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AUTISM AND THE CRIMINAL DEFENDANT

CHRISTINE N. CEA[†]

INTRODUCTION

Picture this: A man at a fast food restaurant walks towards his table with a tray full of food. A woman, who is on her cell phone, passes by the man and is not paying attention. She bumps into the man and his food spills all over him. The man panics. She begins to apologize, but the man cannot focus. He is upset about the food, upset that it fell, and upset that the woman touched him. The woman continues to apologize and suddenly grabs his arm to clean the food off of him. Shocked, the man pulls his arm back, and swings his other arm at the woman. He hits her. She is on the floor. He did not mean to hit her, but he did not stop himself either. It all happened so fast. He simply could not deal with all that had happened at that moment.

The man was diagnosed with autism when he was six months old. He spent his life confronting the challenges of his condition, and overcame many of those challenges. He went to college, got a job at a computer-programming agency, and now lives on his own. Overall, he is able to function in his day-to-day life, but the challenges of his disability remain and manifest in specific ways. His social skills are impaired, and he often engages in self-isolation. He dislikes social pressures. He was fired from his last job as a customer service representative because working with people made him nervous. Like many other autistic individuals, he has difficulty communicating with others. He does not process chaotic interactions very well and finds it difficult to focus when too many things are going on at

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once. He copes with these issues by isolating himself. It is difficult for him to regain his composure when isolation is not a possibility.

The man is prosecuted for assault and battery. While on the stand, he barely reacts. He is nervous. When the attorney shows him a picture of the woman's injuries, he does not act shocked. He does not say he is sorry. He does not say anything. The jury, not understanding why he appears emotionless, does not like him. He ends up pleading guilty. At his sentencing hearing, the man's attorney argues for leniency. The judge asks the man if he understands that his actions were wrong and the defendant shrugs. Believing that the man is unwilling to take responsibility for his actions, the judge gives him the maximum sentence.

This prosecution is hypothetical, but the questions it raises are real.¹ First, should the man's autism have been a defense to the crime through a version of the insanity defense? Second, should the jury have been told about the man's autism and how it affects his social interactions so that the jury could more accurately assess the man's testimony? And third, should the man's autism have been a valid mitigating factor in his sentencing? This Note addresses these questions. Looking at recent case law and social science research, this Note argues generally that autism spectrum disorders require greater acknowledgment in our criminal justice system. More specifically, this Note argues that while autism should not be an affirmative defense, it should be used at trial to combat prejudicial demeanor evidence and should be a mitigating factor at sentencing.

Part I discusses autism spectrum disorders, including the diagnosis and characteristics of autism, and whether autism is linked to criminal behavior. Part II examines whether autism should be an affirmative defense to a crime, and concludes that it should not. However, Part II does propose that autism should be an affirmative defense to specific minor crimes. Part III analyzes

¹ See, e.g., *United States v. Lange*, 445 F.3d 983, 985 (7th Cir. 2006); *People v. Larsen*, 140 Cal. Rptr. 3d 762, 771-73 (Ct. App. 2012); *State v. Anderson*, 789 N.W.2d 227, 235 (Minn. 2010); *State v. Boyd*, 143 S.W.3d 36, 38-39 (Mo. Ct. App. 2004); see also KAMRAN NAZEER, *SEND IN THE IDIOTS* 46-47 (1st U.S. ed. 2006) (recounting a story of an old classmate who was diagnosed with autism and spent a year "in a place for juvenile offenders" after the man assaulted another man who accidentally caused the autistic man to spill a milkshake on himself).

potential prejudicial demeanor evidence that might occur when autistic defendants testify in their own defense at a trial. This Part argues that evidence of autism should be admitted in a trial to explain to the jury why an autistic individual may exhibit unconventional social reactions while testifying. Part IV explores sentencing of an autistic defendant, and proposes that autism be a mitigating factor for sentencing. This Note concludes by explaining how implementing the propositions in this Note can lead to a greater awareness of autism spectrum disorders within the legal community.

I. OVERVIEW: AUTISM SPECTRUM DISORDERS

A. *Characteristics of Autism Spectrum Disorders*

Autism research began over sixty years ago and continues to this day. In 1943, Leo Kanner began studying eleven children who exhibited social withdrawal and communicative peculiarities.² Kanner used the word autism, meaning, “immersed within oneself,” to describe these children.³ Throughout the twentieth century, various psychologists continued to research autism.⁴ Today, after decades of research, we are better able to identify and understand characteristics of autism.⁵ Approximately two million individuals in the United States are diagnosed with autism, and prevalence rates have increased from ten to seventeen percent annually in recent years.⁶

Autism is categorized as a neurodevelopmental disorder.⁷ Neurodevelopmental disorders are characterized by impairment in areas such as personal, social, academic, or occupational

² GARY B. MESIBOV ET AL., *AUTISM: UNDERSTANDING THE DISORDER* 4–5 (1997).

³ *Id.* at 5.

⁴ *See, e.g., id.* at 7–8 (explaining that in 1967, Bruno Bettelheim wrote a book titled *The Empty Fortress* where he noted similarities between children with autism and “the hopeless withdrawal” of victims of concentration camps); *see also id.* at 15–16 (noting that in 1961, Charles Ferster discovered that children with autism learned by reinforcement).

⁵ *See id.* at 1 (“As we learn more about people with autism, we realize how difficult it can be for them to function effectively in our schools and society On the other hand, we are encouraged and inspired by what they can achieve . . .”).

⁶ *How Common Is Autism?, Frequently Asked Questions*, AUTISM SPEAKS, <http://www.autismspeaks.org/what-autism/faq> (last visited Jan. 12, 2015).

⁷ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 50 (5th ed. 2013) [hereinafter *DSM-V*].

functioning.⁸ Autism is typically diagnosed in infancy or early childhood, with characteristics manifesting themselves within the first years of an individual's life.⁹ Autism is also on a spectrum, and the level of severity varies with each individual.¹⁰ Autistic individuals can receive treatment through methods such as therapy, intervention programs, and education.¹¹ However, most autistic individuals will require services throughout their lives.¹²

Autism is commonly diagnosed according to the standards in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-V").¹³ One diagnostic criterion for autism is a "[p]ersistent deficit[] in social communication and social interaction."¹⁴ This criterion is categorized by difficulty having a "normal back-and-forth conversation," failure to initiate social interactions, or poor verbal and nonverbal communication.¹⁵ Similarly, an autistic individual may have difficulty developing and understanding relationships.¹⁶ Furthermore, due to social impairment, autistic individuals may also demonstrate difficulty with "emotional relatedness" or empathy for others.¹⁷ The DSM-

⁸ *Id.* at 31 ("The [neurodevelopmental] disorders typically manifest early in development, often before the child enters grade school, and are characterized by developmental deficits that produce impairments of personal, social, academic, or occupational functioning.").

⁹ *Id.* at 55.

¹⁰ *Id.* at 53 ("Manifestations of the disorder also vary greatly depending on the severity of the autistic condition, developmental level, and chronological age; hence, the term spectrum." (emphasis omitted)).

¹¹ See Thomas A. Mayes, *Persons with Autism and Criminal Justice: Core Concepts and Leading Cases*, 5 J. POSITIVE BEHAV. INTERVENTIONS 92, 93 (2003).

¹² See MESIBOV ET AL., *supra* note 2, at 29 ("People with autism certainly improve as they grow older, some dramatically, especially if they receive competent support and education, but they continue to need some form of assistance for the rest of their lives.").

¹³ See *United States v. Lange*, 445 F.3d 983, 985 (7th Cir. 2006) (writing that the DSM is "the most common reference tool for psychological disorders").

¹⁴ DSM-V, *supra* note 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Cory Shulman et al., *Moral and Social Reasoning in Autism Spectrum Disorders*, 42 J. AUTISM & DEVELOPMENTAL DISORDERS 1364, 1364 (2011) ("Even more cognitively able individuals with ASD experience marked and sustained difficulties in social interactions and emotional relatedness, which continue to impede the development of intimate and effective social interactions throughout their lives."). This, however, is not to say that autistic individuals are void of any emotion or empathy. For example, Temple Grandin, an autistic woman who has published many works on autism, stated, "I definitely have emotions When

V also lists “[r]estricted, repetitive patterns of behavior, interests, or activities” as a diagnostic criterion for autism spectrum disorder.¹⁸ This may manifest itself through repetitive motor movements or by a preoccupation with specific interests.¹⁹ Autistic individuals might have “[t]ightly focused attention,” which may lead them to get upset when their focus is overwhelmed.²⁰ Finally, it is important to note that these are only potential characteristics of autistic individuals as each individual is unique, and not every individual diagnosed with autism will exhibit identical characteristics.²¹

The social impairment of autistic individuals may make it difficult for them to communicate with others or recognize social cues.²² This impairment may inhibit conversation skills.²³ For example, an autistic individual may “find it hard to pay special attention to people.”²⁴ “They may see sparkling eyes and rows of teeth but not see the underlying emotion of ‘happiness.’ They may notice the lines of hair or the perfume but not the facial expression.”²⁵ Again, these are not stereotypical of all autistic individuals, but are merely examples of characteristics.²⁶

An individual diagnosed with autism may also be diagnosed with another illness or disability. About seventy percent of autistic individuals are also diagnosed with mental retardation,

important people in my life die, I become very sad, and I often cry during sad movies. . . . There are a few areas where my emotions may be different. I am not easily shocked or horrified.” Temple Grandin, *How People with Autism Think*, in *LEARNING AND COGNITION IN AUTISM* 137, 148–49 (Eric Schopler & Gary B. Mesibov eds., 1995).

¹⁸ DSM-V, *supra* note 7.

¹⁹ *Id.* (describing repetitive motor movements, use of objects, or speech as “simple motor stereotypies” such as “lining up toys or flipping objects”).

²⁰ See JOHN CLEMENTS & EWA ZARKOWSKA, *BEHAVIOURAL CONCERNS AND AUTISTIC SPECTRUM DISORDERS* 23–24 (2000); MESIBOV ET AL., *supra* note 2, at 5 (“[Leo Kanner] observed that the children strictly followed many routines, becoming very upset at any changes in their rituals.”).

²¹ See *What Is Autism?, Frequently Asked Questions*, AUTISM SPEAKS, <http://www.autismspeaks.org/what-autism/faq> (last visited Jan. 12, 2015).

²² See CLEMENTS & ZARKOWSKA, *supra* note 20, at 12–13.

²³ *Id.* at 12–14.

²⁴ See *id.* at 12–13. However, this does not mean that individuals with autism are completely incapable of communicating altogether. See Matthew S. Luxton, Comment, *Facilitated Communication for People with Autism in the Courts: Balancing the Need for Reliable Evidence with the Requirements of the Constitution*, Comment, 18 *HAMLIN L. REV.* 201, 207 (1994).

²⁵ See CLEMENTS & ZARKOWSKA, *supra* note 20, at 13.

²⁶ See *supra* note 21 and accompanying text.

also called an intellectual disability.²⁷ Autism and an intellectual disability are distinct disabilities, although autism is often confused with an intellectual disability.²⁸ An individual with an intellectual disability is diagnosed by deficits in general mental abilities, often evident by a lower IQ, and impairment in everyday adaptive functioning.²⁹ Autism, however, is not diagnosed by any lack of intellectual functioning or low IQ, but rather through social, behavioral, and communicative impairments.³⁰ Autism also can occur with other “mental impairments” such as seizure disorders or attention deficit disorder.³¹

The distinction between autism and an intellectual disability is crucial for a criminal defendant. For example, if an offending individual is diagnosed with autism and an intellectual disability, that individual may successfully use the insanity defense or receive a lower sentence on the basis of that intellectual disability.³² This is because a court may better recognize an intellectual disability in the context of the insanity defense.³³ This can make it more difficult for a higher-functioning autistic individual, who is not diagnosed with an intellectual disability, to pursue the insanity defense or a lower sentence based on the individual’s disability.³⁴

²⁷ See Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 897 (2009); see also DSM-V, *supra* note 7, at 33 (stating that the term “mental retardation” is replaced with the term “intellectual disability”).

²⁸ See Luxton, *supra* note 24, at 206–07; see also NAZEER, *supra* note 1, at 224 (stating that autistic individuals are either seen as having an “extraordinary mind” or as being “fools, or idiots”).

²⁹ DSM-V, *supra* note 7, at 37.

³⁰ *Id.* at 50–51.

³¹ See Mayes, *supra* note 11.

³² See, e.g., *United States v. Jones*, 42 F. App’x 879, 880–82 (7th Cir. 2002) (stating that mental retardation qualified a defendant for a downward departure of a sentence under the Federal Sentencing Guidelines).

³³ In *Atkins v. Virginia*, the Supreme Court discussed the lower level of culpability for mentally retarded defendants in the context of the death penalty. 536 U.S. 304, 318–20 (2002).

³⁴ See Marc R. Woodbury-Smith et al., *A Case-Control Study of Offenders with High Functioning Autistic Spectrum Disorders*, 16 J. FORENSIC PSYCHIATRY & PSYCHOL. 747, 747–48 (2005).

B. Autism and Crime

1. Criminal Behavior Generally

There is little evidence that autistic disorders are linked directly to criminal behavior, although certain clinical features of autism can predispose an autistic individual to criminal offending.³⁵ General factors that may make an autistic individual vulnerable to offending include “poor school achievement, truancy, aggressive behaviour,” and factors directly linked to autistic characteristics such as “poor social understanding or circumscribed interests; difficulties in adjusting to the diagnosis; and the impact of social exclusion.”³⁶ Considering that autistic individuals often rely on regimented routines, “[a]ggressive behaviour may arise from a disruption of routines or stress from change in daily circumstances.”³⁷ Criminal acts might also stem from obsessions or special interests.³⁸ The factor, for example, that often links criminal offending and Asperger’s Syndrome³⁹ is “the pursuit of circumscribed interests, such as theft of electronics for the purpose of disassembling them.”⁴⁰ On the other hand, however, autistic individuals might be less likely to commit crimes, considering “the very rigid way” in which many of these individuals “tend to keep to rules and regulations.”⁴¹

³⁵ David Allen et al., *Offending Behaviour in Adults with Asperger Syndrome*, 38 J. AUTISM & DEVELOPMENTAL DISORDERS 748, 748 (2008) (“The apparent association with offending [and Asperger’s] has been in part generated by sensationalised, but often unsubstantiated in diagnostic terms, media reports.”); Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483, 507–09 (2010). See generally Woodbury-Smith et al., *supra* note 34.

³⁶ Woodbury-Smith et al., *supra* note 34, at 748 (citation omitted).

³⁷ Svend Erik Mouridsen et al., *Pervasive Developmental Disorders and Criminal Behaviour: A Case Control Study*, 52 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 196, 202 (2008), available at <http://ijo.sagepub.com/content/52/2/196>.

³⁸ Woodbury-Smith et al., *supra* note 34, at 748.

³⁹ Under the fourth edition of the DSM, autism spectrum disorders and Asperger’s were considered separate disabilities; the fifth edition of the DSM refers to them equally. See DSM-V, *supra* note 7, at 51; see also *DSM-V – What Do the Changes Mean?*, JOHNSON CTR. FOR CHILD HEALTH & DEV. (Apr. 10, 2012), <http://www.johnson-center.org/blog/entry/105#.UxuLEvldXl0>.

⁴⁰ Susan London, *Asperger’s Diagnosis Is Tenuous After a Crime*, CLINICAL PSYCHIATRY NEWS, Apr. 1, 2009, at 34.

⁴¹ See Mouridsen et al., *supra* note 37.

Another characteristic of autism that might make an individual vulnerable to committing a crime is the potential difficulty of feeling empathy for others.⁴² In *A Case-Control Study of Offenders with High Functioning Autistic Spectrum Disorders*, a study was conducted to decipher whether autism is linked to criminal behavior and to identify the traits of autism that would make an autistic individual vulnerable to criminal offending.⁴³ The study found that offending was associated with poor empathy skills such as “impaired recognition of the emotional expression of fear.”⁴⁴ Lacking empathetic feelings can make it difficult for an autistic individual to understand another’s distress.⁴⁵

Similarly, social and communicative impairments can make navigating the criminal justice system difficult for an individual with autism or Asperger’s. For example, criminally charged defendants with Asperger’s claimed the court system was daunting as they often felt that they could not “take everything in,” that their Asperger’s had “not . . . been taken into account,” and that they did not feel “believed.”⁴⁶ One man who was convicted of assault stated that a general understanding of Asperger’s within the court system could generally improve the criminal justice system.⁴⁷ He stated, “I know I come across as different to them. If they understood that I had it, and they understood about Asperger Syndrome, then they would understand me more.”⁴⁸

2. Sex Crimes

Although there is no direct link between autism and sex crimes, characteristics of autism may also predispose an autistic individual to sexual crimes.⁴⁹ Autistic individuals have been

⁴² See *supra* note 17 and accompanying text.

⁴³ Woodbury-Smith et al., *supra* note 34, at 747.

⁴⁴ *Id.* at 756.

⁴⁵ *Id.* at 758.

⁴⁶ Allen et al., *supra* note 35, at 754.

⁴⁷ *Id.* at 755.

⁴⁸ *Id.*

⁴⁹ See Mark Mahoney, *Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography*, HARRINGTON & MAHONEY 34 (2009), <http://www.harringtonmahoney.com/documents/Aspergers%20Syndrome%20and%20the%20Criminal%20Law%20v26.pdf> (“There is nothing inherent in Asperger’s Syndrome to make individuals likely to develop sexual fantasies of one kind or another or to make individuals inclined to sexual deviance of any kind.”).

found to have “lower levels of sexual experience, sexual, and social behaviour, and less understanding of privacy.”⁵⁰ A person with a pervasive developmental disorder “may have difficulty indicating his or her interest toward another person in a socially acceptable way, which may lead to touching or kissing a stranger.”⁵¹ Autistic individuals may struggle to distinguish boundaries. For example, an individual with Asperger’s may look at child pornography but have no sense of the harm it is causing the child.⁵² Possible explanations for this misunderstanding include that autistic individuals may perceive themselves as younger than they are, may not understand societal notions, or simply lack empathetic ability.⁵³ Further, it has been found that the “line” between child pornography and legal pornography can be blurred for autistic individuals, who may be “completely unaware they have crossed a moral and legal line.”⁵⁴

II. AUTISM AS A DEFENSE

When an autistic individual is charged with a crime, one issue is whether autism is a defense to that crime. Autism could potentially be a defense in two ways. First, it may negate an element of a crime, and thus the individual would not be found guilty. Second, it could serve as an excuse to a crime. Autism is currently not an affirmative defense and there has been debate within society as to whether it should be one.⁵⁵ This Part explores the issue of autism as a defense. Part II.A looks at cases where autism has negated an element of a crime. Part II.B

⁵⁰ Prianka Mehzabin & Mark A. Stokes, *Self-Assessed Sexuality in Young Adults with High-Functioning Autism*, 5 RES. AUTISM SPECTRUM DISORDERS 614, 619 (2011).

⁵¹ Mouridsen et al., *supra* note 37, at 197; *cf.* Mahoney, *supra* note 49, at 35 (stating that due to shyness or poor social skills, an autistic individual may be less likely to approach another individual in a sexual capacity).

⁵² Mahoney, *supra* note 49, at 43–44; *see also id.* at 37–38 (explaining that individuals with Asperger’s have been deemed to have a desire for intimate relationships but are unable to form them and thus “withdraw[] into the computer as an ostensibly safe refuge”).

⁵³ *Id.* at 40, 42–43.

⁵⁴ *Id.* at 39.

⁵⁵ *See, e.g.*, David Kushner, *The Autistic Hacker*, IEEE SPECTRUM (June 27, 2011, 17:46 GMT), <http://spectrum.ieee.org/telecom/internet/the-autistic-hacker/0> (describing the conflict as to whether Asperger’s should be a defense for hackers in the digital age).

analyzes the insanity statute, and explains why an autistic individual ordinarily will not be able to use autism as a defense through the insanity statute. Part II.C then looks at autism as an affirmative defense. This Part concludes that autism should not be an affirmative defense generally, but should be a defense to specific minor crimes.

A. *Autism Negating Elements of Crimes*

1. Actus Reus

Autism can be used to negate the actus reus, the act itself, of a crime, by demonstrating that there is another explanation for the criminal act. In *State v. Suber*,⁵⁶ the defendant was arrested and convicted of driving under the influence of a controlled substance by a Minnesota state court.⁵⁷ In that jurisdiction, driving under the influence of a controlled substance was proved either by a chemical test or if the individual demonstrated “outward manifestations of [impairment].”⁵⁸ The arresting officer had relied on “outward manifestations of impairment” when arresting Suber.⁵⁹ The arresting officer testified that Suber appeared under the influence of marijuana because he “appeared shaken and jittery.”⁶⁰ The drug recognition expert testified that Suber performed poorly during a walk-and-turn exercise, as he used slow and deliberate “robotic type movements.”⁶¹ At trial, Suber introduced evidence that he was diagnosed with Asperger’s.⁶² For him, Asperger’s was manifested by impairment of eye contact and the ability to interpret social cues, and also caused him to have “stiff, wooden, and mechanical” movements.⁶³ The court reversed the conviction, holding that the conviction was an error because there was insufficient evidence to prove that Suber was driving under the influence.⁶⁴ The court reasoned that the officers had not considered how Suber’s Asperger’s

⁵⁶ No. A06-2438, 2008 WL 942622 (Minn. Ct. App. Apr. 8, 2008).

⁵⁷ *Id.* at *1.

⁵⁸ *Id.* at *4 (alteration in original) (quoting *State v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985)).

⁵⁹ *Id.* at *5.

⁶⁰ *Id.* at *2.

⁶¹ *Id.*

⁶² *Id.* at *3.

⁶³ *Id.*

⁶⁴ *Id.* at *5–6.

would affect his field sobriety test and, at trial, related their testimony without “reference to the potential effects of his autism on their ultimate conclusions.”⁶⁵ Here, Asperger’s negated the actus reus of the crime. Suber did not demonstrate an “outward manifestation of impairment” by ingesting a controlled substance, but did so due to his disability.

2. Mens Rea

Evidence of an autistic disorder can also be used to negate the mens rea, or mental state, of a crime. In *United States v. Cottrell*,⁶⁶ William Jensen Cottrell appealed his conviction for conspiracy to commit arson and seven counts of arson.⁶⁷ Regarding the arson counts, the government charged Cottrell with aiding and abetting.⁶⁸ The lower court had excluded evidence of Cottrell’s diagnosis of Asperger’s, and he appealed.⁶⁹ The appellate court found that aiding and abetting is a specific intent crime, and that the issue of intent is subjective.⁷⁰ Since it was subjective, the court found that evidence of Cottrell’s Asperger’s could have played a role in negating his intent.⁷¹ The court held that “[t]o the extent that the Asperger’s evidence was aimed at defeating an inference of Cottrell’s intent from the circumstances, it was relevant and could have assisted the jury’s determination of whether Cottrell had the specific intent required for aiding and abetting.”⁷² Due to the exclusion of that evidence, the court vacated the convictions for arson.⁷³ In this

⁶⁵ *Id.* at *5.

⁶⁶ 333 F. App’x 213 (9th Cir. 2009).

⁶⁷ *Id.* at 215.

⁶⁸ *Id.* at 216.

⁶⁹ *Id.*

⁷⁰ *Id.* (finding that where a defendant associates himself with a crime, participates in it as something he wished would occur, and attempts to make it succeed, that crime is a specific intent crime).

⁷¹ *Id.* The court also found that evidence of Asperger’s was not admissible to negate criminal responsibility for the charge of conspiracy. *Id.* at 215. The court reasoned that whether Cottrell was liable for conspiracy depended on whether “the acts making up the crime were reasonably foreseeable.” *Id.* The court concluded that “reasonably foreseeable” was judged under an objective standard, and evidence of Asperger’s did not “speak to that objective standard.” *Id.* at 215–16.

⁷² *Id.* at 216.

⁷³ *Id.* at 216–17.

case, evidence of Asperger's directly played a role as to whether the defendant had the necessary mental state—specific intent—for the crime.⁷⁴

B. *Autism and the Insanity Defense*

In cases where autism does not negate an element of a crime, the next question is whether autism can be used as defense. In theory, an autistic individual could attempt to use the insanity defense. This, however, can be problematic for an individual due to the unique characteristics of autism. This Section analyzes standards for legal insanity and presents reasons as to why autism does not necessarily “fit” within those standards.

There are various versions of the insanity test.⁷⁵ Most modern tests “employ cognitive and/or volitional criteria.”⁷⁶ A cognitive test focuses on individuals’ knowledge about their actions and the crimes.⁷⁷ The federal test for insanity, for example, is purely cognitive.⁷⁸ A volitional test focuses on whether individuals can control their actions.⁷⁹ The insanity defense from the Model Penal Code is a blend of cognitional and volitional elements.⁸⁰ The volitional element, however, is often

⁷⁴ Cf. *People v. Larsen*, 140 Cal. Rptr. 3d 762, 778 (Ct. App. 2012) (holding that the defendant’s Asperger’s did not negate his mental state).

⁷⁵ See Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1381–89 (1986) (outlining five versions of the insanity test: the *M’Naghten* test, the irresistible impulse test, the product test, the Model Penal Code test, and the new federal test).

⁷⁶ *Id.* at 1390.

⁷⁷ *Id.* at 1381 (stating that the cognition test originated from the *M’Naghten* test, which articulated that a defendant was insane if “he was ‘labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong’ ” (quoting *M’Naghten’s Case*, (1843) 8 Eng. Rep. 718 (H.L.) 722; 10 Cl. & Fin. 200, 210)).

⁷⁸ See 18 U.S.C. § 17(a) (2012) (stating that it is an affirmative defense if a 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”).

⁷⁹ See *Clark v. Arizona*, 548 U.S. 735, 749 (2006) (“The volitional incapacity or irresistible-impulse test . . . asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions.” (footnotes omitted)).

⁸⁰ See MODEL PENAL CODE § 4.01(1) (1962) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” (alteration in original)).

rejected.⁸¹ This is in part due to the fear that it is not reliable. For example, Congress decided not to include a volitional prong in the federal insanity defense “because of the difficulty of proving reliably whether a particular defendant was unable rather than unwilling to exercise self-control.”⁸²

The distinction between a defect of cognition and a defect of volition is the first reason why an autistic defendant may find the insanity defense problematic. Although some autistic individuals may commit a crime due to a lack of knowledge, others may commit a crime due to a lack of control. The lack of control, however, may stem back to characteristics of autism, and not necessarily to a high level of culpability. For example, individuals with Asperger’s may commit a crime due to “being obsessional in pursuit of a desired outcome.”⁸³ This can be linked to the autistic clinical feature of repetitive types of behaviors, interests, or activities.⁸⁴

The distinction between a defect of cognition and volition is apparent in *Commonwealth v. Rabold*.⁸⁵ In *Rabold*, the defendant, who was diagnosed with autism, was charged with attempted homicide, aggravated assault, and possession of an instrument of crime.⁸⁶ The defense psychiatrist testified that the defendant, at the time the crime was committed, felt that he had to do it.⁸⁷ The prosecution’s psychiatrist pointed out that this was a defect of volition, not a defect of cognition.⁸⁸ The insanity statute in Pennsylvania—where the defendant was prosecuted—did not contain a volitional prong, but was based upon whether the defendant did not know the nature or quality of the act or that the defendant did not know that it was wrong.⁸⁹ The state’s psychiatrist pointed out that the defendant’s inability to appreciate his action was a defect of volition, not a defect of

⁸¹ See Michael Corrado, *The Case for a Purely Volitional Insanity Defense*, 42 TEX. TECH. L. REV. 481, 482 (2009).

⁸² See Sendor, *supra* note 75, at 1388 n.84 (citing S. REP. NO. 98-225, at 225–29 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3407–11).

⁸³ See Allen et al., *supra* note 35, at 753.

⁸⁴ See *supra* notes 18–20 and accompanying text. See generally Allen et al., *supra* note 35.

⁸⁵ 951 A.2d 329 (Pa. 2008).

⁸⁶ *Id.* at 331.

⁸⁷ *Id.* at 331–32.

⁸⁸ *Id.*

⁸⁹ *Id.* at 330–31.

cognition, on which the statute is based.⁹⁰ The jury delivered a verdict of guilty but mentally ill, where the defendant is not found legally insane but found mentally ill at the time of the crime.⁹¹ If the Pennsylvania statute had included a defect of volition, and not only a defect of cognition, the defendant in *Rabold* might have been successful in using his autism as a defense. The distinction between a defect of volition and cognition could have made all the difference for this autistic defendant.

The second reason why the insanity defense is an insufficient defense is because an autistic individual may not “appear” insane.⁹² The federal insanity statute qualifies the insanity defense by requiring that individuals not be able to appreciate their actions due to a “severe mental disease or defect.”⁹³ Similarly, the Model Penal Code allows the defense for individuals who suffer from a “mental disease or defect” and do not have the “substantial capacity” to appreciate the wrongfulness of their actions.⁹⁴ Both statutes require a high standard for mental illness, with “severe” placed in the federal test and “substantial” placed in the Model Penal Code test. As stated earlier, autism is not an intellectual disability and some autistic individuals are fully functional within society.⁹⁵ Autism may manifest itself in subtle, but distinct ways, such as odd mannerisms or strange social reactions.⁹⁶ An autistic individual, however, may not openly appear to be extremely mentally ill. To a judge or jury, that individual may not appear to be suffering from a severe mental illness at all. This may prejudice particularly higher-functioning individuals who attempt to use the insanity defense, as they might appear less affected by a mental disease or defect.

⁹⁰ *Id.* at 332.

⁹¹ *Id.* at 334–35. A defendant who is found guilty but mentally ill might receive a sentence equivalent to that imposed on any person convicted of the same crime, but the court must hold a hearing to determine the defendant’s current need for treatment. *Id.* at 334.

⁹² See Woodbury-Smith et al., *supra* note 34, at 748 (stating that offenders are normally high-functioning autistic individuals).

⁹³ See 18 U.S.C. § 17(a) (2012).

⁹⁴ See MODEL PENAL CODE § 4.01 (1962).

⁹⁵ See Mayes, *supra* note 11 (“Few adults with autism ‘enjoy a degree of independence typically associated with adulthood,’ although many may prosper with only limited support.” (citation omitted)); *supra* notes 27–31 and accompanying text.

⁹⁶ See *supra* notes 14–26 and accompanying text.

C. *Autism as an Affirmative Defense*

If autism does not fit within the insanity defense, the next issue is whether it should be an affirmative defense. However, although it may be a sensible defense in certain scenarios, autism would not be an appropriate affirmative defense. This Section explores this issue.

1. Generally

The first reason why autism would not be an appropriate affirmative defense is because autism is on a spectrum. This fact makes it extremely difficult for a legislature to come up with a bright-line rule for a statute.⁹⁷ Unlike other illnesses, such as an intellectual disability that may be diagnosed in part by an individual's IQ,⁹⁸ there is no specific way to measure the degree of an individual's autism.⁹⁹ Autism, instead, is diagnosed based on categorical criteria such as social impairment, communicative difficulties, and repetitive interests.¹⁰⁰ It would be difficult, if not impossible, to come up with a unified standard due to the fact that autism is unique to each individual.¹⁰¹ Asperger's Syndrome, for example, has been described as a "hard disorder to understand because [individuals with Asperger's] have some capacities but not others."¹⁰² 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.¹⁰³

⁹⁷ Due to the lack of bright-line rules, it would be difficult for the legislature to write a statute that could be implemented fairly. See, e.g., Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1711 (2001) (stating that a stand-alone cultural defense would fail because "there are no bright line rules that can be implemented to ensure that the cultural defenses can be fairly applied").

⁹⁸ See DSM-V, *supra* note 7, at 37 (stating that diagnostic criteria of an intellectual disability include "deficits in general mental abilities" where a lower IQ is considered along with difficulty with verbal comprehension, working memory, and perceptual reasoning).

⁹⁹ See *supra* note 10 and accompanying text.

¹⁰⁰ See *supra* notes 14–26 and accompanying text.

¹⁰¹ See *supra* note 21 and accompanying text.

¹⁰² See London, *supra* note 40 (internal quotation mark omitted).

¹⁰³ See Caruso, *supra* note 35, 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.").

Line-drawing would also be impossible due to the spectrum. A study of autistic defendants revealed that “the more severe the impairment, the more likely that an accused with autism will be able to successfully raise an autism-related defense.”¹⁰⁴ However, there are two problems with this approach to autism as a defense. First, there is no concrete way to measure the level of impairment. Although autistic individuals are often referred to as higher-functioning or lower-functioning in everyday life, the DSM-V does not qualify individuals on that basis.¹⁰⁵ Second, this approach disregards the fact that higher-functioning individuals also may be vulnerable to committing crimes due to autism related impairments.¹⁰⁶ Ultimately, autism would be too difficult to implement as a defense due to the autism spectrum. Guilt, which is all or nothing, requires a black and white standard. Autism, however, is far from black and white.

Another reason why autism is a problematic affirmative defense is due to rehabilitation. There is great value in rehabilitating autistic offenders. Rehabilitation is a cornerstone of the principles of punishment in our criminal justice system as it, in theory, benefits both the individual and society.¹⁰⁷ Rehabilitation may benefit the autistic offender as well, as autistic individuals do have the ability to learn, grow, and change throughout their lives.¹⁰⁸ This can particularly benefit higher-functioning individuals who are active members of society.¹⁰⁹ Further, rehabilitation in prison can be a better alternative than mental health treatment. For example, in *United States v. Lucas*,¹¹⁰ the court found that treatment alone was not sufficient for a defendant with Asperger's convicted of transporting a firearm with intent to commit a felony.¹¹¹ The court determined that incarceration was necessary because the defendant had received extensive counseling in the past but that counseling

¹⁰⁴ See Mayes, *supra* note 11, at 94.

¹⁰⁵ See DSM-V, *supra* note 7, at 50–51.

¹⁰⁶ See *supra* Part I.B.

¹⁰⁷ Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in FOUNDATIONS OF CRIMINAL LAW 60, 61 (Leo Katz et al. eds., 1999) (discussing two views justifying rehabilitation: one where society rehabilitates in order to make “the streets” safer, and one where society rehabilitates offenders so that they can lead “flourishing and successful lives”).

¹⁰⁸ See *supra* note 11 and accompanying text.

¹⁰⁹ See *supra* note 105 and accompanying text.

¹¹⁰ 670 F.3d 784 (7th Cir. 2012).

¹¹¹ *Id.* at 794–95.

proved ineffective.¹¹² Rehabilitation weighs against establishing autism as an affirmative defense because our criminal justice system requires, as it does for all guilty defendants, rehabilitation.

However, rehabilitation through a prison setting can be harmful for an autistic defendant. Autistic individuals respond to punishment differently and learn in different ways.¹¹³ An autistic individual can often learn better by being redirected and encouraged.¹¹⁴ Incarceration may not necessarily serve any rehabilitative purpose without parallel services aimed at remedying the autistic individual's behavior. Similarly, using punishment can have an adverse effect on an autistic individual as "[p]unishment procedures can produce signs of anxiety ranging from avoidance behavior to aggression."¹¹⁵

Rehabilitation through incarceration poses both costs and benefits for an autistic individual. However, this assessment should occur at the sentencing phase, rather than during the trial as an affirmative defense. In some instances, rehabilitation can be extremely beneficial. In others, however, it may be harmful and lead to negative consequences. The type of rehabilitation ultimately depends on the strengths, weaknesses, and needs of the specific individual. Considering this, autism as an affirmative defense would fail in regards to rehabilitation. Instead, this is an issue that is better addressed at a sentencing hearing, when a judge can take into account the needs of an individual. This is more thoroughly discussed in Part IV of this Note.

¹¹² *Id.* at 794.

¹¹³ For example, in *United States v. Morais*, 670 F.3d 889 (8th Cir. 2012), a case heavily discussed in Part IV, a defendant pled guilty to receiving child pornography and appealed his sentence. *See id.* at 891. The defense's medical expert testified that the defendant would have difficulty learning in jail. Brief for Appellant, *Morais*, 670 F.3d 889 (No. 11-1793), 2011 WL 2604025, at *12. The medical expert explained that punishment in prison "would not . . . deter" Morais because "he wouldn't be successful at changing that behavior unless he had feedback about what to do instead, the corrective strategy to use. It can't be just no, it has to be 'You should do it this way instead.'" *Id.*

¹¹⁴ *See* CLEMENTS & ZARKOWSKA, *supra* note 20, at 198–216 (discussing constructive ways to respond to behavior by an autistic individual that may cause concern).

¹¹⁵ June Groden et. al., *The Impact of Stress and Anxiety on Individuals with Autism and Developmental Disabilities*, in *BEHAVIORAL ISSUES IN AUTISM* 177, 182 (Eric Schopler & Gary B. Mesibov eds., 1994).

Third, autism could not function as an affirmative defense due to moral blameworthiness. Moral blameworthiness has become a “paradigm for moral responsibility” where individuals “deserve moral blame for conduct that breaches community norms.”¹¹⁶ An individual is morally blameworthy when the individual has “the capacity to make moral judgments about what to do and how to be and the ability to act in accordance with such judgments.”¹¹⁷ Autistic individuals can be morally blameworthy, and to make autism an affirmative defense would neglect that fact.

For example, in *People v. Larsen*,¹¹⁸ the defendant Larsen was convicted of conspiracy to commit murder and solicitation to commit murder.¹¹⁹ On appeal, Larsen argued that his Asperger’s negated his mental state and the trial court erred when it did not give an instruction on his Asperger’s.¹²⁰ The court held that it was an error not to instruct the jury to consider his Asperger’s, but that the error was not prejudicial.¹²¹ The court reasoned:

The evidence of defendant’s guilt was not only quite forceful, much of it was unrelated to manifestations of his Asperger’s Syndrome. The numerous and detailed discussions, plans, maps, and drawings, the procurement of equipment, the strategy expressed by defendant to strap and compact the intended victim for placement in a cement-filled trough, and the payments made by defendant’s father to several inmates, convincingly established that defendant pursued a serious scheme Defendant’s strong motive and desire to kill Jane Doe was derived from the circumstances he faced, not his mental disorder.¹²²

In looking at the court’s reasoning, it is clear that the court believed that the defendant was morally blameworthy. He did not devise a plan due to his illness, but rather “from the circumstances he faced.”¹²³ It would be unfair in this case to allow the defendant to use his Asperger’s as a defense.

¹¹⁶ Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1517 (1992).

¹¹⁷ *Id.* at 1518 (emphasis omitted).

¹¹⁸ 140 Cal. Rptr. 3d 762 (Ct. App. 2012).

¹¹⁹ *Id.* at 767.

¹²⁰ *Id.* at 773–74.

¹²¹ *Id.* at 782–83.

¹²² *Id.* at 783.

¹²³ *Id.*

Ultimately, that some defendants are morally blameworthy weighs against autism as an affirmative defense. However, in some situations it may be more ambiguous if an autistic defendant is morally blameworthy. For example, in *United States v. Cottrell*, the court was unsure as to whether the defendant's Asperger's negated his intent to aid and abet.¹²⁴ If the defendant did not have the intent to commit the crime, then he certainly could not have been morally blameworthy. Again, due to these competing interests, autism as an affirmative defense would be problematic. The solution instead is to make autism a defense to specific minor crimes, which is discussed in Part II.C.2.

A final reason why autism should not be an affirmative defense is due to the difficulty in creating an efficient standard. As stated above, the insanity defense is insufficient for individuals with autism in part because of the distinction between a defect of cognition and a defect of volition, and the chance that an autistic defendant might be less culpable due to a defect of volition.¹²⁵ It is unlikely that the legislature would draft a defense involving a volitional element considering its past rejection of a volitional prong for the insanity defense.¹²⁶ Furthermore, that autism is on a spectrum makes drafting a statute extremely difficult, as "line-drawing" is impossible.¹²⁷ For these two reasons, it would be extremely difficult for a legislature to draft a statute for autism as a defense.

2. Specific Offenses

Although autism should not be an affirmative defense, autism is a sensible defense to specific crimes. This Subsection explores specific offenses in which autism would serve as an appropriate defense. These crimes are minor and can be linked directly to specific characteristics of autism. When coupling the explanation of autism with the generally low harm of these crimes, autism as a defense to these specific crimes does not pose the same problems when used as an affirmative defense.

¹²⁴ See 333 F. App'x 213, 216 (9th Cir. 2009); see also *supra* Part II.A.2.

¹²⁵ See *supra* notes 75–84 and accompanying text.

¹²⁶ See *supra* notes 75–84 and accompanying text.

¹²⁷ See *supra* note 10 and accompanying text.

The first category of crimes in which autism is a logical defense is minor sexual offenses. This is because an autistic individual may be susceptible to committing a minor sexual offense due to the characteristics of autism.¹²⁸ An autistic individual's knowledge regarding sexuality and how to act in sexual scenarios is limited.¹²⁹ But, despite being incorrectly viewed as sexually immature due to limited experience, autistic individuals are interested in their sexuality, romantic relationships, and marriage.¹³⁰ Due to these limitations, an autistic individual has the potential to behave in an inappropriate sexual manner.¹³¹ Autistic individuals, for example, have displayed inappropriate behavior such as masturbating in public or kissing strangers.¹³² This behavior, however, may be attributed to a lack of social understanding rather than a desire to break the law.¹³³ Similarly, due to clinical features of autism, an individual may "determinedly pursue, harass, and intimidate another into some kind of relationship."¹³⁴ Again, this is not due to an instinctive criminal behavior, or even a feeling of carelessness to another, but rather due to "the combination of poor social understanding, a lack of understanding of behavioural propriety, and . . . obsessional preponderance."¹³⁵

Considering the explanation above, there is a strong argument that autism should be a defense to a minor sexual crime. Consider an example of forcible touching in New York. Hypothetically, assume that Joe, an autistic male, sees Anne, a female stranger. Joe approaches Anne, kisses her on the cheek, and squeezes her buttocks. In New York, this could constitute "forcible touching," which is defined as when a person "intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of

¹²⁸ See *supra* Part I.B.2.

¹²⁹ See *supra* Part I.B.2.

¹³⁰ Mark A. Stokes & Archana Kaur, *High-Functioning Autism and Sexuality: A Parental Perspective*, 9 AUTISM 266, 266 (2005).

¹³¹ *Id.* at 266–67.

¹³² *Id.* at 267–68.

¹³³ *Id.*

¹³⁴ *Id.* at 268.

¹³⁵ *Id.*

gratifying the actor's sexual desire."¹³⁶ In this scenario, assume all of the elements are met: Joe intentionally and forcibly touched Anne for no legitimate purpose, but instead for the purpose of "gratifying the actor's sexual desire." However, Joe did not understand the consequences of his action—both regarding the legal boundary and the effect on Anne. Due to his poor social skills, lack of reception of another's emotions, and a lack of understanding of social boundaries, Joe thought his conduct was acceptable.¹³⁷ Further, Joe did not think that Anne would dislike his affection.¹³⁸ Arguably, Joe's level of culpability to this crime is low and linked directly to autistic characteristics. Therefore, autism is a sensible defense to this crime.

Furthermore, autism as a defense to a minor sexual crime does not pose the same problems as autism as a general defense. That autism is on a spectrum will not present an issue because no bright-line rule is needed. Both lower-functioning and higher-functioning autistic individuals will face challenges with sexuality, and there would be no "line-drawing" necessary regarding the severity of autism.¹³⁹ Also, defendants are not as morally blameworthy because autism could be a reason for the crime. Furthermore, the issue of rehabilitation may no longer pose a problem as an autistic individual who commits a sexual offense is able to gain from rehabilitation.¹⁴⁰ A legislature could also write into a statute that if autistic individuals successfully prevail on autism as a defense for a specific minor crime, they must obtain services or participate in therapy to work on inappropriate sexual behavior.

Autism also is a sensible defense to minor assault crimes. Due to a misunderstanding of social boundaries or poor communication skills, an autistic individual might unintentionally engage in an assault against another individual.¹⁴¹ One minor assault crime is stalking in the fourth degree ("stalking-4"). In New York, stalking-4 is a class B

¹³⁶ N.Y. PENAL LAW § 130.52 (McKinney 2014).

¹³⁷ See *supra* Part I.B.2.

¹³⁸ See Stokes & Kaur, *supra* note 130, at 268 (citing a study of autistic individuals in a group home and finding that their sexual behavior was often aimed at "parent, staff members, strangers and children"—all parties who are not interested in returning the same affection).

¹³⁹ See *supra* notes 50–54 and accompanying text.

¹⁴⁰ See *supra* notes 108–09 and accompanying text.

¹⁴¹ See *supra* notes 14–26 and accompanying text.

misdeemeanor.¹⁴² Under the New York statute, a person is guilty of stalking-4 when that person intentionally engages in a course of conduct directed at a specific person, and knows or reasonably should know that the conduct is likely to cause reasonable fear of material harm to the physical safety, mental or emotional condition of an individual, or make an individual fearful about the individual's employment.¹⁴³

Consider another example. Assume that Phoebe, a young woman in college who is diagnosed with autism, wants to become friends with Mark, a classmate. Phoebe is very shy and has difficulty approaching others.¹⁴⁴ Phoebe follows Mark home from class, but never approaches him. After a few weeks of this, Mark grows fearful. He confronts her, but she does not say anything and continues to follow him the next day. Mark's fear continues to grow to the point where he is afraid to walk home from class. Mark reports her to the police, and Phoebe is charged with stalking in the fourth degree because she reasonably should have known that following Mark would cause material harm to his mental or emotional condition. In this fictional scenario, Phoebe intentionally followed Mark. Since she did not knowingly cause fear, the issue becomes whether she should reasonably have known that the action would cause fear. If this is judged on a subjective standard, then the individual will not be found guilty. But, if more likely, it is judged on an objective standard, then the individual would most likely be found guilty.¹⁴⁵ However, due to Phoebe's autism, there is an explanation that she did not know the action would cause harm and there was no way for her to reasonably know that the action was causing harm. In this case, it is sensible to make autism an affirmative defense to stalking-4 and other similar minor assault crimes, as clinical features of autism may be responsible.

Similar to autism as a defense to a sexual offense, autism as a defense to minor assault crimes does not pose the same issues as autism as a general defense. The fact that autism is on a

¹⁴² N.Y. PENAL LAW § 120.45 (McKinney 2014).

¹⁴³ *Id.*

¹⁴⁴ See *supra* notes 14–17 and accompanying text.

¹⁴⁵ See, e.g., *United States v. Cottrell*, 333 F. App'x 213, 215–16 (9th Cir. 2009) (holding that Asperger's was admissible to negate the mental state of aiding and abetting, which was judged based on the defendant's subjective intent, but that Asperger's was not admissible to negate the mental state for conspiracy because that was judged based on objective intent).

spectrum would not affect a potential rule. Also, Phoebe is not morally blameworthy. And, the legislature can create an educational program with rehabilitative goals for autistic individuals who commit minor assault crimes.

Autism is also sensibly a defense for other minor crimes. One such example is minor theft crimes. Repetitive interests—the third major diagnostic category of autism—can predispose an autistic individual to commit theft.¹⁴⁶ Another example is public disturbance crimes, such as disorderly conduct or harassment. An autistic individual who struggles with communication skills might be in trouble for disturbing the public or shouting at another individual.¹⁴⁷ This could occur due to various potential features of autism, such as feeling overwhelmed in a social situation or the inability to perceive how one's actions come off to others.¹⁴⁸

III. AUTISM AND PREJUDICIAL Demeanor EVIDENCE

The second issue that autistic defendants may face is the risk that juries may misconstrue their behavior while they are testifying. Autistic individuals may find it troubling to testify in their own defense.¹⁴⁹ Individuals may be uncomfortable when speaking in front of others, or fearful that they will act unusual or different and that the jury will be confused.¹⁵⁰ Due to these consequences, an autistic defendant may refuse to testify. This Part addresses this issue and argues that evidence of autism should be admitted during trials in which autistic defendants testify in their own defense in order to combat prejudicial demeanor evidence.

¹⁴⁶ See *supra* note 40 and accompanying text.

¹⁴⁷ This can be traced to difficulty in holding a conversation with others or recognizing social cues. See *supra* notes 22–25 and accompanying text.

¹⁴⁸ See *supra* notes 14–16 and accompanying text.

¹⁴⁹ See *Facts for Prosecutors*, AUTISM SOC'Y OF MAINE, http://www.asmonline.org/programs_law_prosecutors.asp (last visited Jan. 12, 2015) (“Prosecutors should take into account the processing difficulties of autistic individuals when questioning them on the witness stand, giving them adequate time to comprehend and respond to their questions. Be aware that many people with Autism do not show outward emotions . . .”).

¹⁵⁰ See, e.g., *State v. Burr*, 921 A.2d 1135, 1143 (N.J. Super. Ct. App. Div. 2007), *aff'd as modified*, 948 A.2d 627 (N.J. 2008).

A. *Jury Bias and Demeanor Evidence*

Although jurors are presumed unbiased, they are implicitly biased.¹⁵¹ Implicit bias, which is not always recognized, includes “snap judgments” or a biased “perception, forming of impressions, processing of information, use of information, and retrieval of information.”¹⁵² Further, there is evidence that implicit bias exists regarding defendants who plead insanity.¹⁵³ Jurors have considered the insanity defense a “‘loophole’ in the law that allows many guilty criminals to escape punishment.”¹⁵⁴ Furthermore, jurors feel fear regarding a mentally ill defendant.¹⁵⁵

Jurors also use demeanor evidence in evaluating the credibility of a witness.¹⁵⁶ However, the use of this evidence to determine credibility has been questioned.¹⁵⁷ Demeanor can often be misconstrued in a negative and nonsensical way. For example, it has been found that jurors treat “attractive defendants more leniently than unattractive defendants.”¹⁵⁸ Jurors also have used demeanor evidence and implicit bias unfairly against individuals who have pled insanity. In regards to capital punishment cases, it has been said that whether a defendant “looked passive, unremorseful, or emotionless” influenced whether the jury perceived a defendant as risky.¹⁵⁹

¹⁵¹ Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 836 (2012) (“Judges, as well as scholars, have recognized the existence of implicit bias in the courtroom. Supreme Court opinions have acknowledged its presence in jurors, its potential to affect their assessments of evidence, and its potential to affect their verdicts.” (footnotes omitted)).

¹⁵² *Id.* at 834.

¹⁵³ See Jennifer L. Skeem & Stephen L. Golding, *Describing Jurors’ Personal Conceptions of Insanity and Their Relationship to Case Judgments*, 7 PSYCHOL. PUB. POL’Y & L. 561, 563 (2001).

¹⁵⁴ *Id.*

¹⁵⁵ 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, 245 (1994) (stating that in a capital punishment case, mental illness testimony can suggest to the jury that the defendant continuously poses a risk to society).

¹⁵⁶ Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1158 (1993).

¹⁵⁷ *Id.* at 1160–61 (describing that research shows that “one’s ability to detect lies is unrelated to the actual accuracy of the statements”).

¹⁵⁸ See Perlin, *supra* note 155, at 248.

¹⁵⁹ *Id.*

If the jury is unaware of a defendant's autism, the effect of negative demeanor evidence poses a large and substantial risk to defendants diagnosed with autism. The first diagnostic feature of autism, social impairment, may lead an autistic individual to say strange things on the stand, make awkward facial expressions, or cause the individual to freeze due to a dislike of speaking in public.¹⁶⁰ Also, an individual may demonstrate a lack of remorse or empathy, which can be particularly harmful during a criminal trial if the defendant is speaking about a victim.¹⁶¹ Second, if an autistic individual is impaired regarding communication, the individual might be unable to convey accurate thoughts on what occurred.¹⁶² Third, if an autistic individual has repetitive interests, or is seemingly obsessed with something, the jury may find the fascination bizarre. If a jury is likely to be biased strictly on appearance, it is very likely that a jury could misinterpret the demeanor of a defendant diagnosed with a disability that directly affects that individual's ability to communicate and perform in social situations.

This issue was seen in *State v. Burr*, a criminal case in New Jersey.¹⁶³ In *Burr*, the judge grew "alarmed by [the] defendant's odd appearance and demeanor," and ordered a competency evaluation.¹⁶⁴ The defendant was diagnosed with Asperger's.¹⁶⁵ The defendant offered evidence of his Asperger's "to assist the jury in understanding why he might act in a way that appears socially unacceptable to others."¹⁶⁶ The trial court excluded this evidence, and the defendant never testified.¹⁶⁷ On appeal, the defendant argued that he was prevented from a fair trial because the jury "simply saw an odd, eccentric man who never explained his actions."¹⁶⁸ He also alleged that the jury did not understand him due to his Asperger's, which negatively affected his ability to testify at trial.¹⁶⁹ He stated:

¹⁶⁰ See DSM-V, *supra* note 7, at 53–55.

¹⁶¹ See *supra* notes 16–17 and accompanying text.

¹⁶² See *supra* notes 22–26 and accompanying text.

¹⁶³ 921 A.2d 1135 (N.J. Super. Ct. App. Div. 2007), *aff'd as modified*, 948 A.2d 627 (N.J. 2008).

¹⁶⁴ *Id.* at 1142.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1149.

¹⁶⁷ *Id.* at 1149–50.

¹⁶⁸ *Id.* at 1150.

¹⁶⁹ *Id.* at 1150–51.

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

....
My lawyers urged me many times not to get up and speak because of my autistic condition, they know that I always say things that embarrass myself and upset other people.¹⁷⁰

The court ultimately found that the defendant's constitutional right was not violated because his comments and remarks during the trial suggested that he was unlikely to testify.¹⁷¹ However, the court did find that "admitting the evidence would have given the jury a clearer lens through which to view defendant's behavior, including his demeanor while testifying, if he had chosen to do so."¹⁷² This case also demonstrates the fear and insecurity that an individual with an autistic disorder may feel while testifying.

B. Evidence of Autism Should Be Admitted To Combat Prejudicial Demeanor Evidence

If an autistic individual is testifying in the individual's own defense, evidence of autism should be admitted to explain any different or unusual behavior by the individual. This can also help a defendant who is nervous about testifying due to an autistic disorder. Evidence of autism can be admitted through testimony of a medical expert. The testimony need not relate to the effect of autism on the crime; rather, it should relate strictly to the way autism affects the individual's ability to speak and act in front of others. Although a prosecution might dislike this tactic because there is a risk that the jury will be more sympathetic toward a defendant with autism, any evidence admitted must come with limiting jury instructions from the judge. Such instructions should explain that the testimony is being admitted solely for the purpose of explaining the defendant's demeanor during the trial.

¹⁷⁰ *Id.* (alteration in original).

¹⁷¹ *Id.* at 1151.

¹⁷² *Id.*

The negative effects of demeanor evidence have been recognized with other criminal defendants as well. One example is alien criminal defendants.¹⁷³ In *Alien Defendants in Criminal Proceedings: Justice Shrugs*,¹⁷⁴ the author found that a jury might have a bias against an alien defendant due to the defendant's demeanor.¹⁷⁵ This was due to various factors, such as that an alien's culture causes the alien to speak in an unusually high volume, or cultural differences may make the alien "reluctant" to verbalize remorse in the same way as native-born Americans.¹⁷⁶ Similarly, an autistic defendant's social and behavioral norms are different than those of individuals without autism, and an autistic individual might speak strangely—or not at all—and also show a lack of empathy.¹⁷⁷

IV. AUTISM AND SENTENCING

The third issue regarding autism and the criminal justice system is sentencing. Sentencing is a crucial consideration regarding an autistic defendant. For example, the type and length of sentence has a strong bearing on the rehabilitation of the individual. Furthermore, judges will be better able to consider particular aspects of an individual's autistic disorder at a sentencing hearing. Also, considering autism at the sentencing stage can remedy many of the issues presented by using autism as a defense. Although guilt is a yes or no question; sentencing, like autism, is on a spectrum. This Part proposes that autism should be a mitigating factor in sentencing.

A. *Autism, Mitigating Factors, and Federal Sentencing Guidelines*

Autism is sometimes considered as a mitigating factor, although not always. For example, it was considered in *United States v. Williams*, a case in which the Court of Appeals for the Seventh Circuit held that the lower court erred when it did not

¹⁷³ See Flo Messier, Note, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 AM. CRIM. L. REV. 1395, 1395–96 (1999) (documenting some of the difficulties that an alien criminal defendant faces due to cultural differences, and the tendency of such cultural differences to foster prejudice among members of the jury).

¹⁷⁴ See generally *id.*

¹⁷⁵ *Id.* at 1401.

¹⁷⁶ *Id.*

¹⁷⁷ DSM-V, *supra* note 7, at 53.

consider the defendant's autism as a mitigating factor.¹⁷⁸ However, autism is not codified as a mitigating factor in many state statutes, and it is not always considered during sentencing hearings.¹⁷⁹

In the Federal Sentencing Guidelines ("Guidelines"), autism is not a factor that allows for a downward departure.¹⁸⁰ The Guidelines do state that a downward departure can occur due to "diminished capacity."¹⁸¹ A downward departure may be warranted if: "(1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense."¹⁸² The Guidelines define "significantly reduced mental capacity" to mean that the defendant has a "significantly impaired ability" to understand the wrongfulness of the defendant's actions or to control the behavior known to be wrongful.¹⁸³ The Guidelines do not mention pervasive developmental disorders, autism, autistic disorders, or Asperger's.¹⁸⁴

There are, however, many benefits to codifying autism as a mitigating factor at the state level and adding it as a downward departure at the federal level. Specifically, autism as a mitigating factor remedies many of the issues posed by autism as an affirmative defense. First, autism as a mitigating factor will help judges measure moral blameworthiness. For example, defendants who are mentally ill are often viewed as less culpable or less deserving of punishment than defendants who are not

¹⁷⁸ *United States v. Williams*, 553 F.3d 1073, 1085 (7th Cir. 2009).

¹⁷⁹ *See, e.g., United States v. Morais*, 670 F.3d 889, 893 (8th Cir. 2012) (responding to the defendant's appeal alleging that the lower court did not consider the defendant's autism in regards to sentencing, the court stated that "not every reasonable argument advanced by a defendant requires a specific rejoinder by the judge" (quoting *United States v. Gray*, 533 F.3d 942, 944 (8th Cir. 2008))).

¹⁸⁰ *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2013), available at <http://www.ussc.gov/guidelines-manual/2013/2013-ussc-guidelines-manual>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* cmt. n.1; *see also* Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 441 (1995) ("Courts regularly find that, to qualify for a downward departure, a defendant's condition must be 'extraordinary' or 'atypical.'").

¹⁸⁴ *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13.

mentally ill.¹⁸⁵ Although mentally ill defendants still might deserve punishment, they are not necessarily as deserving of as much punishment as those who act maliciously.¹⁸⁶ This can also apply to autistic individuals who may be predisposed to crime due to clinical features of autism.¹⁸⁷ Although they may be technically guilty, their level of culpability is lessened due to their autism. In other words, they may be less blameworthy than others but not completely devoid of any blame. This middle ground of moral blameworthiness can be hard to determine in the context of a defense. But, within the context of sentencing, a judge can utilize evidence and testimony to consider how much “punishment” an autistic individual deserves. A judge, for example, can consider the defendant’s medical history, employment, education, and family history in deciding how affected the individual was by autism when the crime was committed.¹⁸⁸ In doing so, the judge can adjust the sentence according to the level of blameworthiness. This ensures that the defendant will be punished for the crime committed but also will receive a sentence that is commensurate with the specific level of culpability.¹⁸⁹ This can be achieved if autism is a mitigating factor in sentencing.

Secondly, if autism is a mitigating factor a judge can better consider the severity of an autistic person’s disorder when considering the sentence. This is different from autism as a defense, where the fact that autism is on a spectrum poses many problems for a bright-line rule. Here, no bright-line rule is necessary. This is because a judge can consider the facts of the case, the testimony of the defendant, the defendant’s medical history, and testimony from medical experts to conclude whether or not the severity of the diagnosis warrants a lower sentence.¹⁹⁰

¹⁸⁵ Eva E. Subotnik, Note, *Past Violence, Future Danger?: Rethinking Diminished Capacity Departures Under Federal Sentencing Guidelines Section 5K2.13*, 102 COLUM. L. REV. 1340, 1349–50 (2002).

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* note 35 and accompanying text.

¹⁸⁸ See, e.g., *United States v. Williams*, 553 F.3d 1073, 1084 (7th Cir. 2009).

¹⁸⁹ See Sikora, *supra* note 97, at 1715 (arguing that cultural circumstances should not be a defense but a mitigating factor in sentencing, the author states that “[u]sing cultural circumstances as a mitigating factor in the determination of a defendant’s sentence, instead of in the determination of his guilt, would ensure that a defendant would be convicted of the crime he actually committed and not a diluted version of the offense”).

¹⁹⁰ See *Williams*, 553 F.3d at 1084.

Courts have already weighed the severity of an individual's autism when considering autism as a mitigating factor. In *United States v. Williams*,¹⁹¹ Clinton Williams was charged with conspiracy to commit armed robbery.¹⁹² He was the getaway driver in a series of armed robberies.¹⁹³ Williams was borderline mentally retarded and was diagnosed with "autistic disorders and other pervasive developmental disorders."¹⁹⁴ After he was convicted, the trial court rejected his argument that his mental disability and autism should be considered in regards to his sentence.¹⁹⁵ He appealed his sentence.¹⁹⁶ The Seventh Circuit held that it was an error for the district court to reject his disability as a mitigating factor and remanded to the district court to consider his actual disability and whether it justified a lower sentence.¹⁹⁷ In analyzing the appeal, the court looked at factors such as that he was thirty-six years old and had lived with his mother for most of his life, and that he was institutionalized as a teenager.¹⁹⁸ This case is an example of a court's analysis of the severity of the defendant's autism in considering his sentence, and its decision that the severity may warrant a lower sentence.

In contrast, a court can also analyze the severity of an individual's autistic disorder and find that a lower sentence is not warranted. In *United States v. Lange*, the district court also analyzed the severity of the defendant's illness, but found that he was not impaired and thus the court did not reduce the sentence.¹⁹⁹ Lange appealed this decision.²⁰⁰ He argued that he had an "Asperger's-like" diagnosis that affected his ability to control his actions.²⁰¹ After hearing testimony from medical experts, the district court found that there was no evidence of any cognitive impairment and that Asperger's did not affect the defendant's ability to control his actions.²⁰² The Seventh Circuit

¹⁹¹ See generally *id.*

¹⁹² *Id.* at 1079.

¹⁹³ *Id.* at 1084.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1085.

¹⁹⁸ *Id.* at 1084.

¹⁹⁹ *United States v. Lange*, 445 F.3d 983, 986–87 (7th Cir. 2006).

²⁰⁰ *Id.* at 984.

²⁰¹ *Id.* (internal quotation marks omitted).

²⁰² *Id.* at 986–87.

agreed and did not reduce his sentence.²⁰³ In this case, the court analyzed the defendant's disability but concluded that it was not severe enough to affect any cognitive or volitional impairment.²⁰⁴ As a result, the court did not consider Asperger's in reducing his sentence.²⁰⁵ Both *Lange* and *Williams* demonstrate how the severity, or where the defendant falls on the spectrum, can play a major role in sentencing. Autism as a mitigating factor will allow judges to explore in better depth the nuances of an individual's disability and adjust the sentence accordingly.

Third, autism as a mitigating factor will lead to better rehabilitation. A shorter sentence may be sufficient to rehabilitate the defendant, whereas a sentence that is too long may hurt an autistic defendant. Punishment needs to be "just long enough for the message to be effective" in order to be useful for autistic individuals.²⁰⁶ Excessive punishment can fuel anxiety and perhaps lead to greater, and misdirected, aggression.²⁰⁷ Also, if autism is a mitigating factor, it would raise awareness that it is an important issue in the courtroom. This might lead to a hearing on whether the autistic individual needs special treatment instead of incarceration, or whether the individual should receive specific health services while in jail.

If a court does not consider autism during a sentencing hearing and incarcerates that individual, there is a risk that rehabilitation will be unsuccessful. This notion is supported by *United States v. Morais*, a case decided by the Court of Appeals for the Eighth Circuit.²⁰⁸ In this case, Morais pled guilty to child pornography and received ninety-seven months in prison and a lifetime of supervised release for the crime.²⁰⁹ At the trial, the defense's medical expert testified that Morais was extremely intelligent but was impaired socially.²¹⁰ Regarding prison, the expert testified that Morais would face difficulty in jail as he could easily become a victim because the other inmates and staff

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 987.

²⁰⁶ See CLEMENTS & ZARKOWSKA, *supra* note 20, at 212.

²⁰⁷ See *supra* notes 114–15 and accompanying text.

²⁰⁸ 670 F.3d 889 (8th Cir. 2012).

²⁰⁹ *Id.* at 891.

²¹⁰ Brief for Appellant, *supra* note 113, at *14–15 ("Mr. Morais is an extremely bright individual[]' with an IQ score generally in the 90 percentiles but 'his social functioning is far below average.'" (alteration in original)).

might misunderstand his behaviors due to his social impairment.²¹¹ The expert also testified that Morais learns differently; if a prison staff told him “no,” he would not stop the behavior.²¹² Rather, the expert explained that Morais needed to be instructed on how to do something the right way in order to learn.²¹³ The prosecution argued that the doctor did not show a link between autism and the crime.²¹⁴ The Eighth Circuit did not consider autism as a mitigating factor and affirmed the sentence.²¹⁵

There is, however, an indication that Morais would not be rehabilitated in the typical prison setting, as the medical expert suggested. When asked about his time in prison thus far, Morais explained that while in prison he answered a lot of math questions and learned that his math skills could bring him a lot of money in the future.²¹⁶ The court responded that it was disappointed with Morais’s response because he only communicated how prison benefited him, and he did not express that he understood that his actions were wrong or that his actions could take away his liberty.²¹⁷ To this, Morais responded, “What I have to lose, I never had to begin with.”²¹⁸ Morais’s statements reveal that he was not learning about the wrongfulness of his actions in prison. Linking this to what the medical expert said, this could be because Morais’s autism would make it difficult for him to learn in a prison setting without appropriate treatment.²¹⁹

The testimony of the medical expert in *Morais* can apply to other autistic individuals as well. For example, autism can affect an individual’s ability to adapt to different settings.²²⁰ Trouble with adaptive behavior can be particularly burdensome for an

²¹¹ *Id.* at *11.

²¹² *Id.* at *11–12.

²¹³ *Id.* at *12.

²¹⁴ Brief of Appellee, *Morais*, 670 F.3d 889 (No. 11-1793), 2011 WL 3678996, at *7.

²¹⁵ *Morais*, 670 F.3d at 893.

²¹⁶ See Brief for Appellant, *supra* note 113, at *21–22.

²¹⁷ *Id.* at *22.

²¹⁸ *Id.* at *23 (internal quotation marks omitted).

²¹⁹ See *supra* notes 113–15 and accompanying text.

²²⁰ Gregory O’Brien & Joanne Pearson, *Autism and Learning Disability*, 8 AUTISM 125, 127 (2004) (“There is good evidence that adaptive behaviour is more severely impaired in individuals with autism, as compared with deficits in overall or general intelligence.”).

autistic individual in a prison setting, as adjusting to prison life in general is difficult for inmates, with or without disabilities.²²¹ Similarly, autistic individuals struggle with social skills and verbal reasoning skills.²²² These struggles can also make prison life extra daunting, where inmates must learn to communicate with prison staff, security staff, and other inmates.²²³

Fourth, if autism is codified as a mitigating factor, it can promote better uniformity in cases. For example, the *Morais* case involved a defendant who pled guilty for collecting child pornography and did not receive a lower sentence due to his autism.²²⁴ In *United States v. Rothwell*,²²⁵ the defendant also pled guilty to child pornography and the court held a sentencing hearing.²²⁶ An evaluation of Rothwell described him as having an average IQ but with a “very limited degree of social awareness and competence.”²²⁷ The court held that his capacity was relevant to his sentencing, reasoning that although he did not have an intellectual disability, he was impaired with regards to social communication and had “developmental shortcomings.”²²⁸ In considering the mental capacity, the court imposed a lower, non-Guidelines sentence.²²⁹ The defendant in *Rothwell* was not diagnosed with autism or with Asperger’s Syndrome, but was characterized as having similar characteristics such as social impairment and a lack of social and sexual history. In *Rothwell*, the court felt that the “developmental shortcomings” were relevant to the sentencing, whereas in *Morais*, the court did not consider autism as a factor in sentencing.²³⁰ Autism as a mitigating factor can close the gap between these two cases,

²²¹ See Allen et al., *supra* note 35, at 755 (describing that an individual with Asperger’s found prison troubling because he disliked having to be transferred after settling in at one prison); see also Kenneth Adams, *Adjusting to Prison Life*, in 16 CRIME AND JUSTICE 275 (Michael Tonry ed., 1992).

²²² See O’Brien & Pearson, *supra* note 220, at 128.

²²³ See Allen et al., *supra* note 35, at 755 (quoting a man with Asperger’s in jail as saying “[a]t the start I was too scared to come out of my cell. I used to just sit in my cell all day and just not come out”).

²²⁴ See *United States v. Morais*, 670 F.3d 889 (8th Cir. 2012).

²²⁵ 847 F. Supp. 2d 1048 (E.D. Tenn. 2012).

²²⁶ *Id.* at 1050–51.

²²⁷ *Id.* at 1052.

²²⁸ *Id.* at 1062.

²²⁹ *Id.* at 1063.

²³⁰ *United States v. Morais*, 670 F.3d 889, 893 (8th Cir. 2012).

where one defendant's developmental shortcomings are considered, but another's autism, a disability colored by developmental shortcomings, is disregarded.

By recognizing autism as a mitigating factor, and adding autism to the list in the federal downward departure Guidelines, judges may more often consider autism in sentencing. This can lead to better familiarity of autism in the criminal justice system, compared to the present where judges are "required to take crash courses in the psychodynamics of the autistic brain."²³¹ This would also promote uniformity as autism would be an established mitigating factor and judges would not have to choose whether or not to consider it or attempt to force it into another standard such as "mental illness," "emotional illness," or "diminished capacity."

B. Implementing Autism as a Factor for Sentencing

Although some courts have considered autism as a mitigating factor, it is often left to the judge's discretion.²³² If legislatures codify autism as a mitigating factor in sentencing statutes, a judge will still have broad discretion, but the presence of autism may raise more awareness regarding the disorder and sentencing. Although some states do list mitigating factors and recognize that the list is non-exhaustive, placing the language of autism as a factor may increase the likelihood that it is considered as one.²³³ Designating autism as a mitigating factor also would not be uncommon, as states have incorporated illnesses such as fetal alcohol syndrome and posttraumatic stress syndrome into a list of mitigating factors.²³⁴ In addition to implementing autism as a mitigating factor, there is a concrete

²³¹ See Caruso, *supra* note 35, at 510 (describing judges and autism in the context of autism as an excuse for a crime).

²³² See Mayes, *supra* note 11, at 95 ("Aside from mandatory minimum and maximum fines and terms of imprisonment, a court has fairly wide discretion in imposing sentence." (citation omitted)).

²³³ See, e.g., N.C. GEN. STAT. ANN. § 15A-1340.16(e) (West 2012) (listing mitigating factors in North Carolina and including "[a]ny other mitigating factor reasonably related to the purposes of sentences" on the list); TENN. CODE ANN. § 40-35-113 (West 2010) (listing mitigating factors in Tennessee and including "[a]ny other factor consistent with the purposes of this chapter").

²³⁴ See ALASKA STAT. ANN. § 12.55.155(d)(20) (West 2012) (citing fetal alcohol syndrome as a mitigating factor); KAN. STAT. ANN. § 21-6625(a)(8) (West 2011) (including as a mitigating factor if a defendant is suffering from post-traumatic stress caused by violence or abuse by the victim).

way to integrate autism as factor for downward departure in the federal sentencing Guidelines. The United States Sentencing Commission can amend the statute to include “developmental disability” or “autistic disorder,” or define “significantly reduced mental capacity” to include autistic disorders.²³⁵

CONCLUSION

The road of autism research has been challenging and enlightening. Beginning with Leo Kanner in 1943 and continuing to the present day, autism awareness has skyrocketed.²³⁶ Along with greater awareness, there have been significant developments in areas such as medicine, education, and employment.²³⁷ The propositions in this Note lend themselves to greater recognition in the legal world as well.

First, by rejecting autism as an affirmative defense, the criminal justice system maintains a sense of justice. But, allowing autism to be used as an affirmative defense to certain minor crimes protects autistic individuals who may offend due to clinical features of autism. Second, recognizing the prejudicial effect that demeanor evidence can have when an autistic individual testifies, and thus admitting evidence of autism to explain that demeanor evidence, protects the right of autistic defendants to testify in their own defense. And third, by making autism a mitigating factor in sentencing, we can appropriately balance the needs of the criminal justice system while also providing criminal offenders an opportunity to serve a sentence appropriate for their crime and level of culpability.

The hope is that through implementing the proposals set forth in this Note, there will be better treatment for autistic defendants in the criminal justice system and a greater awareness of autism amongst the legal community in general. With that awareness in the legal community, the road of autism awareness can continue to grow and flourish, winding toward a better and more understanding future.

²³⁵ See U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2013), available at <http://www.ussc.gov/guidelines-manual/2013/2013-ussc-guidelines-manual>.

²³⁶ See *supra* notes 1–5 and accompanying text.

²³⁷ See generally Caruso, *supra* note 35.

