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AUTISM, CULPABILITY, AND SENTENCING DECISIONS

Jenna Hayes, MA*

Autism spectrum disorder (ASD) is characterized by certain social deficits and restricted, repetitive patterns of behaviors or interests.¹ While autism has become increasingly prevalent within the criminal legal system, courts have yet to develop a consistent manner of dealing with evidence of autism in determining culpability, blameworthiness, and appropriate punishments. This article provides a brief overview of the relationship between autism and criminality and reviews criminal cases involving defendants with autism to highlight how each court's unique approach to considering defendants' autism creates wide variation in case outcomes. The author offers a potential solution to this inconsistency: legislation that would guarantee expert testimony is provided and appropriately considered in cases involving defendants with autism. This would allow all courts the opportunity to better understand the nuances of each individual's disability, better estimate their blameworthiness, and assign more appropriate sentences.

* Jenna Hayes is part of the Department of Psychology at the University of Alabama, Tuscaloosa. This article was written on April 1, 2024 and revised on February 11, 2025. <https://orcid.org/0000-0003-3178-0399>. Jenna has no conflicts of interest to disclose. Please address all correspondence concerning this manuscript to Jenna at jkhayes2@crimson.ua.edu.

1. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 56-57 (5th ed. 2022) [hereinafter APA, DSM-5-TR].

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The Centers for Disease Control and Prevention have identified autism spectrum disorder (ASD), or more commonly, “autism,” as the fastest-growing developmental disorder in the United States, with approximately one in 36 children having received the diagnosis.² Considering the United States’ extremely high incarceration rate along with the rising prevalence of autism, it is becoming increasingly important for researchers to explore the ways that autism can influence criminal case outcomes.³ Further amplifying the necessity of research in this area are findings that those with autism are disproportionately more likely to become involved in the criminal legal system than those without autism.⁴ Chester and colleagues offer a number of potential explanations for the overrepresentation of

2. *Data & Statistics on Autism Spectrum Disorder*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 16, 2024), <https://www.cdc.gov/autism/data-research/index.html>; Jennifer Cromer, *Autism: Fastest-Growing Developmental Disability*, U.S. ARMY (April 5, 2018), https://www.army.mil/article/203386/autism_fastest_growing_developmental_disability.

3. See J. Collins et al., *A Systematic Review of Autistic People and the Criminal Justice System: An Update of King and Murphy (2014)*, 53 J. AUTISM DEV. DISORDERS 1351, 1351 (2023).

4. See Ami Tint et al., *Correlates of Police Involvement Among Adolescents and Adults with Autism Spectrum Disorder*, 47 J. AUTISM DEV. DISORDERS 2639, 2640 (2017); see generally Collins et al., *supra* note 3; Dennis Debbaudt, LINKEDIN (Oct. 3, 2019), <https://www.linkedin.com/pulse/beyond-guilt-innocence-asd-dilemmas-criminal-justice-system-debbaudt/>; Rachel L. Fazio et al., *An Estimate of the Prevalence of Autism-Spectrum Disorders in an Incarcerated Population*, 4 OPEN ACCESS J. FORENSIC PSYCH. 69, 69 (2012); Charlotte Blackmore et al., *Adults with Autism Spectrum Disorder and the Criminal Justice System: An Investigation of Prevalence of Contact with the Criminal Justice System, Risk Factors and Sex Differences in a Specialist Assessment Service*, 26 AUTISM 2098, 2098 (2022).

people with autism in certain forensic samples, suggesting that they may be more likely to be caught for their criminal behavior, confess during police interviews, enter a guilty plea before considering and understanding alternatives, or fail to advocate for their rights in court.⁵ Despite how common autism has become in the legal system, minimal consideration is afforded to this population as it relates to criminal proceedings.

I. AUTISM AND CRIMINALITY

As outlined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5-TR), individuals with autism demonstrate persistent deficits in social communication and interaction across multiple contexts as well as restricted, repetitive patterns of behaviors (e.g., hand flapping, lining up items), interests (e.g., having very specific knowledge about microwaves), and/or activities (e.g., inflexible adherence to routines).⁶ While both of these core symptoms (i.e., social deficits and restricted, repetitive behaviors) must be present in some capacity to constitute a diagnosis, autism exists on a spectrum, so the disorder manifests uniquely in each individual.⁷ Previous versions of the DSM offered separate diagnoses for “autistic disorder” and “Asperger’s disorder.”⁸ Those diagnosed with Asperger’s were differentiated from those with autism in that they did not experience clinically significant delays in language, cognitive development, or the development of age-appropriate adaptive behaviors.⁹

The updated diagnosis of autism spectrum disorder (ASD) now encompasses all individuals who met the criteria for either autistic disorder or Asperger’s disorder.¹⁰ Given the wide range of functioning captured under an ASD diagnosis, the APA offers specifiers for clinicians to use when providing diagnoses to indicate the “severity” of each individual’s social communication impairments and restricted, repetitive patterns of behavior.¹¹ Clinicians choose from three levels of impairment: Level 1 (“Requiring support”); Level 2 (“Requiring substantial support”); and Level

5. Verity Chester et al., *The Prevalence of Autism in the Criminal Justice System: A Systematic Review*, *BJPSYCH OPEN* (June 20, 2022), <https://www.cambridge.org/core/journals/bjpsych-open/article/prevalence-of-autism-in-the-criminal-justice-system-a-systematic-review/E7650AD83B0CA0C0C936A966D081F943>.

6. APA, DSM-5-TR, *supra* note 1, at 57-58.

7. *See id.* at 56-57; *see also* Jerrod Brown et al., *Autism Spectrum Disorder in the Criminal Justice System: A Review for Caregivers and Professionals*, *J.L. ENF’T*, Apr. 26, 2016, at 1, 2 (2016).

8. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 69-77 (4th ed. 1994) [hereinafter APA, DSM-4-TR].

9. *Id.* at 69-70.

10. APA, DSM-5-TR, *supra* note 1, at 60.

11. *Id.* at 58.

3 (“Requiring very substantial support”).¹² They also specify whether the autism diagnosis is with or without accompanying intellectual or language impairments.¹³

While there is a lack of consensus regarding the relationship between criminality and autism,¹⁴ data shows that the vast majority of individuals with autism do not commit criminal acts.¹⁵ People with autism are less likely to offend than people without autism of the same age and gender.¹⁶ In fact, researchers in this area agree that people with autism are more likely to be victims of crimes than they are to commit them.¹⁷ For those individuals with autism who do commit crimes, certain symptoms associated with the disorder have been implicated in their development of criminality.¹⁸

Although each offender with autism is unique and should be assessed individually by a court, most people with autism who exhibit criminal behavior are thought to do so as a result of specific traits, including poor impulse control, fixation on specific interests, deficits in cognitive empathy, difficulty regulating emotions, and a lack of understanding of social cues, personal space, and the effects of one’s behavior.¹⁹ Additional factors that may predispose individuals with autism to commit

12. *Id.*

13. *Id.*

14. Ann Browning & Laura Caulfield, *The Prevalence and Treatment of People with Asperger’s Syndrome in the Criminal Justice System*, 11 CRIMINOLOGY & CRIM. JUST. 165, 172 (2011).

15. *Id.* at 172; M. Ghaziuddin et al., *Brief Report: Violence in Asperger Syndrome. A Critique*, 21 J. AUTISM & DEVELOPMENTAL DISORDERS 349, 349-51 (1991); *see generally* Daniel C. Murrie et al., *Asperger’s Syndrome in Forensic Settings*, 1 INT’L J. FORENSIC MENTAL HEALTH 59 (2002); Marc R. Woodbury-Smith et al., *High Functioning Autistic Spectrum Disorders, Offending and Other Law-Breaking: Findings From a Community Sample*, 17 J. FORENSIC PSYCHIATRY AND PSYCH. 108, 108 (2006); *see also* Marc Woodbury-Smith & Kalpana Dein, *Autism Spectrum Disorder (ASD) and Unlawful Behaviour: Where Do We Go From Here?*, 44 J. AUTISM & DEVELOPMENTAL DISORDERS 2734, 2735 (2014).

16. Claire King & Glynis H. Murphy, *A Systematic Review of People with Autism Spectrum Disorder and the Criminal Justice System*, 44 J. AUTISM & DEV. DISORDERS 2717, 2729 (2014).

17. Grace Trundle et al., *Prevalence of Victimization in Autistic Individuals: A Systematic Review and Meta-Analysis*, 24 TRAUMA, VIOLENCE, & ABUSE 2282, 2283 (2023); Collins et al., *supra* note 3, at 3170; *see generally* C.S. Allely et al., *Violence is Rare in Autism: When It Does Occur, Is It Sometimes Extreme?* 151 J. PSYCH. 49 (2017); JULIE BEADLE-BROWN ET AL., *LIVING IN FEAR: BETTER OUTCOMES FOR PEOPLE WITH LEARNING DISABILITIES AND AUTISM* (2014); Jonathan A. Weiss & Michelle A. Fardella, *Victimization and Perpetration Experiences of Adults with Autism*, 9 FRONTIERS PSYCHIATRY 1 (2018).

18. *See* Browning & Caulfield, *supra* note 14, at 169.

19. David Allen et al., *Offending Behaviour in Adults with Asperger Syndrome*, 38 J. AUTISM DEV. DISORDERS 748, 753 (2007); *see* Justin Barry-Walsh & Paul Mullen, *Forensic Aspects of Asperger’s Syndrome*, 15 J. FORENSIC PSYCHIATRY AND PSYCH. 96, 99 (2004); Browning & Caulfield, *supra* note 14, at 174; *see generally* Monique Chiacchia, *Autism Spectrum Disorder and the Criminal Justice System*, PURDUE GLOBAL (Apr. 5, 2016), <https://www.purdueglobal.edu/blog/criminal-justice/autism-and-the-criminal-justice-system/>; *see* Jeffrey A. Cohen et al., *A Legal Review of Autism, a Syndrome*

crimes include aggression resulting from disrupted routine or social misunderstanding and obsessive behavior without understanding its implications.²⁰ People with autism are also at an increased risk of being taken advantage of in both social and professional settings,²¹ so it may be that these individuals are also manipulated and pressured by others in ways that lead them to commit crimes.

To further investigate the connection between autism and criminality, researchers have looked to case histories of offenders with autism and identified themes among these cases, including interpersonal naiveté, inappropriate attempts at forming relationships, and threats to harm others in the context of perceived wrongdoings.²² Many of the individuals in these cases were quick to confess to their charges, which could reflect a lack of appreciation for the consequences of a confession.²³ A propensity to honesty is characteristic of many individuals with autism,²⁴ so a quick confession could also result from “a personal view that their actions were justified and hence a lack of feeling any guilt.”²⁵ Furthermore, individuals with autism are thought to be more susceptible to interrogative pressure and more easily manipulated during police questioning due to social deficits associated with the disorder.²⁶ Regardless of how people with autism come into contact with the criminal legal

Rapidly Gaining Wide Attention Within Our Society, 77 ALB. L. REV. 389, 416-17 (2013); Barbara G. Haskins & J. Arturo Silva, *Asperger's Disorder and Criminal Behavior: Forensic-Psychiatric Considerations*, 34 J. AM. ACAD. PSYCHIATRY & L. 374, 374-75 (2006); King & Murphy, *supra* note 16, at 2719; Marianne Kristiansson & Karolina Sörman, *Autism Spectrum Disorders: Legal and Forensic Psychiatric Aspects and Reflections*, 5 CLINICAL NEUROPSYCHIATRY 55, 56 (2008); Murrie et al., *supra* note 15, at 60.

20. See PATRICIA HOWLIN, *AUTISM AND ASPERGER SYNDROME: PREPARING FOR ADULTHOOD* 300-03 (2d ed. 2004).

21. Murrie et al., *supra* note 15, at 60; see Marisa H. Fisher et al., *Differences in Social Vulnerability Among Individuals with Autism Spectrum Disorder, Williams Syndrome, and Down Syndrome*, 7 RSCH. AUTISM SPECTRUM DISORDERS 931, 931 (2013); Amy Pearson et al., “*This Was Just How This Friendship Worked*”: *Experiences of Interpersonal Victimization Among Autistic Adults* 4 AUTISM ADULTHOOD 141, 141 (2022).

22. Isabel Clare & Marc R. Woodbury-Smith, *Autism Spectrum Conditions*, in *FORENSIC NEUROPSYCHOLOGY IN PRACTICE* (Susan Young et al. eds., 2009); see generally Woodbury-Smith et al., *supra* note 15; Murrie et al., *supra* note 15, at 59.

23. Murrie et al., *supra* note 15, at 68.

24. See Pier Jaarsma et al., *Living the Categorical Imperative: Autistic Perspectives on Lying and Truth Telling—Between Kant and Care Ethics*, 15 MED. HEALTH CARE PHIL. 271, 272 (2012); see also Nachum Katz & Zvi Zemishlany, *Criminal Responsibility in Asperger's Syndrome*, 43 ISR. J. PSYCH. & RELATED SCI. 166, 172 (2006).

25. Katy-Louise Payne & Clive Hollin, *Alexithymia, Asperger's Syndrome and Criminal Behaviour: A Review*, 4 J. CRIM. PSYCH. 155, 158 (2014).

26. Lindsay M. Salseda et al., *An Evaluation of Miranda Rights and Interrogation in Autism Spectrum Disorders*, 5 RSCH. AUTISM SPECTRUM DISORDERS 79, 80 (2011).

system, research in this area reveals that the particular needs of this population are often overlooked.²⁷

II. OVERVIEW OF AUTISM IN CRIMINAL PROCEEDINGS

Individuals with autism may face a variety of unique barriers as they navigate criminal proceedings. Defendants with autism can even experience difficulties prior to their arrest, as those with autism often report negative interactions with police as a result of communication difficulties or certain behaviors, like stimming (i.e., self-stimulating behavior[s] such as hand-flapping, head-banging, spinning, rocking, etc.),²⁸ that police officers may misinterpret as aggression or noncompliance.²⁹ One advocate maintains that an autism diagnosis is “as relevant to police and legal proceedings as a diagnosis of mental retardation [*sic*] or mental illness would be, no matter how bright, high-functioning, and/or verbal the individual may be.”³⁰ While judicial consideration for autism has become more common in recent years, researchers in this area stress the importance of properly considering the significance and effects of autism before prosecution even begins (e.g., police interviewing and competency to stand trial evaluations) in responsibility determinations for criminal liability and throughout sentencing proceedings.³¹

Of particular concern are the ways that traits of autism can directly impact the interpretation of a defendant’s culpability and the severity of their punishment. Fortunately, expert witness testimony in cases involving defendants with autism may be used to educate judges and juries on the nuances of the disorder and how it influences behavior.³² However, judges and/or attorneys must first become aware of the defendant’s autism and realize that their symptoms may have affected their

27. See, e.g., *id.*

28. *Stimming - a Guide for All Audiences*, NAT’L AUTISTIC SOC’Y, <https://www.autism.org.uk/advice-and-guidance/topics/behaviour/stimming/all-audiences> (last updated Aug. 14, 2020).

29. Sophia Calton & Guy Hall, *Autistic Adults and Their Experiences with Police Personnel: A Qualitative Inquiry*, 29 PSYCHIATRY, PSYCH., & L. 274, 275-77 (2022); see also Alisha C. Salerno-Ferraro & Regina A. Schuller, *Perspectives from the ASD Community on Police Interactions: Challenges & Recommendations*, RSCH. DEVELOPMENTAL DISABILITIES, July 11, 2020, at 1, 3-4.

30. Barbara T. Doyle & Emily Iland, *And Justice for All . . . Unless You Have Autism: What the Legal System Needs to Know About People with Autism Spectrum Disorder*, BE SAFE, <https://besafethemovie.com/wp-content/uploads/2014/07/BE-SAFE-BONUS-And-Justice-for-All.pdf> (last visited Sept. 29, 2024).

31. Colleen M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-Functioning Autism*, 5 J. INTELL. DISABILITIES & OFFENDING BEHAV. 97, 98 (2014) [hereinafter Berryessa, *Judiciary Views*]; see also Rachel Slavy-Cross et al., *Autism and the Criminal Justice System: An Analysis of 93 Cases*, 15 AUTISM RSCH. 904, 913 (2022).

32. Colleen M. Berryessa, *Educator of the Court: The Role of the Expert Witness in Cases Involving Autism Spectrum Disorder*, 23 PSYCH., CRIME & L. 575, 576 (2017) [hereinafter Berryessa, *Educator of the Court*].

culpability before seeking an expert.³³ Even then, expert witnesses are typically paid by the party requesting their services and often charge high fees that many cannot afford.³⁴ While public defenders can apply for funding to hire an expert witness, the government does not always approve these requests.³⁵ The court may appoint any expert that both parties agree on or any expert of its own choosing,³⁶ but expert testimony is not always obtained or considered in cases involving defendants with autism.³⁷

Even if expert testimony is allowed, courts are not equally responsive to testimony about the challenges that confront individuals with autism and how these challenges might be relevant to their alleged offense(s).³⁸ Results from an interview-based, qualitative study examining judges' perceptions of offenders with autism indicated that judges differed in their opinions regarding whether traits of autism affect a defendant's ability to formulate intent and whether they are culpable for their crime(s).³⁹ In a later study, Berryessa found that some judges considered autism as a potential mitigating factor in their judgments regarding culpability and sentencing, while others did not.⁴⁰ Such studies elucidate the inconsistency with which evidence of autism is integrated into judicial decision-making.

An example of autism complicating criminal proceedings is the case of *State of Western Australia v. Mack*, in which Mack, a man with autism, was charged with murdering his mother.⁴¹ He applied for trial by judge alone, and questions were also raised about his competency.⁴² At the hearing to address these matters, Justice John McKechnie of the Supreme Court of Western Australia noted that the defendant was “averting all eye contact, keeping his head down, staring at the corner of the

33. See Berryessa, *Judiciary Views*, *supra* note 31, at 98.

34. See Sameer Somal, *Expert Witness Hourly Rate*, BLUE OCEAN GLOBAL TECHNOLOGY (Sep. 16, 2023), <https://www.blueoceanglobaltech.com/blog/expert-witness-hourly-rate/> (explaining that the median hourly rate in the United States for 2021 was \$385 and providing a more general expert witness fee breakdown).

35. See 18 U.S.C. § 3006A(a) (only mandating funds to hire expert witnesses as “necessary for adequate representation”); *Id.* § 3006A(e)(1).

36. FED. R. EVID. 706.

37. See Berryessa, *Educator of the Court*, *supra* note at 578 (explaining that “there is still mounting necessity for the expertise of mental health professionals to assist courts in making decisions that are fully informed by expert opinions relating to the complexities of ASD.”).

38. Berryessa, *Judiciary Views*, *supra* note 31, at 98; Berryessa, *Educator of the Court*, *supra* note 32, at 578; see King & Murphy, *supra* note 16, at 2718; see also Katie Maras et al., *Mock Juror Perceptions of Credibility and Culpability in an Autistic Defendant*, 49 J. AUTISM & DEVELOPMENTAL DISORDERS 996, 1004 (2019).

39. Berryessa, *Judiciary Views*, *supra* note 31, at 100-04.

40. Berryessa, *Educator of the Court*, *supra* note 32, at 595-97.

41. *W. Austl. v. Mack* [2012] 127 WASC 1, 3 (Austl.).

42. *Id.*

dock” and was occasionally “twitching or shaking.”⁴³ While Justice McKechnie recognized the defendant’s “mental impairment due to autism,” Mack was ultimately deemed competent. The Justice said, “There is no doubt that a trial judge will have to be responsive to the problems that the accused’s autism raises in relation to the conduct of the trial to ensure that the trial is fair and that the accused is given adequate opportunity to instruct his counsel and make a proper defense.”⁴⁴

At his trial, Justice McKechnie ultimately found Mack guilty of murder and sentenced him to life in prison.⁴⁵ In this trial, neither the prosecution nor the defense presented expert testimony about Mack’s autism.⁴⁶ Instead, Mack’s defense lawyer highlighted Mack’s unusual personality and demeanor.⁴⁷ In his decision, Justice McKechnie acknowledged that Mack’s behavior was “certainly odd,” but he stated that there was no evidence to support that “the accused suffer[ed] from any personality disorder or mental condition.”⁴⁸ In fact, the word “autism” is never mentioned in his decision, despite Justice McKechnie’s previous acknowledgment of Mack’s autism (which is indeed a mental disorder listed in the DSM)⁴⁹ in his decision regarding Mack’s competency to stand trial.⁵⁰ Mack eventually appealed his conviction and sentence in 2014, again citing his autism, but his appeal was denied.⁵¹

A. *Perceptions of Autism in the Courtroom*

As mentioned above, different courts have different approaches to considering evidence of a defendant’s autism.⁵² In her survey of judges, Berryessa found that most judges in her sample identified a diagnosis of autism as a potential mitigating factor in their judgments regarding responsibility determination and sentencing.⁵³ However, another study reported that a small number of judges in their sample admitted that they might consider a diagnosis of autism to be aggravating to sentencing because it could be indicative of a higher risk of recidivism due to the disorder’s

43. *Id.* at 7.

44. *Id.* at 12-13.

45. *See W. Austl. v Mack* [No. 2] (2012) 445 WASC 1, 130 (Austl.); *see also Mack v W. Austl.* [2014] 207 WASC 1, 1 (Austl.).

46. *See generally W. Austl. v Mack* [No. 2] (2012) 445 WASC 1 (Austl.).

47. *See Mack* [2012] 127 WASC at 6, 14.

48. *Mack* [No. 2] (2012) 445 WASC at 17.

49. APA, DSM-4-TR, *supra* note 8, at 66; APA, DSM-5-TR, *supra* note 1, at 56.

50. *See generally Mack*, [2012] WASC 127.

51. *Mack* [2014] 207 WASC at 53, 63.

52. Berryessa, *Judiciary Views*, *supra* note 31, at 103-04; Berryessa, *Educator of the Court*, *supra* note 32, at 578; *see King & Murphy*, *supra* note 16, at 2718; *see also Maras et al.*, *supra* note 38, at 1004.

53. Berryessa, *Judiciary Views*, *supra* note 31, at 104.

impairments to impulse control.⁵⁴ While the majority of research in this area reports that judges are generally sympathetic to those with the diagnosis, some judges are unsure if and how information about autism should inform their sentencing decisions.⁵⁵ Further, judges reported relying upon expert assistance to make decisions regarding defendants with autism, emphasizing the importance of expert testimony in these cases.⁵⁶

State v. Burr highlights the importance of considering the unique traits associated with autism. In this case, the defendant was convicted of second-degree aggravated assault and third-degree endangering of a minor and sentenced to six years imprisonment and a lifetime of community supervision.⁵⁷ The judge was “alarmed by [the] defendant’s odd appearance and demeanor” and requested a competency evaluation.⁵⁸ The defendant was diagnosed with “Asperger’s Disorder” (which now falls under the umbrella of autism spectrum disorder).⁵⁹ However, the trial court excluded this evidence, and the defendant chose not to testify.⁶⁰ On appeal, the defendant claimed that he was prevented from a fair trial because the jury did not understand him due to his diagnosis, which also prevented him from testifying at his trial.⁶¹ He stated:

Because of my autistic condition, I always put my foot in my mouth. I always say something that irritates people and gives the wrong impression. It’s dangerous for me to get up and speak because all my life I say things that annoy people when I didn’t intend to do it. I can’t trust myself to speak. My lawyers can’t trust me to speak. It’s not a good idea for somebody like me in any situation, especially in a court.

...

My lawyers urged me many times not to get up and speak because of my autistic condition, they know that I always say things that embarrass myself and upset other people.⁶²

54. *Id.* at 102.

55. *Id.* at 101.

56. *See id.* at 104; *see also* Ian Freckelton, *Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts*, 26 J. APPLIED RSCH. INTELL. DISABILITIES 420, 430 (2013).

57. *State v. Burr*, 921 A.2d 1135, 1137-38 (N.J. Super. Ct. App. Div. 2007), *aff’d as modified*, 948 A.2d 627 (N.J. 2008).

58. *Id.* at 1142.

59. APA, DSM-5-TR, *supra* note 1, at 60.

60. *Burr*, 921 A.2d at 1150.

61. *Id.*

62. *Id.* at 1151.

On appeal, the court agreed that the defendant was “entitled to a new trial,” citing the trial court’s rejection of the defendant’s request to present expert testimony regarding his diagnosis.⁶³ The appellate court stated that the barred testimony would have educated the jury about behavioral oddities that the defendant might exhibit in court or were described in the witnesses’ testimony.⁶⁴ Proper consideration of defendants’ autism is essential to ensuring proper treatment of these individuals throughout criminal proceedings.

Some of the features associated with autism may lead individuals to say things that are deemed socially inappropriate, make “awkward” facial expressions, or demonstrate a lack of empathy due to deficits in theory of mind (i.e., the inference of others’ emotional states).⁶⁵ If they are unaware of a defendant’s autism, characteristics associated with the disorder risk misinterpretation by police, evaluators, judges, and juries.⁶⁶ For instance, if a person with autism never received a formal diagnosis or chooses not to volunteer their diagnosis to police upon their arrest, they may be perceived as having acted willfully and intentionally during interrogation because of their discomfort with the new environment, change in routine, and heightened stress.⁶⁷ Characteristics such as poor problem solving, heightened acquiescence, and susceptibility to coercive questioning tactics can further obscure criminal intent among those with autism.⁶⁸

Given the social and communication deficits associated with autism, these individuals may even be seen as exhibiting antisocial characteristics, which can have a profoundly aggravating effect on sentencing considerations.⁶⁹ Antisocial personality disorder (ASPD) is characterized by repeated disregard or violation of others’ rights.⁷⁰ Individuals with ASPD may act impulsively, violate the law, and lie, deceive, or manipulate others, typically without showing remorse or guilt.⁷¹ Autism and ASPD share a few notable characteristics, including difficulties with social

63. *Id.* at 1141, 1159.

64. *Id.* at 1150-51.

65. See Simon Baron-Cohen, *Autism: A Specific Cognitive Disorder of “Mind-Blindness,”* 2 INT’L REV. PSYCHIATRY 81, 86 (1990); see generally Neil Brewer et al., *Measuring Theory of Mind in Adults with Autism Spectrum Disorder*, 47 J. AUTISM DEVELOPMENTAL DISORDERS 1927, 1927-28 (2017).

66. Christine N. Cea, *Autism and the Criminal Defendant*, 88 ST. JOHN’S L. REV. 495, 519 (2014); Calton & Hall, *supra* note 29, at 275-77.

67. Woodbury-Smith & Dein, *supra* note 15, at 2737-38.

68. *Id.* at 2738.

69. Mark D. Cunningham & Thomas J. Reidy, *Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations*, 16 BEHAV. SCI. & L. 333, 333 (1998).

70. APA, DSM-5-TR, *supra* note 1, at 749.

71. See Cunningham & Reidy, *supra* note 69, at 336.

information processing and expressions of empathy.⁷² However, ASPD is characterized by a lack of caring about other people,⁷³ while autism is characterized by problems with cognitive perspective-taking, which can be misinterpreted as a complete lack of empathy.⁷⁴ However, while many people with autism show impairments in cognitive empathy (i.e., inferring the thoughts of others), they do not differ from controls in emotional empathy (i.e., feeling empathetic concern).⁷⁵

If courts are unaware of a defendant's autism, they might misinterpret their social difficulties and lack of displayed empathy as products of antisocial personality disorder, which is associated with high recidivism rates⁷⁶ and resistance to psychotherapeutic interventions.⁷⁷ Because ASPD is viewed as difficult to treat and predictive of future offending behavior, courts typically consider ASPD as an aggravating factor in sentencing decisions.⁷⁸ Psychologists, lawmakers, and laymen also tend to exclude ASPD as a valid mental illness that qualifies as decreasing responsibility because ASPD is generally defined by socially deviant behavior.⁷⁹ It is imperative that legal personnel, particularly judges, become at least somewhat familiar

72. Elliott Carthy & David Murphy, *Comorbid Autism Spectrum Disorder and Antisocial Personality Disorder in Forensic Settings*, 49 J. AM. ACAD. PSYCHIATRY L. 462, 462-63 (2021); Patricia L. Lockwood et al., *Dissecting Empathy: High Levels of Psychopathic and Autistic Traits are Characterized by Difficulties in Different Social Information Processing Domains*, 7 FRONTIERS HUM. NEUROSCIENCE 1, 1 (2013).

73. APA, DSM-5-TR, *supra* note 1, at 56-57.

74. See Lockwood, *supra* note 72, at 1.

75. Isabel Dziobek et al., *Dissociation of Cognitive and Emotional Empathy in Adults with Asperger Syndrome Using the Multifaceted Empathy Test (MET)*, 38 J. AUTISM & DEVELOPMENTAL DISORDERS 464, 564 (2008); see Lockwood, *supra* note 72, at 1-2.

76. See Larrotta-Castillo R. et al., *Criminal Characteristics of a Group of Primary Criminals Diagnosed with ASPD: Approach to Criminal Recidivism*, 19 REV. ESPANOLA DE SANIDAD PENITENCIARIA 74, 77 (2017); see generally James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCH. BULLETIN 123 (1998).

77. James P. Frosch, *The Treatment of Antisocial and Borderline Personality Disorders*, 34 HOSP. CMTY. PSYCH. 243, 247 (1983); Leon McRae, *Rehabilitating Antisocial Personalities: Treatment Through Self-Governance Strategies*, 24 J. FORENSIC PSYCHIATRY & PSYCH. 48, 48 (2013).

78. Stephen Morse, *Psychopathy and the Law: The United States Experience*, in PSYCH. EVALUATIONS FOR CTS.: A HANDBOOK FOR MENTAL HEALTH PRO. & LAW. 106 (Luca Malatesti & John McMillan eds., 2010); Jason Schnittker et al., *Neither Mad nor Bad? The Classification of Antisocial Personality Disorder Among Formerly Incarcerated Adults*, SOC. SCI. & MED., Aug. 2020, at 1, 3.

79. David DeMatteo & John F. Edens, *The Role and Relevance of the Psychopathy Checklist-Revised in Court: A Case Law Survey of U.S. Courts (1991-2004)*, 12 PSYCH., PUB. POL'Y, & L. 214, 230-31 (2006); John F. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 BEHAV. SCI. & L. 603, 609, 618 (2005); Sally C. Johnson & Eric B. Elbogen, *Personality Disorders at the Interface of Psychiatry and the Law: Legal Use and Clinical Classification*, 15 DIALOGUES CLINICAL NEUROSCIENCE 203, 207-09 (2013).

with the specific symptoms of autism to minimize the risk of misjudging these traits in defendants and assigning disproportionate sentences.

B. Autism and Criminal Intent

If one lacks the ability to form criminal intent, they cannot satisfy a basic element of most crimes (i.e., *mens rea*)⁸⁰ and cannot be justly convicted of these crimes.⁸¹ A defendant must be conscious of “the facts that make his conduct fit the definition of the offense.”⁸² Whether a person with autism has the capacity to form all or part of the criminal intent required to be convicted of their crime is a multifaceted issue that should be provided the same consideration offered to individuals with intellectual disability or severe mental illness. Woodbury-Smith and Dein contend that autism “is associated with significant socio-emotional impairments, that may, arguably, affect the ability to form intent.”⁸³

Some of the specific socio-emotional impairments associated with autism include difficulty interpreting nonverbal cues,⁸⁴ poor impulse control,⁸⁵ obsessiveness with pursuing specific interests,⁸⁶ trouble understanding the viewpoint of others,⁸⁷ lacking awareness of others’ personal space,⁸⁸ and failing to recognize the implications of one’s behavior.⁸⁹ Individuals with autism may also have a limited understanding of social norms related to sexual interactions, which can result in sexually inappropriate behavior without ill intent or appreciation for the implications of their

80. *Mens Rea*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/mens_rea#:~:text=Mens%20rea%E2%80%8B%20is%20the,guilt%20in%20a%20criminal%20trial (last updated July 2023).

81. DANIEL E. HALL, *CRIMINAL LAW AND PROCEDURE* 73 (7th ed. 2015).

82. *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994).

83. Woodbury-Smith & Dein, *supra* note 15, at 2738.

84. Michael Alexander Pelzl et al., *Reduced Impact of Nonverbal Cues During Integration of Verbal and Nonverbal Emotional Information in Adults with High-Functioning Autism*, 13 *FRONTIERS PSYCH.* 1, 2 (2023).

85. Pavlína Hlavatá et al., *Autism, Impulsivity, and Inhibition: A Review of the Literature*, 14 *BASAL GANGLIA* 44, 44-45, 48 (2018).

86. Fabiana Ventura et al., *Stalking Behavior and High-Functioning Autism Spectrum Disorders – A Case Report*, 33 *J. FORENSIC PSYCHIATRY & PSYCH.* 639, 641 (2022); see Shankar Kumar et al., *A Case Series of Five Individuals with Asperger Syndrome and Sexual Criminality*, 22 *J. MENTAL HEALTH & HUM. BEHAV.* 63, 63 (2017).

87. Baron-Cohen, *supra* note 65, at 28, 33-34; Atsushi Senju, *Spontaneous Theory of Mind and Its Absence in Autism Spectrum Disorders*, 18 *NEUROSCIENTIST* 108, 108 (2012).

88. Kosuke Asada et al., *Reduced Personal Space in Individuals with Autism Spectrum Disorder*, 11 *PLOS ONE* 1, 9 (Jan. 27, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4729526/>.

89. Michal Post et al., *Understanding Stalking Behaviors by Individuals with Autism Spectrum Disorders and Recommended Prevention Strategies for School Settings*, 44 *J. AUTISM & DEVELOPMENTAL DISORDERS* 2698, 2698-99 (2012); Kumar et al., *supra* note 86, at 63-68.

behavior.⁹⁰ Given these impairments, some of the most common offenses committed by people with autism include sexual offending⁹¹ and stalking.⁹²

First consider the crime of “stalking,” or engaging in behavior directed at a specific person that would “cause a reasonable person to fear for his or her safety or the safety of others” or “suffer substantial emotional distress.”⁹³ The social impairments commonly observed in those with autism can result in these individuals unknowingly exhibiting behaviors that equate to stalking.⁹⁴

When compared to individuals without autism, people with autism have been found to be more likely to engage in inappropriate “courting behaviors,” to focus their attention upon celebrities, strangers, colleagues, and ex-partners, and to pursue their “target” for longer periods of time.⁹⁵ In most states, the stalker must display a criminal intent to cause fear in the victim in order to be convicted of stalking.⁹⁶ In a recent stalking case where the defendant made violent threats toward the victim, the Supreme Court of the United States ruled that the state must prove that the defendant had some subjective understanding of his statements’ threatening nature.⁹⁷

If a person with autism engages in stalking behaviors without the intent to harass or harm, and without awareness that others may interpret these behaviors as socially inappropriate, bothersome, or illegal, they should be considered unable to form the requisite criminal intent to be convicted.⁹⁸ Recognizing and accurately interpreting others’ emotional states is essential for successful social interactions, so those who lack this ability are likely to experience frequent misunderstandings in

90. Mark Stokes et al., *Stalking and Social and Romantic Functioning Among Adolescents and Adults with Autism Spectrum Disorder*, 37 J. AUTISM DEVELOPMENTAL DISORDERS 1969, 1979-80 (2007).

91. See e.g., Niklas Långström et al., *Risk Factors for Violent Offending in Autism Spectrum Disorder: A National Study of Hospitalized Individuals*, 24 J. INTERPERSONAL VIOLENCE 1358, 1358 (2009); see also Svend Erik Mouridsen et al., *Pervasive Developmental Disorders and Criminal Behavior*, 52 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 196, 203 (2008). But see Erik Sondenaa et al., *Violence and Sexual Offending Behavior in People with Autism Spectrum Disorder Who Have Undergone a Psychiatric Forensic Examination*, 115 PSYCH. REP. 32, 41 (2014).

92. Stokes et al., *supra* note 90, at 268.

93. Office on Violence Against Women, *Stalking*, U.S. DEP. OF J., <https://www.justice.gov/ovw/stalking> (last updated Nov. 7, 2023).

94. See Stokes et al., *supra* note 90, at 1969-70.

95. *Id.*

96. NAT’L INST. OF JUST., NAT’L INST. OF JUST. RSCH. REP.: DOMESTIC VIOLENCE, STALKING, AND ANTISTALKING LEGISLATION: AN ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 6 (Mary Graham et al. eds., 1996).

97. *Counterman v. Colorado*, 600 U.S. 66, 69, 77 (2023).

98. *Id.* at 77; *Id.* at 93 (Sotomayor, J., concurring).

social situations.⁹⁹ Further, individuals with autism may not fully comprehend that what they have done is wrong or even recognize that they will be prosecuted for their behavior. If someone lacks criminal intent and an understanding of the criminal nature of their behavior, it should follow that they are not held fully responsible for their crime(s).¹⁰⁰

Ventura and colleagues present a recent case report of a man with diagnosed autism who received criminal charges related to a “previously unknown stalking behavior.”¹⁰¹ For several months, he had been randomly selecting people from the telephone directory, memorizing their contact information, and repeatedly calling them from public phones, and one of the victims eventually initiated formal criminal charges.¹⁰² It was noted that the defendant prided himself on his ability to memorize details about others and show them how much he knew about them so they would think he was intelligent.¹⁰³ According to the report, the man did not display remorse for his behavior, as he believed his actions to be a “straightforward path to making friends” and considered his interests to be reciprocated, “over-evaluating platonic interactions.”¹⁰⁴

After considering a partial insanity defense, the defendant was given a forensic psychiatric evaluation and ordered to treatment in lieu of prosecution.¹⁰⁵ He was referred to an Adult Neurodevelopmental Disorder Psychiatry Unit, where he was treated with medication and individual cognitive behavioral intervention to improve his social-cognitive functioning.¹⁰⁶ The report indicated that he showed “complete remission and disapproval of stalking behaviors” following treatment.¹⁰⁷ He was released under his mother’s supervision and later moved into a treatment facility specializing in autism, where he found work in a supported employment program.¹⁰⁸ This case highlights the importance of legal personnel appreciating how characteristics of autism may reduce culpability and seeking expert evaluation as needed to improve outcomes for defendants.

99. Pelzl et al., *supra* note 84, at 1-2.

100. *See id.*; *see also* Freckelton, *supra* note 56, at 429-31.

101. Ventura et al., *supra* note 86, at 640.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 640-41.

106. *Id.* at 640.

107. *Id.* at 641.

108. *Id.*

C. Autism as an Insanity Defense

Given the potential influence of autism on a defendant's ability to form the requisite mens rea for their crime(s) and appreciate the criminality of their actions, a defendant with autism could theoretically attempt to use an insanity, or Not Guilty by Reason of Insanity (NGRI), defense.¹⁰⁹ States utilize different versions of the United States federal standard for insanity, which holds that, "at the time of the commission of the acts constituting the offense, 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."¹¹⁰ When a defendant pleads insanity, they admit to the action for which they are being charged but assert a lack of culpability based on their mental condition.¹¹¹ There are four states (Kansas, Montana, Idaho, and Utah) that explicitly do not allow for an insanity defense.¹¹² The rest of the states generally rely on one of four different tests to determine whether a defendant is legally insane (i.e., the M'Naghten Rule,¹¹³ the Durham Rule,¹¹⁴ the Irresistible Impulse Test,¹¹⁵ and the Model Penal Code¹¹⁶).¹¹⁷

Under the M'Naghten Rule, a defendant must have, at the time of their crime, had a mental disease or defect that interfered with their ability to understand the nature of their act or its wrongfulness.¹¹⁸ Defendants are presumed to be sane unless they can prove that, at the time of their crime, their mental state caused them to be unaware of what they were doing or be unaware that what they were doing was

109. Cea, *supra* note 66, at 506.

110. 18 U.S.C. § 17.

111. See Sarah Williams, *Current Application of the Insanity Defense*, FINDLAW, <https://www.findlaw.com/criminal-procedure/current-application-of-the-insanity-defense.html> (last updated Jan. 3, 2024); *Insanity Defense*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/insanity_defense#:~:text=The%20insanity%20defense%20refers%20to,rather%20than%20a%20partial%20defense (last updated June 2023).

112. Linda Sanabria, *The Insanity Defense Among the States*, FINDLAW, <https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html> (last updated Nov. 28, 2023).

113. See generally *R. v. M'Naghten*, [1843] 8 E.R. 718 (appeal taken from England); *M'Naghten Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/m%27naghten_rule (last updated June 2020) [hereinafter *M'Naghten Rule*].

114. See generally *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *abrogated by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

115. See generally John Barker Waite, *Irresistible Impulse and Criminal Liability*, 23 MICH. L. REV. 443 (1925).

116. See generally Beatrice R. Maidman, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 BOS. U.L. REV. 1831 (2016); MODEL PENAL CODE § 4.01 (AM. L. INST. 1962).

117. See Ashley H. VanDercar & Phillip J. Resnick, *The Insanity Defense: Historical Precedent and Modern Application*, 48 PSYCHIATRIC ANNALS 95, 96-97 (2018).

118. See *M'Naghten Rule*, *supra* note 113.

wrong.¹¹⁹ Examples of situations in which someone might have been unaware that their behavior was wrong include individuals acting on orders from “God” or following the instructions of a trusted authority figure who had convinced them that they were doing the right thing.¹²⁰ The Irresistible Impulse Test focuses on the ability of the defendant to control their behavior at the time of their crime.¹²¹ In other words, this standard applies if the defendant, because of their mental disease or defect, could not resist the impulse to commit the crime of which they are accused. As previously mentioned, many individuals with autism experience poor impulse control that makes it difficult to resist certain urges.¹²²

The Model Penal Code combines the premises of both of these standards, stating that the insanity defense applies when a defendant, because of a diagnosed mental disorder, is unable to understand the criminality of their actions or conform their behavior to the law.¹²³ Thus, defendants with autism might successfully use the insanity defense in jurisdictions utilizing the Model Penal Code if they can prove that they either (1) did not know what they were doing was wrong or (2) were unable to control an impulse that led to the criminal act.¹²⁴ The final test used for determining insanity in the United States is the Durham Rule, or the product test, which holds that the insanity defense applies if a defendant’s mental disease or defect was the reason they committed the crime.¹²⁵ A version of the Durham Rule is used only in New Hampshire, as other states have thought it to be too general and difficult to apply.¹²⁶

The way that a particular jurisdiction conceptualizes insanity has important implications for defendants with autism and whether they meet the criteria for an insanity defense. Jurisdictions considerably vary in their statutory language, but “the most common NGRI prerequisite condition is a mental disease or defect.”¹²⁷ Most jurisdictions do not explicitly define which diagnoses qualify for an insanity defense, but “legal scholars and forensic examiners generally consider ‘mental disease’ to include severe episodic psychiatric disorders that develop and wax and

119. *Id.*

120. *Id.*

121. *See* Waite, *supra* note 115, at 458-59.

122. *See* Hlavatá et al., *supra* note 85, at 44-45.

123. MODEL PENAL CODE § 4.01(AM. L. INST., Proposed Official Draft 1962).

124. *Id.*

125. *See* Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954), *abrogated by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

126. *See* Maidman, *supra* note 116, at 1840.

127. Jeffrey Guina et al., *Neurodevelopmental Disorders, Criminality, and Criminal Responsibility*, 52 J. AM. ACAD. PSYCHIATRY & L. 358, 361 (2022) (internal quotations omitted).

wane during one's life, such as psychotic and mood disorders."¹²⁸ Scholars and examiners typically interpret "mental defect" to include "stable, nonprogressive psychiatric disorders" such as intellectual disability and autism.¹²⁹

In jurisdictions that use other terms in their statutes, such as "mental illness," autism may not even qualify as an acceptable diagnosis for use with the insanity defense, as ASD is technically categorized as a developmental disorder rather than a mental *illness*.¹³⁰ Even if defendants do qualify, it is important to note that insanity defenses rarely succeed, and when they do, the underlying mental condition typically involves psychosis.¹³¹ In fact, one of the only documented cases where a diagnosis of autism was involved in a successful insanity defense involved a defendant who also experienced episodes of depression and psychosis.¹³²

Lastly, autism is generally unsuitable as an affirmative defense due to its nature as a spectrum, which makes it extremely difficult for legislation to produce an objective rule that accounts for the immense variation between individuals. For this reason, expert witness testimony is crucial in cases where evidence of autism is raised or suspected. Rule 704 (Opinion on Ultimate Issue) of the Federal Rules of Evidence specifies that expert testimony should focus on the defendant's diagnosis, mental state, and motivation at the time of the alleged crime,¹³³ but determining whether the relevant legal test for insanity has been met is a matter for the court.¹³⁴ Regardless, experts can provide judges and juries with important information about autism and its potential effects on culpability.¹³⁵ In her research, Berryessa found that judges generally agree that "high-functioning" offenders with ASD "view the world in a unique way, much of their behavior is not directly under their control,

128. *Id.* at 361-62.

129. *Id.* at 362; *see also* GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS & LAWYERS* 211 (3d ed. 2007).

130. *See* APA, *DSM-5-TR*, *supra* note 1, at 35; *see generally* Guina, *supra* note 127.

131. *See* Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 *BULL. AM. ACAD. PSYCHIATRY & L.* 331, 336-37 (1991); Robert E. Cochrane et al., *The Relationship Between Criminal Charges, Diagnoses, and Psycholegal Opinions Among Federal Pretrial Defendants*, 19 *BEHAV. SCI. & L.* 565, 575 (2001); *see generally* AAPL Task Force, *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 *J. AM. PSYCH. & L.* 3 (2014); Samuel Adjorlolo et al., *Mentally Disordered Offenders and the Law: Research Update on the Insanity Defense, 2004-2019*, 67 *INT'L J.L. & PSYCHIATRY* 2 (2019); Paul G. Nestor & Joel Haycock, *Not Guilty by Reason of Insanity of Murder: Clinical and Neuropsychological Characteristics*, 25 *J. AM. ACAD. OF PSYCHIATRY & L.* 161 (1997); Robert Nicholson et al., *Characteristics and Outcomes of Insanity Acquittes in Oklahoma*, 9 *BEHAV. SCI. & L.* 487 (1991).

132. David Owens & Josh Kovner, *After Insanity Acquittal in Mother's Stabbing, Man with Autism Presents Treatment Challenge*, *HARTFORD COURANT*, <https://www.courant.com/news/connecticut/hc-aspergers-insanity-acquittal-whiting-20170524-story.html> (last updated Dec. 12, 2018, 2:26 PM).

133. *FED. R. EVID.* 704.

134. *Id.*

135. *See* *United States v. Edwards*, 819 F. 2d 262, 265-66 (11th Cir. 1987).

and they are inherently different than other offenders and should be treated as such,” emphasizing the need for more education from expert witnesses.¹³⁶

D. Autism as a Diminished Capacity Defense

Many offenders with autism should be considered less culpable for their crimes, but they are rarely completely devoid of intent or understanding. When a defendant has some amount of criminal intent but factors such as a mental illness/disorder or low intelligence reduce their intentionality, the defendant is said to have “diminished capacity.”¹³⁷ Unlike the insanity defense, which is an affirmative defense, diminished capacity is a partial defense that does not suggest a complete lack of criminal responsibility.¹³⁸ A successful diminished capacity defense results in a defendant pleading guilty to a lesser crime and accepting some criminal responsibility but arguing that mitigating factors reduced the intent element.¹³⁹ The diminished capacity plea is based on the principle that certain people, due to mental impairment or disease, are genuinely incapable of forming the requisite intent of their crime(s).¹⁴⁰

A diminished capacity defense may be used successfully in cases where the defendant with autism is able to prove to the court that they experienced a significantly reduced mental capacity that substantially contributed to their criminal offense. However, the nuanced ways that the social and communication deficits associated with autism manifest across individuals with the disorder may not be immediately noticeable to those who are unfamiliar with autism. While these symptoms may not present as prominently as those associated with other disorders (e.g., psychotic disorders), they can still have a major influence over one’s thinking patterns, decision-making process, and behaviors.¹⁴¹ Thus, claims of diminished

136. Berryessa, *Judiciary Views*, *supra* note 31, at 103 (internal quotations omitted).

137. *Diminished Capacity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/diminished_capacity (last updated Oct. 2022); HALL, *supra* note 81, at 260.

138. *See Diminished Capacity*, *supra* note 137.

139. Williams, *supra* note 111. Generally speaking, convicting a defendant of a lesser offense does not require prosecutors to prove as much intentionality as convicting the defendant of a greater offense would. *See Diminished Capacity*, *supra* note 137.

140. *Diminished Capacity*, *supra* note 137.

141. *See* Irwin P. Levin et al., *Extending Decision Making Competence to Special Populations: A Pilot Study of Persons on the Autism Spectrum*, 6 FRONTIERS PSYCH., Apr. 28, 2015, at 5-8; *see generally* Lydia Luke et al., *Decision-Making Difficulties Experienced by Adults with Autism Spectrum Conditions*, 16 AUTISM 612 (2011); Gary J. Gaeth et al., *Toward Understanding Everyday Decision Making by Adults Across the Autism Spectrum*, 11 JUDGEMENT & DECISION MAKING 537 (2016); Nicky Rogge, *Exploring Maximizing, Satisficing and Minimizing Tendency in Decision-Making Among Autistic and Neurotypical Individuals*, 92 RSCH. AUTISM SPECTRUM DISORDERS, Feb. 12, 2022; Lydia Vella, et al., *Understanding Self-Reported Difficulties in Decision-Making by People with Autism Spectrum Disorders*, 22 AUTISM 549 (2017).

capacity may be wrongfully dismissed if a defendant's autism has not been diagnosed or disclosed to the court or if their symptoms are not readily apparent to the court (whether that be because the individual has learned to "mask" their symptoms or because the people in the courtroom lack the ability to recognize their symptoms). The ability of legal personnel to recognize specific traits in defendants that may be indicative of autism can play a major role in determining whether defendants receive fair, proportionate punishments.

In a recent case from the United Kingdom, ASD was successfully used as a defense against murder.¹⁴² Aaron Matthew was arrested for stabbing his mother to death in 2021.¹⁴³ Matthew had not yet been diagnosed with autism, but the defense noticed abnormalities in his behaviors and utilized expert witnesses, a psychiatrist and a psychologist, to evaluate Matthew.¹⁴⁴ They diagnosed Matthew with "severe ASD," and noted that "social disadvantage barriers" and the COVID-19 pandemic had played significant roles in his condition having been undiagnosed until this point.¹⁴⁵ Matthew pled guilty to manslaughter on the grounds of diminished responsibility, and the defense's experts presented evidence as to how the symptoms associated with autism affect social behavior and daily life.¹⁴⁶

At trial, the defense team presented evidence that Matthew "suffered severe ASD" and was "having difficulty in coping, predicting outcomes and fully understanding the consequences of his actions."¹⁴⁷ The prosecution's expert, a psychiatrist, ultimately agreed that, at the time of the murder, Matthew's autism likely "impacted [his] mental functioning and ability to exercise self-control . . ."¹⁴⁸ In the United Kingdom, those convicted of murder receive a mandatory life sentence and must serve a minimum term, whereas those convicted of manslaughter can receive sentences up to a maximum of life imprisonment.¹⁴⁹ Nonetheless, Matthew was

142. Jimmy Nsubuga, *Teen Son Who Killed Mother by Stabbing Her 80 Times Jailed*, YAHOO!NEWS (Aug. 2, 2022), <https://uk.news.yahoo.com/aaron-matthew-ingrid-matthew-144539284.html>.

143. *Id.*

144. *Autism Spectrum Disorder (ASD), a Recognised Mental Health Disorder, was Deemed a Successful Defence to Murder*, GARRICK L. (Apr. 22, 2022), <https://web.archive.org/web/20240418083735/https://garricklaw.com/autism-spectrum-disorder-asd-a-recognised-mental-health-disorder-was-deemed-a-successful-defence-to-murder/>.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Homicide: Murder, Manslaughter, Infanticide and Causing or Allowing the Death or Serious Injury of a Child or Vulnerable Adult*, THE CROWN PROSECUTION SERV. (Oct. 15, 2024), <https://www.cps.gov.uk/legal-guidance/homicide-murder-manslaughter-infanticide-and-causing-or-allowing-death-or-serious>.

given a life sentence and ordered to serve a minimum of six years and 226 days after the judge deemed him a “serious risk to the community.”¹⁵⁰

Even when a defendant’s autism is identified and presented to the court, like in Matthew’s case, not all jurisdictions allow for a plea of diminished capacity.¹⁵¹ In fact, some trial courts do not recognize mental defects as a justification for criminal conduct.¹⁵² Even if a jurisdiction *does* allow a diminished capacity defense, it often requires defendants to meet certain parameters associated with an insanity defense and limits how lawyers can use expert testimony.¹⁵³ So, depending on the jurisdiction, some defendants with autism may be ineligible to argue their diminished capacity. In these cases, defendants must rely on judges to consider evidence of their autism during sentencing.¹⁵⁴

III. OVERVIEW OF AUTISM IN SENTENCING DECISIONS

When an autism diagnosis does not exempt a defendant from conviction, it should still be carefully considered as a potential mitigating factor in the evaluation of the defendant’s intent, capacity, and responsibility.¹⁵⁵ A mitigating factor is any fact or circumstance about the offense or the defendant that persuades the judge to impose a less harsh sentence.¹⁵⁶ While jurisdictions vary in their recognized mitigating factors, commonly accepted mitigating factors include developmental disability, a substance addiction that contributed to the crime(s), and a clean criminal record.¹⁵⁷ Defendants with a mental illness or disorder may be viewed as less culpable and less blameworthy than those who act intentionally and maliciously, but the policymakers rarely consider such defendants completely blameless.¹⁵⁸ This “middle ground” of moral blameworthiness can be hard to determine in the context of a defense, but when used as a mitigating factor during sentencing, a judge can

150. Nsubuga, *supra* note 142.

151. *Diminished Capacity*, *supra* note 137.

152. *Id.*; but see *United States v. Williams*, 553 F.3d 1073, 1084 (7th Cir. 2009) (finding the trial court should have considered a defendant’s autism as a mitigating factor during sentencing).

153. Alan R. Felthous, *Diminished Capacity: Subterfuge or Just Defense?*, AM. ACAD. PSYCH. & L., Jan. 2000, at 10-11.

154. Cea, *supra* note 66, at 528.

155. Berryessa, *Judiciary Views*, *supra* note 31, at 102-03; see also Thomas A. Mayes, *Persons with Autism and Criminal Justice: Core Concepts and Leading Cases*, 5 J. POSITIVE BEHAV. INTERVENTIONS 92, 95 (2003).

156. *Mitigating Factor*, LEGAL INFO. INST. (July 2023), https://www.law.cornell.edu/wex/mitigating_factor.

157. *Id.*

158. See Eva E. Subotnik, *Past Violence, Future Danger?: Rethinking Diminished Capacity Departures Under Federal Sentencing Guidelines Section 5K2.13*, 102 COLUM. L. REV. 1340, 1369-70 (2002).

utilize a wide variety of evidence and testimony (e.g., medical history, employment, education, family history) to consider how much “punishment” is appropriate and adjust the defendant’s sentence accordingly.¹⁵⁹

The Federal Sentencing Guidelines state that a downward departure to sentencing (i.e., a sentence that is lower than the minimum sentence suggested by the sentencing guidelines) 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.”¹⁶⁰ Similarly, downward variances are sentences outside of the guideline range that are “not imposed within the guidelines framework” but are instead based upon the statutory sentencing factors found at 18 U.S.C. § 3553(a).¹⁶¹ Downward departures and variances help ensure that defendants will be punished for their crime(s) while still receiving sentences that are proportionate to their level of culpability.¹⁶² It is important to note that an autism diagnosis does not guarantee leniency during sentencing.

A. *Autism as Mitigating: Successful Downward Departures*

While the Federal Sentencing Guidelines do not require courts to consider evidence of autism as mitigating, autism has been successfully used to achieve downward departures or variances in several child pornography cases.¹⁶³ For instance, a downward departure was granted in *United States v. Huseeth*, in which the defendant was charged with and pled guilty to possession of child pornography.¹⁶⁴ In his motion for a downward departure, Huseeth cited his autism diagnosis, significant cognitive impairments, particular vulnerability to manipulation due to his autism, and his need for treatment.¹⁶⁵ The defense acknowledged that Huseeth had intentionally possessed child pornography and that his autism did not *cause* him to possess child pornography.¹⁶⁶ However, the defense argued that his autism impaired his ability to understand why his behavior was wrong, citing Huseeth’s compromised ability to

159. See *United States v. Williams*, 553 F.3d 1073, 1085 (7th Cir. 2009).

160. U.S. SENT’G GUIDELINES MANUAL § 5K2.13 (U.S. SENT’G COMM’N 2013) [hereinafter SENT’G GUIDELINES]

161. U.S. SENT’G COMM’N, PRIMER ON DEPARTURES AND VARIANCES 1-2, 8 (2023) [hereinafter PRIMER]; 18 U.S.C. § 3553.

162. PRIMER, *supra* note 161, at 1.

163. See *People v. Frenger*, 124 N.Y.S.3d 913, 923 (Sup. Ct. 2020); *United States v. Huseeth*, No. 18-20027-JAR, 2021 WL 4940915, at *12-14 (D. Kan. Oct. 22, 2021); *United States v. Shore*, No. 17-502, 2020 WL 3791550, at *7 (E.D. Pa. July 7, 2020); see also SENT’G GUIDELINES, *supra*, note 160.

164. *Huseeth*, 2021 WL 4940915, at *3, 7.

165. *Id.* at *1.

166. *Id.* at *7.

read the facial expressions and emotional states of the children and recognize that “*all* children depicted in child pornography are being hurt.”¹⁶⁷ The Court ultimately found that Huseth’s autism and associated cognitive deficits significantly impaired his ability to “appreciate the wrongfulness” of his behavior¹⁶⁸ and granted his requested sentence of probation with treatment.¹⁶⁹

In *United States v. Williams*, the United States Court of Appeals for the Seventh Circuit held that the lower court had erred by failing to consider the defendant’s autism as a mitigating factor.¹⁷⁰ Williams had served as the getaway driver in a series of armed bank robberies that his brother had organized.¹⁷¹ Williams was identified as borderline intellectually disabled and had been diagnosed with “autistic disorders and other pervasive developmental disorders.”¹⁷² A jury convicted Williams of conspiracy, two counts of bank robbery by force or violence, and two counts of using and carrying a firearm in relation to a crime of violence.¹⁷³ Once he was convicted, the district court did not consider Williams’s diagnoses during sentencing, resulting in a sentence of 46 years.¹⁷⁴ Williams appealed his conviction and sentence, and the appellate court affirmed his conviction but ruled that the district court must reconsider Williams’s sentence, bearing in mind his mental state and susceptibility to manipulation.¹⁷⁵

On remand, the district court considered the severity of Williams’s autism and recognized that he was institutionalized as a teenager and had lived with his mother for most of his life.¹⁷⁶ Williams’s sentence was reduced to 37 years of incarceration, which was 9 years less than his original sentence.¹⁷⁷ The Court could not reduce his sentence any further because the statutory mandatory minimum sentence for Williams’s two counts of carrying and using a firearm during a crime of violence was 32 years,¹⁷⁸ and he did not qualify for the exceptions that allow for the imposition of a sentence below the statutory minimum.¹⁷⁹ These 32 years had to be served

167. *Id.* at *8 (emphasis in original).

168. *Id.* at *2.

169. *Id.*

170. *United States v. Williams*, 553 F.3d 1073, 1077 (7th Cir. 2009).

171. *Id.* at 1084.

172. *Id.*

173. *Id.* at 1079-1080; *United States v. Williams*, 399 F. App’x 113, *113 (7th Cir. Oct. 25, 2010) (Westlaw).

174. *Id.* at 1078.

175. *Id.* at 1085.

176. *Id.* at 1084; Cea, *supra* note 66, at 524.

177. *See United States v. Williams*, 399 F. App’x 113, *114 (7th Cir. Oct. 25, 2010) (Westlaw).

178. *Id.* (citing to 18 U.S.C. § 924(c)).

179. *Id.* (citing to 18 U.S.C. § 3553).

consecutively to his sentence for the other counts, and the advisory guideline range for those counts was 11.25 years to 14 years.¹⁸⁰ After considering Williams's autism, the district court reduced this sentence to five years of imprisonment (from the 14-year sentence he received at his initial trial) on those counts.¹⁸¹

More recently, in 2019, a 30-year-old man with autism, Jonathan Knott, was charged with possession of child pornography.¹⁸² After being found competent to stand trial, Knott entered into a plea agreement under which the government agreed to seek a sentence at the bottom of the guidelines range.¹⁸³ On the basis of his autism, Knott then moved for a downward variance from the recommended sentence of 27 months.¹⁸⁴ The District Court Judge, Myron H. Thompson, granted this motion, referencing Knott's "diminished moral culpability," and sentenced Knott to 27 months of home detention as one of the conditions of seven years of supervised release.¹⁸⁵

Because Knott did not display obvious language or intellectual impairments, his autism was described as "not always readily apparent."¹⁸⁶ Prior to his trial, Knott was evaluated by two psychologists who agreed that Knott experienced severe deficits in social and adaptive skills.¹⁸⁷ For instance, he scored in the bottom three percent of test takers on a measure of adaptive functioning (i.e., daily living, communication, and socialization skills that are required for success in day-to-day life).¹⁸⁸ Specifically, in the areas of "receptive communication" and "interpersonal relationships," Knott reportedly functioned at about the level of a three-year-old child.¹⁸⁹ Knott also reportedly functioned at about the level of a four-year-old in terms of his "coping skills" and at about the level of a five-year-old in "expressive communication."¹⁹⁰ His parents reported that Knott had experienced problems with socializing, problem-solving, and reading facial expressions since he was a child.¹⁹¹ This case emphasizes the importance of thorough evaluations and testing in cases where evidence of autism is raised, particularly when a defendant's symptoms are more

180. *Id.* (citing to 18 U.S.C. § 924(c)).

181. *Id.*

182. *United States v. Knott*, 638 F. Supp. 3d 1310, 1312 (M.D. Ala. 2022).

183. *Id.*

184. *Id.*

185. *Id.* at 1320.

186. *Id.* at 1316.

187. *Id.* at 1316-18.

188. *Id.* at 1316; See Goldie McQuaid et al., *The Gap Between IQ and Adaptive Functioning in Autism Spectrum Disorder: Disentangling Diagnostic and Sex Differences*, 25 *AUTISM* 1565, 1566 (2021) (explaining the scope of adaptive functioning).

189. *Knott*, 638 F. Supp. 3d at 1316-17.

190. *Id.* at 1317.

191. *Id.*

nanced and covert. Had Knott's autism not been considered in determining his sentence, he may have received an unjust punishment for a crime of which he was not fully morally culpable.

B. Dismissals of Autism Evidence in Sentencing Decisions

Despite the examples above, there are many cases in which evidence of autism did not result in a reduced sentence. In *United States v. Zuk*, federal prosecutors indicted a college student on seven counts for "transmitting, receiving, and possessing child pornography" and, while awaiting trial, received a diagnosis of "mild" autism spectrum disorder (ASD).¹⁹² He ultimately pleaded guilty to one count of possessing child pornography as part of a plea deal.¹⁹³ Though the Sentencing Guidelines' recommendation for Zuk's relevant conduct considerably exceeded 240 months, a 240-month term was the maximum sentence for possession.¹⁹⁴

However, Zuk's recently diagnosed autism became the "primary driver" in the federal district court's determination of his sentence: 26 months (time served) and a life term of supervised release.¹⁹⁵ He was also mandated to complete a residential treatment program followed by a 24-month community confinement.¹⁹⁶ The government filed an appeal seeking to have the sentence overturned on the basis that it was too lenient and did not follow the Federal Sentencing Guidelines.¹⁹⁷ The United States Court of Appeals for the Fourth Circuit agreed with the government's position, acknowledging that Zuk was "highly functioning" compared to others with autism and that he was not diagnosed until after his arrest.¹⁹⁸

The Fourth Circuit recognized that it was appropriate for the district court to consider Zuk's autism spectrum disorder as part of the "history and characteristics of the defendant,"¹⁹⁹ but they did not agree that a time-served sentence was reasonable, particularly because Zuk's behavior "was so egregious."²⁰⁰ Moreover, the Court acknowledged that none of the defense's expert witnesses testified that Zuk's autism *caused* his criminal behavior, nor did the experts argue that Zuk was unable

192. *United States v. Zuk*, 874 F.3d 398, 400-03 (4th Cir. 2017).

193. *Id.* at 400.

194. *Id.* at 400-01 (explaining that undisputed evidence revealed that Zuk actually possessed thousands of images and hundreds of videos, a large portion "of which depicted sadistic treatment of young children" and that Zuk directed a sixteen-year-old relative to abuse a five-year-old child).

195. *Id.* at 401, 406.

196. *Id.* at 406.

197. *Id.* at 401.

198. *Id.* at 408, 411.

199. *Id.* at 411 (quoting 18 U.S.C. § 3553(a)(1)).

200. *Id.* at 411.

to appreciate the criminality of his behavior or control his behavior.²⁰¹ Thus, the Fourth Circuit vacated and remanded Zuk's case for resentencing by the lower court, and his sentence was amended to 71 months in prison and lifetime supervised release.²⁰²

The relationship between each individual's ASD symptoms and their alleged crime should be considered carefully, and an autism diagnosis should neither be disregarded nor given undue influence in a criminal case.²⁰³ In *United States v. Morais*, the defendant pled guilty to two counts of receiving child pornography and received eight years in prison along with a lifetime of supervised release.²⁰⁴ A neuropsychologist testified that Morais was very intelligent but socially impaired.²⁰⁵ He asserted that Morais suffered from "mind blindness" (i.e., deficits in theory of mind), which made it difficult for him to "perceive, predict, and react appropriately to another person's thoughts, emotions, et cetera, to be able to put yourself in another person's shoes, essentially."²⁰⁶ He also mentioned that people with autism tend to collect things (a type of restricted, repetitive behavior), and this related to Morais's collection of 8,200 images of nude children on his computer.²⁰⁷

However, the district court decided that the defense was unable to demonstrate a clear link between Morais's autism and the crime.²⁰⁸ While Morais had tendencies to collect items, his autism did not "necessarily dictate the content of" his collection.²⁰⁹ Morais appealed his sentence, but the United States Court of Appeals for the Eighth Circuit agreed with the lower court's decision to not consider autism as a mitigating factor and affirmed the sentence.²¹⁰ Similarly, in *Director of Public Prosecutions v. HPW*, authorities accused a man with autism of sexually molesting his 11-year-old daughter, and the appellate court struck down the argument that the defendant had "misread" his daughter's sexual cues because of his autism.²¹¹

201. *Id.*

202. *Id.* at 412; Amended Judgment in a Criminal Case at 2, *United States v. Zuk*, No. DNCW513CR000059-001 (W. Dist. N. C. Jan. 13, 2021).

203. M. Saul Farris & Joseph Chien, *Greatly Reduced Sentence Due to Mild Autism Spectrum Disorder Deemed Unreasonable*, 46 J. AM. ACAD. PSYCH. & L. 388, 390 (2018).

204. *United States v. Morais*, 670 F.3d 889, 891 (8th Cir. 2012).

205. *Id.* at 892, 894.

206. *Id.* at 892; see also APA, DSM-5-TR, *supra* note 1 at 117.

207. *Morais*, 670 F.3d at 892-93.

208. See *id.* at 893.

209. *Id.*

210. *Id.* at 897.

211. *DPP (Vic) v HPW* (2011) VSCA 88 (Austl.).

IV. ADDRESSING INCONSISTENCIES

The cases provided throughout this brief article highlight the tremendous variation with which defendants' autism is considered throughout criminal proceedings and sentencing decisions. This is partially due to the wide variation in the type and severity of symptoms that people with autism experience. Thus, courts can analyze the "severity" of an individual's autism and decide that leniency is not warranted. For instance, in *United States v. Lange*, the defendant pled guilty to distributing child pornography and requested a downward departure on the basis of diminished capacity due to his "Asperger's-like disorder" (which would now fall under the umbrella of ASD).²¹² Lange did not suggest that he was unable to appreciate the wrongfulness of his behavior but, like Morais, based his argument on the fact that he was unable to control his compulsion to collect child pornography.²¹³

The district court denied his request, and Lange appealed this decision, claiming that his sentence of 55 months incarceration was unreasonable.²¹⁴ However, testing revealed that neither Lange's executive functioning nor his ability to control his behavior was impaired.²¹⁵ The United States Court of Appeals for the Seventh Circuit agreed with the lower court that Lange's disorder was not severe enough to result in cognitive or volitional impairment or warrant a reduced sentence.²¹⁶ The success of requests for downward departure on the basis of autism is typically dependent on the severity of the defendant's impairment.

To investigate how autistic people's vulnerability is considered throughout criminal proceedings, a recent study from researchers in the United Kingdom surveyed defense lawyers from 12 nations and presented data on 93 cases involving autistic defendants.²¹⁷ Slavny-Cross and colleagues found that 75% of defendants with autism "were not given reasonable adjustments during the process . . . despite their known vulnerability."²¹⁸ However, in cases where a defendant was convicted, 60% of judges viewed the defendant's autism as a mitigating factor and largely granted suspended or reduced sentences.²¹⁹ Of course, in order for courts to consider evidence of a defendant's autism during criminal proceedings, it must first be made known that the defendant has autism. Slavny-Cross and colleagues identified two

212. APA, DSM-5-TR, *supra* note 1, at 36; *United States v. Lange*, 445 F.3d 983, 985 (7th Cir. 2006).

213. *Lange*, 445 F.3d at 984; *see also Morais*, 670 F.3d at 897.

214. *Lange*, 445 F.3d at 984.

215. *Id.* at 985.

216. *Id.* at 986-87 n.1.

217. Slavny-Cross, *supra* note 31, at 904-05.

218. *Id.* at 904, 911.

219. *Id.* at 908.

possible barriers to identifying defendants with autism: (1) some defendants may not disclose their diagnosis during their interaction with law enforcement, and (2) defendants with autism may be undiagnosed and thus only identified by legal professionals with enough experience to recognize their social and communication deficits and pursue a formal assessment and diagnosis.²²⁰

In their survey of defense lawyers, Slavny-Cross and colleagues found that 29% of defendants with autism were diagnosed during criminal proceedings, and 10% were diagnosed after proceedings.²²¹ Results from this study highlight the crucial need for law enforcement and legal professionals to receive “autism awareness training” to learn how to identify autistic traits and ensure proper consideration of these traits throughout proceedings.²²² The researchers also emphasized that many defendants who disclose their diagnoses still fail to receive reasonable adjustments.²²³

Recall *England & Wales v. Matthew*, in which the defendant was diagnosed with “severe ASD” after his lawyer noticed indicators of autism and recruited experts to assess him.²²⁴ The COVID-19 pandemic and certain “social disadvantage barriers” were accredited with Matthew’s autism going undiagnosed until after his arrest.²²⁵ The majority of defendants who are diagnosed during criminal proceedings probably have more “mild” impairments due to autism, hence them going undiagnosed until this point. However, Matthew’s case proves that even “severe” autism can go undiagnosed into adulthood in situations where defendants lack the resources or familial support to obtain an earlier diagnosis. This further highlights the importance of legal professionals learning to identify indicators of autism among defendants and getting them evaluated. Matthew’s case also elucidates the importance of taking post-arrest diagnoses seriously, as it is possible for individuals with “severe” autism to remain undiagnosed up to the time of their arrest.

V. ADMISSIBILITY OF EXPERT TESTIMONY ON ASD

While trial judges are tasked with ruling upon the admissibility of evidence,²²⁶ it is the position of the author that judges should not have the ability to dismiss expert testimony regarding the impact of a defendant’s autism. In *State v. Delorenzo*

220. *Id.* at 910-11.

221. *Id.* at 911.

222. *Id.* (explaining the importance of autism-awareness training in the criminal legal system).

223. *Id.*

224. *See Autism Spectrum Disorder (ASD), a Recognised Mental Health Disorder, was Deemed a Successful Defence to Murder*, *supra* note 144.

225. *Id.*

226. *See, e.g.*, FED. R. EVID. 403.

(2022), Alexander Delorenzo appealed his 2021 sentence of five to fifteen years imprisonment after being convicted of possessing and distributing child pornography.²²⁷ In his appeal, Delorenzo claimed the lower court erred in a variety of ways, the first of which being its decision to prevent Delorenzo's expert from testifying at his trial regarding Delorenzo's autism and obsessive-compulsive disorder (OCD) diagnoses.²²⁸ He argued that the testimony would have provided the jury with context regarding his character traits, mental state, credibility, and subjective understanding of what he was doing.²²⁹ The Supreme Court of Appeals of West Virginia rejected Delorenzo's argument on the grounds that his proposed testimony failed to establish a connection between his diagnoses and the mens rea of the crime, and the Court affirmed his sentence.²³⁰

Chief Justice Hutchison and Justice Wooton dissented; Justice Wooton stated that he primarily took issue with "the majority's failure to recognize the obvious: that the circuit court's refusal to allow the petitioner's expert witness . . . to testify as to his Asperger's Syndrome Disorder ("ASD") gutted the petitioner's ability to advance his sole defense, lack of intent, thereby violating his constitutional right to a fair trial."²³¹ Wooton noted that the circuit court relied on the absence of a "West Virginia precedent governing admission of expert testimony as to ASD . . . either to negate a defendant's mens rea or to explain the affect and behaviors of an individual who has the condition."²³² Thus, when courts lack clear guidance on the admissibility of expert testimony on a defendant's autism, they may dismiss this testimony as irrelevant and miss the opportunity for education on the nuanced ways that the defendant's autism contributed to their criminal behavior and accompanying level of culpability.

In Delorenzo's case, the circuit court failed to consider previous cases in which other jurisdictions were presented with the issue of admissibility of expert testimony concerning a defendant's ASD, disregarding them as "unpersuasive and not applicable to the present case."²³³ In his dissent, Justice Wooton argued that these cases are actually "persuasive and highly relevant" to the Delorenzo case.²³⁴ For instance, consider *State v. Burr* (2007), which is referenced above in the present

227. *State v. Delorenzo*, 885 S.E.2d 645, 650 (W. Va. 2022).

228. *Id.*

229. *Id.* at 652.

230. *Id.* at 655, 664.

231. *Id.* at 664 (Wooton, J., dissenting).

232. *Id.* at 667.

233. *Id.* (quoting the majority).

234. *Id.*

article.²³⁵ In *Burr*, the trial court chose to exclude expert testimony on ASD, claiming that it did not establish diminished capacity, despite the defense counsel's explanation that they were not intending to establish diminished capacity, but rather to demonstrate that the defendant's "ability to make certain social judgments [was] impaired."²³⁶ On appeal, the Superior Court of New Jersey reversed, finding that it would have been "a more fair and complete adversarial process if, in evaluating the evidence and the inferences urged by the State, jurors were aware that defendant's mental disability prevent[ed] him from viewing the world as others do in terms of acceptable social interactions."²³⁷ Mentioning that the New Jersey Evidence Rules "broadly admit 'all' relevant evidence, unless the evidence is otherwise excluded," the appellate court concluded that "mental defect evidence is relevant when asserted to prove or disprove an element of a crime or to advance a defense."²³⁸

Similarly, in *State v. Boyd* (2004), the trial court excluded expert testimony on ASD because it did not address the defendant's diminished capacity.²³⁹ As was the case in *State v. Delorenzo*,²⁴⁰ the defense counsel argued, in vain, that Boyd's defense was not based on diminished capacity, and the expert testimony would have described the limitations of Boyd's abilities, explained his unusual interests, and shown that he was particularly susceptible to being framed.²⁴¹ On appeal, the Missouri Court of Appeals found that the lower court erred by excluding the expert evidence, reversed and remanded for a new trial, and noted that "[t]he denial of the opportunity to present relevant and competent evidence negating an essential element of the state's case may, in some cases, constitute a denial of due process."²⁴² As mentioned in the dissenting judges' statement following the decision in *State v. Delorenzo*, the majority should have considered the precedents outlined in cases like *State v. Burr* and *State v. Boyd*.²⁴³ They contended that refusing to let Delorenzo's expert witness testify at his trial violated his "right to present his own witnesses to establish a defense . . . a fundamental element of due process of law."²⁴⁴

235. See generally *State v. Burr*, 921 A.2d 1135, 1142 (N.J. Super. Ct. App. Div. 2007), *aff'd as modified*, 948 A.2d 627 (N.J. 2008).

236. *Delorenzo*, 885 S.E.2d at 667-68 (discussing the decision of the trial court in *Burr*).

237. *Burr*, 921 A.2d at 1150.

238. *State v. Burr*, 948 A.2d 627, 631-32 (N.J. 2008).

239. *State v. Boyd*, 143 S.W.3d 36, 39-44 (Mo. Ct. App. 2004).

240. *Delorenzo*, 885 S.E.2d at 652-53.

241. *Boyd*, 143 S.W.3d at 39.

242. *Id.* at 40 (quoting *State v. Copeland*, 928 S.W.2d 828, 837 (Mo. en banc 1996)).

243. *Delorenzo*, 885 S.E.2d at 664-70 (Wooton, J., dissenting).

244. *Id.* at 664 (quoting *State v. Whitt*, 649 S.E.2d 258, 264 (2007), *modified on other grounds by State v. Herbert*, 767 S.E.2d 471 (W. Va. 2014)).

Finally, Justice Wooton and Chief Justice Hutchison took issue with the majority's unsubstantiated claim that it is the trial court's responsibility to oversee the examination of each party's witnesses, arguing that this claim is "wholly divorced from the realities of trial practice."²⁴⁵ The majority contended that decisions concerning "what witnesses to call, how best to elicit information from them, and/or how best to discredit their testimony" are matters for attorneys rather than a duty of the trial judge, whose obligation is "to rule on motions, objections, and issues of law, and – in limited circumstances – to pose clarifying questions"²⁴⁶ The dissenting justices expressed concern that the majority's decision in this case could prompt more "judicial interference in the presentation of evidence," overstepping a boundary that has been firmly established by the Supreme Court of Appeals of West Virginia:

The trial judge in a criminal trial must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his position, of unduly influencing jurors in the discharge of their duty as triers of the facts. This Court has consistently required trial judges not to intimate an opinion on any fact in issue in any manner. In criminal cases, we have frequently held that conduct of the trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded.²⁴⁷

A. *Current Practices for Determining Admissibility of Expert Testimony on ASD*

Currently, most states use either the Frye or Daubert standards to determine whether evidence is admissible in court.²⁴⁸ Those employing the Daubert standard assess expert evidence on the basis of its validity, reliability, methodological dependability, and relevancy, as well as whether the evidence has been peer reviewed, tested, and is typically accepted by the relevant intellectual community.²⁴⁹ The Frye standard offers a broadened approach to determining the admissibility of expert evidence.²⁵⁰ This standard states that an expert's opinion is admissible if the "scientific technique on which the opinion is based is 'generally accepted' as reliable in the relevant scientific community."²⁵¹

245. *Id.* at 670 (emphasis omitted) (quoting majority opinion).

246. *Id.*

247. *Id.* (quoting *State v. Rogers*, 600 S.E.2d 211, 216-17 (W. Va. 2004)).

248. Berryessa, *Educator of the Court*, *supra* note 35, at 575-76.

249. *Id.* at 576; *see Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592-98 (1993).

250. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

251. Anjelica Cappellino, *Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony*, EXPERT INST. (Apr. 11, 2022), <https://www.expertinstitute.com/resources/insights/daubert->

The Federal Rules of Evidence employ a version of the Daubert standard.²⁵²The most recent amendment to Rule 702 (Testimony by Expert Witnesses) took effect on December 1, 2023, with the current version of the rule stating that:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- 1) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- 2) the testimony is based on sufficient facts or data;
- 3) the testimony is the product of reliable principles and methods; and
- 4) the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.²⁵³

This recent amendment made minor changes to the language of Rule 702 that intend to clarify and emphasize the judge’s role as a gatekeeper for expert testimony.²⁵⁴ The new language raises the bar for admissibility of expert testimony, now stating that the proponent of expert testimony must prove that the expert’s methods are “more likely than not” reliable.²⁵⁵ It also requires a stronger connection to be established between experts’ opinions and their methods, a matter that courts previously addressed during cross-examination.²⁵⁶ The new rule, however, emphasizes the judge’s role in determining whether an opinion is “more likely than not” supported by an expert’s methodology.²⁵⁷ While these clarifications aim to improve the quality of the expert testimony that is admitted, they risk making it even more difficult for autistic defendants to present evidence of their ASD as part of their defense.

Despite the recently increased stringency of Rule 702, Rule 706 offers another avenue for defendants to get expert testimony admitted.²⁵⁸Rule 706(a) (Appointment Process) stipulates the following:

vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony/; *see also Frye*, 293 F. at 1014.

252. *See, e.g.*, FED. R. EVID. 702.

253. FED. R. EVID. 702.

254. *Id.* advisory committee notes to the 2023 amendment.

255. *Id.*

256. *See id.*

257. *Id.*

258. FED. R. EVID. 706.

On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.²⁵⁹

For judges, there are no obvious barriers to the court appointment of experts and very few disadvantages to doing so.²⁶⁰

VI. PROPOSED SOLUTION

A review of the cases presented throughout this article suggests that many judges do not seem to understand autism well enough to apply the existing law in a matter that affords proper consideration to the ways that autism can contribute to a defendant's culpability and deserved punishment. Without expert testimony, judges and juries risk making unfair and excessively harsh decisions regarding autistic defendants that do not reflect their unique circumstances. Thus, future legislation should explicitly require courts to appoint (or at least allow) an expert in cases involving defendants with autism. An expert can provide insight on a defendant's individual experience of autism and whether it: (1) affects their ability to form the requisite criminal intent to be convicted of their crime and/or (2) is mitigating and warrants a lower sentence.²⁶¹ Once provided with this insight, courts would still have the power to determine whether a defendant's autism was directly related to their criminal behavior and whether their symptoms are "severe" enough to warrant a successful defense or a lighter sentence.²⁶²

One possible solution to address the inconsistency with which expert evidence of autism is permitted and adequately considered would be to make another adjustment to the Federal Rules of Evidence. These rules could specify that courts are required to utilize an expert in cases where a defendant has been diagnosed with autism, whether the diagnosis was given before the alleged offense(s) or at some point during criminal proceedings. Either party would still be able to submit their own expert to be considered under Rule 702, but if their expert's testimony was inadmissible for some reason, autistic defendants should not be deprived of their right to utilize expert testimony in their defense.²⁶³ Thus, Rule 706 could be amended to include a statement such as, "In cases where the defense can provide

259. FED. R. EVID. 706(a).

260. Anthony Champagne et al., *Are Court-Appointed Experts the Solution to the Problems of Expert Testimony?*, 84 JUDICATURE 178, 183 (2001).

261. Chiacchia, *supra* note 19.

262. *See id.*

263. *See* FED. R. EVID. 702.

evidence of a defendant's ASD, the court is required to appoint, or at least allow, any appropriate expert who consents to act and is qualified to testify on the defendant's diagnosis and symptoms."

Requiring courts to appoint expert witnesses in cases where one is not appointed by either party would solve the problem of defendants with limited financial resources being unable to afford their own expert witnesses. The utilization of expert witnesses ensures that each defendant's autism is considered on an individual basis, taking into account their specific symptoms and how they contributed (or did not contribute) to their criminal behavior.²⁶⁴ The various cases presented throughout the present article highlight the assortment of ways in which symptoms of autism can influence defendants' presentation in court, interpersonal interactions, ability to control their behavior, and/or capacity to appreciate the wrongfulness of their acts.

While the Federal Rules of Evidence only apply in federal court, many states base their rules of evidence on the federal system. Thus, amending the Federal Rules of Evidence would hopefully inspire individual states to integrate more explicit language into their statutes to ensure experts for defendants with autism. In theory, this type of amendment could be applied to a variety of other mental illnesses and disorders as well, though this article has focused on its application to autism specifically.

VII. POTENTIAL COUNTERARGUMENTS

Anticipated counterarguments for this proposal would likely mimic those offered against other laws that allow for leniency in cases involving defendants with mental illness. For instance, some may have concerns about whether such laws create the opportunity for defendants to feign as mentally ill in an attempt to garner leniency from the court. In cases where a defendant claims to have autism, the hypothetical amendment to Rule 706 would require evidence of their ASD diagnosis before the court is required to grant an expert witness. If a defendant has no previous diagnosis (and no legal professionals noticed any indicators of autism that prompted an official evaluation at some point during criminal proceedings), courts would not be required to admit or provide expert testimony.

Another potential counterargument to the proposed amendment might be that the appointment of expert witnesses to more cases involving autistic defendants would be too expensive and time-consuming. While the proposed solution may be expensive and lead to some delays, the research and cases presented throughout this article demonstrate that the proper consideration of autism evidence is integral in yielding fair and informed convictions and sentencing outcomes for these

264. Chiacchia, *supra* note 19.

defendants. A more definite solution would indeed be easier to apply, more affordable, and create further uniformity (e.g., listing autism as a permissible downward departure at the federal level or codifying autism as a mitigating factor at the state level). However, autism exists on a spectrum, so categorical treatment of the diagnosis would be unsuitable in the context of legal decision-making.

Autism is known as a spectrum disorder because of the wide variation in the type and severity of symptoms that people experience.²⁶⁵ It is important to highlight that many individuals with autism are highly intelligent and capable of making rational, smart decisions.²⁶⁶ So, it would be harmful to perpetuate the stereotype that all people with autism are inherently less capable than those without autism. As previously mentioned, the APA provides severity specifiers in the DSM-5-TR for clinicians to indicate the amount of support each individual requires.²⁶⁷ However, they specifically state, “The descriptive severity categories should not be used to determine eligibility for and provision of services; these can only be developed at an individual level and through discussion of personal priorities and targets.”²⁶⁸

This rationale should also extend to the consideration of autism in the legal system, as it would be inappropriate to assume that all individuals with autism experience a similar level of impairment. Even if autism were to be acknowledged more explicitly in the law (e.g., as a permissible downward departure or mitigating factor), utilization of the specifiers provided in the DSM-5-TR should not be used to determine which individuals experience impairment “severe” enough to warrant leniency. Each defendant with autism should be individually assessed by an expert to determine whether they experience a level of impairment that would significantly affect their ability to form criminal intent or warrant a downward departure or variance in sentencing.

A final counterargument anticipated for this proposal is that it is a way for people with autism to blame their behavior on their diagnosis and avoid punishment. It is important to emphasize that the proposed amendment to the Federal Rules of Evidence would not guarantee that all defendants with autism receive leniency from the court. Simply providing evidence of one’s autism would not be enough for defendants to beat their charges, reduce their sentences, or negotiate better plea deals. Ensuring the utilization of expert witnesses in cases involving autistic defendants

265. See APA, DSM-5-TR, *supra* note 1, at 56-58.

266. Concetta de Giambattista et al., *Subtyping the Autism Spectrum Disorder: Comparison of Children with High Functioning Autism and Asperger Syndrome*, 49 J. AUTISM & DEVELOPMENTAL DISORDERS 138, 139 (2019); George D. Farmer et al., *People With Autism Spectrum Conditions Make More Consistent Decisions*, 28 PSYCH. SCI. 1067, 1073 (2017).

267. APA, DSM-5-TR, *supra* note 1, at 58-59.

268. *Id.* at 59.

would simply guarantee an expert on the matter the opportunity to explain to judges and juries the nuances of the disorder and how it affects that particular defendant. For instance, *United States v. Zuk* and *United States v. Morais* mentioned above provide examples of autism diagnoses having no mitigating influence on sentencing where a clear link cannot be established between a defendant's autism and their crime.²⁶⁹ In both the *Zuk* and *Morais* cases, the severity of the defendants' symptoms was carefully considered in determining whether reduced sentences were warranted.²⁷⁰

VIII. CONCLUSION

There has been increasing pressure for mental health professionals to testify on how a defendant's mental illness or disorder affects their culpability.²⁷¹ Expert witness testimony is especially imperative to help courts handle these unique cases involving criminal defendants with autism. In any case where a defendant's autism is a relevant issue, legislation should ensure the presence of an expert witness to help judges and juries understand the defendant's symptoms and whether they may have reduced their culpability.²⁷² Without this explicit legislation, courts will continue to handle these cases with minimal guidance despite the plethora of evidence demonstrating how differently individuals with autism communicate, process information, make decisions, and interpret social cues.²⁷³ This lack of guidance will surely result in more offenders with autism receiving unwarranted punishments while being deprived of the individualized treatment required to develop appropriate social behaviors and prevent recidivism.

While it would be unrealistic to first suggest that major changes be made to each state's laws on expert testimony, a potential place to start would be to amend Rule 706 of the Federal Rules of Evidence in hopes that individual states would follow suit.²⁷⁴ Rule 706 should be amended to include a statement that courts are required to appoint, or at least allow, expert witnesses in cases involving diagnosed autistic defendants. Of course, this proposal could also apply to other psychiatric diagnoses, though the present paper intended to establish its appropriate usage for ASD. Ensuring that expert testimony is provided and adequately considered in these cases would help courts to appreciate the nuances of each individual's disability,

269. *United States v. Zuk*, 874 F.3d 398, 411 (4th Cir. 2017); *United States v. Morais*, 670 F.3d 889, 897 (8th Cir. 2012).

270. *Zuk*, 874 F.3d at 411; *Morais*, 670 F.3d at 897.

271. Nicholas Hallett, *To What Extent Should Expert Psychiatric Witnesses Comment on Criminal Culpability?*, 60 *MED., SCI., & L.* 67, 67 (2020).

272. See Freckelton, *supra* note 60, at 425.

273. APA, *DSM-5-TR*, *supra* note 1, at 59.

274. See *FED. R. EVID.* 706.

better estimate their moral blameworthiness, and assign more informed and proportionate punishments.²⁷⁵

275. See Cea, *supra* note 66, at 523.