

“SOMETHING’S HAPPENING HERE/BUT YOU  
DON’T KNOW WHAT IT IS”: HOW JURORS  
(MIS)CONSTRUE AUTISM IN THE CRIMINAL  
TRIAL PROCESS

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# “SOMETHING’S HAPPENING HERE/BUT YOU DON’T KNOW WHAT IT IS”: HOW JURORS (MIS)CONSTRUE AUTISM IN THE CRIMINAL TRIAL PROCESS

Michael L. Perlin\* & Heather Ellis Cucolo\*\*

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## INTRODUCTION

“In the past 50 years, autism spectrum disorder (ASD) has gone from a narrowly defined, rare disorder of childhood onset to a well-publicised, advocated, and researched lifelong condition, recognised as [both] fairly common and . . . heterogeneous.”<sup>1</sup> Although the autism rights movement has drastically altered perceptions of ASD within the last two decades, how ASD is “processed” in the criminal trial process is a topic that is still largely under the radar and yet to be fully explored.<sup>2</sup> As research into this population increases, and as more and more children are diagnosed on the spectrum and enter into adulthood, the number of persons with ASD in our criminal courts will undoubtedly grow exponentially.<sup>3</sup>

Participation in the criminal justice system is often described as a humiliating and shaming experience in general,<sup>4</sup> but for persons with ASD, the process can be especially detrimental and destructive.<sup>5</sup> For many reasons, persons with ASD are more vulnerable to mistreatment and overrepresentation in criminal justice trials. For one, improper behavior attributed to ASD often rises to the level of purported criminal conduct.<sup>6</sup> Additionally, according to the Autism Society of America, “because individuals with ASDs have difficulty picking up social cues and

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<sup>1</sup> Catherine Lord, Mayada Elsabbagh, Gillian Baird & Jeremy Veenstra-Vanderweele, *Autism Spectrum Disorder*, 392 LANCET 508, 508 (2018). Because here there are no reliable biomarkers, a diagnosis must be made with reference to behavior. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> Jeffrey A. Cohen, Thomas A. Dickerson & Joanne Matthews Forbes, *A Legal Review of Autism, A Syndrome Rapidly Gaining Wide Attention Within Our Society*, 77 ALB. L. REV. 389, 413 (2014) (noting people on the spectrum are “breaking down the wall of silence surrounding their condition,” and there has been “significant growth in the number and strength of advocacy organizations, followed by an attendant increase in litigation and legal lobbying to establish and defend new rights”); see Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483, 512–13, 520, 521–23 (2010) (describing cases in which courts have recognized or expanded on the rights of persons living with ASDs).

<sup>4</sup> See, e.g., JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

<sup>5</sup> Robert Costello, *Caught in the Web of the Criminal Justice System*, 34 CRIM. JUST. 53, 53 (2019) (reviewing CAUGHT IN THE WEB OF THE CRIMINAL JUSTICE SYSTEM: AUTISM, DEVELOPMENTAL DISABILITIES, AND SEX OFFENSES (Lawrence A. Dubin & Emily Horowitz eds., 2017) (interviewing Professor Dubin); see also Michael L. Perlin & Naomi M. Weinstein, “*Friend to the Martyr, a Friend to the Woman of Shame*”: Thinking About the Law, Shame and Humiliation, 24 SO. CAL. REV. L. & SOC’L JUST. 1, 2 (2014) (“[H]umiliation and shame are detrimental in ways that lead to recidivism, inhibit rehabilitation, discourage treatment, and injure victims.”).

<sup>6</sup> Cohen et al., *supra* note 3, at 413–14.

understanding other individual's thoughts and intentions, they are 'vulnerable to a range of crimes from fraud and theft to more violent crimes.'"<sup>7</sup>

The same social and communicative impairments that lead to the initial interaction with the criminal justice system, similarly, make navigating the process even more difficult.<sup>8</sup> In particular, "[i]ndividuals with ASD are . . . generally taught compliance from a very young age, making them easy targets for abuse and victimization."<sup>9</sup> This abuse and victimization can come from various sources: not only must we consider the effect on persons with ASDs in pre-trial containment within jails and/or prisons,<sup>10</sup> but significantly—and the focus of this Article—on the abuse and victimization that arises from the criminal trial procedure. Attorneys, judges, experts, and factfinders all fail to conceptualize the meaning of autism in this context and do not always make the appropriate accommodations at the crucial pressure points of a trial.<sup>11</sup>

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<sup>7</sup> *Id.* (quoting CAROLYN GAMMICCHIA & CATRIONA JOHNSON, LIVING WITH AUTISM: AUTISM INFORMATION FOR LAW ENFORCEMENT AND OTHER FIRST RESPONDERS, [https://www.autism-society.org/wp-content/uploads/files/2014/04/Law\\_Enforcement\\_and\\_Other\\_First\\_Responders.pdf](https://www.autism-society.org/wp-content/uploads/files/2014/04/Law_Enforcement_and_Other_First_Responders.pdf) (last visited Mar. 13, 2021)).

<sup>8</sup> Cohen et al., *supra* note 3, at 414; *see also* Caruso, *supra* note 3, at 506 ("Individuals with autism are seriously handicapped by their inability to understand social cues or to reason intuitively in relational contexts."); Shelley Channon, Sian Fitzpatrick, Helena Drury, Isabelle Taylor & David Lagnado, *Punishment and Sympathy Judgments: Is the Quality of Mercy Strained in Asperger's Syndrome?*, 40 J. AUTISM DEVELOPMENTAL DISORDERS 1219, 1220 (2010), <http://www.springerlink.com/content/d8683778812814no/fulltext.pdf>.

<sup>9</sup> Cohen et al., *supra* note 3, at 414 (quoting GAMMICCHIA & JOHNSON, *supra* note 7); *see also* Karen Hughes, Mark A. Bellis, Lisa Jones, Sara Wood, Geoff Bates, Lindsay Eckley, Ellie McCoy, Christopher Mikton, Tom Shakespeare & Alana Officer, *Prevalence and Risk of Violence Against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies*, 379 LANCET 1621, 1626, 1627 (2012).

<sup>10</sup> Laura I Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 471 (2018) ("[C]ognitively impaired offenders are more likely to be convicted, receive a prison sentence, and serve a greater portion of their prison term than non-cognitively disabled offenders.").

<sup>11</sup> *See* Laura I Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1318 (2012). *See generally* THE ARC'S NAT'L CTR. ON CRIMINAL JUSTICE & DISABILITY, COMPETENCY OF INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM: A CALL TO ACTION FOR THE CRIMINAL JUSTICE COMMUNITY (2017), <http://thearc.org/wp-content/uploads/2019/07/16-089-NCCJD-Competency-White-Paper-v5.pdf>.

As scholars have begun to analyze the voluminous data surrounding ASD as a diagnosis and its overall effect on social and cognitive development,<sup>12</sup> we find it necessary to focus this Article on the particular issues surrounding the misperceptions of factfinders. There is no question that ASDs “require greater acknowledgment in our criminal justice system,”<sup>13</sup> and “that criminal justice professionals may struggle to differentiate those behaviors typical of an individual with an ASD and the prototypical conduct of an offender.”<sup>14</sup> Factfinders regularly misconstrue the meaning of ASDs and the “signals” they perceive that persons with ASDs are presenting.<sup>15</sup> Thus, if the professionals miss the mark, how can we expect jurors to effectively assess such complexities in criminal trials? What measures should “be taken to avoid misinterpreting behaviors and characteristics typical of those with autism as evidence of guilt, indifference, or lack of remorse?”<sup>16</sup>

Our title comes, in part, from Bob Dylan’s brilliant song, *Ballad of a Thin Man*.<sup>17</sup> As the narrator of that song tells us, “something is happening/but [we] don’t know what it is.”<sup>18</sup> As the critic Robert Shelton pointed out, it is “about an observer who does not see.”<sup>19</sup> Because something *is* happening in these cases, and many of us—lawyers, criminal justice professionals, and other concerned laypeople—truly “*don’t* know” what is happening when members of the ASD population have their

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<sup>12</sup> Paul T. Shattuck & Scott D. Grosse, *Issues Related to the Diagnosis and Treatment of Autism Spectrum Disorders*, 13 MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES RES. REV. 129, 131 (2007).

<sup>13</sup> Christine N. Cea, Note, *Autism and the Criminal Defendant*, 88 ST. JOHN’S L. REV. 495, 497 (2014).

<sup>14</sup> Cohen et al., *supra* note 3, at 414–15.

<sup>15</sup> See, e.g., Caruso, *supra* note 3, at 506 (“[A]utism is often associated with difficulty recognizing intentional states of others. The ethical implications of this alleged trait are startling and further complicate the already fuzzy logic of culpability.”).

<sup>16</sup> Cohen et al., *supra* note 3; see Michael L. Perlin, Talia Harmon & Sarah Wetzel, “*Man Is Opposed to Fair Play*”: An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously *Atkins v. Virginia*, 12 WAKE FOREST J.L. & POL’Y, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=366056](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=366056) (forthcoming), manuscript at 66–69 (discussing perceptions of remorse in cases involving defendants with intellectual disabilities). See Cea, *supra* note 13, at 519, and *infra* notes 70–76 and accompanying text, for a discussion on how a defendant’s apparent lack of remorse or empathy can be particularly harmful during a criminal trial.

<sup>17</sup> BOB DYLAN, *Ballad of a Thin Man*, on HIGHWAY 61 REVISITED (Columbia Records 1965).

<sup>18</sup> *Id.*

<sup>19</sup> ROBERT SHELTON, NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN 280 (DaCapo ed., 1997). One of the authors has quoted this observation previously in another article whose title draws on the same song. See Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: Sanism in Clinical Teaching, 9 CLINICAL L. REV. 683, 685 (2003).

futures put before a jury, or we do not “see” what the ramifications of the process are. In this Article, we will consider all the issues that contribute to this lack of understanding and offer some potential solutions. Our hope is that an understanding of the need to reconstruct how we deal with persons with ASDs in the criminal trial process will help remediate the current state of affairs, and finally intentionally promote dignity and justice for these individuals.<sup>20</sup>

Thus, in our efforts to maintain dignity and preserve justice for persons with ASDs in the criminal justice process, we present the following roadmap to outline the pertinent issues that must be explored. In Part I, we offer an abbreviated overview of the science that supports an autism diagnosis, and then analyze the particular clinical traits of ASD that most affect the criminal justice procedure and outcome at trial. In Part II, we present the particular steps that must be taken to better serve this population, including:

- The effective utilization of voir dire in juror selection that incorporates consideration of juror attitudes on mental disability and juror perceptions of a defendant’s expression of remorse and empathy.
- The importance of holding judges accountable in recognizing the dangers of ordinary common sense (OCS) and conveying those dangers to jurors.
- The necessity of an expert witness at trial and how the expert can either bolster or inhibit a successful defense.
- Reconstructing how we charge the jury on autism in order to comply with constitutional mandates and a justiciable outcome.

Finally, in Part III, we consider the effect of therapeutic jurisprudence on the overall process, and then, in Part IV, we offer some conclusions.

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<sup>20</sup> Beyond the scope of this paper are questions that relate to the impact of an autism diagnosis on fact finders’ decisions on questions related to competency, responsibility, and sentencing. In this context, however, consider the sentencing case of *United States v. Zuk*, 874 F.3d 398, 412 (4th Cir. 2017), in which 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,” noting 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 BEHAV. INTERVENTIONS 92 (2003). For a recent article discussing a vignette involving a judge’s thoughts on the questions of the competency of a specific *juvenile* defendant with autism, see Collen M. Berryessa & Jillian Reeves, *The Perceptions of Juvenile Judges Regarding Adolescent Development in Evaluating Juvenile Competency*, 110 J. CRIM. L. & CRIMINOLOGY 551, 574 (2020).

## I. ABOUT AUTISM

### A. *The Science*

“Autism Spectrum Disorder (ASD) is a neurodevelopmental condition characterized by social communication difficulties and restricted and repetitive behaviors among strengths in varied domains.”<sup>21</sup> It is an early-onset, pervasive, and lifelong neurodevelopmental disorder.<sup>22</sup> We now know that “ASD results from early altered brain development and neural reorganization,”<sup>23</sup> and it can present in symptoms that can range from mild to severe.<sup>24</sup> According to the Centers for Disease Control and Prevention (CDC), approximately one in fifty-four children has been identified with ASD.<sup>25</sup> ASDs occur in all racial, ethnic, and socioeconomic groups but are four times more likely to occur in boys than girls.<sup>26</sup> The estimated prevalence

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<sup>21</sup> Megha Sharda, Carola Tuerk, Rakhee Chowdhury, Kevin Jamey, Nicholas Foster, Melanie Custoblanck, Melissa Tan, Aparna Nadig & Krista Hyde, *Music Improves Social Communication and Auditory-Motor Connectivity in Children with Autism*, TRANSLATIONAL PSYCHIATRY, Oct. 2018 at 1, <https://doi.org/10.1038/s41398-018-0287-3>.

<sup>22</sup> See James C. McParland, Karen Law & Geraldine Dawson, *Autism Spectrum Disorder*, 1 ENCYCLOPEDIA OF MENTAL HEALTH 124, 124 (2016). On how the neurodiversity movement “challenges us to rethink autism through the lens of human diversity,” see Christina Nicolaidis, *What Can Physicians Learn from the Neurodiversity Movement?*, 14 VIRTUAL MENTOR 503 (2012) (quoting Andrea Lollini, *Brain Equality: Legal Implications of Neurodiversity in a Comparative Perspective*, 51 NYU J. INT’L L. & POL. 69, 76 (2018)).

<sup>23</sup> COLO. DEP’T OF EDUC., GUIDELINES FOR THE EDUCATIONAL EVALUATION OF AUTISM SPECTRUM DISORDER 6 (Aug. 2020), [https://www.cde.state.co.us/cdesped/asd\\_guidelines](https://www.cde.state.co.us/cdesped/asd_guidelines).

<sup>24</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION, AUTISM SPECTRUM DISORDER: DATA & STATISTICS ON AUTISM SPECTRUM DISORDER (2015), <https://www.cdc.gov/ncbddd/autism/data.html>; see also John D. Lewis & Jeffrey L. Elman, *Growth-Related Neural Reorganization and the Autism Phenotype: A Test of the Hypothesis That Altered Brain Growth Leads to Altered Connectivity*, 11 DEVELOPMENTAL SCI. 135 (2008).

<sup>25</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 24.

<sup>26</sup> *Id.*; Matthew J. Maenner et al., *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years—Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2016*, 69 MMWR SURVEILLANCE SUMMARIES, no. 4, Mar. 2020, at 1, <https://www.cdc.gov/mmwr/volumes/69/ss/ss6904a1.htm>. Research also indicates a higher prevalence of ASD among people who are transgender:

The literature investigating ASD in children and adolescents with gender dysphoria showed a higher prevalence rate of ASD compared with the general population. There is a limited amount of research in adults. Only one study showed that adults attending services for gender dysphoria had increased ASD scores. Another study showed a larger proportion of adults with atypical gender identity and ASD.

of *identified* ASDs has increased roughly 29 percent since 2008, 64 percent since 2006, and 123 percent since 2002.<sup>27</sup>

Studies examining the link between ASD, race, and ethnicity have found the following:

- “[M]inority children are less likely to receive an autism diagnosis.”<sup>28</sup>
- “African American and Hispanic children [are] disproportionately underrepresented among children diagnosed with autism.”<sup>29</sup>
- “African American and Hispanic children who received an autism diagnosis were more likely to . . . also experience[] significant intellectual impairments.”<sup>30</sup>

The results of the studies on the connection between autism, race, and ethnicity raise critical questions surrounding the “underrecognition of ASD symptoms in some racial/ethnic groups, cultural differences influencing the decision to seek services, [and] socioeconomic disparities in access to services . . . .”<sup>31</sup>

Furthermore, we need to consider the criteria for diagnosing ASD as specified in the most recent version of the American Psychiatric Association’s *Diagnostic and*

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Derek Glidden, Walter Pierre Bouman, Bethany A. Jones & Jon Arcelus, *Gender Dysphoria and Autism Spectrum Disorder: A Systematic Review of the Literature*, 4 *SEXUAL MED. REV.* 3, 3 (Jan. 2016).

<sup>27</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 24; *see also* Deborah L. Christensen et al., *Prevalence and Characteristics of Autism Spectrum Disorder Among Children Aged 8 Years—Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2012*, 65 *MMWR SURVEILLANCE SUMMARIES*, no. 3, Apr. 2016, at 1, <https://www.cdc.gov/mmwr/volumes/65/ss/ss6503a1.htm>.

<sup>28</sup> Ashley Yull, *The Impact of Race and Socioeconomic Status on Access to Accommodations in Postsecondary Education*, 23 *J. GENDER, SOC. POL’Y & L.* 353, 368 (2015) (citing CTRS. FOR DISEASE CONTROL AND PREVENTION, *TEN THINGS TO KNOW ABOUT NEW AUTISM DATA* (Mar. 31, 2014)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 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*, 63 *MMWR SURVEILLANCE SUMMARIES*, no. 2, Mar. 2014, at 10, <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm>.

*Statistical Manual* (DSM-5).<sup>32</sup> According to the DSM-5,<sup>33</sup> Autism is signaled by the following:

- Persistent deficits<sup>34</sup> in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive):
  - 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. . . .
- 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 . . .

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<sup>32</sup> See AM. PSYCHIATRIC ASS'N, AUTISM SPECTRUM DISORDER (2013), <https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets> (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013)) (last visited Mar. 13, 2021) (outlining the American Psychiatric Association's revised recommendation, included in DSM-5, its most recent standard Diagnostic and Statistical Manual of Mental Disorders, for a single diagnosis for the four listed disorders). Asperger's syndrome (AS) is one of several previously separate subtypes of autism that were recategorized into the single diagnosis ASD. *Id.*

<sup>33</sup> The following bulleted list is reproduced from the DSM-5. The authors have added citations to further develop and explain these criteria.

<sup>34</sup> On the source of the use of the word "deficit" in descriptions of ASD, see Mylène Legault, Jean-Nicolas Bourdon & Pierre Poirier, *Neurocognitive Variety in Neurotypical Environments: The Source of "Deficit" in Autism*, 9 J. BEHAV. & BRAIN SCI. 246 (2019).

- Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypes, lining up toys or flipping objects, echolalia, idiosyncratic phrases).<sup>35</sup>
  - Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).<sup>36</sup>
  - Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
  - Hyper or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement) . . . .
- 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.<sup>37</sup>
  - These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or by global developmental delay.<sup>38</sup>

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<sup>35</sup> See *Autism Spectrum Disorder: Signs and Symptoms*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 21, 2016), <http://www.cdc.gov/ncbddd/autism/signs.html>.

<sup>36</sup> See Isaac S. Kohane, Andrew McMurry, Griffin Weber, Douglas MacFadden, Leonard Rappaport, Louis Kunkel, Jonathan Bickel, Nich Wattanasin, Sarah Spence, Shawn Murphy & Susanne Churchill, *The Co-Morbidity Burden of Children and Young Adults with Autism Spectrum Disorders*, 7 PLOS ONE, Apr. 12, 2012, at 1, 4, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3325235/>.

<sup>37</sup> See, e.g., Anne Masi, Marilena M. DeMayo, Nicholas Glozier & Adam J. Guastella, *An Overview of Autism Spectrum Disorder, Heterogeneity and Treatment Options*, 33 NEUROSCIENCE BULL. 183, 185 (2017).

<sup>38</sup> See, e.g., Robert Wozniak, *The Development of Autism Spectrum Disorders: Variability and Causal Complexity*, WIREs COGNITIVE SCIENCE (Dec. 23, 2016), <https://doi.org/10.1002/wcs.1432>; Audrey Thurm, Cristan Farmer, Emma Salzman, Catherine Lord & Somer Bishop, *State of the Field:*

Intellectual disability and autism spectrum disorder frequently co-occur;<sup>39</sup> to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.<sup>40</sup>

*B. As It Relates to the Criminal Justice System*

This summary of ASD is critical to support and clarify the points this Article makes. By understanding the diagnostic criteria, attorneys can educate themselves—in addition to educating the fact finder—on any significant impulsivity or problems maintaining self-control that could affect the case.<sup>41</sup> This all makes it much more difficult for individuals with ASD in the criminal justice system,<sup>42</sup> 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,<sup>43</sup> and who regularly consider demeanor evidence (and their idiosyncratic perceptions of how “demeanor”

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*Differentiating Intellectual Disability from Autism Spectrum Disorder*, FRONTIERS PSYCHIATRY (July 30, 2019), <https://www.frontiersin.org/articles/10.3389/fpsy.2019.00526/full>.

<sup>39</sup> See, e.g., Jane McCarthy, Colin Hemmings, Eugenia Kravariti, Katharina Dworzynski, Geraldine Holt, Nick Bouras & Elias Tsakanikos, *Challenging Behavior and Co-Morbid Psychopathology in Adults with Intellectual Disability and Autism Spectrum Disorders*, 31 RES. DEVELOPMENTAL DISABILITY 362 (2010). On the over-representation of anorexia nervosa in persons with ASD, see Heather Westwood & Kate Tchanturia, *Autism Spectrum Disorder in Anorexia Nervosa: An Updated Literature Review*, CURRENT PSYCHIATRY REP. (May 24, 2017), <https://doi.org/10.1007/s11920-017-0791-9>.

<sup>40</sup> *Autism Diagnosis Criteria: DSM-5*, AUTISM SPEAKS (headings and original numbering omitted) (internal citations added) (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013)), <https://www.autismspeaks.org/autism-diagnosis-criteria-dsm-5> (last visited Mar. 13, 2021); see, e.g., Karen Szyma Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1, 11 n.42 (2016) (discussing NAT’L AUTISM CTR., FINDINGS AND CONCLUSIONS: NAT’L STANDARDS PROJECT, PHASE 2, 12 (2015), <http://www.nationalautismcenter.org/090605-2/>).

<sup>41</sup> Randy Shively, *Risk Assessment for Individuals with Intellectual Disabilities (ID)*, in SEX OFFENDERS WITH INTELLECTUAL/DEVELOPMENTAL DISABILITIES: A CALL TO ACTION FOR THE CRIMINAL JUSTICE COMMUNITY 11, 12 (THE ARC 2015) (“[I]t is important to assess . . . how much structure the individual may need in daily routines” and whether a dual diagnosis of developmental disability and mental illness exists).

<sup>42</sup> Beyond the scope of this paper is an inquiry into the relationship between autism and competence to enter a plea. See R.J. Brewer, G.M. Davies & N.J. Blackwood, *Fitness to Plead: The Impact of Autism Spectrum Disorder*, 16 J. FORENSIC PSYCHOL. PRAC. 182 (2016).

<sup>43</sup> See, e.g., Mary Keller, *Jumping the Gun on Mental Illness: How Television News Coverage of Rampage Violence Promulgates the Stereotype That People with Mental Illness Are Violent*, 26 S. CAL. REV. L. & SOC. JUST. 273 (2017).

can be translated into remorse, empathy, motive and more in evaluating a witness's credibility).<sup>44</sup> All of these preconceptions can unfairly prejudice jurors:

There has been relatively little empirical investigation of offenders with ASDs with most studies being based on case reports and surveys of criminal groups. However, follow-up studies have suggested that, compared with the general population, individuals with ASDs are actually no more likely to commit violent crime and may actually be less likely to commit violent crime.<sup>45</sup>

It is important to acknowledge that, although “there is little evidence that autistic disorders are linked directly to criminal behavior, . . . certain clinical features of autism can predispose an autistic individual to [certain kinds] of criminal offending.”<sup>46</sup> Consider the perspective of one of the leading forensic psychologists in Australia:

Offenders with autism spectrum disorder tend to lack theory of mind (especially empathy and the ability to see from other perspectives), the ability to appreciate the whole context, executive functioning required for planning and organization, appreciation for the consequences of one's actions, and the ability to generalize learning from one situation to another.<sup>47</sup>

Despite the paucity of evidence linking ASDs with criminal behavior, laypersons and experts alike tend to link certain behaviors or disorders to criminal

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<sup>44</sup> For an incisive and helpful overview, see Kenneth J. Weiss & Alexander R.N. Westphal, *Autism Spectrum Disorder and Criminal Justice*, in *PSYCHIATRIC EXPERT TESTIMONY: EMERGING APPLICATIONS* 67 (Kenneth J. Weiss & Clarence Watson eds., 2015).

<sup>45</sup> 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, 106 (2017).

<sup>46</sup> Cea, *supra* note 13, at 501 (citing David Allen, Carys Evans, Andrew Hider, Sarah Hawkins, Helen Peckett & Hugh Morgan, *Offending Behaviour in Adults with Asperger Syndrome*, 38 *J. AUTISM & DEVELOPMENTAL DISORDERS* 748, 748 (2008)).

<sup>47</sup> Astrid Birgden, *Enabling the Disabled: A Proposed Framework to Reduce Discrimination Against Forensic Disability Clients Requiring Access to Programs in Prison*, 42 *MITCHELL HAMLINE L. REV.* 637, 655 (2016) (citing David Murphy, *Risk Assessment of Offenders with an Autism Spectrum Disorder*, 4 *J. INTELL. DISABILITIES & OFFENDING BEHAV.* 33, 37–38 (2013)).

propensity and/or criminal guilt.<sup>48</sup> To effectively distinguish between general beliefs and fact-based assessments, it is crucial that the following steps in Part II be considered and applied.

## II. STEPS THAT MUST BE TAKEN

### A. *The Role of Counsel*

At the outset, we must consider the effectiveness of counsel.<sup>49</sup> The burden to assure a fair and judicious trial must be placed on the advocate and, particularly, on defense counsel. The U.S. Supreme Court's standard in *Strickland v. Washington* governs the question of adequacy of counsel in criminal trials.<sup>50</sup> In its Sixth Amendment analysis, the Court acknowledged that simply assigning a lawyer to a defendant was not constitutionally adequate per se; rather, that lawyer must provide "effective assistance of counsel," requiring simply that counsel's efforts be "reasonable" under the circumstances.<sup>51</sup> The standard for evaluating an ineffectiveness claim is simply "whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result."<sup>52</sup> As we have emphasized before,

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<sup>48</sup> See Heather Ellis Cucolo, *Sex Offender Registration*, in REPRESENTING PEOPLE WITH MENTAL DISABILITIES: A CRIMINAL DEFENSE LAWYER'S GUIDE 287, 298 (Elizabeth Kelley ed., 2018).

<sup>49</sup> On the important related question of the quality of counsel in cases of persons with ASD and how lawyers "typically know very little about autism," see Mark Mahoney, *Introduction* to CAUGHT IN THE WEB OF THE CRIMINAL JUSTICE SYSTEM: AUTISM, DEVELOPMENTAL DISABILITIES, AND SEX OFFENSES 11, 11 (Lawrence A. Dubin & Emily Horowitz eds., 2017). On the ineffectiveness of counsel in the representation of persons with mental disabilities in general, see Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, "A World of Steel-Eyed Death": *An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J.L. REFORM (2020).

<sup>50</sup> 466 U.S. 668, 668 (1984).

<sup>51</sup> *Id.* at 686; Heather Ellis Cucolo & Michael L. Perlin, "Far from the Turbulent Space": *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J.L. & SOC. CHANGE 125, 125 (2015) [hereinafter Cucolo & Perlin, *Turbulent Space*]. As the Court further explained, "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 694–95 (internal citation omitted).

<sup>52</sup> *Id.* at 686. One of us (MLP) critiques this standard extensively in MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 123–39 (2013). On how this standard is "pallid," see, e.g., Cucolo & Perlin, *Turbulent Space*, *supra* note 51, at 132.

To meet this heightened standard, counsel must use every resource and tool at his [or her] disposal in order to be effective and offer ethical and rigorous representation. Counsel must seek out and have access to expert instruction and opinion on the psychiatric, social, and political elements of each case—skills that are most likely beyond most attorneys’ schooling and legal education.<sup>53</sup>

At the very least, counsel in the cases that are the subject of this Article must demonstrate a familiarity with both the clinical diagnosis and the societal perceptions of persons with ASD.

### B. *Changes in Voir Dire of Prospective Jurors*

Voir dire is the process through which potential jurors from a panel of prospective jurors (the venire pool) are questioned by either the judge or a lawyer to determine their suitability for jury service.<sup>54</sup> Lawyers use the voir dire process as a multi-purpose vehicle—to learn about the prospective juror’s *background* (“e.g., their occupations, educational background and training, socio-economic status, media viewing habits and internet footprint and usage, among other background characteristics”) to determine if it might affect their decisions in the case; to learn about the prospective juror’s *life experiences* (e.g., was the juror ever the victim of a crime or involved in prior lawsuits under circumstances that might affect how the potential juror would “view the case, evidence, witnesses, and parties”); and to learn about the prospective juror’s *opinions, beliefs, and values* (e.g., what filters will jurors apply, consciously or unconsciously, to create a framework through which the case will be viewed).<sup>55</sup>

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<sup>53</sup> Cucolo & Perlin, *Turbulent Space*, *supra* note 51, at 158.

<sup>54</sup> Bruce R. Parker & David S. Gray, *Looking Backward to Move Forward with Your Defense: Using History to Overcome Jurors’ Misunderstandings About Science*, 78 DEF. COUNS. J. 389, 392 (2011) (“Although voir dire provides an opportunity to identify potential biases, it may not expose all biases that may affect how potential jurors will process evidence.”). Voir dire also refers to the preliminary questioning of witnesses, especially experts, to determine their competence to testify. *See, e.g.*, *Hitkansut LLC v. United States*, 127 Fed. Cl. 101 (2016) (“[A] trial judge must determine at the outset whether an expert witness is qualified or whether his or her opinions constitute admissible evidence.”).

<sup>55</sup> Jeffery T. Frederick, Director, Jury Research Services National Legal Research Group, Inc., *Presentation at the ABA Midyear Meeting: Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury* (Jan. 25, 2019); *11 Tips for Effectively Conducting Voir Dire*, AM. BAR ASS’N (Jan. 28, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/01/11-tips-for-effectively-conducting-voir-dire/>. Frederick’s work in this context has been cited approvingly by the United States Supreme Court. *See Uttecht v. Brown*, 551 U.S. 1, 9–10 (2007). On the related question

It is especially critical that, in the cases we are considering here, prospective jurors' attitudes toward *all* mental disabilities (mental illness, intellectual disabilities, and ASD) be explored during voir dire.<sup>56</sup> Also, the voir dire process can be used to *educate* prospective jurors about a defendant's particular disabilities, and their effect on his behavior and appearance.<sup>57</sup> Competency of counsel is crucial even at these beginning trial stages. Before counsel can even begin to educate a venire pool or jury on a particular deficit or disability, the attorney must have a current assessment of the defendant's intellectual level and how cognitive functioning might impact the ability to understand right versus wrong.<sup>58</sup> The research shows that, if a juror was already exposed before the trial to particular disability concepts, that juror will be far more likely to understand the significance of relevant evidence when it is offered by experts and lay witnesses at trial.<sup>59</sup>

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of jurors with disabilities, see Jordan Benson, *Stricken: The Need for Positive Statutory Law to Prevent Discriminatory Peremptory Strikes of Disabled Jurors*, 103 CORNELL L. REV. 437 (2018).

<sup>56</sup> See, for example, this article about jury decision making in tort cases involving suicide stresses: Robert K. Jenner & Bryant Welch, *Suicide Watch: Liability for Negligent Psychiatric Care*, 37 TRIAL 20, 26 (May 2001) ("In voir dire, the attorney must ask and pursue questions designed to elicit jurors' attitudes about mental illness, suicide, and psychiatry.").

<sup>57</sup> There is a blatant contrast here between the view of the courts (see, e.g., *Perryman v. State*, 830 N.E.2d 1005, 1008 (Ind. Ct. App. 2005) ("[T]he function of voir dire examination is not to educate jurors.")), and that of lawyers (see, e.g., Janeen Kerper, *The Art and Ethics of Jury Selection*, 24 AM. J. TRIAL ADVOC. 1, 8 (2000) (discussing how to "educate the jury about an important fact of your case without engaging in impermissible argument"))).

<sup>58</sup> One suggested assessment tool, the Wechsler Adult Intelligence Scale, often shows interesting discrepancies between Verbal Comprehension, Perceptual Reasoning, Working Memory and Processing Speed. See DAVID WECHSLER, WECHSLER ADULT INTELLIGENCE SCALE (4th ed. 2008).

<sup>59</sup> David L. Faigman, Emily V. Shaw & Nicholas Scurich, *Intellectual Disability, The Death Penalty, and Jurors*, 58 JURIMETRICS J. 437 (2018); John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 410 (2014); see also *Moody v. State*, 543 S.W.3d 309 (Tex. App. 2017) ("There is nothing in the law that automatically disqualifies an autistic witness, nor do inconsistencies automatically lower evidence below the required standard [of reliability]."). Jurors may misconstrue intellectual disabilities in death penalty cases:

It will also be a significant task for attorneys to present courtroom witnesses with ASDs in a manner that jurors lacking exposure to individuals with ASDs can understand, without judgment as to unusual responses or mannerisms, and with understanding as to an ASD individual's "normal." Left unexplained, such witness's loud vocal tone, aloof body language, flat facial expressions, difficulty in making eye contact, repetitive behavior, and tactless statements, could adversely affect the ultimate goal of meting out justice.

Consider here the diagnostic criteria of ASD already discussed, especially the significance of “restricted, repetitive patterns of behavior, interests, or activities that may manifest as repetitive movements or language.”<sup>60</sup> Then, consider 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 laypersons in a criminal trial.<sup>61</sup>

The case of *State v. Burr* exemplifies how such characteristics run the risk of being misconstrued, and yet are left unaddressed by the court.<sup>62</sup> The judge in *Burr* grew “alarmed by [the] defendant’s odd appearance and demeanor,”<sup>63</sup> and ordered a competency evaluation at which time the defendant was diagnosed with Asperger’s.<sup>64</sup> The defendant sought to offer evidence of his Asperger’s “to assist the jury in understanding why he might act in a way that appears socially unacceptable to others.”<sup>65</sup> However, the trial court excluded this evidence, and the defendant never testified.<sup>66</sup>

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Cohen et al., *supra* note 3, at 415; *see also* Perlin, Harmon & Wetzel, *supra* note 16.

<sup>60</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS (5th ed. 2013). The same criteria discuss how the individual in question may repeat 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. *Id.* *See generally* McParland et al., *supra* note 22.

<sup>61</sup> These behaviors may also predispose individuals with this condition to *accidental* criminal behavior. *See* Barbara G. Haskins & J. Arturo Silva, *Asperger’s Disorder and Criminal Behavior: Forensic-Psychiatric Considerations*, 34 J. AM. ACAD. PSYCHIATRY & L. 374, 378 (2006), *as discussed in* Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 897 n.204 (2009). On how jurors interpret certain diagnoses in their fact-finding, *see* Teneille Brown, *From Bibles to Biomarkers: The Future of the DSM and Forensic Psychiatric Diagnosis*, 2015 UTAH L. REV. 743, 749–50 (“Diagnoses such as autism, gambling disorder, obsessive-compulsive disorder, and narcissism are not theories, but labels. Both for questions related to admissibility of psychological testimony as well as how the jury interprets these diagnoses, this is a crucial distinction.”).

<sup>62</sup> *State v. Burr*, 921 A.2d 1135 (N.J. Super. Ct. App. Div. 2007), *aff’d as modified on other grounds*, 948 A.2d 627 (N.J. 2008); *see* Cea, *supra* note 13, at 519. We owe Ms. Cea for her concise summary of the facts in this case.

<sup>63</sup> *Burr*, 921 A.2d at 1142.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1149.

<sup>66</sup> *Id.* at 1151; Cea, *supra* note 13, at 519.

The defendant appealed, arguing that he was prevented from receiving a fair trial because the jury “simply saw an odd, eccentric man who never explained his actions.”<sup>67</sup> “He also alleged that the jury did not understand him due to his Asperger’s, which negatively affected his ability to testify at trial.”<sup>68</sup> 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.<sup>69</sup>

The population under consideration is widely perceived as lacking in both empathy<sup>70</sup> and remorse;<sup>71</sup> these perceptions are especially problematic in courtroom settings, especially when a defendant appears emotionally unaffected in a criminal trial.<sup>72</sup> Social impairment—often a characteristic of ASD—may lead defendants on the autistic spectrum to make awkward expressions, make inappropriate statements<sup>73</sup> on the witness stand, or be unable to speak in public.<sup>74</sup> Thus, careful questions must

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<sup>67</sup> 921 A.2d at 1149.

<sup>68</sup> Cea, *supra* note 13, at 519; 921 A.2d at 1150–51.

<sup>69</sup> 921 A.2d at 1150–51. The defendant’s conviction was reversed, the court finding that the proffered testimony from expert that defendant suffered from Asperger’s was sufficiently relevant to be admissible. *Id.*

<sup>70</sup> See, e.g., Heidi E. Ramos-Zimmerman, *The Need to Revisit Legal Education in an Era of Increased Diagnoses of Attention-Deficit/Hyperactivity and Autism Spectrum Disorders*, 123 DICK. L. REV. 113, 161 (2018). Professor Ramos-Zimmerman points out that it is five times as likely that a person with autism (as opposed to members of the general public) will have the condition of alexithymia, as a result of which there will be difficulty recognizing one’s own emotions. *Id.* (citing Rebecca Brewer & Jennifer Murphy, *People with Autism Can Read Emotions, Feel Empathy*, SPECTRUM (July 12, 2016), <http://bit.ly/2xoz97q>). On the need for empathy to be “ground[ed] in the criminal justice system, see Nigel Stobbs, *Compassion, the Vulnerable, and COVID-19*, 45 ALT. L.J. 81 (2020).

<sup>71</sup> See Cohen et al., *supra* note 3, at 415.

<sup>72</sup> This appearance should not be discounted. See, e.g., *State v. Forsyth*, 642 P.2d 1035, 1040 (Mont. 1982) (“[O]n the morning following the killing, the investigating officer began to suspect the defendant because he seemed emotionally unaffected by his wife’s death.”).

<sup>73</sup> See, e.g., *Moody v. Moody*, No. 19-642, 2020 WL 578877, at \*4 (La. Ct. App. Feb. 5, 2020); Cea, *supra* note 13, at 519.

<sup>74</sup> *Id.* On the specific issues involved in cases involving testimony by juveniles with autism, see Deborah Goldfarb & Alejandra Gonzalez, *Children with Autism Spectrum Disorder in the Courtroom: How Courts*

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' expectations/preconceptions of what remorse and empathy "look like" may not comport with the reality of how persons with autism appear.<sup>75</sup>

Again, crucial to this issue is the role of counsel. Consider some of the questions counsel must consider:

First, should [the defendant's] autism have [potentially] been a defense to the crime through a version of the insanity defense? Second, should the jury [be] told about . . . autism and how it affects . . . social interactions so that the jury could more accurately assess [the defendant's] testimony? And third, should [the defendant's] autism be a valid mitigating factor in sentencing?<sup>76</sup>

In this context, it is the criminal defense 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.<sup>77</sup>

Collateral issues here include: (1) how judges assess juror attitudes on mental disabilities, and (2) to what extent judges understand and acknowledge the

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*Handle Testimony Today and What We Can Do in the Future*, in WILEY HANDBOOK OF MEMORY, AUTISM SPECTRUM DISORDER & L. 340 (Jonni L. Johnson, Gail S. Goodman & Peter C. Mundy eds., 2018).

<sup>75</sup> See Cea, *supra* note 13, at 498 (quoting Cory Shulman, Ainat Guberman, Noa Shiling & Nirit Bauminger, *Moral and Social Reasoning in Autism Spectrum Disorders*, 42 J. AUTISM & DEVELOPMENTAL DISORDERS 1364, 1364 (2011) ("Due to social impairment, autistic individuals may also demonstrate difficulty with 'emotional relatedness' or empathy for others.")).

<sup>76</sup> Cea, *supra* note 13, at 496. On how evidence ostensibly introduced to be mitigating can be used as aggravating instead, see Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239, 259 (1994) [hereinafter Perlin, *The Sanist Lives of Jurors*] (discussing *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979), and the research reported in Ellen F. Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 299–300 (1989)).

<sup>77</sup> See, e.g., Shruti S.B. Desai, *Effective Capital Representation of the Mentally Retarded Defendant*, 13 CAP. DEF. J. 251, 275 (2001) ("Defense counsel should use the voir dire process and opening statements to educate the jurors about defendant's mental retardation and the effects of this disability. Voir dire must also be used to explore jurors' attitudes towards mental retardation. Prospective jurors who are not willing to give meaningful consideration to mental retardation as a mitigating factor should be disqualified from sitting on the jury.").

significance of remorse and empathy in juror decision-making. It is essential that judges carefully process these issues.

### 1. Assessment of Juror Attitudes

Courts are typically superficial in these inquiries. By way of example, recently the Eighth Circuit rejected the defendant's argument in a death penalty case that the trial judge should have "asked prospective jurors more targeted questions about attitudes toward mental health *defenses*,"<sup>78</sup> relying on a Ninth Circuit case that had found a defendant was entitled to voir dire about attitudes toward an *insanity defense* (which the defendant in the case before it did not proffer).<sup>79</sup> The court concluded on this issue:

[T]he district court asked potential jurors whether they or immediate family or close friends had experience with mental illness or mental impairment, and it asked whether they had any negative attitudes toward mental health professionals. We are not persuaded that all mental health evidence carries the same stigma as the insanity defense, and we believe these questions adequately inquired as to biases here.<sup>80</sup>

Tellingly, there was no citation here to case law or valid and reliable research on this point. The evidence is clear: mental illness is often not an effective mitigator because of jury attitudes,<sup>81</sup> and jurors decide cases involving mental status issues at least "partly on what they believe will be the dispositional outcome of the verdict."<sup>82</sup>

But how do jurors assess ASD or other cognitive limitations that may fall outside of the stigma associated with mental illness? In one study:

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<sup>78</sup> United States v. Coonce, 932 F.3d 623, 644 (8th Cir. 2019).

<sup>79</sup> United States v. Jones, 722 F.2d 528, 529–30 (9th Cir. 1983).

<sup>80</sup> *Coonce*, 932 F.3d at 644–45. On autism and the insanity defense in general, see Cea, *supra* note 13, at 506–08.

<sup>81</sup> See, e.g., Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1165 (1997); James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 444–45 (1996); Phoebe C. Ellsworth, *To Tell What We Know or Wait for Godot?*, 15 LAW & HUM. BEHAV. 77, 88–89 (1991); Perlin, *The Sanist Lives of Jurors*, *supra* note 76, at 245–49 (all citing research studies).

<sup>82</sup> Lisa M. Sloat & Richard L. Frierson, *Juror Knowledge and Attitudes Regarding Mental Illness Verdicts*, 33 J. AM. ACAD. PSYCHIATRY & L. 208, 213 (2005).

One-hundred-and-sixty 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. [In this study,] 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. . . . [P]articipants 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.<sup>83</sup>

The outcome of this limited study leads to a few conclusions:

1. Educating the factfinder is a necessary component of effective and competent representation.
2. Demeanor evidence and displayed behavior have a significant effect on juror analysis and assessment of the case.
3. Potentially, the more information jurors have that excuses or explains a defendant's actions and/or behavior—as a result of conditions that are out of the individual's control—the more merciful the outcome and ultimate punishment.

## 2. On Perceptions of Empathy and Remorse

The Supreme Court is cognizant of how jurors' perceptions of a defendant's remorse and compassion may be dispositive factors to jurors in death penalty cases.<sup>84</sup> Concurring in the case of *Riggins v. Nevada*, in which the Supreme Court held that competent insanity-pleaders had a qualified right to refuse medication at trial,<sup>85</sup> Justice Kennedy underscored that "[a]ssessments of character and remorse may carry

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<sup>83</sup> See Katie Maras, Imogen Marshall & Chloe Sands, *Mock Juror Perceptions of Credibility and Culpability in an Autistic Defendant*, 49 J. AUTISM & DEVEL. DISORDERS 996, 996 (2019).

<sup>84</sup> 504 U.S. 127, 144 (citing William Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51–53 (1988)). One of the co-authors (MLP) discusses this in Michael L. Perlin, "Merchants and Thieves, Hungry for Power": *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1531 (2016). See Perlin, Harmon & Wetzel, *supra* note 16, manuscript at 66–69.

<sup>85</sup> See *Riggins*, 504 U.S. at 127.

great weight and, perhaps, be determinative of whether the offender lives or dies.”<sup>86</sup> In that case, Riggins had been medicated with 800 milligrams of the drug Mellaril, considered to be within the “toxic range”;<sup>87</sup> an expert in the case testified that that was sufficient dosage with which to “tranquilize an elephant.”<sup>88</sup> Justice Kennedy relied on research by William Geimer and Jonathan Amsterdam, which demonstrated that jurors may consider their evaluation of the defendant’s remorse to be the deciding factor in death penalty cases.<sup>89</sup>

Subsequently, in *Atkins v. Virginia*, striking down the death penalty for defendants with intellectual disabilities,<sup>90</sup> the Supreme Court held that the demeanor of such defendants “may create an unwarranted impression of lack of remorse for their crimes.”<sup>91</sup> This impression, of course, in the death penalty context, could “enhance the likelihood that the jury will impose the death penalty due to a belief that [the defendants] pose a future danger.”<sup>92</sup>

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.”<sup>93</sup> Again, judges must make it clear that jurors’ “ordinary common sense”<sup>94</sup> 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.<sup>95</sup> As we discuss in the next Section, we believe

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<sup>86</sup> *Id.* at 144.

<sup>87</sup> *Id.* at 137.

<sup>88</sup> *Id.* at 143.

<sup>89</sup> *Id.* at 144.

<sup>90</sup> 536 U.S. 304, 304 (2002).

<sup>91</sup> *Id.* at 321–22. The Court here also noted the difficulties that persons with intellectual disabilities (then characterized as mental retardation) may have in being able to give meaningful assistance to their counsel as well as their status as “typically poor witnesses.” *Id.*

<sup>92</sup> John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. REV. 93, 108 (2003).

<sup>93</sup> This, of course, presupposes that judges do not fall prey to the same sort of false OCS. *See, e.g.*, Colleen M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-Functioning Autism*, 5 J. INTELL. DISABILITY & OFFENDING BEHAV. 97, 97 (2014) (interviewed judges believed that the behavior of persons with autism was not under their control) [hereinafter Berryessa, *Judiciary Views*].

<sup>94</sup> *See infra* text accompanying notes 90–93.

<sup>95</sup> *See, e.g.*, Colleen Berryessa, *Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders*, 3 INT’L J. CRIMINOLOGY & SOCIO. 46, 46 (2014). On how decisionmakers “succumb . . . to the vividness heuristic,” see Michael L. Perlin, Deborah A. Dorfman &

it is imperative that judges convey to jurors these pitfalls—ones the Supreme Court has recognized—in deciding cases with a subset of the population that “appears” to not show remorse in a common-sensical way.

### 3. Holding Judges Accountable in Recognizing the Dangers of Ordinary Common Sense and Conveying Those Dangers to Jurors

It is essential that judges be on the “look out” for jurors employing false “ordinary common sense” (OCS) in their decision-making. 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.”<sup>96</sup>

OCS “presupposes two ‘self-evident’ truths. First, everyone knows how to assess an individual’s behavior. Second, everyone knows when to blame someone for doing wrong.”<sup>97</sup> 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.”<sup>98</sup>

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Naomi M. Weinstein, “*On Desolation Row*”: *The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us*, 24 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 59, 85–86 (2018). The “vividness heuristic” is a cognitive-simplifying device through which a “single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.” Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1417 (1997).

<sup>96</sup> David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see 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: “[w]hat 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, 29 (1990).

<sup>97</sup> Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5, 17 (1996) (quoting Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 126 U. PA. L. REV. 729, 738 (1988)).

<sup>98</sup> Michael L. Perlin & Naomi Weinstein, *Said I, ‘But You Have No Choice’: Why a Lawyer Must Ethically Honor a Client’s Decision About Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUB. L. POL’Y & ETHICS J. 73, 88 (2016).

OCS is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information.<sup>99</sup>

OCS can be present at the very beginning of a case, and can last throughout its entirety. It is often discreet and hidden underneath general socially acceptable statements. Hundreds of cases acknowledge the importance of voir dire in criminal cases to weed out prejudice, bias, and unfitness to serve, but voir dire can only elicit so much information, and failures in excluding jurors in the voir dire stage can have detrimental results.<sup>100</sup> The Supreme Court has acknowledged that, despite its importance, “the adequacy of voir dire is not easily subject to appellate review.”<sup>101</sup>

Trial counsel should establish their pertinent observations regarding the opinions of prospective jurors, who may appear to be unwilling to consider issues of cognitive disability during jury selection.<sup>102</sup> Such a detailed foundation may prove beneficial on appeal, in order to overcome the deference normally afforded by appellate courts to trial judge rulings on voir dire.

Such adequate voir dire best “assure[s] the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”<sup>103</sup> One consistent suggestion is to prepare “a written juror questionnaire [to] serve as a discreet preview of the extent to which a panel holds highly sensitive, prejudicial, or inflammatory opinions.”<sup>104</sup> Yet, not all courts would accept these written juror questionnaires, and often the attorney must convince the court to allow a questionnaire during the voir dire process.<sup>105</sup> It is often helpful to remind the court that, “although identifying and removing biased jurors is an important outcome of

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<sup>99</sup> 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 & JUST. 431, 453 (2017) [hereinafter Perlin & Cucolo, *Tolling*].

<sup>100</sup> See, e.g., Jim Goodwin, *Articulating the Inarticulate: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739 (1996).

<sup>101</sup> *Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991).

<sup>102</sup> Paul H. Jepsen & Daniel Wolfe, *A Once-in-A-Trial Opportunity: Effective Voir Dire*, 48 THE BRIEF, 18, 14 (Jan. 17, 2019).

<sup>103</sup> *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986); see Jepsen & Wolfe, *supra* note 102, at 19 (“Voir dire presents a critical opportunity to influence the outcome of a trial. Only during voir dire do counsel have the opportunity to listen to the panel members and to identify and remove potentially dangerous jurors.”).

<sup>104</sup> Jepsen & Wolfe, *supra* note 102, at 18, 21.

<sup>105</sup> *Id.*

voir dire, there is an equally important benefit: learning more about the jurors via a written questionnaire allows the parties to use their peremptory strikes more effectively.”<sup>106</sup>

Despite all of the suggested and available safeguards, in a recent paper, one of the authors has argued that OCS is so powerful that, in certain criminal cases, defendants should have the right to an *additional* expert<sup>107</sup> who could illuminate why reliance on heuristics and false OCS is inappropriate in such cases, as they “distort our abilities to rationally consider information.”<sup>108</sup> Thus, the fact that most persons with severe mental illness do not comport with popular culture’s depictions of “crazy people”<sup>109</sup> increases the likelihood of teleological decision-making via the use of false OCS.<sup>110</sup>

By way of example, 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

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<sup>106</sup> *Id.* at 21.

<sup>107</sup> The Supreme Court held in *Ake v. Oklahoma* that a “criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.” 470 U.S. 68, 77 (1985).

<sup>108</sup> Michael L. Perlin, “*Deceived Me into Thinking/I Had Something to Protect*”: A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in which Fact-finders Rely on Heuristic Reasoning and “Ordinary Common Sense,” 13 L.J. SOC. JUST. 88, 102 (2020) [hereinafter Perlin, *Deceived Me*] (quoting in part, Michael L. Perlin, *Simplify You, Classify You: Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 622 (2009)). On how these stereotypes are conflated with stereotypes of race and ethnicity (critical issues in cases involving defendants with autism), see Perlin & Cucolo, *Tolling*, *supra* note 99; Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 390 (1992).

<sup>109</sup> See, e.g., Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 724 (1990) [hereinafter Perlin, *Unpacking the Myths*] (citing Walter Bromberg & Harvey Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L. & CRIMINOLOGY 729, 738 (1952)) (“To the lay person (the juror or the judge), the temporarily delirious patient ‘leaping over chairs and taking the broomstick to hallucinatory monsters’ [still] looks more genuinely psychotic than a deeply disordered but calm and brittle-worded schizophrenic.”).

<sup>110</sup> As one of the authors (MLP) noted in an earlier article: “When the defendant fails to exhibit any stereotypical behaviors . . . jury members may think that the mental retardation defense is untrue or unwarranted.” Michael L. Perlin, “*Life Is in Mirrors, Death Disappears*”: Giving Life to Atkins, 33 N.M. L. REV. 315, 335 (2003) (citing Denis W. Keyes, William J. Edwards & Timothy J. Darning, *Mitigating Mental Retardation in Capital Cases: Finding the “Invisible” Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 536 (1998)).

evidence may be “beyond the understanding of jurors who rely on ordinary common sense in decision-making.”<sup>111</sup>

Yet defense attorneys must not only be cognizant of juror OCS but must also police the judges who are similarly susceptible. Some twenty-six years ago, one of the authors of this paper, (MLP) writing with another colleague, noted:

In attitudes that strikingly mirror attitudes of jurors in assessing mental disability in death penalty cases, judges conceptualize mental disability as an “all or nothing” absolute construct, demand a showing of mental disability that approximates the amount needed for an exculpatory insanity defense, continue to not “get” distinctions between mental illness, insanity, and incompetency, repeat sanist myths about mentally disabled criminal defendants, and engage in pretextual decision-making.<sup>112</sup>

Great care, thus, must be taken in selecting jurors and monitoring judicial intervention due to the impact of OCS and its relation to persons with ASD.

### C. *During the Trial: The Role of Experts*<sup>113</sup>

In this Section, we will focus on the need for expert witnesses so that the person at risk can most adequately explain to the factfinder the reasons for otherwise-

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<sup>111</sup> 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 Perlin, *Unpacking the Myths*, *supra* note 109, at 679). Purportedly, 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, 719 (1992). It is not clear at all that this disqualification regularly happens. See Janae M. Lepir, *Hypothetically Speaking: The Constitutional Parameters of Capital Voir Dire in the Military After Morgan v. Illinois*, 225 MIL. L. REV. 375 (2017).

<sup>112</sup> Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 452 (1995).

<sup>113</sup> Beyond the scope of this paper are the important issues of how police respond to persons with autism in the apprehension and arrest process, *see, e.g.*, Rachel Shonebarger, Note, *Police Training and Autism Spectrum Disorder: Providing a Reasonable Accommodation under the ADA*, 80 OHIO ST. L.J. 351 (2019); of sentencing decision making in cases of persons with autism, *see, e.g.*, *United States v. Zuk*, 874 F.3d 398 (4th Cir. 2017); of how persons with autism, if convicted and incarcerated, are treated in prison, *see, e.g.*, *Latson v. Clarke*, 249 F. Supp. 3d 838 (W.D. Va. 2017) (on state correctional officials’ motives for placing inmate with autism in segregation); or treated in high-security psychiatric facilities, *see* David Murphy, *Autism: Implications for High Secure Psychiatric Care and Move Towards Best Practice*, 100 RES. DEVELOPMENTAL DISABILITIES 103615 (2020), <https://www.sciencedirect.com/science/article/abs/pii/S089142220300457>.

strange-seeming behavior. Courts will often consider the risk to reoffend in various phases of the criminal case—such as bail hearings and sentencing determinations.<sup>114</sup> Assessing risk in developmentally disabled individuals is extremely complex and dependent on a vast number of factors. “Risk Assessment for people with [intellectual disabilities] is far from an exact science. Pertinent assessment tools with other populations need to be adapted and sometimes risk issues are unclear.”<sup>115</sup> To get a complete understanding of a defendant’s cognitive functioning, it is necessary to hire an expert who has the credentials and pertinent experience.

Twenty-five years ago, in *Ake v. Oklahoma*, the Supreme Court held that a criminal trial is “fundamentally unfair” unless a defendant has access to “the raw materials integral to the building of an effective defense.”<sup>116</sup> 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.”<sup>117</sup>

This same rationale should be embraced in cases involving defendants with ASDs—whether or not, like *Ake*, they involve the use of the insanity defenses in death penalty cases.<sup>118</sup> As discussed previously,<sup>119</sup> 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.<sup>120</sup>

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<sup>114</sup> See, e.g., Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 58 (2018).

<sup>115</sup> Shively, *supra* note 41, at 12.

<sup>116</sup> 470 U.S. 68, 77 (1985).

<sup>117</sup> *Id.* at 80–81.

<sup>118</sup> On cases of defendants with autism and questions of voluntariness of confessions, see, e.g., Lindsay M. Salseda, Dennis R. Dixon, Tracy Fass, Deborah Miora & Robert A. Leark, *An Evaluation of “Miranda” Rights and Interrogation in Autism Spectrum Disorders*, 5 RES. AUTISM & SPECTRUM DISORDERS 79 (2011); Alice S. North, Ailsa J. Russell & Gisli H. Gudjonsson, *High Functioning Autism Spectrum Disorders: An Investigation of Psychological Vulnerabilities During Interrogative Interview*, 19 J. FORENSIC PSYCHIATRY & PSYCH. 323 (2008).

<sup>119</sup> See *supra* text accompanying notes 101–11.

<sup>120</sup> See Perlin, *Deceived Me*, *supra* note 108, at 89–90.

A sort of “extra” expert is especially vital in cases involving this population—where jurors’ 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.<sup>121</sup> As discussed above, in the New Jersey case of *State v. Burr*, a defendant diagnosed with Asperger’s Disorder was convicted of second-degree aggravated assault and third-degree endangering a minor.<sup>122</sup> On appeal, the New Jersey Supreme Court reversed the conviction and remanded the case for a new trial, finding that by precluding the defendant from presenting expert testimony regarding his diagnosis with Asperger’s Disorder, the trial court “denied defendant access to evidence that was relevant and material to his explanation of himself and his conduct.”<sup>123</sup>

Shockingly, “a number of courts in the United States do not permit psychiatric experts to provide testimony about Asperger’s syndrome (AS) or high-functioning ASD (hfASD).”<sup>124</sup> Courts are often tasked with assessing the legal relevance of ASD; and how, and if, evidence of ASD should be considered: “For example, in criminal cases, courts are charged with identifying whether the symptoms of ASD might have played a causal or contributory role in the criminal action for which the accused is on trial.”<sup>125</sup> Autism may have an impact not only on an individual’s reasoning process in committing a crime, but also on the individual’s ability to fully assist counsel in preparing a defense or navigating through the plea-bargaining process. As a result, courts should not shy away from at least hearing testimony on the subject.<sup>126</sup>

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<sup>121</sup> *Id.* at 108.

<sup>122</sup> *State v. Burr*, 921 A.2d 1135, 1138 (N.J. Super. Ct. App. Div. 2007), *aff’d as modified*, 948 A.2d 627 (N.J. 2008).

<sup>123</sup> *Burr*, 948 A.2d at 629.

<sup>124</sup> Clare S. Allely, *Perception of Defendants with ASD by Judges and Juries*, in REPRESENTING PEOPLE WITH AUTISM SPECTRUM DISORDERS: A PRACTICAL GUIDE FOR CRIMINAL DEFENSE LAWYERS 195, 199 (Elizabeth Kelley ed., 2020).

<sup>125</sup> Colleen M. Berryessa, *Educator of the Court: The Role of the Expert Witness in Cases Involving Autism Spectrum Disorder*, 23 PSYCHOL., CRIME & L. 575, 578 (2017) [hereinafter Berryessa, *Educator*] (citing Ian Freckelton, *Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts*, 26 J. APPLIED RES. INTELL. DISABILITIES 420, 425 (2013)).

<sup>126</sup> See 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, 2718–19 (2014). On the different consideration of mental illness and autism in competency to stand trial, see *State v. Smith*, 982 So. 2d 756, 758 (Fla. Dist. Ct. App. 2008):

The time period that must elapse before charges are dismissed is much shorter in the case of mental retardation and autism than for mental illness. The

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.”<sup>127</sup> In the same way that expert assistance on ASD is crucial to seeking just outcomes for individuals so diagnosed, it is essential that lawyers know and understand how expert witnesses perceive and approach their roles as well as the factors that may influence such perceptions.<sup>128</sup>

It is also critical to consider the subset of cases involving sexual offenses,<sup>129</sup> an especially troubling category of cases in light of the significant possibility that “[a]n autistic individual’s knowledge regarding sexuality and how to act in sexual scenarios [may be] limited,”<sup>130</sup> and the fact that this population appears to be “disproportionately impacted by convictions for noncontact sex offenses involving computers.”<sup>131</sup> For example, “[p]eople with AS[D] often get into legal trouble without even realizing they have committed an offense such as . . . child

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difference in the standards and time period can probably be explained by the fact that mental retardation and autism are typically lifelong conditions, whereas mental illness may be a condition more amenable to treatment.

<sup>127</sup> 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, <https://static1.squarespace.com/static/58386abcebbd1a7523016589/t/5838940f9f74566f0d665d6b/1480102927429/andjusticeforal1.pdf> (last visited Mar. 13, 2021).

<sup>128</sup> Berryessa & Reeves, *supra* note 20, at 575.

<sup>129</sup> On the need for forensic experts in such cases, see Michael L. Perlin, Alison J. Lynch & Valerie R. McClain, “*Some Things are Too Hot to Touch*”: *Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses*, 35 *TOURO L. REV.* 405, 422 (2019) (“Forensic experts are in a unique position to assist in cases involving alleged sexual offenses by individuals who have been diagnosed with intellectually disabled or autism spectrum disorder.”). Outside the scope of this Article is the discussion of sexual assault victims with autism, see *Carter v. State*, 754 N.E.2d 877, 882–83 (Ind. 2001) (expert’s testimony that autistic children find it difficult to deliberately deceive others did not cross the line into impermissible vouching for purposes of prosecution of defendant for molesting autistic child; although expert’s testimony might have been persuasive, the jury still had to draw its own inference as to whether child’s story was an accurate account).

<sup>130</sup> Cea, *supra* note 13, at 514. “Autistic individuals have been found to have ‘lower levels of sexual experience, sexual, and social behaviour, and less understanding of privacy.’” *Id.* at 502–03 (quoting Prianka Mehzbabin & Mark A. Stokes, *Self-Assessed Sexuality in Young Adults with High-Functioning Autism*, 5 *RES. AUTISM SPECTRUM DISORDERS* 614, 619 (2011)).

<sup>131</sup> Costello, *supra* note 5, at 53; see also Mark J. Mahoney, *Autism Spectrum Disorder and Inline Sexual offenses: Surviving the “Perfect Storm”* (unpublished paper presented at the 2018 NACDL Fall Meeting and Seminar, Savannah, GA) (on file with author).

pornography.”<sup>132</sup> Accordingly, “[d]uring adolescence and into adulthood, they often have limited or nonexistent sexual experience while their hormones are raging as they are physiologically sexual people.”<sup>133</sup> As they seek to better understand their sexuality, they may inadvertently wander into criminal territory:

They tend to use their computers to learn about matters that interest them and sexual urges get their interest. With [countless examples] of pornography available, they feel comfortable and safe in viewing these images in the privacy of their dwelling without having to engage in any normal type of social interaction. They assume if it is all over the computer, it must be legal—until law enforcement comes to their door with a search warrant.<sup>134</sup>

Any compounding characteristics of a developmental disability might subject an offender to greater consequences and additional criminal charges:

1. They may not behave appropriately for their age level and may choose to socialize with people who are younger.<sup>135</sup>
2. They may act impulsively and fail to understand the consequences of, or the seriousness, of their actions.<sup>136</sup>

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<sup>132</sup> Costello, *supra* note 5, at 53 (quoting Professor Emeritus Gary Mesibov, leading expert on autism).

<sup>133</sup> *Id.* In an article with another co-author, one of the authors of this paper (MLP) wrote several years ago: “An article published in early 2014 in a peer-reviewed scientific journal began with a startling comment: ‘The recognition that individuals with disabilities have a *desire* for sexual relationships with other people is a relatively new concept in the scientific community.’” See Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 258 (2014) (quoting Laura Gilmour, Veronica Smith & Melike Schalomon, *Sexuality and ASD: Current State of the Research*, in 1 COMPREHENSIVE GUIDE TO AUTISM 569 (Vinood B. Patel et al. eds., 2014)) (emphasis added).

<sup>134</sup> Costello, *supra* note 5, at 53.

<sup>135</sup> Jessica Oppenheim, *Sex Offenders with I/DD: The Negative Impact of Megan’s Law Consequences on Communities*, in ARC’S NAT’L CTR. CRIM. JUST. & DISABILITY, SEX OFFENDERS WITH INTELLECTUAL/DEVELOPMENTAL DISABILITIES: A CALL TO ACTION FOR THE CRIMINAL JUSTICE COMMUNITY 6, 7 (2015).

<sup>136</sup> *Id.* In *State v. Young*, 535 S.E.2d 380, 388 (N.C. Ct. App. 2000), the court found that whether the defendant was on notice of a state sex offender registration law was functionally “irrelevant” and constitutionally insufficient, given his cognitive limitations. The court urged the legislature to revisit its registration statute to account for such defendants. *Id.*

3. Their basic skill set might be limited which could impact their ability to understand the consequences of a conviction or plea.<sup>137</sup>

#### *D. Reconstructing How We Charge the Jury on ASD*

The first step in securing a jury charge on ASD or a related cognitive disability is to present expert testimony on the issue.<sup>138</sup> Yet even if such testimony is available, judges must often first weigh the value of such testimony and whether it will confuse the jury.<sup>139</sup> In a recent federal case, the court determined that permitting expert testimony on autism would only confuse the jury.<sup>140</sup> Despite the expert's explanation that her training and experience was critical to help the court "in determining . . . the capacity of an individual to form [intentional] criminal responsibility and criminal culpability"<sup>141</sup> and "that autistic individuals lacked capacity to understand the social environment around them or develop adequate social problem solving skills," the court found the testimony at best "a dangerously confusing theory more akin to justification and excuse," and an impermissible affirmative defense.<sup>142</sup>

In fact, legislators have primarily found that autism would not be an appropriate affirmative defense because it occurs on a spectrum, making it difficult for legislatures to construct a bright-line rule for a statute.<sup>143</sup> "Judges, attorneys, and juries would be compelled to dissect the diagnosis of an autistic individual, decide which capacities the individual has, and then link certain autistic characteristics with a criminal act."<sup>144</sup> This is essentially problematical, given that it is often trial judges—and not mental health professionals—who are tasked with considering whether and to what extent autism can serve as a mitigator.<sup>145</sup>

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<sup>137</sup> See Cucolo, *supra* note 48, at 300.

<sup>138</sup> See Berryessa, *Educator*, *supra* note 125, at 575.

<sup>139</sup> FED. R. EVID. 403. Federal Rule of Evidence 403 allows evidence to be excluded if its potential to confuse the issues and mislead the jury substantially outweighs its probative value.

<sup>140</sup> United States v. Ngo, No. CR H-17-413, 2020 WL 1234186, at \*3 (S.D. Tex. Mar. 13, 2020).

<sup>141</sup> *Id.* (emphasis omitted).

<sup>142</sup> *Id.* (quoting United States v. Cameron, 907 F.2d 1051, 1067 (11th Cir. 1990)).

<sup>143</sup> Cea, *supra* note 13, at 509.

<sup>144</sup> *Id.* (citing Caruso, *supra* note 3, at 510 ("Judges face enhanced public scrutiny when they tackle the question of autism as excuse, and they are in a sense required to take crash courses in the psychodynamics of the autistic brain.")).

<sup>145</sup> *Id.* at 528; see Mayes, *supra* note 20, at 95.

If a jury charge can be secured on this condition, its significance cannot be overstated. The New Jersey Supreme Court has made clear the significance of the judge's charge to the jury in criminal cases:

We have always placed an extraordinarily high value on the importance of appropriate and proper jury charges to the right to trial by jury. Erroneous instructions on matters or issues material to the jurors' deliberations are presumed to be reversible error. The right to a trial by jury includes certain intangible but real benefits to a defendant that are lost whenever the jury is induced to think incorrectly in terms of guilt. . . . So solemn is the jury's responsibility that we do not permit it to be misled by consideration of issues not proper for its deliberation. This judicial obligation, to assure the jury's impartial deliberations upon the guilt of a criminal defendant based solely upon the evidence in accordance with proper and adequate instructions, is at the core of the guarantee of a fair trial.<sup>146</sup>

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.<sup>147</sup> 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 jurors' expectations and preconceptions of what remorse and empathy "look like" may not comport with reality.<sup>148</sup> This is especially vital because of how jurors may be negatively influenced by stigmatizing beliefs and misconceptions with respect to ASD.<sup>149</sup> There are significant concerns here as judges often have limited understanding and familiarity with autism, and like jurors, over-rely on false OCS.<sup>150</sup>

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<sup>146</sup> *State v. Grunow*, 506 A.2d 708, 716 (N.J. 1986) (internal citations and internal quotation marks omitted).

<sup>147</sup> *Berryessa, Judiciary Views*, *supra* note 93, at 98.

<sup>148</sup> See Deborah Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 379 (2019) (citing *Payne v. State*, 838 N.E.2d 503, 509 (Ind. Ct. App. 2005)) ("Many acknowledge relying on 'gut instinct' in determining whether defendants are sincere, and have different, sometimes contradictory, views of what genuine remorse looks like.").

<sup>149</sup> *Allely & Cooper*, *supra* note 45, at 110.

<sup>150</sup> *State v. Dunn*, 974 So. 2d 658, 660 (La. 2008) ("Any pretrial determination by the judge that a defendant is not mentally retarded shall not preclude the defendant from raising the issue at the penalty phase, nor shall it preclude any instruction to the jury . . ."). On judicial reliance on false ordinary common sense in general, see Perlin, *Deceived Me*, *supra* note 108, at 116.

### III. CONSIDERATION OF THERAPEUTIC JURISPRUDENCE IN THE OVERALL PROCESS

#### A. Introduction<sup>151</sup>

Therapeutic jurisprudence (TJ) recognizes that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.<sup>152</sup> It asks “whether legal rules, procedures, and the role of lawyers can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.”<sup>153</sup> Professor David Wexler resolves the inherent tension in this inquiry by observing that “the law[’s] . . . use [of] mental health information to improve therapeutic functioning [cannot] impinge[] upon justice concerns.”<sup>154</sup> As one of the authors (MLP) has written elsewhere, “an inquiry into therapeutic outcomes does *not* mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”<sup>155</sup> TJ “look[s] at law as it actually impacts people’s lives”<sup>156</sup> and supports “an ethic of care.”<sup>157</sup> It emphasizes “psychological wellness over adversarial triumphalism.”<sup>158</sup>

Professor Amy Ronner describes the “prime ingredients” of TJ, also known as the “three Vs,”<sup>159</sup> as:

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<sup>151</sup> Text accompanying notes 152–59 is generally adapted from Perlin, Harmon & Chatt, *supra* note 49, at 305 and Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 FLA. J.L. & PUB. POL’Y 291, 299 (2017) [hereinafter Cucolo & Perlin, *Promoting Dignity*]. It also distills the work of one of the authors over the past twenty-seven years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

<sup>152</sup> Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009).

<sup>153</sup> Cucolo & Perlin, *Turbulent Space*, *supra* note 51, at 165; Michael L. Perlin, “*And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005).

<sup>154</sup> Wexler, *supra* note 96, at 21.

<sup>155</sup> Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000).

<sup>156</sup> Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

<sup>157</sup> Michael L. Perlin, “*I’ve Got My Mind Made Up*”: *How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 94 (2018) (quoting, in part, Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006)).

- Voice: “litigants must have a sense of voice or a chance to tell their story to a decision maker.”<sup>160</sup>
- Validation: the decision maker needs to take seriously the litigant’s story.<sup>161</sup>
- Voluntariness: “In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.”<sup>162</sup>

In an article about dignity and the civil commitment process, Professors Jonathan Simon and Stephen Rosenbaum embrace TJ as a modality of analysis, and focus specifically on this issue of voice: “When procedures give people an opportunity to exercise voice, their words are given respect, decisions are explained to them their views taken into account, and they substantively feel less coercion.”<sup>163</sup> We must ask ourselves whether the ways that we treat persons with autism in the criminal trial process comport with TJ principles.

### B. *Therapeutic Jurisprudence and Autism*

One of the central principles of TJ is a commitment to dignity.<sup>164</sup> We believe that the “three Vs” must be present if litigants—in this case, litigants with autism—are to be afforded dignity. Dignity, the “core” of TJ,<sup>165</sup> means that people “possess an intrinsic worth that should be recognized and respected, and that they should not

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<sup>158</sup> Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001).

<sup>159</sup> See, e.g., 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).

<sup>160</sup> Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94 (2002). On the importance of “voice,” see Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 588 (2008).

<sup>161</sup> Ronner, *supra* note 160, at 94.

<sup>162</sup> *Id.* at 95.

<sup>163</sup> Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIAMI L. REV. 1, 51 (2015).

<sup>164</sup> See BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005); Michael L. Perlin & Alison J. Lynch, “*She’s Nobody’s Child/The Law Can’t Touch Her at All*”: *Seeking to Bring Dignity to Legal Proceedings Involving Juveniles*, 56 FAM. CT. REV. 79 (2018). On dignitarian concepts in cases involving criminal punishments, see Simon & Rosenbaum, *supra* note 163, at 29–32.

<sup>165</sup> Michael L. Perlin, “*Have You Seen Dignity?*”: *The Story of the Development of Therapeutic Jurisprudence*, 27 N.Z.U. L. REV. 1135, 1137 (2017).

be subjected to treatment by the state that is inconsistent with their intrinsic worth.”<sup>166</sup> In considering these dignity issues, we need to take seriously multiple ancillary issues, including the realities that common maladaptive responses to shame are depression, hiding/avoidance, and anger.<sup>167</sup> Further, if one hides from or avoids a topic, that can lead to denial,<sup>168</sup> and anger may lead to acts of revenge.<sup>169</sup> Importantly, “the natural response to shame is to cover the source of the shame,”<sup>170</sup> and, the all-too-frequent “response to shame seems to be: more shame.”<sup>171</sup> As Professor Carol L. Zeiner has put it, “Therapeutic jurisprudence highlights the worth and dignity of the individual human being.”<sup>172</sup> Professor Eric J. Miller, too, has emphasized the significance of individual dignity to TJ:

[A] notion of individual dignity, generally articulated through concepts of autonomy, respect, equality, and freedom from undue government interference, was at the heart of a jurisprudential and moral outlook that resulted in the reform, not only of criminal procedure, but of the various institutions more or less directly linked with the criminal justice system, including juvenile courts, prisons, and mental institutions.<sup>173</sup>

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<sup>166</sup> Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009).

<sup>167</sup> Cucolo & Perlin, *Promoting Dignity*, *supra* note 151, at 299 (discussing Aaron Lazare & Wilton S. Sogg, *Shame, Humiliation and Stigma in the Attorney-Client Relationship*, 47 PRAC. L. 11, 15 (2001)).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* (discussing George P. Fletcher, *Thinking About Eden: A Tribute to Herbert Morris*, 22 QUINNIPIAC L. REV. 1, 16 (2003)).

<sup>171</sup> *Id.* (discussing MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 3 (1999)).

<sup>172</sup> Carol L. Zeiner, *Should Therapeutic Jurisprudence Be Used to Analyze Impacts of Legal Processes on Government?*, 28 ST. THOMAS L. REV. 1, 6 (2016).

<sup>173</sup> Perlin & Weinstein, *supra* note 5, at 12 (discussing Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1569 n.463 (2004)). On the constitutional significance of dignity in this process, see Michael L. Perlin, “Dignity Was the First to Leave”: *Godinez v. Moran*, *Colin Ferguson*, and the Trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCI. & L. 61, 75 (1996). See generally MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 13-3-2.4 (3d ed. 2016) (2020 update).

Similarly, “coercive police authority, by shaming and intruding on dignity, violates TJ.”<sup>174</sup> For example, a Canadian human rights tribunal case has emphasized the “right of autistic individuals to be treated equally, with dignity and respect, free of any discrimination or harassment related to their condition.”<sup>175</sup>

Fair process norms such as the right to counsel “operate as substantive and procedural restraints on state power to ensure that the individual suspect is treated with dignity and respect.”<sup>176</sup> Dignity is demanded not only by American constitutional norms,<sup>177</sup> but it is also required by international human rights law.<sup>178</sup> TJ will also “help to create a feeling of connectedness” between the lawyer and her client,<sup>179</sup> a connectedness vitally needed in the context we speak about here. “If we embrace . . . [therapeutic jurisprudence,] shame and humiliation will diminish and greater dignity will be provided.”<sup>180</sup> Certainly, our *infantilization* of persons with autism robs them of the dignity that is a *sine qua non* of TJ.<sup>181</sup>

Of special significance to the population that we write about in this Article, “[t]he *perception* of receiving a fair hearing is therapeutic because it contributes to

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<sup>174</sup> Michael L. Perlin & Alison J. Lynch, “*Had to Be Held Down by Big Police*”: A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities, 43 *FORDHAM URB. L.J.* 685, 705 (2016).

<sup>175</sup> Lollini, *supra* note 22, at 125 (quoting *Dawson v. Can. Post Corp.*, [2008] *CHRT* 41, ¶¶ 243, 246 (Can.)).

<sup>176</sup> Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 *GEO. L.J.* 185, 200 (1983).

<sup>177</sup> See Perlin & Weinstein, *supra* note 5, at 16–18 (discussing, *inter alia*, *United States v. Windsor*, 570 U.S. 744 (2013) (striking down portions of the Defense of Marriage Act)); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 366 (2009) (finding that strip search of a 13-year-old-girl by school principal violated her expectations of privacy); and *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (declaring Texas sodomy law unconstitutional).

<sup>178</sup> See, e.g., Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law, 117 *PENN ST. L. REV.* 1159, 1174–76 (2013), discussing dignity requirements in UN Convention on the Rights of Persons with Disabilities.

<sup>179</sup> Cucolo & Perlin, *Promoting Dignity*, *supra* note 151, at 326.

<sup>180</sup> See Perlin & Lynch, *supra* note 164, at 80. On how shame can lead to recidivism, inhibit rehabilitation, discourage treatment, and injure victims, see Perlin & Weinstein, *supra* note 5, at 2.

<sup>181</sup> See, e.g., Jennifer L. Stevenson, Bev Harp & Morton Ann Gernsbacher, *Infantilizing Autism*, *DISABILITIES STUD. Q.* (2011), <http://dsq-sds.org/article/view/1675/1596> [<https://perma.cc/89XZ-NXV4>] (noting how society’s “overwhelming proclivity for depicting autism as a disability of childhood poses a formidable barrier to the dignity and well-being of autistic people of all ages”).

the individual's sense of dignity and conveys that he or she is being taken seriously."<sup>182</sup> In an article that dealt in part with cases involving individuals charged with crimes who had been diagnosed with ASD, one of the authors of this paper, MLP, wrote with two others: "Psychological testing and a comprehensive review of relevant contributing developmental factors can yield critical information that can provide mitigation and potential solutions consistent with the goals of therapeutic jurisprudence."<sup>183</sup>

In a previous article, MLP argued that "humiliation and shaming contravene basic fundamental human rights and raise important constitutional questions."<sup>184</sup> These practices "lead to recidivism, inhibit rehabilitation, discourage treatment, and injure victims."<sup>185</sup> Moreover, "[t]hey also directly contravene the guiding principles of TJ, especially in the context of its relationship to the importance of dignity in the law."<sup>186</sup>

Recently, a full range of scholars and activists have brought a focus to studies of humiliation and the ways that such humiliation robs the legal system and society of dignity.<sup>187</sup> This is made explicit in the mandate of the Human Dignity and Humiliation Studies Network:<sup>188</sup> "We wish to stimulate systemic change, globally and locally, to open space for dignity and mutual respect, and esteem to take root and grow . . . ending systemic humiliation and humiliating practices, and preventing new ones from arising."<sup>189</sup>

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<sup>182</sup> Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption*, 1 PSYCHOL. PUB. POL'Y & L. 80, 114 (1995).

<sup>183</sup> Perlin, Lynch & McClain, *supra* note 129, at 422.

<sup>184</sup> Perlin & Weinstein, *supra* note 5, at 5.

<sup>185</sup> *Id.*

<sup>186</sup> See, e.g., Michael L. Perlin, "There Are No Trials Inside the Gates of Eden": *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: LAW AND POLICY 193 (Bernadette McSherry & Ian Freckelton eds., 2013) [hereinafter Perlin, *There Are No Trials*]. In the context of sex offender law, see Cucolo & Perlin, *Promoting Dignity*, *supra* note 151, at 297.

<sup>187</sup> Perlin & Weinstein, *supra* note 5, at 5.

<sup>188</sup> *Welcome to Human Dignity and Humiliation Studies (HumanDHS)*, HUM. DIGNITY & HUMILIATION STUD., <http://www.humiliationstudies.org/> (last visited Mar. 13, 2021).

<sup>189</sup> *Id.*, as quoted in Perlin & Weinstein, *supra* note 5, at 5–6.

In this context, consider the potential role of mental health courts as a possible partial palliative.<sup>190</sup> Mental health courts—one of many kinds of “problem-solving courts”<sup>191</sup>—follow TJ in an effort “to improve justice by considering the therapeutic and anti-therapeutic consequences that ‘flow from substantive rules, legal procedures, or the behavior of legal actors.’”<sup>192</sup> They are designed to deal holistically with those arrested when mental illness—rather than criminality—appears to be the precipitating reason for the behavior in question.<sup>193</sup> The mental health court judge seeks to divert the individual from the criminal court in exchange for an agreement to participate in community treatment, and to “help participants avoid future criminal court involvement.”<sup>194</sup> Importantly, the promotion of self-determination has been recognized as an important aspect of mental health courts,<sup>195</sup> and such self-determination is a significant aspect of ASD advocacy movements.<sup>196</sup>

Recently, MLP wrote, “[E]mbracing the modern mental health court model is the single-best way that this dignity can be provided.”<sup>197</sup> Such courts promote dignity, embrace therapeutic jurisprudence, focus on procedural justice, and use the

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<sup>190</sup> See MICHAEL L. PERLIN, *ADVANCED INTRODUCTION TO MENTAL HEALTH LAW*, §§ 7.2 to 7.2.3, at 116–28 (2021).

<sup>191</sup> Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1508 (2003).

<sup>192</sup> Nancy Wolff, *Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts*, 30 J. AM. ACAD. PSYCHIATRY & L. 431, 431 (2002) (quoting LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 8 (David B. Wexler & Bruce J. Winick eds., 1996)). See PERLIN & CUCOLO, *supra* note 173, § 2-6 n.274, at 2–52 to 2–55.

<sup>193</sup> See Arthur J. Lurigio, Amy Watson, Daniel J. Luchins & Patricia Hanrahan, *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184 (2001), as discussed in Michael L. Perlin, “*Wisdom Is Thrown into Jail*”: Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness, 17 MICH. ST. U. J. MED. & L. 343, 366–67 (2013).

<sup>194</sup> Michael L. Perlin, “*The Judge, He Cast His Robe Aside*”: Mental Health Courts, Dignity and Due Process, 3 MENTAL HEALTH L. & POL’Y J. 1, 11 (2013) (discussing Kirk Kimber, Comment, *Mental Health Courts—Idaho’s Best Kept Secret*, 45 IDAHO L. REV. 249, 270 (2008)).

<sup>195</sup> Michael S. King, *Should Problem-Solving Courts Be Solution-Focused Courts?*, 80 REV. JUR. U.P.R. 1005, 1023 (2011).

<sup>196</sup> See, e.g., Michael J. Ward & Roger N. Meyer, *Self-Determination for People with Developmental Disabilities and Autism*, 14 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 133 (1999).

<sup>197</sup> Michael L. Perlin, “*Who Will Judge the Many When the Game is Through?*”: Considering the Profound Differences Between Mental Health Courts and “Traditional” Involuntary Civil Commitment Courts, 41 SEATTLE U.L. REV. 937, 961 (2018); see also Perlin, *There Are No Trials*, *supra* note 186.

principles of restorative justice.<sup>198</sup> Further, they offer a vehicle through which the often-overlooked need for “continuity of care can meaningfully be provided to criminal defendants with mental disabilities.”<sup>199</sup>

This leads to an important question: are these courts suitable for persons with ASD? Professor Lawrence Dubin has answered this question emphatically in the affirmative:

A mental health court specifically created to understand the relationship of the neurological component of the ASD population with the charged crime is greatly needed to protect this vulnerable group of people from being labeled as criminals. In most of these cases, education and therapy will make recidivism an unlikely outcome.<sup>200</sup>

#### IV. CONCLUSION

Persons with ASD consist of yet another vulnerable population the dispositions of whose cases are at the mercy of the quality and competence of attorneys, experts, judges, juries, and outdated court procedures.<sup>201</sup> In order to effectively uphold constitutional and human rights, we must be vigilant in confronting ignorance, bias, and misguided pop-culture beliefs. As we have made advancements in understanding mental illness and severe cognitive disability (although such advancements are still limited and lacking),<sup>202</sup> we must work as a community of advocates, scientists, doctors, and researchers to make similar advancements to provide accurate and reliable information about the diagnosis of ASD and educate court participants on

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<sup>198</sup> Perlin, Dorfman & Weinstein, *supra* note 95, at 96.

<sup>199</sup> Naomi M. Weinstein & Michael L. Perlin, “Who’s Pretending to Care for Him?” *How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Persons with Mental Disabilities the Right to Continuity of Care*, 8 WAKE FOREST J.L. & POL’Y 455, 487 (2018).

<sup>200</sup> Costello, *supra* note 5, at 54 (noting that at least one juvenile mental health court explicitly accepts individuals with autism); see Morgan Molinoff, *The Age of (Guilt or) Innocence: Using ADR to Reform New York’s Juvenile Justice System in the Wake of Miller v. Alabama*, 15 CARDOZO J. CONFLICT RESOL. 297, 323–24 (2013) (discussing the Court for the Individualized Treatment of Adolescents (CITA), Santa Clara, California).

<sup>201</sup> See Perlin & Cucolo, *Tolling*, *supra* note 99; Michael L. Perlin & John Douard, “Equality, I Spoke That Word/As If a Wedding Vow”: *Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y.L. SCH. L. REV. 9 (2009); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63 (1991).

<sup>202</sup> See *supra* notes 59 and 76.

how to legally and therapeutically assist persons with ASD in the criminal trial process.

In an analysis of *Ballad of a Thin Man* (the song that, in part, gives this Article its title), the critic Fritz Warner Haver notes that “Mr. Jones” (the song’s central character) has “lost the security of apperception [and] is deeply afraid of . . . freedom.”<sup>203</sup> Persons with ASD are often denied their freedom via a criminal trial process through which they have lost *their* security. Again, to the song lyric, “something *is* happening,” but we close our eyes to avoid reckoning with what it is.

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<sup>203</sup> Fritz Warner Haver, *All These People That You Mention . . .*, in THE DYLAN COMPANION 117, 120 (Elizabeth Thomson & David Gutman eds., 1990).

