

Chapter 9

Autism, the Criminal Justice System, and Transition to Adulthood



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Abstract The criminal justice system is set up for the purpose of regulating people's behavior. If an individual violates a criminal norm, sanctions should reflect that person's mental capacity in understanding what they did was legally wrong. When an autistic individual commits a crime, questions may be raised as to the responsibility of key social/state actors for failing to provide structures that would facilitate accepted behavior in this special category of citizens. Many of the infractions that autistic individuals are likely to commit come as a result of failed interactions with the wider neurotypical society as well as with law-enforcement officials. If the general public were more sensitive and educated about some of the issues raised here, and if (parts of) the public realm were less stressful and more autism friendly, there may well be fewer problematic incidents involving autistic people.

9.1 Introduction

With fully grown bodies, access to adult activities, and still-developing executive function skills and social understanding, it is not surprising that young adults are the group most likely to be arrested (Office of Juvenile Justice and Delinquency Prevention 2019). As young people transition to adulthood, they lose the support offered by schools and, eventually, parents. When young adults are autistic, the challenges increase. Police officers and autistic citizens can fail to understand each other, and can have difficulty predicting what the other will do. Officers can misinterpret

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autistic speech as uncooperative or disrespectful; autistic people can misunderstand or have difficulty complying with expectations of officers, or fail to appreciate an officer's authority to enforce compliance. The same applies in court settings. Research suggests that not only autistic people and their parents, but also police and legal professionals are often dissatisfied with their interactions (Crane et al. 2016; Maras et al. 2017). Here we examine this topic from the perspective of philosophical ethics and law, with emphasis on moral responsibility and justice.

An important aspect of this discussion has to do with whether a person is responsible for what she did. When we say that a person should not be held fully responsible for an action, this does not mean that the action should be allowed or that the action is not a problem. We only mean that the individual should not be blamed or punished. It might still be imperative for someone—the individual herself or others—to take steps to avoid it happening again.

Our discussion makes no claims about how likely it is that autistic individuals will commit crimes. It is generally accepted that autism makes people more likely to be victims than perpetrators of crime, and there is no conclusive evidence that autism increases the likelihood of criminal behavior (Heeramun et al. 2017). We certainly do not want any reader to fear or try to control people just because they are autistic. But, like members of other groups, some autistic people will sometimes commit criminal acts. How, if at all, should their autism affect the response? To get started, we offer three real-world examples.

9.2 Examples

Manny

Our first example is from a mother who gave us permission to share her son's story. Her son, whom we will call Manny, is an intelligent 16-year-old autistic male. Manny has been bullied at school, and fears being bullied again. He has no real friends, although he has a great wish to have some, and spends time with peers who engage in risky and socially questionable behavior.

Manny's mother asks him about news that students are illegally selling the tobacco product snus at Manny's school. Manny denies knowing anything, and excuses himself abruptly. A few days later, a police officer comes to their home. Manny admits delivering snus and collecting money for the dealers. He knew it was illegal, but wanted to be involved with peers and was happy to pass on the money he collected without keeping any. The police offered not to put the incident on Manny's record if he named everyone involved, which he did.

After some time, one of the dealers texted Manny. This dealer had a car trunk full of snus and marijuana, and believed the police were suspicious. Manny could have the illegal goods for free so the dealer wouldn't get caught with them. Manny considered accepting the offer so he could make friends by giving the goods away.

He thought this would be OK because he would not be selling anything. Luckily, he explained this thinking to his mother, who discouraged him.

Manny's mother believed her son felt compelled to do anything to fill his deep need for peer relationships, much as someone might steal if there were no other way to get food. Manny did not understand that he was being exploited. He had difficulty seeing what was relevantly similar about selling the substances and distributing them for free. He also did not appreciate the potential long-term consequences of having a criminal record.¹

Reginald “Neli” Latson

Neli Latson is a young, autistic Black man with an IQ of 69 (Marcus 2014). In 2010, Neli was outside waiting for the public library to open when a neighbor called the police to report a suspicious person. When an officer tried to question and frisk him, Neli became agitated and aggressive, and the officer was injured (O'Dell 2016). Neli was informed he was “under arrest for refusing to provide his identity,” and eventually convicted of “malicious wounding on a law enforcement officer and assault on a law enforcement officer” (Epps 2015). While in jail, Neli was put in solitary confinement, where his mental health and functioning deteriorated.

Neli served two years in prison, and was later transferred to a community-based residential facility. He was re-arrested after another altercation with an officer who was attempting to restrict his movement. At one point he was shot with a stun gun and then strapped to a chair for hours (O'Dell 2016). He spent another year in isolation. In January 2015, Neli was granted a conditional pardon which required him to remain in prison for another six months (Fain 2015).

It seems likely that racial bias played a role in what happened to Neli. Knowingly or not, race may have shaped why someone was bothered by his presence outside the library to begin with, and why the officer felt the need to engage with him physically. Other cases involving autistic Black young men have also ended badly (Sitz and Mesner-Hage 2020).

Nick Dubin

Nick Dubin is an autistic author and advocate who has written at length about his experience with the law (Nick's case is described in greater detail in the chapter authored by his father Larry Dubin). Not long after he earned a doctorate in psychology, Dr Dubin (Nick) was assessed using the Vineland Adaptive Behavior Scale, a tool widely used to evaluate people with developmental differences. Nick's scores indicated a psychosocial age appropriate to a “preadolescent” (Attwood et al. 2014). Based on the gap between his verbal and nonverbal functioning, Nick was identified as having nonverbal learning disability (NVLD) (Attwood et al. 2014).

Curious and concerned about his sexuality, Nick collected a variety of pornographic images from the internet. Some of these involved young children. Nick writes that he understands now that these images and their production were harmful and illegal. When he first viewed them, however, he did not see himself as different

¹ Manny's story has some similarities with what happened to Jesse Snodgrass (cf. Erdely 2014).

from these children. He saw himself as their peer, and was unable to discern from the images that the children were being exploited or harmed. Nick's apartment was raided by the FBI. Nick's parents, therapists, and lawyers supported him through the traumatic process of interrogations, forensic neuropsychology assessments, and court appearances. The court accepted the findings that Nick poses no danger and that he did not understand the implications of his actions. Unfortunately, Nick is now a lifetime felon and permanently on the sex offender registry (Attwood et al. 2014).

9.3 Values and Dilemmas

Topics requiring ethical discussion generally involve dilemmas—values that conflict or must be balanced against each other. What values are relevant here? What do we care about when it comes to criminal justice and autistic young adults? In law enforcement and criminal justice, relevant values include fairness, attention to facts, and respect. Respect is owed to innocent civilians, offending civilians, victims, officials, and communities. Respect for individuals, their freedom, and their privacy can conflict with protecting those same individuals and others from harm. Fairness and respect themselves require balancing component values.

The decision of whether to hold someone responsible sits on a key dilemma between respect for an individual's agency and compassion for that individual's limitations. While holding someone responsible for an offense generally comes with blame and the potential for punishment,² treating someone as not responsible can exclude that person from participation in significant human interactions and undermine their own sense of themselves as agents.³ The following discussion should be considered in light of these values.

The remainder of this chapter addresses four aspects of the encounter with the criminal justice system:

1. Autistic individuals' understanding of and ability to comply with legal expectations
2. Interactions between autistic individuals and law enforcement
3. Assessing whether an autistic individual should be found guilty of an offense
4. Appropriate response or punishment for those who are guilty.

9.4 Understanding and Complying

We will draw from a variety of sources to highlight a few ways that autism can make it harder for autistic individuals to know what is expected and behave accordingly. A

² Some approaches allow responsibility without moral blame (cf. Pickard 2004).

³ David Shoemaker discusses the cost of exclusion in an unpublished manuscript (Shoemaker 2019).

general range of differences are understood to be characteristic of autism (Fletcher-Watson and Happé 2019). It is worth emphasizing that these characteristics apply to individuals in different measures and combinations, so that autism is not so much a spectrum as a distinctive constellation of skills and experiences in each person (Hearst 2015).

Autistic individuals tend to have difficulty understanding the experiences of other people, including predicting their behavior and expectations.⁴ This could be due to a primary issue with theory of mind. It could also be due to lower general orientation toward social facts, resulting in a small inductive base for learning social patterns (Fletcher-Watson and Happé 2019). Autistic individuals may miss contextual cues (Vermeulen 2013) or not shift attention to salient facts due to monotropism, which is the tendency to allocate attention to an atypically narrow range of interests (Murray et al. 2005). We see some of these tendencies in our examples. The result can be interpersonal conflict, failure to understand when romantic attention is unwanted, or behavior associated with stalking (Stokes et al. 2007). It is easy to understand how these challenges could cause young people like Manny to choose illegal ways to meet deeply felt social needs.

Intense sensitivity to visual or auditory stimuli (Markram and Markram 2010) can make some autistic people extremely uncomfortable. For instance, some autistic individuals have told us that, for them, being touched by another person is unbearable, even like being burned by acid. This could make someone unable to remain quiet, to speak, to stay in place, or to move away even when required to do so. Consider that a neurotypical individual might be similarly unable to control responses to an explosion, terror attack, or fire.

Stimming behaviors, such as flapping or rocking, can be crucial for maintaining emotional regulation and feelings of safety. Autistic author Fergus Murray connects stimming to monotropism:

It is easier for autistic people to process one channel at a time. ... Often, if we get overloaded, it helps to have controlled or predictable input. Stimming, flapping, rocking and humming provide something we can do and feel without having to think about it, and can make it much easier to filter, to focus on something else, or to deal with feelings (Murray 2019).

To those unfamiliar with this phenomenon, stimming can at times also make it seem that an autistic individual is willfully refusing to comply with the demands of law enforcement or other authorities, and can appear threatening.

Some autistic authors use the word ‘inertia’ to explain the autistic experience of being stuck—difficulty initiating action, even action that the person needs or wants to do. Karen Leneh Buckle identifies several contributory factors, including planning (executive function), focus (cognitive flexibility/monotropism), initiative, and motivation (Buckle 2019). Inertia can occur even with respect to matters deeply connected to a person’s values. On a broad, second-order level the person cares about caring; in the moment, the first-order, on-the-ground caring is not happening. But

⁴ This is sometimes attributed to a mismatch between autists and typical social environments rather than any deficit in the autist. Self-styled “Guerilla Aspie” Paul Wady likes to say “We have empathy for our own kind.”

autistic individuals can also get stuck and fail to act on matters that they do care about in the moment. Some of these matters can involve responsibilities to others, where failure to act (or to speak) can have legal consequences.

We see that some autistic characteristics can make understanding and complying with social and legal expectations harder.⁵ The next section discusses challenges arising from interactions between autistic individuals and law enforcement officials.

9.5 Navigating Encounters

Being different makes people vulnerable to discrimination, distrust, or even physical harm. For autistic individuals, this is further complicated because autism can be an “invisible” difference. If someone is blind, this is generally apparent to sighted people around them. Some autistic people are different in ways that are as obvious as being blind. Others show their autism in ways that are clear, but only to those with relevant insight or experience. Still others may be autistic in ways that are not usually noticeable by others but become apparent in situations that reduce available cognitive resources (e.g., when the person is stressed, excited, tired, or engaged in a complex task). This variability can cause uncomfortable surprises for others.

These issues point to what Damian Milton terms “the double empathy problem:” neurotypical people can have difficulty understanding autistic individuals just as autistic individuals can have difficulty understanding neurotypical people (Milton 2012). Double empathy is central to how autism can complicate the workings of criminal justice. Anyone faced with behavior that they cannot predict or that fails to fall into expected patterns is likely to feel threatened, and if law enforcement is involved it is likely that someone is already feeling threatened.

Disclosure can help. Parents can explain to passersby that a child who is stimming or whose clothes are inside out (perhaps to avoid scratchy tags) is autistic (Cobb 2018). Autistic people can carry disclosure cards, and some have advocated for an autism designation on drivers’ licenses to facilitate interactions with police (Torres 2019). But while there is increasing understanding of autism, we might still wonder: When we disclose to a community member that a person is autistic, what can we expect that person to know as a result? What can we expect them to do differently?⁶ At this point, our expectations should be limited. News stories and television shows are contributing to awareness, but autism sensitivity is in early stages. Practical knowledge about autism is not yet part of the broad social or health literacy expected in communities. Furthermore, autistic people may not think to disclose, or may, for various reasons, choose not to disclose.

Another relevant issue for law-enforcement officers is the co-occurrence of autism and intellectual disability (ID). While “earlier epidemiological reports indicated that as many as 70% of autistic individuals had co-occurring ID,” more recent reports,

⁵ Members of other groups will have different challenges.

⁶ Question suggested by Joel Anderson.

though contested, suggest that “ID was present in as few as 30% of” autistic children. (Thurm et al. 2019). The disparate estimates are partly explained by similarities in how autism and ID are manifested. In Thurm et al.’s deficit-based description, “because many of the social communication deficits that define ASD [autism] represent a failure to acquire developmentally expected skills, these same deficits would be expected to occur to some extent in all individuals with intellectual disability (ID)” (Thurm et al. 2019). Even assuming that the lower estimates were correct, however, there still is a large gap between them and the estimated 1% incidence of ID in the wider population (McKenzie et al. 2016). Ideally, law enforcement officers should be aware that rates of ID are higher in the autistic population and should be prepared to assess and respond to this.

Our case examples describe some situations in which autistic young people might encounter law enforcement officers. The wallet card offered by AANE (the Asperger/Autism Network) to help when autistic individuals need to interact with police lists some of the autistic tendencies that can derail these encounters. This card states that the holder might:

- “Panic if yelled at, and lash out if touched or physically restrained.
- Misinterpret things you tell me or ask me to do.
- Not be able to answer your questions.
- Appear not to be listening or paying attention.
- Tend to interpret statements literally.
- Appear rude or say things that sound tactless, especially when anxious or confused.
- Have difficulty making eye contact.
- Speak too loud, too soft, or with unusual intonation.” (AANE Asperger/Autism Network 2019).

These tendencies, if unexplained, could cause a situation to escalate, as it did for Neli Latson (discussed above). Because these behaviors could be interpreted as resistance, the wallet card states clearly “I would like to cooperate.”

The card also provides ways for first responders to facilitate cooperation.⁷ It could be hard for a first responder to stop to read such a card in an emergency. However, first responders who are familiar with autism can make some adjustments quickly to keep the encounter safe and effective for everyone. Resources and training for this are increasingly available (National Autistic Society 2017).

Once the initial encounter has been navigated, autism can impede efforts to determine relevant facts. Witness interviews and interrogation of autistic suspects require alternative approaches. First, the setting of the interview can be a significant factor. Sensitivity to lighting, sounds, and even smells can make it impossible for some autistic individuals to participate effectively. These can be profoundly uncomfortable or just impossible to ignore, so that they occupy cognitive resources needed to respond in expected ways. Many problematic sensory stimuli can easily be eliminated or reduced once identified. When autistic individuals find the environment

⁷ These include explaining who you are, calling a contact listed on the card, avoiding touching or restraint, and giving very clear instructions (AANE Asperger/Autism Network 2019).

tortuous or too distracting, addressing these issues is not unfair special treatment, but a requirement for respect, due process, and fact-seeking.

Even where the environment is conducive to exchange of information, an autistic person may misunderstand the nature of the exchange or what is at stake. For instance, even after being escorted out of a high school classroom in handcuffs, autistic student Jesse Snodgrass asked “Am I getting in any trouble?” (Erdely 2014). More than neurotypicals, autistic individuals can require explicit explanations of what is happening and what is expected of them.

Certain types of questions that are usually appropriate in these situations can lead autistic people to appear to confess to acts they did not commit, or to appear uncooperative (Crane et al. 2015). In the UK, the National Autistic Society’s (NAS’s) “Autism: a Guide for Police Officers and Staff” gives this example: “asking, ‘Has your laptop got anything on it about plans for any terrorism acts?’ is likely to elicit agreement, as a web browser or a text editor could be used to plan anything” (National Autistic Society 2017). This guide also advises against leading questions, and statements with tag questions (“You went to the shop, didn’t you?”), which could also lead to false agreement. It notes that other common question types could lead to false ‘no’s.’ For instance, if an interviewee is explaining what happened at an earlier time, the interrogator might say “so now we are in your apartment?” This could be confusing because the interrogator wants to confirm the sequence of past events but uses the present tense to say something that is, in the present, clearly false.⁸

The “spikey profiles” of some autistic individuals, such that the same person can have very strong cognitive skills in some areas and very weak skills in others, can lead to confusion about what to expect from them. When people are knowledgeable and articulate about many things, it’s easy to assume that they also have easy access to social insights and unfairly blame them when their actions or answers fail to take these into account.

In the UK, the Police and Criminal Evidence Act requires the presence of an “appropriate adult” for questioning “a juvenile or vulnerable person” (Home Office UK 2019). The law’s definition of vulnerability includes autism-relevant characteristics such as “difficulty understanding or communicating effectively about the full implications for them of any procedures and processes connected with” their interactions with the police (Home Office UK 2019). Involving an appropriate adult can be an excellent way of facilitating effective interactions.

9.6 Assessing Guilt

Once the initial encounters are done and an autistic individual has been charged with a crime, what role could autism play in determining whether the defendant should be found guilty? The following discussion relies on some concepts from English common law as codified in the American Model Penal Code, or MPC (American

⁸ See Maras (2020) for a useful and relevant discussion of related matters.

Law Institute 2008). These legal concepts parallel ethical ones in many ways, but here we focus on legal issues. We are not defending the legal categories as correct or ideal, only using them as guideposts for thinking about how autism intersects with some legal criteria relevant to culpability.

Substantial capacity

First, let's consider the following clause from the MPC:

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 (American Law Institute 2008).

Autism is not a “mental disease or defect,” but might it affect substantial capacity to appreciate wrongfulness or conform conduct? One of us has argued elsewhere that autism can reduce a person's access to information relevant to the wrongness of an action (Richman 2017; Richman and Bidshahri 2018). Such information can include the experiences of others, and what alternative actions were available.

The Reporter's comment on MPC 4.01 (1) remarks that: “An individual's failure to appreciate the criminality of his conduct may consist in a lack of awareness of what he is doing or a misapprehension of material circumstances, or a failure to apprehend the significance of his actions in some deeper sense.” Autism doesn't cause someone to be unaware of what they are doing. However, autism may account for some misapprehension of social information, as in the case of Nick Dubin, or failure to apprehend the significance of actions, as with Manny. These failures (or difficulties) are not the kind of global incapacity that comes with severe psychosis or an epileptic seizure. They are limited in scope, and, as we see with Nick Dubin, seem to have more to do with “reasons blockage” (Richman 2017) than with the ability to appreciate the wrongness of actions once the morally relevant features are apparent. That is, there may be some information that would cause a neurotypical person to change her behavior, but that might not be accessible to an autistic individual. We do not blame people for failing to respond to facts that are not available to them.

Atypical cognitive styles can contribute to this phenomenon. Typically developing children and adults have a tendency to “process incoming information for meaning and gestalt (global) form, often at the expense of attention to or memory for details and surface structure” (Happé and Frith 2006). This particular cognitive style may help explain skills in generalizing, i.e., in recognizing situations that are different in some respects as nonetheless belonging to the same (proto)type. This capacity might well be at play when we place distinct particular actions under the same category, as, for example, when we infer from the fact that a certain action is wrong that another, relevantly similar action is also wrong. The cognitive style that characterizes autism is different in this respect, as it tends to focus on detail as opposed to the general or global. This may in turn result in a difficulty in inferring the wrongness of one action from the wrongness of another similar action in spite of a general capacity to discern right from wrong.

Of our few examples, only Neli Latson appears broadly unable to conform his conduct to the requirements of law. This is likely not a function of autism alone. His intellectual disability appears to have intensified his difficulty understanding and communicating about his situation, his inability to predict what will happen in the novel situation of the first encounter with police, and what must have been severe discomfort in response to unwanted touching and restraint. Neli's intellectual disability is global in a way that Nick's NVLD is not. This makes it more obvious how Neli could lack substantial capacity with respect to the interactions leading to his arrest.

Section 4.3 of the MPC requires that an intention to rely on a defense of mental disease or defect be filed at or around the time of a not guilty plea. This suggests that if a person lacked substantial capacity, that person is not a candidate for another defense. A finding that someone lacked substantial capacity might thus be understood as an exemption, not an excuse. It is a finding that the person was, at least at that time in respect to that action, outside the community of those who are even candidates for responsibility. Despite this treatment in the MPC, since autism per se appears to cause specific challenges rather than global incapacity, we suggest that when autism is exculpatory, it is more likely to justify an excuse for a particular action than an exemption that puts the autistic person outside the community of responsible agents.

Actus reus

Under common law traditions, criminal culpability generally requires both *actus reus* (guilty act) and *mens rea* (guilty mind). Failure of one or the other would be a legitimate excuse for many types of offenses.⁹ The *actus reus* must be voluntary rather than, for example, a spasm or reflex. Could autism be relevant to whether an action is voluntary?

As discussed above, someone who can generally conform behavior to the requirements of law might have a sudden and involuntary response to touch or other stimuli, and that response may look to others like voluntary violence. Challenges with inhibition, an executive function that can be reduced in autism, may be relevant. Stimming behaviors may also be difficult to stop if they are part of how an autistic person maintains equilibrium or relative calm. Issues with sensory overload and high levels of anxiety may also arguably decrease the level of voluntariness of one's (re)actions. These phenomena can raise questions about whether the *actus reus* requirement for culpability was satisfied.

Mens rea

Someone can satisfy the *mens rea* requirement for criminal culpability by acting "purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense" (American Law Institute 2008). *Purposely* and *knowingly* require intentions (purposely) or expectations (knowingly) that the harmful results of a voluntary action will occur. 'Recklessly' applies when a person "consciously disregards a substantial and unjustifiable risk" (American Law Institute

⁹ Culpability for strict liability crimes does not require *mens rea*.

2008). Autism hardly seems exculpatory when someone has these mental states with respect to harm that the person knows is wrong.

Autism might, however, make it harder to determine what a defendant knew, expected, or consciously disregarded. It is characteristic of autistic individuals (especially young autistic persons) to have difficulty with perspective-taking. This applies to their own earlier selves (Happé 2003). By around age four, typically developing children understand that others might have false beliefs that contradict the child's own true beliefs (Baron-Cohen et al. 1985). Autistic individuals tend to catch up on this ability in well-defined tasks that can be taught, but can continue to show difficulties in real-life situations (Klin et al. 2002). Those who do poorly at these tasks with others may also forget that they themselves had false beliefs at a previous time (Happé 2003). This can be very problematic when it comes to assessing culpability. Consider an autistic person who attacks someone in her apartment thinking that the person is a dangerous intruder, and who then learns that the "intruder" was her roommate. We can speculate that, if the autistic person struggles with theory of mind issues, she may falsely report that she believed it was her roommate all along.¹⁰ This could lead to a false guilty verdict.

Negligence "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation" (American Law Institute 2008, 2.02(2)(d)). The reasonable person standard is intended to offer an objective way of assessing what a person ought to have known about or done in response to some risk. Variation has been allowed for children on the basis that:

Children are less able than adults to maintain an attitude of attentiveness toward the risks their conduct may occasion and the risks to which they may be exposed. Similarly, children are less able than adults to understand risks, to appreciate alternative courses of conduct with respect to risks, and to make appropriate choices from among those alternatives (American Law Institute 2010, p. 116).

Autistic adults, even young adults, are not children. They can, however, have similar challenges with attentiveness to, understanding, and responding to risk. It is appropriate, then, that legal scholars continue to argue for personalized application of the reasonable person standard: "The reasonable person standard, traditionally derived from an aggregate relevant pool, would be replaced by the 'reasonable you' standard—a personalized command that is based on information about *this* actor's specific characteristics" (Ben-Shahar and Porat 2016, p. 629). Given the great variety in the autism constellation, a "reasonable you" standard may offer the best promise of fairness in determining whether a person has been culpably negligent.

¹⁰ This suggestion is based on extrapolation from data involving children (Happé 2003) showing challenges with attributing false beliefs to the earlier self and data showing that, with substantial variation, some autistic adults perform poorly at theory of mind tasks (Brewer et al. 2017). Future data might show that the type of error described is quite unlikely.

9.7 Shared Responsibility, Structuring Causes

Behavior is shaped by social structures much as mobility is shaped by the physical environment. This is easiest to see with young children (who depend on adults to structure activities and social interactions to facilitate a successful day) or drivers (who depend on road design and signs to travel safely). When an autistic individual commits a crime, questions may be raised as to the part of responsibility that might be attributed to key social/state actors for failing to provide structures that would facilitate accepted behavior in this special category of citizens. Many of the infractions that autistic individuals are likely to commit come as a result of failed interactions with the wider neurotypical society as well as with law-enforcement officials. If the general public were more sensitive and educated about some of the issues raised here, if (parts of) the public realm were less stressful and more autism friendly, there may well be fewer problematic incidents involving autistic people.

The social conception of disability can provide illumination here. According to that concept, disability is a state of society (not of individuals) that puts some people at a disadvantage (Silvers 1996). If disadvantage arises from a state of society, the community as a whole bears responsibility for the consequences. When the disadvantage consists in extra difficulty conforming to legal expectations, there may be instances when it is reasonable to assign blame for transgressive behavior quite widely.

In a recent dialogue with the autism community in Aarhus, Denmark, an autistic autism consultant suggested that local municipalities offer “autistic ambassadors” as a social service. These specially trained helpers would have the task of accompanying groups of autistic individuals on, say, a night out, functioning as an interface between the autistic individuals and their environment, ensuring smooth transitions on public transportation, in public houses, cinemas, shops, etc. Similarly, one may argue that government bodies should ensure that the general public and its officers have a basic understanding of autism. This would arguably be as necessary to guarantee the equality and dignity of autistic individuals as the provision of wheelchair access to public spaces is necessary to guarantee the equality and dignity of those who cannot walk. If provision of such services could be shown to be a legitimate claim and be linked to diminished violations by autistic individuals, societies that could provide these services but failed to do so may indeed be understood as sharing in the responsibility for such violations.

9.8 Determining an Appropriate Response or Punishment for Those Who Are Guilty

Legal punishment is commonly understood as “imposing *deprivation* (“hard treatment”) on someone, in a manner that conveys *censure*” (Von Hirsch and Ashworth 2012, p. 17). The idea of censure is quite central here. Unlike other methods for the

regulation of behavior such as for example the imposition of a tax, penal sanction involves reprobation and blame. At its heart, then, we find a form of moral communication between the state as the representative of society and the act's perpetrator or wrongdoer. By visiting hard treatment upon the offender, the state sends the message to the offender (as well as to society at large) that, for example, harming someone is wrong and will not be tolerated. In this communication, the offender is treated as a moral agent, that is, "someone who is offered moral reasons for specified choices, for he is assumed capable of comprehending and acting on such reasons" (Von Hirsch and Ashworth 2012, p. 17). This, of course, is not to say that consequentialist aims such as harm prevention are not also at play in punishment. Yet sanctions that do not involve censure as described here will fail to treat offenders as persons or moral agents, and would rather treat them as beings that need to be "restrained, intimidated, or conditioned into compliance" (Von Hirsch and Ashworth 2012, p. 18).

This conceptualization of legal punishment nicely explains why expressions of guilt and remorse on behalf of the offender during trial or in the process of parole granting may mitigate or shorten the punishment, as these emotions are taken to signal that the offender has recognized and repudiated the wrongness of their conduct that the punishment is meant to convey. Yet the very same feature so elegantly explained by this view of punishment is likely to discriminate against individuals like those on the autism spectrum who have difficulties with social communication and with understanding and expressing emotions. In fact, one may wonder how autistic individuals receive and understand the whole idea of punishment as moral communication of censure. In the other direction, judges and juries may fail to appreciate an autistic person's expression of remorse, resulting in an unfairly harsh sentence.

These worries notwithstanding, this view inspires a plausible theory of sentencing that revolves around the principle of proportionate, deserved sentences: penalties are graded according to the degree of reprehensibility, that is, the harmfulness and culpability, of the actor's conduct, with a view to communicating censure rather than to matching the level of deprivation imposed on the offender to the level of suffering of the victim ("pay back" or *lex talionis*). Proportionate sentencing is not confined to the realm of philosophical ideas but has inspired sentencing policies in the United States, Finland, Sweden, Canada, New Zealand, and England (Von Hirsch and Ashworth 2012, p. 1). This view is interesting here for it prescribes sentencing policies that are particularly attentive to the case of juveniles and, as we shall argue, to autistic juveniles. In short, the idea is that the same criminal act should receive a lesser sentence when committed by a juvenile as opposed to a mature person and that for two reasons: (i) diminished culpability due to the juvenile's diminished cognitive and volitional capacities; and (ii) increased punitive "bite." The rationale behind (i) is already clear from our discussion above. Let us, then, focus on (ii).

As a general rule, a given penalty is considered to have greater punitive bite when suffered by a child or a juvenile than when suffered by an adult. That's because the former are less psychologically resilient and their punishments interfere more with opportunities for education and personal development (Ball et al. 1995, p. 116;

Zedner 1998, p. 173). Now consider the evidence cited by Johnston in her discussion of “just deserts” for offenders with “severe mental illness” (Johnston 2013, p. 151). Autism is not a mental illness, but autistic individuals tend to share relevant vulnerabilities. Compared to typical people, those with the kinds of “cognitive and behavioral limitations” (Johnston 2013, p. 151) that tend to be experienced in autism and mental illness (i) are more vulnerable to bullying and predation inside (as well as outside) prison and (ii) have a harder time coping with prison structures and rules, hence incurring relatively more disciplinary violations (as in the case of Neli). In short, they are more susceptible to serious harm in prison. This extra susceptibility should be factored into the sentences of autistic juveniles (and adults) if we do not wish them to suffer undeservedly more onerous punishments than their peers who are not affected by these differences or limitations (Johnston 2013). Autism should then be considered as a mitigating factor in determining appropriate sentences.

9.9 Conclusion

Autism can be relevant to all facets of an autistic person’s engagement with the criminal justice system. Being autistic can make it harder to appreciate and conform to social and legal expectations, and can pose challenges for the interactions with law enforcement that follow social disturbances or accusations of illegal behavior. Autism can also provide good reasons for finding that someone should not be punished for offending behavior, and good reasons for deviating from sentencing standards used for neurotypical offenders. While these considerations are not specific to young people transitioning to adulthood, they are most relevant to that age group because young adults are the most likely to offend and be arrested.

We hope these findings are helpful for families, schools, the law enforcement community, and others. They point to a wide range of topics for future work. For instance, to develop usable models of the “reasonable you” standard, we might want to learn more about how specific types of neuropsychological profiles affect ability to perceive and respond to morally/legally relevant information. Community views on sentencing may be relevant. We may also want to see how the considerations treated here fit into ongoing philosophical discussions of moral responsibility. The concept of “answerability” discussed by David Shoemaker and others (Shoemaker 2015) may be promising in this context. Answerability, as opposed to simple blameworthiness, may provide a framework for retaining as much as possible the idea that autistic individuals are moral agents—members of the moral community—while recognizing vulnerabilities and mitigating factors. As always, a primary challenge is to provide an analysis that makes sense for a wide enough range of autistic profiles while also allowing for individualized application, all with respect and while honoring the autistic experience. We hope this chapter has moved the dialogue a bit further in that direction.

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