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## DEFENDANTS WITH AUTISM SPECTRUM DISORDER IN CRIMINAL COURT: A JUDGES' TOOLKIT

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### ABSTRACT

*This Article acts as a toolkit for members of the judiciary on defendants with Autism Spectrum Disorder (ASD), and specifically looks to equip judges with knowledge, evidence, and resources on recognizing and understanding symptoms of ASD in order to better identify and evaluate diagnosed defendants and their offending behavior. This will allow judges to have impactful and beneficial interactions with defendants, potentially make appropriate procedural and sentencing adjustments before and during the legal process, and better ensure more positive and appropriate legal outcomes for defendants with ASD. First, this Article discusses ways in which judges can identify defendants with ASD in court by recognizing and understanding both distinctive characteristics of offending and courtroom behavior that may be exhibited in cases involving defendants with ASD. Second, recognizing the limited previous research on judges' understanding of ASD's legal relevance, this Article provides judges guidance on three aspects of the legal process in which ASD may be forensically significant for defendants: fitness to stand trial, negating criminal elements necessary for criminal liability, and sentencing decisions. Finally, this Article puts forth recommendations for judges in order to improve the legal process for defendants with ASD.*

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## TABLE OF CONTENTS

INTRODUCTION .....	842
I. IDENTIFYING DEFENDANTS WITH AUTISM SPECTRUM DISORDER	
IN COURT .....	844
A. <i>Distinctive Offending Characteristics</i> .....	845
B. <i>Social and Communication Impairments in the             Courtroom</i> .....	850
II. EVALUATING DEFENDANTS WITH AUTISM SPECTRUM DISORDER	
IN COURT: THE ROLE OF JUDGES .....	852
A. <i>Previous Research</i> .....	853
B. <i>Considerations for Judges</i> .....	856
1. <i>Fitness to stand trial</i> .....	857
2. <i>Negating criminal elements</i> .....	858
3. <i>Sentencing</i> .....	860
III. RECOMMENDATIONS .....	863
A. <i>Reliance on Expert Assistance</i> .....	863
B. <i>Procedural Adjustments</i> .....	865
C. <i>Sentencing Alternatives</i> .....	866
CONCLUSION .....	867

## INTRODUCTION

Autism Spectrum Disorder (ASD) is a neurodevelopmental disorder marked by impairments in social interactions, communication, hypersensitivity, and systematic patterns of behavior.<sup>1</sup> As its name indicates, the presentation and symptomology of ASD vary widely.<sup>2</sup> Individuals with ASD who have an intellectual disability often have difficulty with basic life skills, such as living on their own or dealing with personal finances, and may also be nonverbal.<sup>3</sup> Individuals with

1. See *What Is Autism Spectrum Disorder?*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> (last visited Mar. 17, 2021).

2. Chris Plauché Johnson, Scott M. Meyers & Council on Child. with Disabilities, *Identification and Evaluation of Children with Autism Spectrum Disorders*, 120 PEDIATRICS 1183, 1184 (2007).

3. See Ami Klin, Celine A. Saulnier, Sara S. Sparrow, Domenic V. Cicchetti, Fred R. Volkmar & Catherine Lord, *Social and Communication Abilities and Disabilities in Higher Functioning Individuals with Autism Spectrum Disorders: The Vineland and the ADOS*, 37 J. AUTISM & DEV'L DISORDERS 748, 748–50 (2007).

ASD who do not have an intellectual disability often hold jobs and have independent lives but show a variety of characteristic social and communication impairments.<sup>4</sup> There are many well-written overviews,<sup>5</sup> both general and clinical, of issues related to the identification, presentation, and psycho-social impact of ASD, which provide fuller, more detailed understandings of ASD than I could ever provide here.

Although the great majority of individuals with ASD are thought to be law-abiding,<sup>6</sup> there are still a number of people with ASD that enter the criminal justice system as offenders, and ultimately defendants in cases, in the criminal court system.<sup>7</sup> The involvement of individuals with ASD as defendants in our criminal justice system raises important questions in regard to their legal status and the appropriate legal response to offending behavior of diagnosed individuals.<sup>8</sup> ASD presents challenges for even the most experienced criminal justice professionals, who are tasked with acting as their own “experts” in such cases.<sup>9</sup>

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4. See Susanna Baldwin, Debra Costley & Anthony Warren, *Employment Activities and Experiences of Adults with High-Functioning Autism and Asperger's Disorder*, 44 J. AUTISM & DEV'L DISORDERS 2440, 2440–41 (2014).

5. See, e.g., Anne Masi, Marilena M. DeMayo, Nicholas Glozier & Adam J. Guastella, *An Overview of Autism Spectrum Disorder, Heterogeneity and Treatment Options*, 33 NEUROSCI. BULL. 183 (2017); Samata R. Sharma, Xenia Gonda & Frank I. Tarazi, *Autism Spectrum Disorder: Classification, Diagnosis and Therapy*, PHARMACOLOGY & THERAPEUTICS, Oct. 2018, at 91; Lonnie Zwaigenbaum & Melanie Penner, *Autism Spectrum Disorder: Advances in Diagnosis and Evaluation*, BRIT. MED. J., May 21, 2018.

6. See M. R. Woodbury-Smith, I.C.H. Clare, A.J. Holland & A. Kearns, *High Functioning Autistic Spectrum Disorders, Offending and Other Law-Breaking: Findings from a Community Sample*, 17 J. FORENSIC PSYCHIATRY & PSYCH. 108, 110, 116 (2006). See generally Svend Erik Mouridsen, Bente Rich, Torben Isager & Niels Jørgen Nedergaard, *Pervasive Developmental Disorders and Criminal Behaviour*, 52 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 196 (2008) (finding serious crime is rare in people with Pervasive Developmental Disorders).

7. See generally Rachel L. Fazio, Christina A. Pietz & Robert L. Denney, *An Estimate of the Prevalence of Autism-Spectrum Disorders in an Incarcerated Population*, 4 OPEN ACCESS J. FORENSIC PSYCH. 69 (2012).

8. *Id.*

9. See Colleen M. Berryessa, *Educator of The Court: The Role of the Expert Witness in Cases Involving Autism Spectrum Disorder*, 23 PSYCH., CRIME & L. 575, 575, 578 (2017) [hereinafter Berryessa, *Educator of the Court*].

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This Article can be used as a toolkit for members of the judiciary in their interactions with defendants with ASD, and specifically looks to equip judges with knowledge, evidence, and resources on recognizing and understanding the symptoms of ASD to ensure judges better identify and handle diagnosed defendants. This will allow judges to ascertain effective communication with defendants, make appropriate accommodations in the legal process, and better guarantee just and fair consequences for defendants with ASD.

Part I of this Article demonstrates how judges can identify defendants with ASD in court, focusing on understanding the distinctive characteristics of offending and courtroom behavior that may be exhibited by defendants with ASD. Part II explores the role of the judiciary in handling defendants with ASD in court. In addition to reviewing the limited previous research on judges' experiences with offenders with ASD in criminal court, this Article identifies three specific considerations that judges must account for: (1) whether a defendant's fitness to stand trial is affected by an ASD diagnosis, (2) whether a defendant's ASD may negate criminal elements necessary for criminal liability, and (3) whether an ASD diagnosis should affect choices in and objectives of sentencing. Finally, this Article puts forth three recommendations for judges, related to expert assistance and procedural and sentencing adjustments, in order to improve the legal process for defendants with ASD.

#### I. IDENTIFYING DEFENDANTS WITH AUTISM SPECTRUM DISORDER IN COURT

Unfortunately, existing research and caselaw demonstrates that judges are often unaware of the potential significance of ASD and its symptomology in contextualizing defendants' offending and courtroom behavior.<sup>10</sup> In fact, some defendants'

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10. Ian Freckelton, *Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts*, 26 J. APPLIED RSCH. INTELL. DISABILITIES 420, 420–21 (2013).

diagnoses are not known to the court at the time of conviction.<sup>11</sup> Thus, the potential nexus between features of ASD and involvement in the criminal justice system, both related to offending and behavior observed in court, may be overlooked during the legal process.<sup>12</sup>

Unusual or maladaptive behaviors either demonstrated during offending or in court by a defendant with ASD may be misinterpreted, which may skew dispositional outcomes or potentially lead to prejudicial impressions.<sup>13</sup> Thus, courts can avoid misapprehension of behaviors and characteristics typical of those with ASD, as evidence of guilt, indifference, or lack of remorse, if judges can identify patterns and characteristics of offending and courtroom behavior that are common to defendants with ASD due to their symptomatic presentations—especially if their diagnoses are not known.<sup>14</sup>

#### A. Distinctive Offending Characteristics

Although evidence has been greatly mixed and limited by methodological choices in research,<sup>15</sup> individuals with ASD

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11. See, e.g., Sheena Foster, *Autism Is Not a Tragedy . . . Ignorance Is: Suppressing Evidence of Asperger's Syndrome and High-Functioning Autism in Capital Trials Prejudices Defendants for a Death Sentence*, 2 LINCOLN MEM'L UNIV. L. REV. 9, 19–21 (2015).

12. Eddie Chaplin, Jane McCarthy & Andrew Forrester, *Defendants with Autism Spectrum Disorders: What Is the Role of Court Liaison and Diversion?*, 3 ADVANCES AUTISM 220, 220–23 (2017).

13. See Clare S. Allely & Penny Cooper, *Jurors' and Judges' Evaluation of Defendants with Autism and the Impact on Sentencing: A Systematic Preferred Reporting Items for Systematic Reviews and Meta-analyses (PRISMA) Review of Autism Spectrum Disorder in the Courtroom*, 25 J. L. & MED. 105, 107–10 (2017).

14. See Colleen M. Berryessa, Lauren C. Milner, Nanibaa' A. Garrison & Mildred K. Cho, *Impact of Psychiatric Information on Potential Jurors in Evaluating High-Functioning Autism Spectrum Disorder (hfASD)*, 8 J. MENTAL HEALTH RSCH. INTELL. DISABILITIES 140, 140–44 (2015); Colleen M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-Functioning Autism*, 5 J. INTELL. DISABILITIES & OFFENDING BEHAV. 97, 97–100 (2014) [hereinafter Berryessa, *Judiciary Views on Criminal Behaviour*].

15. See generally Clare Sarah Allely, *Firesetting and Arson in Individuals with Autism Spectrum Disorder: A Systematic PRISMA Review*, 10 J. INTELL. DISABILITIES & OFFENDING BEHAV. 89 (2019); Johanna E. Mercer & Clare Sarah Allely, *Autism Spectrum Disorders and Stalking* (May 25, 2020) (unpublished manuscript) (published in 10 J. CRIM. PSYCH. 201 (2020)); Niklas Långström, Martin Grann, Vladislav Ruchkin, Gabrielle Sjöstedt & Seena Fazel, *Risk Factors for Violent Offending in Autism Spectrum Disorder, A National Study of Hospitalized Individuals*, 24 J. INTERPERS. VIOLENCE 1358 (2009).

without intellectual disability may demonstrate an elevated propensity toward arson,<sup>16</sup> stalking,<sup>17</sup> interpersonal violence,<sup>18</sup> sexual offenses,<sup>19</sup> or computer-related crime.<sup>20</sup> However, as research on the predisposition of individuals with ASD toward the commission of specific crime typologies is both inconsistent and inconclusive,<sup>21</sup> conclusions are inherently limited on how ASD diagnoses may overlap with specific crime typologies.

Instead, judges will likely gain a much better understanding of the offenses perpetrated by individuals with ASD through examining the characteristics of offenses, rather than types of offenses, committed by this population.<sup>22</sup> Particularly, individuals with ASD without intellectual disability are those who are more likely to offend, relative to those individuals with ASD with intellectual disabilities.<sup>23</sup> They most often offend in accordance with the presentation of ASD symptoms, namely: (1) poor impulse and motor control, (2) narrow fixation on specific interests, (3) theory of mind deficits, and (4) lack of

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16. See Allely, *supra* note 15, at 97.

17. Mercer & Allely, *supra* note 15 (manuscript at 6).

18. Långström et al., *supra* note 15, at 1366. See generally Michelle A. Fardella, Priscilla Burnham Riosa & Jonathan A. Weiss, *A Qualitative Investigation of Risk and Protective Factors for Interpersonal Violence in Adults on the Autism Spectrum*, 33 *DISABILITY & SOC'Y* 1460 (2018).

19. Melanie Clark Mogavero, *Autism, Sexual Offending, and the Criminal Justice System*, 7 *J. INTELL. DISABILITIES & OFFENDING BEHAV.* 116, 116 (2016).

20. Kathryn C. Seigfried-Spellar, Casey L. O'Quinn & Kellin N. Treadway, *Assessing the Relationship Between Autistic Traits and Cyberdeviancy in a Sample of College Students*, 34 *BEHAV. & INFO. TECH.* 533, 533–34 (2015); Katy-Louise Payne, Ailsa Russel, Richard Mills, Katie Maras, Dheeraj Rai & Mark Brosnan, *Is There a Relationship Between Cyber-Dependent Crime, Autistic-Like Traits and Autism?*, 49 *J. AUTISM & DEV'L DISORDERS* 4159, 4159–60 (2019).

21. See Svend Erik Mouridsen, *Current Status of Research on Autism Spectrum Disorders and Offending*, 6 *RSCH. AUTISM SPECTRUM DISORDERS* 79, 81 (2012); Claire King & Glynis H. Murphy, *A Systematic Review of People with Autism Spectrum Disorder and the Criminal Justice System*, 44 *J. AUTISM & DEV'L DISORDERS* 2717, 2717–19 (2014).

22. See Allely & Cooper, *supra* note 13, at 115–16; NEIL BREWER & ROBYN L. YOUNG, *CRIME AND AUTISM SPECTRUM DISORDER: MYTHS AND MECHANISMS* 152–54, 157–58 (2015).

23. See Marc R. Woodbury-Smith, Isabel C. H. Clare, Anthony J. Holland, Anthony Kearns, Ekkehart Staufenberg & Peter Watson, *A Case-Control Study of Offenders with High Functioning Autistic Spectrum Disorders*, 16 *J. FORENSIC PSYCHIATRY & PSYCH.* 747, 749 (2005) [hereinafter Woodbury-Smith et al., *A Case-Control Study*].

understanding of social and empathy cues.<sup>24</sup> Some of these symptoms and how they may coalesce with offending behavior are covered in this Article, including case examples.<sup>25</sup>

Deficiencies in social interaction, associated with difficulties interpreting and responding to social cues, have been described as some of the most significant and enduring features of ASD in offending behavior.<sup>26</sup> Characteristics of ASD, including social naiveté and deficits in socioemotional reciprocity, may impair individuals with ASD in interpreting and responding to social situations appropriately, which may precipitate engagement in offending.<sup>27</sup> The British psychologist Simon Baron-Cohen uses the phrase “zero degrees of empathy” to characterize the difficulties and deficiencies in empathic concern for others that may be exhibited by defendants with ASD.<sup>28</sup>

Often, individuals with ASD have difficulty identifying the emotional or mental states (e.g., fear, anxiety) of others, and how to respond appropriately, which may contribute to offenses.<sup>29</sup> For example, a man named Nick with ASD without intellectual disability was convicted of the possession of child pornography after coming across it while using the internet to explore his sexual identity.<sup>30</sup> However, as shown by his own

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24. Berryessa et al., *supra* note 14, at 143; *see also* Daniel C. Murrie, Janet I. Warren, Marianne Kristiansson & Park E. Dietz, *Asperger's Syndrome in Forensic Settings*, 1 INT'L J. FORENSIC MENTAL HEALTH 59, 60 (2002); Justin B. Barry-Walsh & Paul E. Mullen, *Forensic Aspects of Asperger's Syndrome*, 15 J. FORENSIC PSYCHIATRY & PSYCH. 96, 97 (2004).

25. *See* discussion *infra* Sections I.A.–B.

26. King & Murphy, *supra* note 21, at 2718; Tessa Grant, Rosaria Furlano, Layla Hall & Elizabeth Kelley, *Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning*, 59 CAN. PSYCH. 65–70 (2018).

27. Mouridsen, *supra* note 21, at 80; Barry-Walsh & Mullen, *supra* note 24, at 96–99.

28. SIMON BARON-COHEN, *THE SCIENCE OF EVIL: ON EMPATHY AND THE ORIGINS OF CRUELTY* 43–44 (2012).

29. *See id.* at 100–03; Woodbury-Smith et al., *A Case-Control Study*, *supra* note 23, at 756–57 (“[O]ffending was associated with impaired recognition of the emotional expression of fear. In contrast, though, it was not associated with impaired theory of mind. No association was found between offending and either executive function or the recognition of facial expressions of sadness.”).

30. TONY ATTWOOD, ISABELLE HÉNAULT & NICK DUBIN, *THE AUTISM SPECTRUM, SEXUALITY AND THE LAW: WHAT EVERY PARENT AND PROFESSIONAL NEEDS TO KNOW* 98–99, 118–20 (2014).

reflection, Nick showed a severe lack of awareness of the full implications of accessing such materials:

At the time, I didn't understand that downloading free images on my computer in the privacy of my residence could lead to the severe legal consequences I later experienced. I also didn't understand at the time that the children in the images had been victimized in the process of creating those images. I honestly had no idea that I was causing harm to anyone. It is very embarrassing to admit that I needed to have this information spelled out for me, as I wasn't able to make that connection on my own. After my arrest, [my psychologist] spent considerable time explaining the issue of victim awareness to me. I was horrified to learn that these minors had been mistreated and that I had not been able to see that.<sup>31</sup>

Social deficiencies associated with ASD, specifically naiveté or the inability to recognize the intentions of others, can also lead to offending.<sup>32</sup> Individuals with ASD may have difficulties making friendships, and may mistake malevolent intentions with friendship, leading to their risk of exploitation.<sup>33</sup> In one case, police arrested a man with ASD after they saw stolen goods lined up in his apartment front window; it was later found that a local gang frequently used him to store items that they had stolen in exchange for allowing him to hang out with them.<sup>34</sup>

Insensitivity to social cues and perspective-taking (i.e., being able to understand a situation from another person's view) also renders individuals with ASD unable to respect or understand

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31. *Id.* at 99.

32. Murrie et al., *supra* note 24, at 62–67.

33. PATRICIA HOWLIN, AUTISM AND ASPERGER SYNDROME: PREPARING FOR ADULTHOOD 323–24 (2004).

34. *Id.* at 306.



common, unspoken social rules, such as refraining from looking in people's windows, touching other people's possessions, or standing too close.<sup>35</sup> Further, social niceties may be mistaken as signs of romantic interest, leading to the pursuit of unwanted romantic relationships.<sup>36</sup> In one case, a man with ASD was charged with assault after rubbing a stranger's body after she briefly smiled at him as his attempt to try to "get to know her, to see if something would come out of it; a relationship or something."<sup>37</sup>

Finally, those with ASD commonly exhibit repetitive or systematic behaviors, including rituals with unusual focuses, to reduce anxiety by enhancing predictability and routine.<sup>38</sup> Such behaviors may lead to offending however, when such behaviors or routines are disrupted—as individuals with ASD may exhibit reactive aggression when they are unable to complete their rituals.<sup>39</sup> For example, a man with ASD named Joey broke into a neighbor's house to watch a washing machine after the closure of his local laundromat.<sup>40</sup> Joey systematically watched the washing machines at the laundromat every day because it soothed him, and he needed to find another way to fulfill this routine when his laundromat closed.<sup>41</sup> However, when police officers arrived to escort him from the neighbor's home, he reactively punched one of the officers in his attempt to stay, which resulted in additional assault charges.<sup>42</sup>

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35. See Daniel P. Kennedy & Ralph Adolphs, *Violations of Personal Space by Individuals with Autism Spectrum Disorder*, PLOS ONE, Aug. 6, 2014.

36. See Michal Post, Linda Haynes, Keith Storey, Tamara Loughrey & Camille Campbell, *Understanding Stalking Behaviors by Individuals with Autism Spectrum Disorders and Recommended Prevention Strategies for School Settings*, 44 J. AUTISM & DEV'L DISORDERS 2698, 2698–702 (2012).

37. Ian Freckelton & David List, *Asperger's Disorder, Criminal Responsibility and Criminal Culpability*, 16 PSYCHIATRY, PSYCH. & L. 16, 26 (2009) (internal quotations omitted).

38. See Santhana Gunasekaran, *Assessment and Management of Risk in Autism*, 6 ADVANCES MENTAL HEALTH & INTELL. DISABILITIES 314, 317–29 (2012).

39. HOWLIN, *supra* note 33, at 137–72.

40. *Id.* at 143–44.

41. *Id.*

42. *Id.* at 304.

B. *Social and Communication Impairments in the Courtroom*

In addition to offending characteristics, the courtroom behavior of defendants with ASD may also be affected by the symptomatic presentation of the disorder and may be misconstrued without knowledge of its symptoms. Social and communication impairments are the two main symptomatic features that may affect the courtroom experience of defendants with ASD.<sup>43</sup>

As individuals with ASD often have difficulty in appreciating the perspectives or subjective experiences of other people, defendants with the disorder may not exhibit expressions of empathy or may show inappropriate facial expressions that are counter to what is occurring in court at the time.<sup>44</sup> For example, in one case, a defendant with Asperger's Syndrome read a book while his alleged victim spoke on the stand.<sup>45</sup>

Other similar cases have involved defendants laughing when talking about victims or crimes in court proceedings.<sup>46</sup> Such behaviors may make defendants with ASD appear "cold and calculating," or lacking remorse for their actions, when in fact they are often unable to react in typical or socially accepted ways.<sup>47</sup> Defendants with ASD may also say things that appear to be inappropriate and callous.<sup>48</sup> Indeed, without knowledge of ASD, these expressions could very well be misinterpreted as indicative of arrogance, dishonesty, or guilt.<sup>49</sup>

Defendants with ASD also may show no interest in court proceedings, such as avoiding eye contact with judges,

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43. See Berryessa, *Educator of the Court*, *supra* note 9, at 594–96.

44. DENNIS DEBBAUDT, *AUTISM, ADVOCATES, AND LAW ENFORCEMENT PROFESSIONALS: RECOGNIZING AND REDUCING RISK SITUATIONS FOR PEOPLE WITH AUTISM SPECTRUM DISORDERS* 20 (2002).

45. See *Sultan v. Regina* [2008] EWCA Crim 6, [8], [34] (appeal taken from Eng.).

46. Allely & Cooper, *supra* note 13, at 108.

47. *Id.*

48. See *id.* at 107–09 (listing, for example, that "a defendant with ASD may start laughing when talking about their victim during the court proceedings.").

49. See Freckelton & List, *supra* note 37, at 31. See generally Barbara G. Haskins & J. Arturo Silva, *Asperger's Disorder and Criminal Behavior: Forensic-Psychiatric Considerations*, 34 J. AM. ACAD. PSYCHIATRY L. 379 (2006).

attorneys, or other individuals in the courtroom during pretrial hearings and trial proceedings.<sup>50</sup> Individuals with ASD often reduce eye contact in stressful situations as a way to help reduce the extent of their stimulation and potential anxiety.<sup>51</sup> However, observers may mistakenly interpret such behavior as shame or evidence that they cannot own up to their behavior.<sup>52</sup>

Aside from atypical social behaviors, individuals with ASD may exhibit uncommon verbal or speaking patterns.<sup>53</sup> Sometimes their phrasing is unusual, nonsensical, and exceedingly formal.<sup>54</sup> They may take a long time to answer questions, which may appear evasive.<sup>55</sup> They may also let out "sudden and unexpected verbal utterances," which might come across as rude.<sup>56</sup> They may also misinterpret or nit-pick questions asked of them during questioning or cross-examination.<sup>57</sup> For instance, defendants may fail to pick up on cues which signal the end of a line of questioning, or attempt to shift the conversation to a topic of their interest.<sup>58</sup> Such behavior may be misunderstood as the defendant being "cagey," or unwilling to discuss a particular area or answer questions.<sup>59</sup> As another example, when questioned in his jury trial, a defendant with ASD instigated "arguments with the prosecutor over comparatively trivial detail, while failing, unless re-directed, to confront the underlying and critical question."<sup>60</sup> Indeed, when interacting with individuals during the court process, defendants with ASD may exhibit difficulties in understanding

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50. Allely & Cooper, *supra* note 13, at 109.

51. *Id.*

52. *Id.* at 109.

53. Joanne McCann & Sue Peppé, *Prosody in Autism Spectrum Disorders: A Critical Review*, 38 INT'L J. LANGUAGE & COMMUN DISORDERS 325, 327 (2003).

54. Freckelton & List, *supra* note 37, at 31.

55. *See* Allely & Cooper, *supra* note 13, at 109.

56. *Id.* at 108–09.

57. *See id.*

58. *See id.* at 109; Murrie et al., *supra* note 24, at 60.

59. *See* Allely & Cooper, *supra* note 13, at 109.

60. *Id.* at 108 (quoting *Thompson v. Regina* [2014] EWCA Crim 836, [33] (appeal taken from Eng.)).

or responding to non-literal language, such as metaphors, irony, or sarcasm.<sup>61</sup>

In addition to language, individuals with ASD may also display odd or pedantic speaking rhythms.<sup>62</sup> Defendants with ASD may show flat, monotonous verbal affect, including when talking about emotional topics.<sup>63</sup> In one case, a man on trial for the murder of his mother exhibited monotonous speaking patterns with an awkward, “robotic rhythm” during his questioning.<sup>64</sup> His attorney worried that his “unusual personal characteristics” may cause him prejudice if he were tried by a jury, which might be “distracted by his behavior or draw adverse inferences against him as a result of such behavior.”<sup>65</sup>

## II. EVALUATING DEFENDANTS WITH AUTISM SPECTRUM DISORDER IN COURT: THE ROLE OF JUDGES

In addition to many judges’ general unawareness of the potential significance of ASD in contextualizing defendants’ offending and courtroom behavior, literature has reinforced concerns about how courts’ lack of understanding on the forensic relevance of ASD may also negatively impact legal decisions made on behalf of defendants with ASD.<sup>66</sup> The relatively little research on judges’ views of defendants with ASD, as reviewed below, indicates that judges are often unsure if and how ASD and its symptoms should affect their

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61. *Id.* at 108.

62. Uta Frith, *A New Look at Language and Communication in Autism*, 24 BRIT. J. DISORDERS COMMUN 123, 125 (1989).

63. Freckelton & List, *supra* note 37, at 18.

64. *See W. Austl. v Mack* [2012] WASC 127, ¶ 41 (17 April 2012); *accord* Freckelton, *supra* note 10, at 421.

65. *See W. Austl. v Mack* [2012] WASC 127, ¶ 44 (17 April 2012). Ultimately, the judge granted a bench trial, but not because of the reasons argued by the defendant’s attorney; the judge held that the defendant’s autism “and its impact on the trial process generally,” i.e., that the trial would be more lengthy and require more adjournments than usual, necessitated a trial by judge without a jury. *Id.* ¶¶ 43–44.

66. Allely & Cooper, *supra* note 13, at 110, 116–17, 121–22.

evaluations of a defendant at different stages of the legal process.<sup>67</sup>

In order to provide some guidance on aspects of the legal process in which ASD may be forensically significant, this Part discusses the research as well as three areas that judges must consider: (1) whether an ASD diagnosis affects a defendant's fitness to stand trial, (2) whether a defendant's ASD may negate criminal elements necessary for criminal liability, and (3) whether an ASD diagnosis should affect choices in and objectives of sentencing.

#### A. Previous Research

Only a few interview-based, qualitative studies have examined how judges think about ASD as it relates to the criminal court process.<sup>68</sup> These limited studies have come from the same sample of interviews of trial court judges in California, but do span a variety of different issues that judges may encounter in cases involving defendants with ASD.<sup>69</sup>

A few judges in these studies reported some previous case experience with defendants with ASD, but the majority had never knowingly seen the diagnosis in their courtrooms.<sup>70</sup> Almost all judges, however, did have some type of personal experience with ASD and believed they had used this experience (and would continue to do so) to draw from in

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67. See generally Berryessa, *Judiciary Views on Criminal Behaviour*, *supra* note 14; Colleen M. Berryessa, *Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism*, 46 J. AUTISM & DEV'L DISORDERS 2770 (2016) [hereinafter Berryessa, *Brief Report: Sentencing*]; Colleen M Berryessa, *Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders*, 3 INT'L J. CRIMINOLOGY & SOCIO. 46 (2014) [hereinafter Berryessa, *Judicial Perceptions: Media Portrayals*].

68. See, e.g., Berryessa, *Judiciary Views on Criminal Behaviour*, *supra* note 14, at 98; Berryessa, *Brief Report: Sentencing*, *supra* note 67, at 2770; Berryessa, *Judicial Perceptions: Media Portrayals*, *supra* note 67, at 48. See also Freckleton & List, *supra* note 37, at 17 ("forensic ramifications are still being evaluated by the courts and commencing to be analysed by clinical and legal commentators.").

69. See, e.g., Berryessa, *Judiciary Views on Criminal Behaviour*, *supra* note 14, at 98; Berryessa, *Brief Report: Sentencing*, *supra* note 67, at 2771; Berryessa, *Judicial Perceptions: Media Portrayals*, *supra* note 67, at 48.

70. Berryessa, *Judiciary Views on Criminal Behaviour*, *supra* note 14, at 100.

potential forensic considerations involving the disorder.<sup>71</sup> However, personal experiences did not mean that judges felt they were familiar with or knowledgeable about ASD, and admitted they generally knew very little about it and its potential forensic relevance.<sup>72</sup>

One inquiry examined judges' perceptions of how a diagnosis with ASD may affect a defendant's capacity to control behavior and whether it may impact the ability to formulate criminal intent (i.e., *mens rea*).<sup>73</sup> In discussing these issues, judges described their understanding that individuals with ASD may be "predisposed" to behave in certain ways or exhibit particular behaviors because of the symptomology of the disorder.<sup>74</sup> However, judges also expressed uncertainty with regard to how this "predisposition" may be relevant to evaluating criminal intent or even important for sentencing decisions, and they were unsure of how to factor it in to their considerations.<sup>75</sup> Additionally, judges were unsure how the disorder could act, or may have acted, as a mitigating factor to either responsibility or sentencing by altering the ability to commit a "willful criminal act."<sup>76</sup>

Another study with this sample examined judges' perceptions of how a defendant's diagnosis with ASD may affect their choices in sentencing.<sup>77</sup> Most judges reported that a defendant's diagnosis with ASD would be a significant consideration in sentencing decisions, particularly if the

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71. *Id.* (finding eighteen of the twenty-one judges interviewed had personal experience with people with ASD including friends and family members).

72. *Id.* at 104.

73. *Id.* at 102–03 (noting one judge in the study was "more sympathetic" to individuals with ASD when considering whether there was sufficient *mens rea*).

74. *Id.*

75. *Id.* at 103–04 (explaining that because of their limited ability "to effectively and properly understand the disorders, their symptoms," it is difficult for judges to determine how much weight, if any at all, should be given in "their decisions in order to ensure they are fair and just").

76. *See id.* at 102.

77. Berryessa, *Brief Report: Sentencing*, *supra* note 67, at 2770.

offending behavior was related to the diagnosis.<sup>78</sup> Judges were mixed, however, as to whether the diagnosis's connection to offending behavior would be considered mitigating or aggravating to sentencing.<sup>79</sup> Most judges questioned whether a defendant's responsibility for his actions could be mitigated if they were influenced by his symptomatic presentation.<sup>80</sup> They also believed that the prison environment could be toxic and potentially useless for defendants with ASD, and stated they would likely attempt to prioritize alternatives to incarceration for defendants with ASD.<sup>81</sup>

Yet, a few judges said they might consider a diagnosis with ASD to be aggravating to sentencing, in so far as it could lead an individual to be at a higher risk to offend in the future, due to the disorder's impairments to impulse control in certain situations.<sup>82</sup> Judges believed this could pose an issue for public safety, which could lead to the choice to incarcerate.<sup>83</sup>

Overall, although sympathetic to those with the diagnosis, judges were unsure if and how information on ASD should inform their sentencing decisions, or even what types of information they should draw on in such decisions.<sup>84</sup> Additionally, even those that supported alternatives to incarceration were still unsure of which types of sentences may be appropriate, and if the criminal justice system even has the ability or resources to offer such diversionary measures.<sup>85</sup>

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78. *Id.* at 2771.

79. *Id.* at 2771–72.

80. *Id.* (“the large majority of judges that believed HFA would be a potential mitigating factor questioned if an offender’s actions . . . would be potentially influenced by the symptoms of the condition”).

81. *See id.* at 2772; Caitlin E. Robertson & Jane A. McGillivray, *Autism Behind Bars: A Review of the Research Literature and Discussion of Key Issues*, 26 J. FORENSIC PSYCHIATRY & PSYCH. 719, 724 (2015) (“[D]ata suggested that individuals with a learning disability and/or ASD were at risk of being exploited, bullied and ostracized by other prisoners within prison settings.”).

82. *Id.*

83. *See id.*

84. *See id.*

85. *Id.*

A final study, using the same interview sample, investigated judges' views on how knowledge of ASD may be skewed by media coverage and "myths" about the disorder and its relationship to criminality, and how such views may impact both public and criminal contexts.<sup>86</sup> Judges generally believed that the media is one of the main ways that the public, as well as other judges, learns about ASD and its features.<sup>87</sup> However, sometimes media coverage can be misleading and harmful when it connects the diagnosis with acts of violence.<sup>88</sup>

Around the time these interviews were conducted, the Sandy Hook shooting in Newtown, Connecticut had recently occurred.<sup>89</sup> Judges were specifically asked to discuss the ways in which media coverage of the shooting, and the media's connection between the perpetrator's alleged ASD and his actions, had impacted their and the public's views of ASD.<sup>90</sup> Although they stated that their views were unaffected by such coverage, they expressed concern that coverage of the shooting misled and negatively informed the public, and other judges, on the relationship between ASD and violence.<sup>91</sup> Judges did express fear that such media attention could negatively affect the legal process by fueling misperceptions of the disorder and its relationship to criminality.<sup>92</sup>

### B. Considerations for Judges

Given that existing research suggests judges need guidance on the forensic relevance of ASD in their evaluations of an autistic defendant in different stages of the legal process, this Article provides three considerations that judges should

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86. See generally Berryessa *Judicial Perceptions: Media Portrayals*, *supra* note 67 (finding that media coverage of crimes associated with ASDs, hfASDs, and other diagnosed disorders impacts not only the public's perception, but also judges' perceptions of these disorders).

87. See *id.* at 53.

88. *Id.*

89. See *id.* at 46, 49.

90. *Id.* at 50.

91. See *id.* at 54–56.

92. *Id.* at 53–54.



contemplate during the legal process in cases involving defendants with ASD. Specifically, judges must consider the significance and effects of ASD before prosecution even begins (fitness to stand trial), in responsibility determinations for criminal liability (criminal elements), and in sentencing proceedings.

### 1. *Fitness to stand trial*

Judges should consider how symptomology of ASD may complicate an individual's participation in and comprehension of the legal process during criminal proceedings. Difficulties in understanding and integrating nuanced language may create problems for defendants with ASD in interpreting questions asked by judges or attorneys, or the implications of legal decisions made on their behalf.<sup>93</sup> Studies of defendants with ASD have identified a range of difficulties related to their fitness to stand trial, including (1) poor understanding of the legal process, (2) the nature of the charges against them, (3) the roles of the judge, attorneys, and other courtroom personnel, (4) implications of pleas, and (5) difficulties communicating with legal representation.<sup>94</sup>

Further, anxiety incurred by the court process may lead defendants with ASD to stop speaking or engaging in the legal process, and they may show maladaptive coping behaviors.<sup>95</sup> Unfortunately, this may impact whether they are able to meaningfully participate in their trials or aid their lawyers in their defenses.<sup>96</sup> Notwithstanding these issues, literature that

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93. See, e.g., Kimberly Taylor, Gary Mesibov & Dennis Debbaudt, *Autism in the Criminal Justice System*, AUTISM RISK MGMT. (2009), [https://www.autismriskmanagement.com/wp-content/uploads/2016/07/Autism\\_Criminal\\_Justice.pdf](https://www.autismriskmanagement.com/wp-content/uploads/2016/07/Autism_Criminal_Justice.pdf).

94. Rebecca Brewer, Graham Davies & Nigel Blackwood, *Fitness To Plead: The Impact of Autism Spectrum Disorder*, 16 J. FORENSIC PSYCH. PRAC. 182, 187 (2016); see also David Allen, Carys Evans, Andrew Hider, Sarah Hawkins, Helen Peckett & Hugh Morgan, *Offending Behaviour in Adults with Asperger Syndrome*, 38 J. AUTISM & DEV'L DISORDERS 748, 749 (2007) (describing the vulnerability of people with Asperger syndrome within the penal system).

95. See Taylor, Mesibov & Debbaudt, *supra* note 93, at 4 (listing several behaviors and characteristics people with ASD may display in a courtroom).

96. *Id.*

has reviewed cases involving defendants with ASD suggests that most often they are ruled fit to stand trial without question.<sup>97</sup>

For these reasons, judges should be careful in potentially overestimating and overlooking the fitness of defendants with ASD to stand trial. This is primarily important for defendants with ASD who have average or above average intelligence and whose level of impairment may not be readily apparent.<sup>98</sup> Rather, judges should consider how the court may accommodate defendants with ASD with respect to their abilities to understand and follow the legal process. Accommodations that may “restore” fitness to stand trial need not be lofty—they can be as simple as attorneys, judges, or others in the courtroom taking steps to familiarize the defendant with the courtroom, simplifying language used during questioning, and effectively communicating about the nature and nuances of the legal process.<sup>99</sup> One defendant with ASD, commenting on his ability to understand the legal process, said it was his lawyer and other court personnel that made all the difference: “[my lawyer] explained the court process to me, and the other couple of guys who saw me . . . they explained everything to me.”<sup>100</sup> Although such strategies may slow the trial process, they will be integral to ensure the defendants with ASD, and particularly those without intellectual disability, will be able to stand trial and will be treated more equitably.

## 2. *Negating criminal elements*

In cases involving defendants with ASD, judges should consider whether the disorder may negate the essential criminal

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97. Barry-Walsh & Mullen, *supra* note 24, at 96–107; Allen et al., *supra* note 94, at 752–53.

98. Taylor, Mesibov & Debbaudt, *supra* note 93, at 3–9.

99. *See id.* at 6; Jenny Talbot, *Fair Access to Justice? Support for Vulnerable Defendants in the Criminal Courts*, PRISON REFORM TRUST 7 (2012), <http://www.prisonreformtrust.org.uk/Portals/0/Documents/FairAccessToJustice.pdf>.

100. Allen et al., *supra* note 94, at 755.

elements that are necessary for establishing criminal liability. Previous research has found that although judges may understand that defendants with ASD “view the world” in a unique way, they still are unsure if and how the disorder and its symptomology may affect a defendant’s ability to formulate intent, and how to consider it in their rulings.<sup>101</sup> Indeed, judges should consider whether ASD may affect and potentially negate a defendant’s ability to formulate the appropriate state of mind to commit certain criminal acts (i.e., mens rea, meaning “guilty mind”).<sup>102</sup>

This consideration is likely most relevant for specific intent crimes, which are crimes in which the prosecution must prove that the defendant had the desire to commit a specific crime in order to accomplish a specific outcome.<sup>103</sup> ASD may alter a defendant’s specific intent, in that the symptomology of the disorder may hinder an individual from controlling or projecting the full potential and consequences of his actions.<sup>104</sup> For example, in *U.S. v. Cottrell*, the U.S. Court of Appeals for the Ninth Circuit reversed the district court’s decision to exclude expert testimony regarding the defendant’s ASD diagnosis.<sup>105</sup> The defendant was charged with aiding and abetting—a specific intent crime.<sup>106</sup> The Ninth Circuit reasoned that the defendant’s ASD diagnosis was relevant because it “was aimed at defeating an inference of Cottrell’s intent from the circumstances.”<sup>107</sup> Thus, the conviction was vacated because the defendant’s ASD diagnosis was improperly excluded.<sup>108</sup>

Judges may also want to reflect on how a defendant’s ASD diagnosis may negate the actus reus, meaning “guilty act,” of

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101. Berryessa, *Judiciary Views on Criminal Behaviour*, *supra* note 14, at 101.

102. See e.g., Christine N. Cea, Note, *Autism and the Criminal Defendant*, 88 ST. JOHN’S L. REV. 495, 505–06 (2014).

103. *Specific Intent*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/specific\\_intent](https://www.law.cornell.edu/wex/specific_intent) (last visited Mar. 29, 2021).

104. See Cea, *supra* note 102, at 505–06.

105. 333 F. App’x 213, 216–17 (9th Cir. 2009).

106. *Id.* at 216.

107. *Id.*

108. *Id.*

his or her crimes because the symptomology may provide an alternative explanation for the action itself.<sup>109</sup> A prime example of this involves a case in which a defendant was arrested and convicted of driving under the influence of a controlled substance by demonstrating impairment.<sup>110</sup> The arresting officer testified that the defendant “appeared shaken and jittery” by not giving him eye contact, and the defendant performed poorly during a sobriety field exercise by exhibiting “robotic type movements.”<sup>111</sup>

Upon appeal, evidence of the defendant’s ASD became known, including how his symptomology presented itself as “stiff, wooden, and mechanical” movements and social anxieties, including a lack of eye contact.<sup>112</sup> Ultimately, the conviction was reversed, as the court reasoned that there was insufficient evidence that the defendant had actually been under the influence and the arresting officer had not considered how the defendant’s ASD may have affected his behavior and sobriety test at the arrest.<sup>113</sup> The defendant’s “impairment” was actually due to his diagnosis, and not marijuana as the arresting officer had thought.<sup>114</sup> Thus, judges must consider whether ASD symptomology may provide an alternative explanation not only for the defendant’s state of mind, but also for the action itself.

### 3. Sentencing

Judges who have participated in previous ASD research have expressed disparate views as to the ways in which they believe

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109. Cea, *supra* note 102, at 504–505.

110. See generally *State v. Suber*, No. A06-2438, 2008 WL 942622 (Minn. Ct. App. Apr. 8, 2008) (reversing conviction after finding the lower court relied on the police officers’ erroneous belief that Suber’s “outward manifestations of impairment” satisfied the actus reus requirement for driving under the influence of marijuana).

111. *Id.* at \*2–7.

112. *Id.* at \*10.

113. *Id.* at \*15–16. Though the case was reversed for lack of evidence, not solely the discovery of the defendant’s diagnosis, the court still highlighted the defendant’s diagnosis as a fact weighing against conviction. See *id.*

114. *Id.*

ASD may impact sentencing deliberations, which could potentially lead to differential outcomes.<sup>115</sup> Judges should consider how a defendant's ASD may change both the objectives of and choices in sentencing.

Judges should consider weighing whether a defendant's ASD should be a mitigating factor to sentencing. Although considered a statutory mitigating factor in some states,<sup>116</sup> the mitigating impact of an ASD diagnosis often relies on the sentencing judge's discretion and consideration regarding the facts of the case, clinical history, and expert testimony.<sup>117</sup> ASD diagnoses are often raised as mitigating factors because the symptomology of ASD may reduce the moral blameworthiness of an offender, who may not be able to understand the impact of his actions.<sup>118</sup>

Research suggests that although individuals with ASD may cognitively understand that their behavior is considered illegal, they often still do not appreciate its social and emotional implications, especially for victims of their crimes.<sup>119</sup> In one case, a woman with ASD wrote letters in search of friendship, and was arrested when the letters, after having gone unanswered, became threatening.<sup>120</sup> She continued to send these letters, despite warnings from the police and clear communication from the letters' recipients that she should stop, demonstrating her inability to perceive and understand the impact of her actions on the letter recipients.<sup>121</sup>

Judges should also consider the potential impact of a prison or jail sentence on a defendant with ASD. Prison or jail settings

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115. Berryessa, *Brief Report: Sentencing*, *supra* note 67, at 2771–72.

116. Cea, *supra* note 102, at 522.

117. See Thomas A. Mayes, *Persons with Autism and Criminal Justice: Core Concepts and Leading Cases*, 5 J. POSITIVE BEHAV. INTERVENTIONS 92, 95 (2003).

118. Freckelton & List, *supra* note 37, at 32–33.

119. Lorna Wing, *Aspergers Syndrome: Management Requires Diagnosis*, 8 J. FORENSIC PSYCHIATRY 253, 255 (1997).

120. Luke Beardon, *Asperger Syndrome and Perceived Offending Conduct: A Qualitative Study* 136–42 (May 2008) (Ph.D. dissertation, Sheffield Hallam University) (ProQuest), <http://shura.shu.ac.uk/7155/6/10694214.pdf>.

121. *Id.* at 136, 139.

can cause anxiety, acting out, and reactive aggression in response to stressors, while social naïveté may increase defendants' likelihood to be victimized, exploited, or manipulated by other prisoners.<sup>122</sup> Misinterpretation of unwritten social cues and rules may cause conflict between defendants with ASD and other prisoners, and potentially result in physical injuries.<sup>123</sup> Further, communication deficits associated with ASD may hinder interactions with prison staff, security staff, and other inmates.<sup>124</sup>

Finally, judges should consider weighing whether a defendant's ASD should affect the objective of a sentence all together.<sup>125</sup> In one case, a defendant with ASD was found guilty for possession of child pornography and was sentenced to eight years in prison.<sup>126</sup> A defense expert testified that the due to the defendant's disorder, he likely would be victimized by other inmates and staff might misunderstand his behaviors due to his social impairments.<sup>127</sup> The expert also testified that the defendant likely would not gain any benefit from being incarcerated.<sup>128</sup> Ultimately, when asked about his time in prison, the defendant explained that he completed math questions in prison and learned that his math skills could bring him a lot of money when he got out of prison.<sup>129</sup> He only understood how prison benefited him, and did not express any understanding that he or his actions were wrong or that incarceration helped him learn his lesson or change his life.<sup>130</sup>

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122. Robertson & McGillivray, *supra* note 81, at 723–24, 728.

123. *See id.* at 725–726 (describing the social difficulties two autistic men faced while imprisoned).

124. *Id.* at 728.

125. *See generally* Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1 (2006) (explaining the various goals of punishment that sentences aim to achieve, including retribution, deterrence, incapacitation, restoration, and rehabilitation).

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

127. *Id.* at 892.

128. Brief for Appellant at \*13, *Morais*, 670 F.3d 889 (No. 11-1793).

129. *Id.* at \*22.

130. *Id.* at \*22–23.

Ultimately, punishment for individuals with ASD should be “just long enough for the message to be effective.”<sup>131</sup> However, the previous defendant’s response suggests that incarceration may not always provide the appropriate message, or objective, in punishment, regardless of sentence length, to allow for change.<sup>132</sup>

### III. RECOMMENDATIONS

The involvement of individuals with ASD as defendants in our criminal justice system presents challenges for even the most experienced judges.<sup>133</sup> In order for judges to establish effective communication with defendants and make appropriate accommodations in the legal process, this Part provides three recommendations for judges—utilizing expert assistance and making procedural and sentencing adjustments—to improve the legal process for defendants with ASD.

#### A. *Reliance on Expert Assistance*

Knowledge of ASD and its symptoms is fundamental for judges in trials involving defendants with the disorder.<sup>134</sup> Having a basic background knowledge on the disorder and its forensic relevance, as laid out in this Article, is important. However, judges should additionally utilize expert assistance to assess how ASD may be relevant to the offending behavior and sentencing considerations, and whether any procedural adjustments to the legal process are necessary.

Expert witnesses are often thought of as “educators” to the court, and have significantly more information and training in their respective areas than members of the court.<sup>135</sup> Experts have

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131. JOHN CLEMENTS & EWA ZARKOWSKA, BEHAVIOURAL CONCERNS AND AUTISTIC SPECTRUM DISORDERS: EXPLORATIONS AND STRATEGIES FOR CHANGE 212 (2001).

132. See Brief for Appellant, *supra* note 128, at \*22–23.

133. Taylor, Mesibov & Debbaudt, *supra* note 93, at 1.

134. Berryessa, *Educator of the Court*, *supra* note 9, at 578.

135. John A. Auxier, *The Role of the Expert Witness*, 117 RADIATION RSCH. 178, 178–80 (1989).

years of past case and often clinical experiences that shape their perspectives on what information is relevant and necessary for judges and other members of the court to know.<sup>136</sup>

For example, one of the objectives in a criminal case involving a defendant with ASD is to identify the ways in which a defendant's disorder may have been associated with the commission of the alleged offense.<sup>137</sup> Experts are able to use their knowledge and training on ASD to act as "reconstructionists" by retroactively assessing the forensic relevance of the disorder to the crime on trial.<sup>138</sup> Another role that experts may fulfill is that of "myth-dispellers" by using education to dismiss inaccurate misunderstandings about ASD and its symptoms.<sup>139</sup>

Yet, arguably the most important role of experts is that of "communicators" who educate the court on the legal aspects of ASD and distinctive ways in which the symptoms of ASD affect behavior and daily life.<sup>140</sup> Experts are able to communicate to judges about not only how a defendant's ASD may be forensically relevant to offending and fact finding, but how it may manifest in the courtroom or should be considered in legal outcomes. For example, experts may be able to explicate if and how a defendant's ASD may affect choices with regard to if and what environment may be appropriate for an individual with ASD in sentencing.<sup>141</sup>

Experts have stressed that their services are often necessary to edify the court on ASD in order to better ensure more positive outcomes for defendants with ASD, and have expressed concerns that judges and other court personnel may rely on limited or inaccurate knowledge of ASD in decision-making without expert assistance.<sup>142</sup> Thus, although having a basic

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136. Berryessa, *Educator of the Court*, *supra* note 9, at 593–97.

137. *Id.* at 584–85.

138. *Id.* at 594.

139. *Id.* at 595–96.

140. *Id.* at 594–96.

141. *See* *United States v. Morais*, 670 F.3d 889, 892–93 (8th Cir. 2012).

142. Berryessa, *Educator of the Court*, *supra* note 9, at 590–91.



understanding of ASD's forensic relevance is fundamental, judges should take advantage of such proficiency, experience, and knowledge by calling in clinical and legal experts on ASD whenever necessary.

### B. Procedural Adjustments

As defendants with ASD may have difficulty understanding the legal process and in conforming their behavior to social norms in the courtroom, judges should consider whether procedural adjustments are necessary to the legal process in cases involving ASD.

Certain modifications to ensure defendants with ASD are fit to stand trial, such as familiarizing the defendant with the courtroom, simplifying language used during questioning, or effective communication during the legal process, have been discussed above.<sup>143</sup> More generally, judges should require court personnel to speak in a clear, calm, and non-threatening manner, avoid complex instructions that may be misinterpreted, forgo body language that may be perceived as threatening to those with ASD and cause them anxiety, and be patient and repeat things when necessary.<sup>144</sup> Accordingly, judges should provide some sort of specific training to court personnel on how to enact such behaviors in court.

Sometimes noisy or overly stimulating environments may overwhelm individuals with ASD—even something neurotypical people may never even think twice about, like overhead lights, can be too stimulating for those with ASD.<sup>145</sup> Therefore, judges should consider making adjustments to the courtroom, as a sensory environment, such as limiting distractions, lowering lighting, or removing anything or anyone that may lead to a “sensory overload.”<sup>146</sup>

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143. See *supra* Section II.B.1.

144. See Taylor, Mesibov & Debbaudt, *supra* note 93, at 1, 6.

145. *Id.* at 7.

146. See *id.* at 3, 7.

Finally, comprehension will likely not be “one size fits all.” It is important to remember that defendants with ASD may understand one question perfectly but be unable to understand the meaning or content of other questions, even if they are related or about similar things.<sup>147</sup> Judges should consider whether they or other court personnel should write or draw something in order to aid in a defendant’s comprehension, especially if he or she has overwhelming difficulties with verbal communication.<sup>148</sup>

### C. Sentencing Alternatives

In conjunction with the discussion on sentencing above,<sup>149</sup> judges should consider whether defendants with ASD may be more likely to benefit from alternative, non-incarceration-based sentences with more holistic, and less retributive, objectives. As incarceration may increase the risk of a defendant with ASD being exploited, physically harmed, or socially isolated,<sup>150</sup> this vulnerability should be considered when weighing whether prison is appropriate for a defendant. For individuals with ASD, non-incarceration-based sentences may be more effective to rehabilitate the defendant, whereas incarceration may be more taxing and toxic for defendants with ASD as compared to other prisoners.<sup>151</sup>

Rather, if possible, defendants with ASD may benefit from diversion or probation programs that provide clear expectations and guidelines for defendants to follow, integrate the participation of families or other trusted contacts, and work to rehabilitate and change, rather than punish, offending

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147. *Id.* at 3, 9.

148. *See id.* at 6–7.

149. *See supra* Section II.B.3.

150. *See* Robertson & McGillivray, *supra* note 122, at 724 (“data suggested that individuals with a learning disability and/or ASD were at risk of being exploited, bullied and ostracised by other prisoners within prison settings.”).

151. *Cea, supra* note 102, at 525–27.

behavior.<sup>152</sup> Such programs may be far more effective than incarceration in preventing defendants with ASD from making future contact with the justice system again.

However, if an individual with ASD is incarcerated for any period of time, it is important to notify corrections personnel about the defendant and his disorder, and even suggest potential modifications.<sup>153</sup> For example, judges may want to recommend that a defendant be segregated from the general population, or monitored by prison doctors or medical personnel. Apprising corrections officials of a defendant's ASD is absolutely imperative in order to provide more appropriate prison or jail conditions and services if a defendant is to be incarcerated.

#### CONCLUSION

Although the knowledge, considerations, and recommendations put forth here for judges should begin to help build some groundwork on these issues, this toolkit is only a first step. Judges have admitted that they have limited knowledge on the forensic relevance of ASD, which impairs their abilities to make fair and informed legal decisions.<sup>154</sup> They should ask their jurisdictions to develop and implement specially designed education programs, conferences, and workshops on ASD. This will provide at least a foundational understanding of how to identify a defendant's ASD, if undiagnosed, and the potential legal considerations that may arise if a defendant has ASD.

In order to tackle complicated cases involving more technical knowledge, existing research across a variety of topical areas increasingly suggests the need for judicial training and

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152. See Cristian Raggi, Kiriakos Xenitidis, Maria Moisan, Quinton Deeley & Dene Robertson, *Adults with Autism Spectrum Disorder and Learning Disability Presenting with Challenging Behaviour: How Tolerant Should We Be?*, 4 J. INTELL. DISABILITIES & OFFENDING BEHAV. 42, 49–50 (2013).

153. Taylor, Mesibov & Debbaudt, *supra* note 93, at 8.

154. Berryessa, *Judiciary Views on Criminal Behaviour*, *supra* note 13, at 104.

education in cases involving complex and scientific subject matter that is likely outside of a judge's wheelhouse.<sup>155</sup> Judicial training on ASD is no different, and should cover both legally-relevant and clinical facets, such as symptomology, offending, implications for sentencing, and best practices for judges and other legal professionals.

Ultimately, judges must be equipped with appropriate awareness, evidence, and resources to be able to recognize and understand the symptoms of ASD and to better identify and communicate with diagnosed defendants. Not only does this allow for judges to make appropriate accommodations in the legal process, but a more holistic understanding of ASD's forensic relevance to each aspect of the legal process will maximize positive outcomes and legal consequences for defendants with ASD in our criminal court system.

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155. E.g., Colleen M. Berryessa, *Judges' Views on Evidence of Genetic Contributions to Mental Disorders in Court*, 27 J. FORENSIC PSYCHIATRY & PSYCH. 586 (2016); Colleen M. Berryessa, *Potential Impact of Research on Adolescent Development on Juvenile Judge Decision-Making*, 69 JUV. & FAM. CT. J. 19 (2018); Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 L. & SOC'Y REV. 202 (2018); Colleen M. Berryessa & Jillian Reeves, *The Perceptions of Juvenile Judges Regarding Adolescent Development in Evaluating Juvenile Competency*, 110 J. CRIM. L. & CRIMINOLOGY 550 (2020).