

Some Suggested Corrections for the Ways Jurors (Mis)construe Autism in the Criminal Trial Process

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Background



- ▶ In the past 50 years, autism spectrum disorder (ASD) has gone from a narrowly defined, rare disorder of childhood onset to a well publicized, advocated, and researched lifelong condition, recognized as fairly common and very heterogeneous,
- ▶ ASD results from early altered brain development and neural reorganization.
- ▶ ASD is now seen as a spectrum that can range from very mild to severe.
- ▶ The estimated prevalence of ASD has increased roughly 29% since 2008, 64% since 2006, and 123% since 2002.*
 - ▶ Centers for Disease Control and Prevention (2015, August). Autism spectrum disorder: data and statistics. Retrieved from <http://www.cdc.gov/ncbddd/autism/data.html>



Issues of race and ethnicity

- Studies that look at the link between autism, race and ethnicity found:
 - Minority children are less likely to receive an autism diagnosis.
 - African American and Hispanic children are disproportionately underrepresented among children diagnosed with autism.*
 - African American and Hispanic children who received an autism diagnosis were more likely to be children who also experienced significant intellectual impairments.
- **Ten Things to Know About New Autism Data*, Centers for Disease Control and Prevention (Mar. 31, 2014), [http:// www.cdc.gov/features/dsautismdata/](http://www.cdc.gov/features/dsautismdata/).



Issues of race and ethnicity, 2

- ▶ The results of the studies on the connection between autism, race and ethnicity raise important questions regarding the “under-recognition of ... symptoms [of autism] in some racial/ethnic groups, cultural differences influencing the decision to seek services, [and] socioeconomic disparities in access to services.”
 - ▶ Jon Baio et. al., *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years - Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010* (Ctr. for Disease Control & Prevention, 2014), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm>



Diagnostic Criteria for Autism Spectrum Disorder, DSM-5

- ▶ Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history:
 - ▶ **Deficits in social-emotional reciprocity**, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
 - ▶ **Deficits in nonverbal communicative behaviors used for social interaction**, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
 - ▶ **Deficits in developing, maintaining, and understand relationships**, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.



Diagnostic Criteria, 2

- Severity is based on social communication impairments and restricted, repetitive patterns of behavior.
- Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following:
 1. Stereotyped or repetitive motor movements, use of objects, or speech;
 2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior;
 3. Highly restricted, fixated interests that are abnormal in intensity or focus;
 4. Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment.

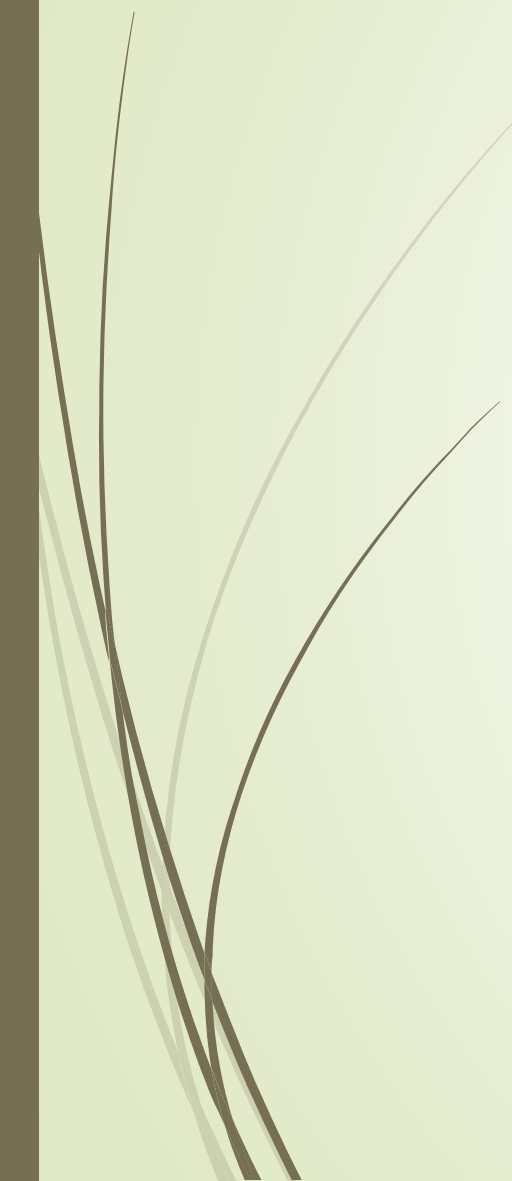


Diagnostic Criteria, 3

- ▶ Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).
- ▶ Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.
- ▶ These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay.
- ▶ Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.



How does this all relate to our topic?

- ▶ All of this makes it much more difficult for a person with autism in the criminal justice system, especially when their fate is to be decided by jurors who may either have no familiarity with autism or whose “familiarity” is based on a television stereotype, and who regularly consider demeanor evidence in evaluating a witness’s credibility.
 - ▶ As a result, participation in such a system is often humiliating and shaming.
 - ▶ How autism is “processed” in the criminal trial process is a topic that is largely under the radar (certainly in the legal community), and we have done this presentation so as to, we hope, inspire some discussion and reflection about some of the salient issues.
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Roadmap



- ▶ Here are the relevant steps to consider in order to maintain dignity and preserve justice for persons with autism
- 1. Utilizing voir dire effectively in juror selection
- 2. Assessing juror attitudes on mental disabilities
- 3. Acknowledging the significance of remorse and empathy in juror decision-making
- 4. Holding judges accountable in recognizing the dangers of ordinary common sense (OCS) and conveying those dangers to jurors
- 5. Recognizing the need for expert assistance
- 6. Reconstructing how we charge the jury on autism
- 7. Consideration of therapeutic jurisprudence in the overall process



Significance of voir dire

- ▶ French for "to speak the truth."
- ▶ The process through which potential jurors from a panel of prospective jurors (i.e. venire pool) are questioned by either the judge or a lawyer to determine their suitability for jury service.
- ▶ Can also refer to the preliminary questioning of witnesses (especially experts) to determine their competence to testify. *Peretz v. United States*, 501 U.S. 923 (1991).



General analysis of prospective jurors during voir dire

- ▶ **Backgrounds:** What backgrounds do jurors have (e.g., their occupations, educational background and training, socio-economic status, media viewing habits and internet footprint and usage, among other background characteristics) that may affect their decisions in the case?
- ▶ **Experiences:** What experiences do jurors bring to the case (e.g., being a victim of a crime or involvement in prior lawsuits) that can affect how they view the case, evidence, witnesses and parties?
- ▶ **Opinions, beliefs and values:** These are the most important things to know about jurors, because they will serve as the framework or filter through which the jurors will view the case.
 - ▶ Jeffery T. Frederick, *Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury*” discussed on Jan. 25, 2019 at ABA Midyear Meeting in Las Vegas.



Analysis of prospective jurors on mental intellectual/developmental disability

- ▶ It is crucial that attitudes toward mental/intellectual/developmental disabilities are explored during voir dire.
- ▶ The voir dire process can be used to educate prospective jurors about the particular disabilities suffered by a defendant.
- ▶ Thus, if impaneled jurors have already been exposed to particular disability concepts and evidence, they will be far more likely to understand the significance of that evidence when its offered by experts and lay witnesses at trial.
 - ▶ William J. Bowers, Marla Sandys and Benjamin Steiner, *Foreclosing Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 Cornell L. Rev. 1476 (1998).



Analysis of prospective jurors, 2

- ▶ Think back to the diagnostic criteria of autism (slide 7):
 - ▶ Restricted, repetitive patterns of behavior, interests, or activities that may manifest as repetitive movements or language, such as repeating a phrase at unusual times; or may display behavioral rigidity such as experiencing extreme distress to small changes; or may have restricted interests that are abnormal in intensity or focus; and/or may display unusual sensory reactivity.*
 - ▶ *J.C. McParland, K. Law & G. Dawson, *Autism Spectrum Disorder*, 1 Encyclopedia of Mental Health 124 (2016).
- ▶ Imagine how these potential characteristics may have played a role during the underlying charged crime and how they might be interpreted or perceived by jurors and lay persons in a criminal trial.




Analysis of prospective jurors, 3

- ▶ This population is perceived as lacking in both empathy and in remorse, and these perceptions are especially problematic in courtroom settings, especially when a defendant appears emotionally unaffected in a criminal trial.
- ▶ Social impairment – often a characteristic of autism – may lead defendants on the autistic spectrum to make awkward expressions, make inappropriate statements on the witness stand, or be unable to speak in public.
- ▶ Careful questions must be asked during the *voir dire* process (in assessing which jurors should be able to sit on the case) to determine the extent to which prospective jurors have expectations/pre-conceptions of what remorse and empathy “look like” may not comport with the reality of how persons with autism appear.



Analysis of prospective jurors, 4

- ▶ Finally, it is an attorney's obligation to attempt to prevent the court or the state from rehabilitating prospective jurors who will automatically reject mental health or disability evidence during deliberation in either the guilt or sentencing phase.
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What judges must consider

- ▶ Judges must be on the look out for “ordinary common sense” (OCS).
- ▶ OCS is a powerful unconscious animator of legal decision making that reflects idiosyncratic, reactive decision-making, and is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities.
 - ▶ Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737–38 (1988) (OCS exemplified by the attitude of “What I know is ‘self evident’; it is ‘what everybody knows.’”).
 - ▶ Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3, 21–21, 29 (1990).



What judges must consider, 2

- ▶ OCS presupposes two “self-evident” truths: first, everyone knows how to assess an individual’s behavior; and second, everyone knows when to blame someone for doing wrong.
- ▶ OCS is self-referential and non-reflective- “I see it that way, therefore everyone sees it that way; I see it that way, therefore that’s the way it is.”
- ▶ OCS is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information.*
 - ▶ *Michael L. Perlin & Heather Ellis Cucolo, “Tolling for the Aching Ones Whose Wounds Cannot Be Nursed”: *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUSTICE 431, 453 (2017).

What judges must consider, 3

- ▶ Thus, we know that, in death penalty cases, jurors often self-reflectively reject consideration of the sort of scientific evidence that must be relied on in efforts to demonstrate mental impairment as a basis for mitigation, as such evidence may be “beyond the understanding of jurors who rely on ordinary common sense in decision-making.”*
- ▶ In a capital case, prospective jurors who are not willing to give meaningful consideration to mental health mitigation evidence, even after the client has been convicted of a death-eligible murder, are not qualified to sit on the jury. (*Morgan v. Illinois*, 504 U.S. 719 (1992)).

▶ *Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447, 499 n. 336 (2004) (quoting Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 679 (1989–90)).



What judges must consider, 4

- ▶ The Supreme Court is cognizant of how the assessment of remorse and compassion might be the dispositive factor to jurors in death penalty cases.
 - ▶ In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (striking down the death penalty for defendants with intellectual disabilities), it held that demeanor of such defendants may create an unwarranted impression of lack of remorse for their crimes.
- ▶ Justice Kennedy has focused on this issue extensively:
 - ▶ In his concurring opinion in *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (granting defendants on trial, pleading not guilty by reason of insanity, the right to refuse antipsychotic medication), he notes that “[a]ssessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.”



What judges must convey to jurors

- ▶ Great care must be taken in selecting jurors due to the impact of OCS and its relation to persons with autism.
- ▶ In particular, judges must explain to jurors that they cannot rely on their false “ordinary common sense” about what remorse “looks like” or what an empathetic person “looks like.”
- ▶ Judges must make clear that jurors’ “ordinary common sense” is simply wrong – that it is premised on media stereotypes or the heuristic of one person they may know, and that it cannot be left unchecked or guide their decisions in reaching a verdict.



The need for expert assistance

- ▶ Expert witnesses must be provided for the person at risk to explain to the fact-finder the reasons for otherwise-strange-seeming behavior.
- ▶ Twenty-five years ago, in *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that that a criminal trial is “fundamentally unfair” unless a defendant has access to “the raw materials integral to the building of an effective defense.” *Id.* at 77.
 - ▶ Importantly, the *Ake* court also stressed that, “through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the medical condition of the defendant at the time of the offense.” *Id.* at 80.
- ▶ This same rationale should be embraced in cases involving defendants with autism – whether or not, like *Ake*, they involve the use of the insanity defenses in death penalty cases.



Need for expert assistance, 2

- ▶ Certain criminal cases may demand two separate experts: **one** who has evaluated the defendant and has a professional opinion as to, variously, his competency, responsibility, potential future dangerousness, etc., and **another** who explains to jurors why their preconceptions about persons with mental disabilities are, bluntly, all wrong.
- ▶ This sort of “extra” expert is especially vital in cases involving this population – where juror’s stereotypical views are so discordant with reality – and without which, it is impossible for the fact finder to actually make a “sensible and educated determination” about the case in question.



Need for expert assistance, 3

- ▶ In a New Jersey case, a defendant diagnosed with Asperger's Disorder was convicted of second-degree aggravated assault and third-degree endangering a minor.
- ▶ On appeal, the New Jersey Superior Court reversed the decision and remanded the case for a new trial on the basis that the trial court erred when it excluded defendant's request to present expert testimony regarding his diagnosis with Asperger's Disorder
 - ▶ *State v. Burr*, No. A-2671-10T3, 2013 N.J. Super. Unpub. LEXIS 1130, at *1 (N.J. Super. Ct. App. Div. May 13, 2013); *State v. Burr*, 921 A. 2d 1135 (N.J. App. Div. 2007), *aff'd as modified*, 948 A. 2d 627 (N.J. 2008).



Need for expert assistance, 4

- ▶ Because of autism's impact on the individual's reasoning process in crime commission but also on one's ability to fully assist counsel in his/her offense in preparing a defense or navigating through the plea-bargaining process, courts should not shy away from at least hearing testimony on the subject.*
- ▶ As one advocate maintains, "[a] diagnosis of an autism spectrum disorder is as relevant to police and legal proceedings as a diagnosis of mental retardation or mental illness would be, no matter how bright, high-functioning, and/or verbal the individual may be.**"
 - ▶ * Claire King & Glynis H. Murphy, *A Systematic Review of People with Autism Spectrum Disorder and the Criminal Justice System*, 44 *J. Autism & Developmental Disorders* 2717 (2014).
 - ▶ ** Barbara T. Doyle, *And Justice for All: Unless You Have Autism: What the Legal System Needs to Know About People With Autism Spectrum Disorders* 1-2, http://www.autismspeaks.org/docs/family_services_docs/LegalSystem.pdf.



The charge to the jury

- ▶ At the conclusion of the trial, the judge's charge to the jury must incorporate sufficient information to make it less likely that stereotypical biases infect the final case outcome.
- ▶ Thus, the judge's charge to the jury should include information about the impact of autism on a defendant's demeanor, focusing in on how the juror's expectations/pre-conceptions of what remorse and empathy "look like" may not comport with reality .



Charge to the jury, 2

- ▶ This is especially vital because of how jurors may be negatively influenced by stigmatizing beliefs and misconceptions with respect to autism.
- ▶ A concern: Judges have limited understanding and familiarity with autism, and like jurors, over-rely on false “ordinary common sense.”
 - ▶ 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 Metaanalyses (PRISMA) Review of Autism Spectrum Disorder in the Courtroom*, 25 J. L. & Med. 105 (2017).




Charge to the jury, 3

- ▶ An example:
- ▶ 168 jury-eligible participants read a vignette describing a male who was brought to the attention of police for suspicious and aggressive behaviors and who displayed atypical behaviors in court.
- ▶ Half of the participants were informed that he had autism spectrum disorder (ASD) and were given background information about ASD; the other half received no diagnostic label or information.
- ▶ The provision of a label and information led to higher ratings of the defendant's honesty and likeability, reduced blameworthiness, and resulted in fewer guilty verdicts, and more lenient sentencing.
- ▶ Participants in the label condition were more empathetic and attributed his behaviors to his ASD and mitigating factors, while participants in the No label condition perceived the defendant as deceitful, unremorseful, rude and aggressive.
 - ▶ See Katie Maras, Imogen Marshall & Chloe Sands, *Mock Juror Perceptions of Credibility and Culpability in an Autistic Defendant*, 49 J. Autism & Devel. Disorders 996 (2019).



Other aspects of the criminal trial process

- ▶ The impact of an autism diagnosis on questions related to competency, responsibility, and sentencing may be crucial, and these issues are worthy of a separate presentation.*
- ▶ A sentencing case to consider:
 - ▶ In *United States v. Zuk*, 874 F. 3d 398, 412 (4th Cir. 2017), the Court, at the Government's request, vacated a time-served 26- month sentence for such possession as "substantively unreasonable," concluding that the defendant's "mild autism diagnosis" was below the "bare minimum necessary to reflect seriousness of offense, promote respect for law, and provide just punishment."
 - ▶ The Court also noted that the initial sentence "fails in a message of deterrence." *Id.* at 411.
 - ▶ * See e.g., Thomas A. Mayes, *Persons with Autism and Criminal Justice: Core Concepts and Leading Cases*, 5 J. Positive Behavior Interventions 92 (2003).



Connection to therapeutic jurisprudence (TJ),

- ▶ Therapeutic jurisprudence “look[s] at law as it actually impacts people’s lives”* and assesses law’s influence on “emotional life and psychological well-being.”**
- ▶ The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.
 - ▶ *Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).
 - ▶ **David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et al. eds., 2000).



Connection to TJ, 2

- ▶ Therapeutic jurisprudence mandates that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness.”*
- ▶ *Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).



Connection to TJ, 3

- ▶ Professor Amy Ronner has argued persuasively that one of the essential values of therapeutic jurisprudence is adherence to what she characterizes as the “three Vs” – voice, validation and voluntariness.
- ▶ What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome.*
 - ▶ *Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).



Connection to TJ, 4

- ▶ We believe that these “three Vs” must be present if litigants -- in this case, litigants with autism -- are to be afforded dignity.
- ▶ If we embrace therapeutic jurisprudence, shame and humiliation will diminish and greater dignity will be provided.



Conclusion, what needs to be done

- ▶ To remediate this situation before us, we must adopt the approach outlined in this presentation to trials of persons with autism to provide dignity to the persons at risk, and to comply with principles of therapeutic jurisprudence.
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