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# Beyond Dusky: Developing A Statutory Affirmative Defense For Individuals With Autism Spectrum Disorder

Sara Murphy

# *BEYOND DUSKY: DEVELOPING A STATUTORY AFFIRMATIVE DEFENSE FOR INDIVIDUALS WITH AUTISM SPECTRUM DISORDER*

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## I. INTRODUCTION

Jim,[1] a 28 year old man, is arrested and charged with stalking and harassment after he had been reported following a young woman on her way home from the train station every day for the past two weeks. He is a high school graduate who has worked in a variety of clerical positions in local businesses. Jim also has autism. Jim had experienced developmental delays and was enrolled in special education classes throughout the entirety of his schooling, and had been released from his most recent job held for his "poor interpersonal skills." Jim also collects trains, and is known to be the best at remembering dates and names. He swears he didn't mean to break the law- he just wanted to be her friend. Should Jim be off the hook for his charged crime because he has autism? Should he have to spend the next month in a psychiatric facility to learn that "stalking" is wrong? What, if anything, should his diagnosis influence? The answers to these questions are complex, and ones that this paper will seek to address in terms of their complexity and implications, as well as proposed legislative recommendations.

The United States has come a long way with regard to its understanding of Autism Spectrum Disorder (ASD). From the norm being atrocities like *Willowbrook*[2]*,* to the Autistic Self

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[1] Pseudonym given

[2] *The Closing of Willowbrook,* DISABILITY JUSTICE, https://disabilityjustice.org/the-closing-of-willowbrook/. (Last accessed Jun.12 2023).

> A watershed case in the evolution of the legal rights of people with disabilities to live in dignity arose out of public awareness of the horrific conditions under which children and adults with disabilities were living at the Willowbrook State Developmental Center in New York. This case set important precedents for the humane and ethical treatment of people with developmental disabilities living in institutions. This, in turn, served as the impetus for accelerating the pace of community placements for people with developmental disabilities, expanding community services, increasing the quality and

Advocacy movement,[3] much progress has been made in terms of recognizing the autonomy and capabilities of individuals with autism. However, the rights and treatment of this population in the criminal legal system is largely understudied and underprioritized. The unique characteristics of Autism Spectrum Disorder, specifically what are often referred to as social deficits, can unfortunately serve as risk factors for detrimental encounters with law enforcement and the criminal legal system as a whole. Moreover, the unique nature of autism being a spectrum makes the diagnosis unlike most developmental disabilities and thus, requires a unique, differential approach when determining the relevant mens rea of the criminal defendant with autism. This paper will argue that the only affirmative defense relating to mental disabilities, the Insanity defense, is incompatible for individuals with autism and thus there is a dire need for a specialized affirmative defense.

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availability of day programs, and establishing the right of children with disabilities to a public education.

[3] Kathy Leadbitter et al., *Autistic Self-Advocacy and the Neurodiversity Movement: Implications for Autism Early Intervention Research and Practice,* FRONTIERS IN PSYCHOLOGY, (April 2021), https://www.frontiersin.org/articles/10.3389/fpsyg.2021.635690/full

> Out of the early autistic social groups of the 1990s emerged autistic culture, the autistic self-advocacy movement, and the assertion that autism is a valid way of being. This environment also gave rise to the neurodiversity movement (Singer, 1998). Through the 2000s, the neurodiversity movement has been galvanized in a large part due to the voices, advocacy and protest of the autistic community, facilitated through developments in online communication and networks (Kras, 2009) and is increasingly influencing academic, clinical and lay understanding of autism and other forms of neurological difference.

## II. BACKGROUND: AUTISM SPECTRUM DISORDER

### *A. Autism: an 80 year evolution*

The concept of autism was first discovered and introduced by Austrian-American psychiatrist Dr. Leo Kanner in 1943[4], and has since evolved into what is referred to globally today as autism spectrum disorder. In his seminal case study of 11 children, Kanner effectively put the world on notice of the traits and characteristics of what would become those of the autism spectrum, by finding commonalities between children exhibiting the same unique symptoms. Observations of these children led to the discovery of the first-regarded key features of autism, such as lack of communicative use of language, preservation of sameness, restricted interest in activities, and stereotypical and repetitive patterns of behavior such as hand flapping and spinning. [5] Although Kanner discovered what are now known as the hallmark traits for diagnosing autism in the 1940s, his term, infantile autism, was not introduced into the Diagnostic and Statistical Manual, DSM III, until 1980, thirty seven years later. [6]

Since its inception, autism has changed profoundly in many aspects, specifically in terms of its diagnostic classification. [7] What is now widely recognized as its own unique diagnosis was first viewed as a cluster of several mental illnesses. Specifically, immediately following its introduction to society by Kanner in 1943, autism was first considered to be a childhood

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[4] Leo Kanner, *Autistic Disturbances of Affective Contact*, PATHOLOGY, http://simonsfoundation.s3.amazonaws.com/share/071207-leo-kanner-autistic-affective-contact.pdf (last visited Apr. 13 2023).
[5] *See id.*
[6] James Harris, *Leo Kanner and Autism: A 75-year Perspective,* INTERNATIONAL REVIEW OF PSYCHIATRY (2018), https://pubmed.ncbi.nlm.nih.gov/29667863/ (last visited May 29, 2023).
[7] *See id.*

manifestation of schizophrenia and early onset psychosis.[8] It was not until 1987, when the DSM-III was revised (DSM III-R), that autism was formally recognized medically as autistic disorder.[9] Less than ten years later, further interest led the DSM-IV to include four distinct subgroups of pervasive developmental disorder: Autistic disorder, Rett Disorder, childhood disintegrative disorder, and Asperger Syndrome.[10] At this point, these four diagnoses fit together in the sense that they all involved disruption of more than one developmental system. Thus, the DSM-IV clustered the four diagnoses under the umbrella of pervasive developmental disorder.[11]

The DSM-IV introduced the widely-known diagnosis of Asperger Syndrome in 1991. Though no longer accepted, the term was used to describe "higher functioning" individuals with social and communication deficits. In 1944, Austrian psychiatrist Hans Asperger emphasized the element of personality among people with autism as well as introduced the concept of said individuals having normal to above average intelligence and having only mere social deficits.[12] Through his research and observation of four children, Asperger described a new group of individuals as being of *normal intelligence*, with *good grammar and vocabulary*, yet *socially odd*

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* When discussing Asperger's novel emphasis on the role of personality in autism, the author writes:

> The term Asperger Syndrome was introduced in ICD-10 and DSM-IV to describe higher functioning people with social communication deficits. The term Asperger Syndrome did not exist until 1981, when it was introduced by Lorna Wing as a new term for autistic psychopathy (Asperger, 1991). In using this term, Hans Asperger's focus was on the personality dimension (Asperger, 1991), an autistic personality disorder. Asperger used the term autistic psychopathy through- out his paper. However, the English language translation of his paper also uses the term autism when translating autistic psychopathy; this has led to some confusion (Asperger, 1991).

with *poor non-verbal communication and limited and circumscribed interests*.[13] As a result of Asperger's research and findings, the concept of autism spectrum disorder was introduced, and the DSM-IV pervasive developmental disorder subgroups were eliminated.[14] The work of Hans Asperger is undoubtedly influential in shaping the way we view autism today–as a spectrum hosting many bright minds with extraordinary capabilities. However, the term Asperger Syndrome is no longer accepted by the general and psychological communities as a result of the evolution to viewing autism as a spectrum of individuals of all ability and intelligence levels versus"higher-functioning" individuals having Asperger Syndrome.

### *B. Autism Today*

In recent years, tremendous research and initiatives have been implemented across the world in an attempt to understand and assist individuals with autism spectrum disorder. Under the most current version of the DSM, the DSM-V, there are specified and standardized criteria used to diagnose individuals with autism spectrum disorder. It is important to note that while autism can sometimes be, and often is, detected around age 2 or early childhood, individuals may first be diagnosed at adulthood. [15]

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[13] *Id.*

[14] *Id.* When discussing the implications and rationale behind the change from pervasive personality disorder to autism spectrum disorders, distinguishing Kanner and Asperger's approaches

> Asperger clearly distinguished his subjects from Kanner's early infantile autism, whom he viewed as a form of infantile psychosis. In discussion with Lorna Wing, Asperger did not accept the term autism spectrum disorder she proposed, but always maintained that his personality spectrum disorder was distinct (Donvan & Zucker, 2016).

[15] Anna Gotter & David Rossiaky, *Everything You Need to Know About Autism in Adults,* HEALTHLINE (Mar. 30, 2023), https://www.healthline.com/health/autism-in-adults.

Today, the accepted conceptualization of autism is that it is a spectrum. While it can be difficult to diagnose autism, the standardization of diagnostic criteria[16] and screening procedures has aided tremendously. Under the DSM-5, to meet diagnostic criteria for autism, a child [or individual] must have *persistent deficits* in each of three areas of social communication and interaction, as well as display two of four types of restricted, repetitive behaviors.

In terms of the first component, *persistent deficits in social communication and interaction,* the individual may exhibit deficits in social emotional reciprocity, which can sometimes look like inability to hold a back-and-forth conversation, or inability to maintain relationships, for example.[17] In addition to fulfilling the requirement of possessing a social deficit, the severity of the deficit must also be identified, which is based on social

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*See id.*

There are currently no ASD diagnostic criteria specifically for adults. But the current DSM-5 criteria can be adapted and used for this age group.Clinicians primarily diagnose adults with ASD through a series of in-person observations and interactions. They also take into consideration any symptoms the person reports experiencing.

[16] *Diagnostic Criteria,* CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/autism/hcp-dsm.html (Nov. 2, 2022).

[17] *Id.* (discussing the persistent deficits in social communication and interaction component of diagnosing ASD, the CDC provides a non-exhaustive list of behaviors):

1. 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.
2. 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.
3. Deficits in developing, maintaining, and understanding 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.

communication impairments and restricted, repetitive patterns of behavior. For either criterion, severity is described in 3 levels: Level 3, requires very substantial support, Level 2, requires substantial support, and Level 1, requires support.[18] Further, in terms of socio-communicative deficits, individuals with autism may have difficulties with complex scenarios of moral reasoning,[19] which not only has the potential to lead to the commission of crimes, but also an inability to appreciate the nature or consequences of the action at hand.

The second component considered when determining if an individual meets the diagnostic criteria for autism spectrum disorder is whether they exhibit restrictive or repetitive behaviors. Under this element, one is to look at whether the individual has restrictive or repetitive patterns of behavior, interests, or activities, as manifested by at least two of four types of behaviors. [20] First, the individual may make stereotyped or repetitive motor movements, use

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[18] *See id.*

[19] Tessa Grant, Rosaria Furlano, Layla Hall, & Elizabeth Kelley, *Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning,* CANADIAN PSYCHOLOGY, (Dec. 2017).

[20] *Diagnostic Criteria,* CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/autism/hcp-dsm.html (Nov. 2, 2022).
discussing the ways that restrictive, repetitive patterns of behaviors, interests, or activities may manifest).

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypes, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. 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 the same route or eat the same food every day).
3. 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).
4. Hyper or hypo reactivity 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).

of objects, or speech, such as repeating certain phrases or words, making repetitive movements with objects or body parts.[21] Second, the individual may display an insistence on sameness, be inflexibly adhered to a particular routine or ritual. This may be displayed by extreme distress at small changes, difficulty with transitions, rigid patterns of thinking or speaking, and much more.[22]

### *C. Autism as a Spectrum*

Today, according to the American Psychiatric Association, autism spectrum disorder is characterized as a complex developmental condition involving persistent challenges with social communication, restricted interests, and repetitive behavior. It is also critical to note that the degree of impairment in functioning because of these challenges varies immensely between individuals, hence why autism is referred to as a spectrum.[23] The Diagnostic and Statistical Manual (DSM-V) places the diagnosis into three distinct categories of severity based on social communication impairments and restrictive, repetitive patterns of behavior. Severity is described by either Level 3- *requires very substantial support,* Level 2- *requires substantial support,* or Level 1- *requires support.* [24] Because of this variance in severity and characteristics, no two individuals with autism experience autism and its traits in the same way. Specifically, because autism affects each person differently, people with autism have unique strengths and challenges,

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[21] *See id.*
[22] *See id.*
[23] *What Is Autism Spectrum Disorder?,* AMERICAN PSYCHIATRIC ASSOCIATION (Aug. 2021), https://www.psychiatry.org/patients-families/autism/what-is-autism-spectrum-disorder.
[24] *Diagnostic Criteria,* CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/autism/hcp-dsm.html (Nov. 2, 2022).

with support plans usually involving multiple different professionals and catered to the individual.[25]

It is important to note that autism is not always associated with an intellectual disability. Dr. Susan Caldecott-Johnson, a specialist in pediatric neurodevelopmental disabilities, for example, asserts that the two do not always go hand in hand.[26] As a result, it is urged by professionals such as Dr. Caldecott-Johnson that the two must be differentiated, as an individual with autism "may have intellectual challenges or have a lower IQ, or be very, very, bright." This point is of particular significance as it relates to why autism spectrum disorder must be better studied and understood in the criminal legal system, as a criminal defendant may have autism, with little to no intellectual impairment, relating directly to the issue of competency assessments.

### *E. Autism on the Rise?*

Statistics have consistently shown that diagnoses of ASD are on the rise, with 1 in 54 children being diagnosed with autism by age 8 in 2016, compared to 1 in 150 children in 2000. [27] The cause, however, is of great debate. On one hand, many believe that the prevalence of autism is what is increasing. On the other hand, many believe that we have just gotten better at

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[25] *ASD Diagnosis, Treatment, and Services,* CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/autism/facts.html (Dec. 9, 2022).
[26] *The Autism Spectrum Explained,* OSF HEALTHCARE, https://www.osfhealthcare.org/blog/the-autism-spectrum-explained (Dec. 21, 2021).
[27] *Autism Rates have Tripled. Is it now more common or are we just better at diagnosis?,* NATIONAL BROADCASTING CORPORATION (Jan. 26, 2023, 12:01 AM), https://www.nbcnews.com/health/health-news/autism-rates-rising-more-prevalent-versus-more-screening-rcna67408.

diagnosing it. In either respect, the number of individuals in our society that are diagnosed with autism has been on the steady increase for quite some time now. Literature suggests that people with autism are overrepresented in the criminal legal system.[28] One reason for this disparity could be that individuals with autism may exhibit behaviors including aggression and self injury that are at odds with social norms, placing them at a greater risk for being removed from their communities.[29] Further, it has recently been reported that 20% of youth with autism have been stopped and questioned by police, with almost 5% being arrested.[30] As more individuals in the United States are diagnosed with autism, and are thus, making up a disproportionate percentage of individuals involved in the criminal legal system, it is crucial to adapt to this increase by increasing understanding of ASD, and accounting for it in our legal system.

## III. BACKGROUND: *DUSKY V. UNITED STATES*

The current legal standard used to determine whether a criminal defendant is competent to stand trial or to meaningfully participate in their legal process is referred to as the *Dusky* Standard, as derived from the 1960 Supreme Court Case *Dusky v. United States*.[31] In *Dusky,* the

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[28] Andrew Cashin & Claire Newman, *Autism in the Criminal Justice Detention System: A Review of the Literature* (2009). https://pubmed.ncbi.nlm.nih.gov/19538651/. (last visited May 29, 2023).
[29] Paul Turcotte, Lindsay L. Shea, David Mandell *School Discipline, Hospitalization, and Police Contact Overlap Among Individuals with Autism Spectrum Disorder* (citing Bauminger et al. 2010, Gray et al. 2012, Hartley et al. 2008, Kanne and Mazurek 2011, Matson and Cervantes 2014) JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS, (November 2017) https://link.springer.com/article/10.1007/s10803-017-3359-y.
[30] *See id.*
[31] *Dusky v. United States*, 362 U.S. 402 (1960).

Defendant was charged with rape and kidnapping, and later sought a writ of certiorari in the United States Supreme Court for the conviction to be overturned on the grounds of his diagnosis of schizophrenia and its influence on his ability to participate in his own defense proceeding. The Supreme Court held, in a *per curiam* opinion, that the conviction of the defendant be overturned on the ground that the record was insufficient in showing that the accused was mentally competent to stand trial.[32] It is important to note that while *Dusky* and the competency assessment hinges on a defendant's current mental state at the time of the trial[33] or alternative proceeding, it does not look to the defendant's mental state at the time of the commission of the crime whatsoever. Thus, while an individual with autism may be competent to stand trial, that is, understand the charges being brought before them, why they are in court that day, why they are in trouble, or the fact that they may go to jail, this does not cover whether the individual knew at the time of the commission of the defense that what they did was wrong. Moreover, while *Dusky* may allow a Court to find that a defendant with autism is competent to stand trial and participate in their own defense, there must be an appropriate and effective statutory defense put in place for those who may be competent under *Dusky,* but cannot appreciate the nature and consequences of the action in question. Because an assessment of competency only yields information regarding the defendant's mental state at the time of trial, not whether they should be found criminally responsible as a result of an autism-related socio communicative deficit, the criminal legal system must look beyond competency and establish an affirmative statutory defense.

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[32] *Id.*

[33] *Insanity Defense FAQs,* PUBLIC BROADCASTING STATION, https://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/faqs.html (last accessed Jun. 12 2023).

Specifically, there must be a defense that qualifying defendants with autism may assert against statutory crimes, which do not require a culpable mens rea. Further, when a statutory offense, by nature, merely requires the defendant commit the act proscribed by the statute, absent any consideration of mens rea, a defendant with autism, who, as a result of their diagnosis cannot appreciate the nature and consequences of the action, is left defenseless. Thus, the development of a statutory defense for individuals with autism who cannot appreciate the nature and consequences of their actions would benefit from an affirmative statutory defense for a multitude of reasons.

## IV. ARGUMENT

This paper will argue that the current standard of determining whether a criminal defendant is competent to stand trial, the *Dusky* standard, is an adequate standard for determining competency and need not be tailored to defendants with autism. Because *Dusky* is an individualized approach to whether the defendant is competent to participate in their criminal process, it is appropriate. Beyond competence, however, is the need for an affirmative defense for individuals with autism who cannot appreciate the nature and consequences of their actions as a result of their diagnosis. While an individual with autism may be able to understand and participate in components of their criminal trial or alternative proceedings, it is not guaranteed by any means that the defendant can appreciate the true nature and consequences of the action at issue at the time the action was performed. Thus, a competency standard alone is not sufficient. This paper will argue that the insanity defense as it stands today is incompatible with individuals

with autism spectrum disorder, further emphasizing the need for a unique affirmative defense completely independent of insanity.

### *A. Why not Insanity?*

As it stands, the insanity defense is inadequate for a criminal defendant on the basis of a diagnosis of autism alone. While there is a high rate of comorbidity in individuals with autism for disorders such as anxiety, depression, and sleep disorders, the following analysis places an emphasis on the criminal defendant that has a diagnosis of autism spectrum disorder, solely.[34] In a prosecution regarding any federal statute, an individual may assert that at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.[35] Thus, the defendant admits the action, but asserts a lack of culpability based on mental illness.[36] Under this Code, the defendant has the burden of proving the defense of insanity by clear and convincing evidence. [37] While the insanity defense is instrumental in the defense of many with psychiatric diagnoses who have been charged with crimes, it is incompatible and perverse to the objectives of justice for individuals with a diagnosis of autism. Based on the

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[34] *Co-Occurring Conditions and Autism,* AUTISM RESEARCH INSTITUTE https://autism.org/comorbidities-of-autism (last visited June 8, 2023).
[35] 18 U.S.C. § 17.
[36] *Insanity Defense,* CORNELL LEGAL INFORMATION INSTITUTE (last visited June 12, 2023). https://www.law.cornell.edu/wex/insanity_defense.
[37] *Id.*

language of the statute alone, it is incompatible for people with autism, as autism is not a mental illness, but a developmental disorder.

According to 18 U.S. Code § 4243, if a person is found not guilty by reason of insanity at the time of the offense charged, they are to be committed to a suitable facility until they are eligible for release.[38] Following commitment, the individual is only to be released after the person has "recovered from his mental disease…" It is clear from the language of this provision that not only is the mental condition preventing the individual from understanding the nature of their actions a "disease," but that it is also viewed as something that is fleeting. Both components are incompatible with an individual diagnosed with autism spectrum disorder.

Further, it is not only deeply stigmatizing but also greatly inaccurate to refer to autism as a "mental disease" that can be "recovered from," as per the language of U.S. Code §4243. It is well-known and accepted that autism is not a fleeting psychiatric condition that can be healed over time. Rather, autism is a neurodevelopmental disorder and often referred to as the "normal functioning of a differently structured brain."[39] There is also no cure for autism. While there are treatments that can be implemented to ameliorate the symptoms of autism spectrum disorders such as related behaviors and speech and language disorders, there is no one-size-fits-all treatment for autism in itself. [40] This is vastly distinguishable from psychological conditions such as bipolar disorder, anxiety, and depression, which are instead classified as mental illnesses.

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[38] 18 U.S.C. § 4243.

[39] Nicola Read & Adel Schofield, *Autism: Are Mental Health Services Failing Children and Parents? Recent Research Suggests that many CAMHS Need to Improve*, Family Health Care J (2010) https://pubmed.ncbi.nlm.nih.gov/21053660 (last visited May 23 2023).

[40] *Autism Spectrum Disorder,* MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/autism-spectrum-disorder/diagnosis-treatment (last visited May 29 2023).

Mental illnesses are health conditions that involve changes in mood, emotion, thinking, and behaving, associated with mental distress and problems with social functioning.[41] Further, mental illnesses are also different in the sense that they can occur at any age and are treatable with medication, therapy, or a combination of both.[42] On the contrary, autism falls under the category of developmental disorders, which are marked by the inability to be successfully treated, lifelong disabilities, [with a likelihood] of impacting a person's ability to learn and understand certain thoughts. [43] Autism, being a developmental disability, is markedly different in significant ways and should thus be treated entirely separate from mental illnesses in the legal system.

As set out in U.S. Code §4243, it is standard practice for a defendant who is found not guilty by reason of insanity (NGRI) to be committed to a psychiatric institution following the criminal proceeding(s).[44] The individual is then only to be released after the person has "recovered from his mental disease…" [45] As discussed previously, autism is neither a mental disease nor something that can be recovered from. Moreover, an individual with autism that exhibits no comorbid mental illnesses would serve no purpose in a psychiatric facility. The underlying principle behind placing defendants found not guilty by reason of insanity in psychiatric facilities is the premise that the individual can be rehabilitated, in an effort to deter future crime. When an individual has autism, yet lacks any mental health disorders that can and

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[41] *Mental Illness vs. Autism and Other Developmental Disorders* https://www.arrowpassage.com/mental-illness-vs-autism (last visited June 8 2023).
[42] *See id.*
[43] *Id.*
[44] 18 U.S.C. § 4243.
[45] *See id.*

should be treated with psychiatric intervention, there is nothing to rehabilitate, and nothing to deter.

Further, there is extensive literature and firsthand accounts of individuals with autism that reveal how inpatient psychiatric hospitalizations can be disproportionately distressing and traumatizing to individuals with autism. A recent study in the United Kingdom, for example, reported that an inpatient unit is rarely helpful and often "deeply damaging," specifically for this population.[46] Although it is widely accepted that autism need not be "treated" or "rehabilitated," and that involuntary commitment to an inpatient facility can be especially traumatic and counterproductive for an individual with autism, many criminal defendants with autism are left with no choice other than to plead insanity, and subsequently be committed to a psychiatric institution as means of achieving "justice." In the alternative, if an individual with autism is found by a presiding judge or alternate trier of fact to not meet the statutory elements required to plead the affirmative defense, that individual may be forced to go to trial, and faces potential incarceration. The practice of incarcerating individuals with autism has been called into question in several studies. Specifically, researchers and policymakers have cautioned about the dangers of doing so, as many individuals with autism exhibit communication deficits and aggressive

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[46] *Number of Autistic People in Mental Health Hospitals: Latest Data,* NATIONAL AUTISTIC SOCIETY, https://www.autism.org.uk/what-we-do/news/autistic-people-in-mental-health-hospitals. (Feb. 17 2022). *(*website posting regarding the number of individuals with autism in inpatient facilities in the United Kingdom, based on NHS Digital Date report):

> Wards can be noisy, bright and unpredictable. Without reasonable adjustments to the environment and support from a professional who understands autism and how to adapt their care, it can be completely overwhelming, particularly if you have an extreme sensitivity to sound, light or touch. It can actually increase someone's level of distress, which can lead to further restrictions and make it even harder to move to support in the community. On top of this, there aren't enough of the right type of mental health and social care services in the community for autistic people to move into.

behavior in unfamiliar social situations, and are at greater risk of being victimized in prison.[47] Further, prison staff members often have limited knowledge of ASD, resulting in poor communication and difficulty managing undesirable behaviors among inmates with autism.[48] Thus, when considering the options a criminal defendant with autism has when being tried for a crime in which they committed as a result of the socio-communicative deficits of ASD, an effective, safe, and ethical option is surely lacking.

### *B. An Alternative Defense: Autism Spectrum Disorder*

Currently, a defendant with autism spectrum disorder may be able to have their sentencing mitigated as a result of judicial consideration of their diagnosis. While autism can be taken into consideration as justification, it is not a defense and thus the individual is still held criminally liable and subject to incarceration or involuntary commitment to an inpatient facility as a result. It is in this respect that the need for an affirmative defense for autism spectrum disorder is so crucial.

It is critical to understand that this must not be a blanket defense. If an individual has autism but is not deemed by the appropriate authorities, e.g, psychiatrists whose testimony is being offered to analyze the defense, to display the requisite social deficits, and a finding is met

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[47] Tessa Grant, Rosaria Furlano, Layla Hall, & Elizabeth Kelley, *Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning,* CANADIAN PSYCHOLOGY, (Dec. 2017) (citing de la Cuesta, 2010; Paterson, 2007).
[48] *See id.*

that the individual does in fact understand the nature and consequences of their actions, then they would not meet the prerequisite elements to assert the defense. Because autism is a spectrum, it would be neither just nor appropriate to allow a defendant to claim that they did not understand the nature or consequences of their actions absent an adequate showing of socio communicative deficits, based on the diagnosis alone. Individuals with autism should also be afforded the opportunity to assert the affirmative defense of that, because of their diagnosis of autism spectrum disorder, their social or communicative deficits prevent them from understanding the nature and consequences of their specific action at issue.

### *C. Proposed Statutory Framework*

Ideally, a statute implemented to provide individuals with autism spectrum disorder with an affirmative defense would be highly individualized, with specified requisite elements that must be met in order to assert in a Court of law. That being said, it is of the utmost importance that the statute be used in an advisory capacity, ensuring that the presiding jurisdiction exercises careful discretion following a case-by-case approach. Because autism does not look the same in any two individuals, and because one person with autism may fully understand the nature and consequences of their actions while another may not, diligence and individualized analyses to ensure that the eligibility of each individual defendant is reviewed on a case-by-case basis is imperative.

To raise the affirmative defense of not guilty by reason of insanity, a defendant will usually be required to undergo a complete mental evaluation, and substantial supplemental evidence relating to the defendant's purported mental state, as conveyed by psychiatrists,

psychologists, and other professionals. These professionals testify regarding their findings of the defendant's mental state, which allows for the trier of fact, either in the form of a judge or a jury, to decide whether the evidence supports a finding of insanity to allow the defendant to plead such a defense.[49] By requiring a defendant to prove by a showing of clear and convincing evidence that they could not appreciate the nature and consequences of their actions, a trier of fact is able to analyze the evidence presented to determine whether or not the defendant actually was, more likely than not, unable to possess the requisite mens rea at the time of the offense.

A statutory defense for individuals with autism would work in the same regard. The individual would have to prove, by clear and convincing evidence, first, that the individual has autism spectrum disorder, and second, that at the time of the offense, the individual was unable to appreciate the nature and consequences of their actions as a result of their diagnosis of autism spectrum disorder. Assuming arguendo, if an individual wished to assert this defense, they would have to undergo a complete mental evaluation by the appropriate professional(s), as an individual asserting not guilty by reason of insanity would be required to do. Additionally, the defendant would have the opportunity to supplement findings relating to their diagnosis with appropriate documentation- individualized education plans, medical history, testimony from physicians, psychiatrists, teachers, and other professionals who can credibly and accurately testify to their diagnosis. In addition, the opposing counsel would, reminiscent of a pleading of not guilty by reason of insanity, have the opportunity to present evidence of the contrary. Thus, opposing

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[49] *Not Guilty by Reason of Insanity,* CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/not_guilty_by_reason_of_insanity#:~:text=To%20prove%20legal%20insanity%2C%20defendants,%E2%80%9Cguilty%20but%20mentally%20ill.%E2%80%9D, (Jul. 2020).

counsel would have the opportunity to argue that the individual either has not made a sufficient showing of a diagnosis of autism spectrum disorder, or that while the diagnosis prong is satisfied, the individual has not made a sufficient showing that because of the individual's diagnosis they were unable to appreciate the nature and consequences of their actions at the time of the offense. A statute possessing elements such as those aforementioned would allow criminal defendants with autism to provide a trier of fact with context surrounding the action at issue, as well as avoid the harrowing reality that inpatient hospitalization and incarceration creates for individuals with autism. Rather, individuals with autism who successfully plead the affirmative defense could be subject to an individualized treatment plan, made collaboratively with the defendant themselves, family members, the government and defense counsel, in a means that truly helps the defendant avoid future recidivism if applicable. Furthermore, programs such as alternative rehabilitation as opposed to inpatient psychiatric hospitalization, community programs, or private organizations in which staff are experts in autism spectrum disorder could potentially decrease the risk of recidivism[50] without further distressing and traumatizing the individual.

### *D. The Statute in Action: Virginia*

Virginia exemplifies that developing a statutory defense for individuals with autism is not merely idealistic– but a long overdue reality. Virginia Code 19.2-303.6 provides statutory protection for criminal defendants with autism by setting out the following:

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[50] Tessa Grant, Rosaria Furlano, Layla Hall, & Elizabeth Kelley, *Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning,* CANADIAN PSYCHOLOGY, (Dec. 2017) (citing de la Cuesta, 2010; Paterson, 2007).

> In any criminal case, except a violation of § 18.2-31, an act of violence as defined in § 19.2-297.1, or any crime for which a deferred disposition is provided for by statute, upon a plea of guilty, or after a plea of not guilty, and the facts found by the court would justify a finding of guilt, the court may, if the defendant has been diagnosed by a psychiatrist or clinical psychologist with (i) **an autism spectrum disorder as defined in the most recent edition of the Diagnostic and Statistical Manual** of Mental Disorders published by the American Psychiatric Association or (ii) an intellectual disability as defined in § 37.2-100 and the court finds by clear and convincing evidence that the **criminal conduct** was **caused by or had a direct and substantial relationship to the person's disorder or disability**, without entering a judgment of guilt and with the consent of the accused, after giving due consideration to the position of the attorney for the Commonwealth and the views of the victim, defer further proceedings and place the accused on probation subject to terms and conditions set by the court. Upon violation of a term or condition, the court may enter an adjudication of guilt; or upon fulfillment of the terms and conditions, the court may discharge the person and dismiss the proceedings against him without an adjudication of guilt. This section shall not limit the authority of any juvenile and domestic relations court granted to it in Title 16.1.[51]

Virginia Code 19.2-303.6 allows for a trier of fact to consider the individual's diagnosis and its influence on the action in question as a means of finding individuals with autism and related intellectual disabilities not guilty, so long as the diagnosis is substantially related to their disability. While the statute does not apply to defendants who commit certain acts of statutory violence, it is a step taken before many states as a means of protecting criminal defendants with autism.

## V. CONCLUSION

[51] Virginia Code § 19.2-303.6

While our nation has made great strides in the arena of disability rights advocacy, the criminal legal system still has ways to go. As the rate of individuals with mental health conditions and developmental disabilities such as autism continue to increase globally, the impetus is on lawyers, advocates, policymakers, and those who truly care to see individuals in the legal system tried and treated fairly to advocate for effective and appropriate change in response.