critical that psychiatrists keep dangerousness in mind when assessing persons with autism and Asperger's syndrome."

In addition, Fitzgerald wrongly ascribes callousness to persons with Asperger's Syndrome. As van Krevelen (1971) noted, Asperger's individuals have no intuitive grasp of social situations. Specifically, they have a great deal of trouble understanding how others perceive and react to them. They also have problems with relating to and understanding others. In his article, van Krevelen (1971) describes patients who want to be able to relate to others and want to be able to participate in relationships as peers but are unable to do so. Van Krevelen (1971) cites a patient who asked for a list of topics that he could talk about in social situations. The patient wanted to engage in conversation. However, the patient had no intuitive grasp of how to handle a spontaneous conversation.

Contrast this desire to engage, a desire which may, depending on the

degree of impairment, yield intermittent results, with those of psychopaths, who may not feel empathy. Convicted killer Jack Abbot, a psychopathic inmate, verbalized this concept in his famous statement: “I can imagine I feel these emotions but I do not” (Raine & Sanmartin, 2001, p. 21). By contrast, an individual on the autism spectrum may sincerely try to engage on an emotional level while remaining unable to do so, an inversion of Abbot’s manipulative approach.

In their study of 96 boys between 9 and 16 years of age, Jones, Happe, Gilbert, et al. (2010) also make distinctions between autism and psychopathy in terms of empathy and emotional development, focusing on empathy dysfunction. This distinction is further supported by Lockwood, Bird, Bridge, and Viding (2013), who studied one hundred and ten adults and note that “psychopathy appears characterized by problems with resonating with others’ emotions,” while “ASD appears characterized by problems with cognitive perspective-taking.”

This divergence between a sincere desire for social bonding in individuals with Asperger’s Disorder versus disinterest in socialization in psychopathic patients is often seen in treatment programs. While Asperger’s patients can make genuine progress within a carefully designed and implemented cognitive behavioral intervention program aimed at enhancing social reciprocity skills (e.g., Baron-Cohen, Golan, & Ashwin, 2009; Bauminger, 2002), psychopathic individuals placed in cognitive behavioral intervention programs show both less improvement and less motivation and thus fail at such programs at high rates (e.g., Ogloff, Wong, & Greenwood, 1990).

Jones, Happe, Gilbert, et al. (2010) studied four groups of boys and looked at factors such as dysfunctional affective apathy and cognitive perspective taking disabilities. Their findings determined that boys representing psychopathic traits were less likely to recognize “distress cues” such as sadness and fear in others (Blair, 1999) than the comparison group of boys. However, boys with psychopathic personalities did not vary significantly on distress cues from the comparison group on tasks that required cognitive perspective taking abilities. In contrast to the group of boys with psychopathic tendencies, those with ASD reported a greater degree of emotional experiences and victim empathy. However, the ASD group lacked cognitive perspective taking abilities when measured against a

control group.

Others (e.g., Wahlund and Kristiansson, 2006), have also remarked on the problems individuals on the ASD spectrum have with respect to perspective taking and have proposed that this problem with seeing the perspectives of others leads ASD individuals to have a lack of empathy for the positions and needs of others.

Incarceration in the criminal justice system is frequently justified as society's revenge for the harm an individual has caused. However, persons with ASD who lack the ability to comprehend others' perceptions cannot understand why they are being punished. Thus, the principle of retribution is lost on the prisoner with ASD. Further, if autistic persons handle frustrations in a manner that makes sense to them (though it may cause harm to others) they clearly will not understand the connection between their acts and being sent to prison. Consequently, the goal of exacting retribution from an offender through incarceration is ineffectual.

Deterrence, another goal of the criminal justice system, is likewise difficult to achieve with an ASD offender. After all, deterrence requires that a person (a) know why he or she is incarcerated, (b) know that the act was objectively wrong by society's standards and (c) make the connection between social reprobation and incarceration. Expecting an ASD offender who has issues with perspective taking to make these cognitive connections is generally unrealistic.

Additionally it should be noted that the nature of a prison is confrontational, not therapeutic. Prisons are not places where a person with ASD can "let down their guard" and begin to learn new ways of acting in the society to which they will eventually be released. In order to truly help those with ASD who have been incarcerated to avoid becoming involved again with the criminal justice system or becoming co-conspirators and victims of stronger and more criminalistic individuals, their diagnosis must be fully understood by those treating them. To provide the utmost therapy necessary to change criminal behavior by those with ASD, inmates with ASD should be placed in the least restrictive environment possible, offering protection from fears about being injured or killed while incarcerated. They must also receive treatment and instruction by experts in the ASD field, with the understanding that the factors that make up their disabilities cannot

easily be changed.

Furthermore, while it is possible that individuals on the autism spectrum may have comorbid psychopathy, relatively little literature on this phenomenon exists. The literature that does exist largely demonstrates that individuals with autism or Asperger's who are also diagnosed with another psychiatric disorder are more likely to commit a violent crime; however, said literature does not establish frequent comorbidity between ASD and psychopathy. In their study, Newman and Ghaziuddin (2008) followed up on Ghaziuddin, Tsai, and Ghaziuddin (1991), who found that individuals with Asperger's were no more likely to commit violent crime than persons in the general population. Newman and Ghaziuddin (2008) found that of the 37 cases they reviewed where an individual with Asperger's syndrome committed a violent crime, 11 of those individuals (29.7%) had a definite psychiatric condition comorbid with Asperger's and a further 20 (54%) had a probable psychiatric condition, leaving six (16.2%) cases where an individual with Asperger's committed a violent crime without the probability of a psychiatric comorbidity. Among the most common psychiatric conditions that these individuals had comorbid with Asperger's disorder were ADHD and major depression; none were diagnosed with comorbid psychopathy.

Furthermore, de la Cuesta (2010) found that autistic patients with comorbid psychiatric conditions such as depression and psychosis may be more at risk for committing crimes. However, de la Cuesta emphasizes that it is difficult to prove that individuals on the ASD spectrum in general are inherently more likely to commit crimes.

There is little in the literature to support the conclusions of Fitzgerald. The closest might be Lester and White (2011). Lester and White argue that a subset of criminals in their study—individuals who engage in necrophilia—“might” be individuals with Asperger's syndrome. Lester and White describe individuals with Asperger's syndrome as being characterized by a lack of empathy and having “perverse interests.” It should be noted that Lester and White do not clarify whether these persons truly lack empathy or whether they lack the ability to display empathy. Furthermore, the individuals studied by Lester and White were often abused in childhood, an issue which complicates efforts to connect Asperger's syndrome with a lack

of empathy or with sexual deviance.

Contradicting Ghaziuddin et al. (1991), who studied a small sample of case studies and found there was no association between autism spectrum disorder and violent behavior, Scragg and Shah (1994) concluded that there may be a slight association between ASD and violent behavior. However, research does not bear out the proposition that there is a large and definitive link between Asperger's and psychopathy or violent behavior.

Representative of work in this area is the study of Langstrom et al. (2009), which examined risk factors in offenders with autistic spectrum disorder in a national study of hospitalized individuals in Sweden. The authors' data set included every individual over the age of 15 who was discharged with a principal diagnosis of a psychiatric disorder between 1988 and 2000. This population included but was not limited to ASD and Asperger's patients. Langstrom et al.'s findings indicated that only 7% of individuals with ASD committed violent crimes. This finding is higher, in terms of percentage, than the findings of prior researchers—for instance, Scragg and Shah (1994) found that only 1.5% of violent offenders were diagnosed with ASD—six in all—but this larger statistical finding may be due to a skewed sample that included only those who were hospitalized and diagnosed with a psychiatric disorder, a population that cannot be said to represent all ASD or Asperger's patients. We also do not know how these hospitalizations came about; issues other than the principal diagnosis may have been factors. In sum, these findings do not point to any evidence that people with ASD are inherently more likely to act in a violent manner: the findings simply indicate that these individuals may be more likely to be committed to a mental health facility if there is an underlying mental health need.

Malice, Dangerousness, and Deception: ASD versus Psychopathy

In addition to the differences between ASD and psychopathic individuals in emotional bonding capability and desire to connect with others, we wish to discuss three other areas of divergence between these two populations, which Fitzgerald (2011) ignored. These areas of divergence are relative degrees of malice, type of dangerousness and level, and type of deception.

In describing autistic psychopaths, Fitzgerald (2011, p. 301) cautions that these individuals “show gross lack of empathy, [and] are dangerously

perverse,” and later relies on Asperger (1944) to state that this subset commits “autistic acts of malice” with elements of calculation. In a legal sense, malice refers to a wrongful act done with intention (Black, 2009). However, when translating Asperger’s work from the original German, Frith (1991) cautioned that although the behavior of Asperger’s patients may have been deemed malicious, malice was not the intent: rather, Frith suggests that these children found emotional states difficult to navigate and wanted to provoke a definitive emotional response that they could feel confident about interpreting.

In addition, it is important to recognize the types of violent behavior that ASD individuals are most likely to present. In their work, Farmer and Aman (2011) used the Children's Scale for Hostility and Aggression: Reactive/Proactive (C-SHARP) scale, which they developed in 2009, to identify subscales of specific types of aggression. Farmer and Aman (2011) note the difficulty in assigning intent to the behaviors of those on the autism spectrum. ASD children far outscored their peers with other intellectual developmental disabilities on subscales centering on behaviors that were reactive and impulsive: In fact, in the category “reacts impulsively,” 70.1% of the ASD participants were rated as moderate or severe. By contrast, the ASD group scored low on subscales that would indicate malice: only 5.0% of the ASD participants were rated as moderate or severe in the “insults behind back” category, versus 14.1% in “insults others to face.” Likewise, only 8.2% were found to be in the moderate or severe category when it came to baiting others, and only 2.5% encouraged others to gang up on a target.

As far as we know, relatively little work has applied this scale to adults, and no work has been done contrasting ASD children with typically developing ones on the C-SHARP scale. In addition, to our knowledge there is no work comparing adult psychopaths with typically developing adults and ASD adults—all studies that should be undertaken. Nevertheless, we can say with some confidence that a key distinction between the ASD population and the psychopathic population is malice and ill will. Specifically, the maliciousness that is the hallmark of a psychopath (Kendler, 1985) is often absent from the behavior of an individual on the autism spectrum.

Fitzgerald (2011, p. 301), claimed that autistic psychopaths are “extremely bored by the activities of children in the schoolyard and are therefore often excluded and bullied”; however, Jobe and Williams-White (2007) studied ASD individuals and concluded that these persons may experience social isolation, be aware of their isolation, and know that it results from their lack of social skills. Thus, ASD individuals do not seek out social isolation as a matter of free choice.

This distinction could be used in therapy to separate the psychopathic subgroup from the autistic population, perhaps by simply inquiring whether an individual feels alone and if so, why. Non-verbal autistic individuals can also be assessed: Georgescu, Kuzmanovic, Roth, Bente, and Vogeley (2014) have had success using virtual characters, embedded in virtual reality environments, to help non-verbal autistic individuals communicate their emotions and perceptions. We most strenuously disagree with the suggestion of Fitzgerald (2011, p. 302) that “psychiatrists keep dangerousness in mind when assessing persons with autism and Asperger’s Syndrome” and propose instead that psychiatrists make an effort to distinguish between malicious misconduct and misconduct that arises from a misunderstanding of social cues. In so doing, it is important to keep in mind that those on the ASD scale do not share typically developing adults’ recognition of actions considered to be misbehavior.

We do not dispute that ASD individuals can be dangerous. Farmer and Aman (2011) chronicle a host of problematic and dangerous or potentially dangerous behaviors in children with ASD such as shoving, pushing, throwing objects, and breaking objects. We do not wish to minimize the danger some ASD individuals can create; rather, our goal is to attempt to quantify the dangers that can be posed by the ASD population in the context of their interactions with the criminal justice system. While science has come a long way since recommending electric shock as a form of punishment for autistic children who misbehave (Risley, 1968), understanding and managing the dangers of autism continues to be a challenge for clinicians, family members, and the community around autistic individuals. In this respect, Fitzgerald (2011) was on solid ground in quoting the work of Dr. Asperger. Miller and Ozonoff (1997) detail children’s acts that Asperger considered psychopathic, including aggression,

attacks, and a lack of concern with social mores. However, we must caution clinicians that these descriptions should be considered in light of Asperger's differentiation between autistic psychopaths, who in his opinion retained the ability (and presumably the desire) to forge genuine interpersonal relationships, and the classical schizophrenic psychotic individuals who lacked this ability (Hippler & Klicpera, 2003).

In our opinion, this distinction also operates to distinguish the types of dangerous behaviors that autistic individuals present. Such individuals often find it difficult to control undesirable behaviors not because they do not want to, but because they do not recognize the behaviors as inappropriate. Kibbie (2012) refers to this inability as mindblindness: a deficiency in understanding another's mental state. As studies by Schilling and Schwartz (2004), Foxx and Meindl (2007), and others have shown in a variety of contexts, once autistic individuals are alerted to how their behavior is perceived by others and therapy is undertaken, they often display genuine and lasting change. This response contrasts with that of many psychopathic persons who, in treatment, often appear more focused on mimicking responsiveness than on substantive change (Ogloff, Wong, & Greenwood, 1990) and for whom treatment efforts may in fact have a negative effect (Salekin, 2002). From this perspective, those who present on the autism spectrum pose a very different type of danger than those deemed psychopathic.

Indeed, psychopaths are known for their propensity to deceive. These deceptions may be self-serving, and may include the denial of culpability in criminal acts (Porter & Woodworth, 2007) or attempts to gain favorable treatment within the justice system (Rogers & Cruise, 2000). Some psychopathic individuals practice deception for no reason other than sheer enjoyment (Rieber & Vetter, 1994). Indeed, psychopathic individuals are known for being able to deceive others while maintaining an aura of sincerity; this is sometimes accomplished through speech ploys, as psychopaths modulate their voices in order to control and manipulate interactions (Louth, Williamson, Alpert, Pouget & Hare, 1998).

Fitzgerald (2011) seemed to argue against what he perceives as the notion that individuals with Asperger's cannot lie. Neither we, nor the applicable literature makes such a claim. Instead, we wish to call attention to the

fact that the lies of ASD individuals and psychopaths are fundamentally different in nature. Rather than being sly and deceptive, Asperger's individuals are often considered downright rude in their forthrightness (Alpern & Zager, 2007). This is a key distinction and it is likely rooted in a fundamental divergence between ASD individuals and psychopathic ones—the difference between having the ability to empathize and having the ability to display that empathy. Psychopathic individuals have the ability to understand the thoughts of others, in that they are capable of cognitively discerning what empathy is; however, they consciously choose not to express this recognition on an affective level. (Dadds, Hawes, Frost, Vasallo, Bunn, Hunter, et al., 2009). Conversely those with autism lack the cognitive ability to recognize situations that necessitate empathy and are therefore less likely to display affective empathy (Hansman-Wijnands & Hummelen, 2006).

Perhaps more importantly, research has also made note of the pronounced difficulty autistic individuals have with lying in the first place; not only does this population have trouble telling lies, they also have difficulties grasping when they are being lied to (Lantz, 2002). Bowler and Worley (1994) found that those with Asperger's, like autistic individuals, had a great deal of difficulty noticing deception. In contrast, psychopaths have a keen grasp of the mental states of others, which allows them to both lie with ease as well as detect when others lie to them (Blair et al. 1996). This is a key distinction between the two groups.

A psychopathic individual typically understands how he or she has affected his or her victim. In fact, those with psychopathy often excel in selecting the most vulnerable victim. In one study by Wheeler, Book, and Costello (2009), psychopaths were able to choose which passerby would be easiest to assault, simply by observing their gait. Additionally, the subset of psychopaths who engage in criminal behavior often consider the emotional response of the victim to be one of the most enjoyable parts of the process of victimization, with the awareness of the pain caused being a source of stimulation rather than regret (Murphy & Vess, 2003). Even when not deriving such joy, psychopathic people on the whole are aware of the damage they cause and use various strategies, such as narcissism, to demonstrate how little they care for the feelings of their victims (Murphy &

Vess, 2003).

As studies (Blair, 1999[a]; Blair, Colledge, Murphy, & Mitchell, 2001; Blair et al., 2004) have shown, psychopathic individuals have a difficult time emotionally responding to distress cues from a victim. They are unable to recognize these cues (Blair et al., 2004). However, they are unimpaired in responding to and expressing their own distress (Murphy & Vess, 2003). In contrast, autistic individuals are unimpaired in responding to distress cues, although they are hypo responsive to threatening stimuli directed at them (Blair 1999[b]). This difference in response suggests that autistic persons are not, as a whole, psychopathic. In fact, we would go so far as to say that autistic individuals, in the absence of callous and unemotional traits, are more concerned about the welfare of others than they are about themselves, but lack the means to convey this concern. We base this on the work of Markram, Rinaldi, and Markram (2007), who argued that autistic individuals are in fact highly empathic but experience sensory overload when feeling this way and are thus inhibited from expressing their feelings.

Autism Spectrum Disorders and Criminal Activities

Some contend that individuals with autism spectrum disorders are overrepresented in the criminal justice system (Haskins & Silva, 2006). This view is by no means universal; King and Murphy (2014) argue that “people with ASD do not seem to be disproportionately over-represented in the CJS [criminal justice system], though they commit a range of crimes and seem to have a number of predisposing features.” However, an examination of the criminal activities in which autism spectrum individuals are often involved remains important. Since men are five times more likely than women to be diagnosed with autism spectrum disorders (Haskins & Silva, 2006) and men are also overrepresented in the criminal justice system by a factor of 15, with incarceration rates of 58 per 100,000 women and 896 per 100,000 men (Covington & Bloom, 2003, p. 1), it is highly likely that the disparity in incarceration rates between genders is also, to some degree, responsible for the relative prevalence of individuals with autism spectrum diagnoses in the justice system. A longitudinal study could investigate the statistical correlation between these factors in the context of examining how autism spectrum disordered individuals are treated by the justice system.

In their work, Haskins and Silva (2006) distinguish between individuals with autism and those with Asperger's on the grounds that the latter group is viewed as being high functioning on the Autism Spectrum Disorders Scale. In the view of Haskins and Silva, autistic individuals do not seek out social contact in the way that high functioning individuals do; thus, high functioning individuals, who still possess social deficits, are at a greater risk of entanglement in the criminal justice system by virtue of greater exposure to unstructured social situations. We agree with this view: individuals who are higher functioning (e.g., Klin, 2000) may desire to engage in the world but lack the full set of skills necessary to do so successfully.

More and more American jurisdictions have begun to recognize the extenuating circumstances of autism, Asperger's, and related ASD conditions, in both sentencing and trial phases. For example, in *State of New Jersey v. Burr* (2008), the New Jersey Supreme Court decided that a criminal defendant should be retried, partly because the defendant was not allowed to introduce evidence of Asperger's syndrome in order to explain his actions at his first trial. To explain these issues, many defendants turn to mental health professionals who may be able to evaluate them and assist in their defense.

Mens Rea

The intention to commit a crime, or *mens rea*, from the Latin for "guilty mind," is an essential component of any finding of criminal responsibility, and has long been required to hold someone accountable for conduct (Bowes Sayre, 1932). The issue of determining a defendant's state of mind has long posed a quandary for the criminal justice system (Bowes Sayre, 1932). This issue has arisen repeatedly with respect to individuals with Asperger's syndrome and those who are on the autism spectrum.

Recent research (Kibbie, 2012) takes a different tack from Fitzgerald (2011), claiming that the disorder itself may lead an individual with Asperger's syndrome to be more vulnerable to committing a crime. The description of Asperger (1944) relied upon by Fitzgerald (2011) is greatly expanded upon by Kibbie (2012). While Fitzgerald (2011) used phrases such as "inveterate liar," supporting this appellation by claiming to have seen "them" (presumably Asperger's patients, but Fitzgerald is not clear on this)

make “false accusations” (no specifics or examples are provided) against their parents, Kibbie (2012) is far more precise in describing the type of deception that an individual with Asperger’s may employ. Specifically, Kibbie (2012) writes that when an individual with Asperger’s lies, it is often out of shame or fear of ridicule if his or her mistakes are exposed. Kibbie does not claim that these persons are successful liars: If anything, her research implies the opposite. Lying requires good interpersonal relationship skills—the ability to manipulate, to charm, to act, to be expressive, and to bond with the target (Vrij, Granhag, & Mann, 2010)—qualities generally absent or impaired in autistic and Asperger’s individuals.

Murie et al. (2002) evaluated six case studies from a forensic setting, identifying a number of other dynamics that significantly influenced the commission of unlawful acts by individuals with Asperger’s syndrome, as well as their convictions for the acts. Among these dynamics were deficits in identification with others’ feelings, inexperience in interpreting interpersonal cues, frustration with sexual performance, and prompt confessions without forethought to consequences of same.

In contrast with autism spectrum disordered individuals, psychopathic persons fully appreciate the nature of social situations and use such knowledge in the commission of criminal offenses. The charm and charisma of psychopaths frequently aids them in commission of crimes, particularly those involving serial killing, whereas individuals with ASD lack the facility to blithely interact with peers and others. Although people with ASD may engage in unlawful interactions with others if their routines are interrupted, psychopaths easily change their plans to assure that they have the opportunity to achieve their criminal goals. Cleckly (1982) and Hare (1999) found that achievement of personal aims was a major factor in psychopaths’ actions (both legal and illegal). In contrast, individuals with ASD may be both reactive to a large extent as well as proactive. Accordingly, the psychopath will commit crimes to further his/her goals, whereas the person with ASD often reacts to a situation that upsets them or that they do not understand.

As Kibbie (2012) notes, it is possible for an individual with Asperger’s to be viewed as psychopathic. She ties this perception to the mind-blindness discussed above and is careful to distinguish—as we also strive to do—

between third-person perception of psychopathy and active psychopathy. Clinicians must be particularly mindful of this distinction for a host of reasons.

Persons on the autism spectrum can often behave inappropriately without knowing so and without apparent ill intent. Consider this exchange between a therapist and “Jack,” an 18-year-old with Asperger’s, as relayed by Carrington, Templeton, and Papinczak (2003):

- Jack: We played kick the football. We played other outdoor games as well like T-square, or there’s another game like handball. This is what you shouldn’t do—kill insects.
- Researcher: Did you?
- Jack: Yeah. Me and my friends did that, used to do naughty things.
- Researcher: So, you were doing things together?
- Jack: Yeah, we killed them. One of my friends and I had a magnifying glass and the sun was reflecting from it, PSSST! Smoke from the ant. Yeah, barbequed ant. (p. 5)

The foregoing exchange may demonstrate a psychopathic bent. After all, torturing and/or killing animals before one reaches adulthood is often considered to be a leading indicator of budding psychopathy, given that cruelty to animals in childhood is correlated with adult violence (Meloy, 1997).

However, like Meloy (1997) and unlike Fitzgerald (2011), we distinguish between bad behavior and intent to engage in bad behavior. Animal torture should not of itself lead to the conclusion that the torturer is a psychopath. Key questions to ask are whether a person knows that they are committing an anti-social act and whether they wish to commit such an act. In this regard, we note that individuals with Asperger’s often find it difficult to understand and foresee the impact of their actions on others due to a preoccupation with individual elements of their behavior that forecloses an understating of the social consequences of their conduct (Freckelton and List, 2009). In comparison, psychopaths are aware of both the constituent elements and overall impact of their behavior on others, even planning

crimes that injure others. Additionally, while those with psychopathy design their crimes for their own benefit, individuals with Asperger's may be capable of planning illegal acts but become unable to carry them out under stress, becoming overwhelmed by outside factors.

Conclusion

We argue that the key point differentiating criminal acts by psychopaths and individuals on the autism spectrum is that of intent. Autistic and Asperger's individuals are particularly likely to not understand that the acts that they engage in might be considered criminal, due to their deficient grasp of normative behavior in social situations. Furthermore, individuals with autism spectrum disorders should be protected by the mens rea requirement, as their acts are not commonly driven by malice.

Silvergate (2010) discussed the problem of over criminalization, which he calls endemic to modern Federal criminal legislation. According to Silvergate (2010), too many acts are considered criminal, an issue compounded by the vagueness of the Federal criminal code, which is difficult for ordinary people to understand. Thus, it is challenging for many to know in advance that their conduct could be considered criminal. Silvergate (2010) contrasts this vagueness, a problem of "due process" as protected under the Fifth Amendment, with state criminal codes embedded with the concept of mens rea, a principle dictating that the state cannot obtain a conviction "unless it could show that the miscreant not only committed the act, but that he or she did so intentionally and with the knowledge that it violated the law" (p. 712).

We also posit that some crimes committed by those on the autism spectrum could be prevented through the provision of proper treatment. This is particularly true of individuals with a history of confinement. Lack of familiarity with autism spectrum disorders has led judges and others in the criminal justice system to treat ASD-afflicted individuals with a harshness typically reserved for the most remorseless of recidivists. Articles like Fitzgerald's (2011) encourage this trend without educating individuals about the fine-grained distinctions between individuals on the autism spectrum and individuals with psychopathic features on the autism

spectrum.

Incarcerated persons who struggle with ASD often fail to receive adequate mental health treatment while in prison, an issue exacerbated by the fact that incarcerated persons with ASD often present greater comorbidity with other psychiatric disorders than non-incarcerated persons with ASD (Anckarsater et al. 2008). Nevertheless, those with Asperger's can and often do take advantage of programs for transformation offered in correctional institutions, unlike psychopaths, who feel their criminal behavior is acceptable for a variety of reasons.

Psychopathy in confined inmates tends to be difficult to treat (Ogloff, Wong and Greenwood, 1990), and these individuals often become recidivists for a number of reasons. Among the traits that are symptomatic of psychopathy are an absence of empathy, callousness, impulsivity, and a lack of guilt (Berkout, Gross & Kellum, 2013). Because these symptoms are long standing and deeply internalized, treatment of such individuals is problematic. Additionally, the inability and often unwillingness of psychopathic offenders to form a therapeutic alliance with a member of the correctional treatment team can substantially inhibit the success of treatment of any type.

Notwithstanding these barriers, some therapeutic milieus including aversive conditioning, behavior modification, and psychodynamic treatments have shown some potential in abating criminal behavior in psychopathic individuals (Salekin 2002; Wallace & Newman 2004).

An epidemiologic study of treatment outcomes for psychopathic individuals by Skeem, Monahan, and Mulvey (2002) was based on a sample of civilly committed individuals that included those described as having psychopathic tendencies (195) and those with psychopathy diagnoses (72). The treatment regime for 41% of those studied consisted of seven or more treatment sessions during the 10 weeks following their institutional release, while a second group (59% of those studied) attended six or fewer such sessions during the ten weeks following their release. Those who received seven or more sessions had a much lower rate of subsequent violence (6%) than those who attended six sessions or fewer (23%). The authors concluded that psychopathy may be treatable, finding that concentrated treatment for high-risk patients after release could inhibit violent acts in the first 10 weeks

following discharge. The group from which they drew this analysis was small—8% of psychopathic individuals treated for seven or more treatment sessions. Of those who received six or fewer sessions of therapy, 24% were violent over the 10 subsequent weeks following treatment.

In their conclusion, Skeem, Monahan and Mulver (2002) raise some interesting questions regarding the amount of treatment necessary to reduce violent acts of behavior in both psychopathic and non-psychopathic individuals, opining that more research is required. They also opine that psychopathic patients who received 1-6 sessions were no more likely to curtail their violent behavior than those who received no treatment.

Lastly, the authors conclude that psychopathic persons in correctional facilities may exhibit reduced levels of violence if given extensive treatment and are viewed as needing intensive services. This suggestion is admirable but not realistic. The second author's extensive work as a psychological associate belies this hypothesis. Firstly, there is not enough staff in a correctional facility to conduct intensive therapy. Secondly, inmates tend not to seek treatment, as doing so may be taken as a sign of weakness, endangering them as members of a prison population.

As a practical matter, most offenders, particularly those who are psychopathic, do not voluntarily choose to seek treatment while incarcerated (Pankow and Knight, 2012). Inmates most likely to attend therapy while imprisoned are generally those who have been court ordered to do so or who may be eligible for parole if they attend treatment groups or individual therapy. However, even if psychopathic inmates do attend treatment sessions, they can choose to be inactive in the therapy process, maintaining silence or delivering extraneous remarks. Moreover, for psychopathic inmates, success in a therapeutic setting is not a predictor of success upon release (Seto & Barbaree, 1999).

In summary, persons with psychopathic personalities are aware of their behaviors and the ways that their conduct impacts others. In contrast, while those on the autism spectrum may at times exhibit features associated with psychopathy, this overlap should not be treated as an invariable co-morbidity. Differentiation between the two diagnoses is crucial, and hinges on distinctions in individuals' abilities to freely exercise appropriate judgment, to think rationally, and to clearly appreciate the criminal nature

of the act committed. Defendants' capabilities in this regard must be decided on a case-by-case basis in determining both culpability and sentencing.

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