AUTISM AND CRIME: SHOULD AUTISTIC INDIVIDUALS BE AFFORDED THE USE OF AN “AUTISM” DEFENSE?

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INTRODUCTION

On March 4, 2011, a jury in Stafford County, Virginia found 19-year-old Reginald “Neli” Latson guilty of four charges, including assault of a law enforcement officer. Latson was stopped by a deputy after a call was received about a suspicious black male, possibly carrying a gun, sitting outside a library. When approached by the deputy, Latson refused to give his name after being asked several times to provide it, was told he was under arrest and was bent over the hood of a car. A struggle between Latson and the deputy ensued, during which Latson flipped the deputy onto his back, causing his head to hit the pavement, and hit him dozens of times. When the struggle was over the deputy had a one-inch cut on his head, numerous abrasions, and a shattered ankle that required two plates and a dozen screws to fix. The jury recommended a ten and a half year sentence for Latson.1

This appears to be a clear-cut case of assault of a police officer: Many would read this and think that Latson deserves to be sent to prison. One important fact has been left out of this account, however: Latson has Asperger’s syndrome.2

Asperger’s syndrome is a type of Autism Spectrum Disorder (ASD).3 The Centers for Disease Control and Prevention (CDC) estimates that an average of 1 in 110 children in the United States has an ASD.4 Latson’s case is just one example of what can happen as persons with ASD grow up, and are swept up in the criminal justice system. Should there be an “autism defense” for men and women diagnosed with an ASD who commit crimes? This paper will attempt to provide an answer to that question.

Part I of this paper will examine the science behind ASD, its symptoms, how it is diagnosed, and treatment options. It is important to understand the background behind ASD in order to determine whether individuals with an ASD fit within the scope of the insanity defenses currently used in the United States. Part II will look at other mental illnesses, specifically schizophrenia and Tourette’s syndrome, and how these illnesses fit into the different variations of the insanity test. Part III examines aggression and ASD, first by discussing Asperger’s syndrome and criminal behavior and then looking at specific instances where an autistic individual has committed a crime. Part IV will survey the history of the insanity defense and will

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2 Id.
consider how determinations of competence to stand trial are affected by an ASD diagnosis. The paper will conclude with a discussion of whether an individual with ASD should be afforded an “autism defense” and what form such a defense could take.

I. AUTISM SPECTRUM DISORDER

ASD is a range of complex neurodevelopment disorders, characterized by social impairments; communication difficulties; and restricted, repetitive, and stereotyped patterns of behavior.\(^5\) The disorders along this spectrum range from Autism, the most severe form, to Asperger’s syndrome, which is the mildest form.\(^6\) The CDC estimates that two to six per 1,000 children have an ASD.\(^7\) ASD is three to four times more prevalent in males than females.\(^8\)

All children diagnosed with an ASD demonstrate deficits in social interaction, verbal and nonverbal communication, and repetitive behaviors or interests.\(^9\) Children with an ASD will frequently also have unusual responses to specific sensory experiences, such as certain sounds or the appearance of certain objects.\(^10\) The manifestation of these symptoms varies from child to child and can range from very mild to severe.\(^11\) A closer look at these symptoms can provide a better understanding as to how a person with an ASD can find themselves caught up in the legal system.

A. Symptoms

1. Social interaction

Impaired social interaction is a hallmark of ASD.\(^12\) Most children with ASD exhibit signs of indifference towards others, and seem to prefer being alone.\(^13\) As they get older, these children seldom seek comfort and do not respond to parents’ displays of anger and affection in the way a typical child would.\(^14\) Children with ASD often lack the ability to interpret subtle social cues (a smile, for example) and this can lead to difficulty in understanding what others are thinking and feeling.\(^15\) Individuals with ASD also have difficulty understanding the world from the perspective of others, which leaves them unable to predict or understand other people’s actions.\(^16\) Many people with ASD also have problems managing their emotions:

\(^{12}\) Id.


\(^{16}\) Id.
The individual with ASD might also be disruptive and physically aggressive at times, making social relationships still more difficult. They have a tendency to “lose control,” particularly when they’re in a strange or overwhelming environment, or when angry and frustrated. They may at times break things, attack others, or hurt themselves.\textsuperscript{17}

It is possible that manifestations of this type of aggressive behavior often leads to individuals with ASD being charged with crimes, as in the case of Neli Latson.

2. Communication difficulties

Children diagnosed with ASD also experience difficulties communicating with others.\textsuperscript{18} About forty percent of children with an ASD do not talk at all.\textsuperscript{19} Others use language in unusual ways or are unable to combine words into meaningful sentences, and may use only single words or repeat the same phrase over and over.\textsuperscript{20} They may have a difficult time effectively using body language, facial expressions, and movements to communicate.\textsuperscript{21} Individuals with ASD might also stand too close to the person they are talking to, and may have trouble transitioning to another topic of conversation.\textsuperscript{22}

The communication difficulties faced by people with ASD can exacerbate misunderstandings with law enforcement professionals. A police officer who comes into contact with a person with ASD who doesn’t speak, for example, may take that person’s silence as a sign of disobedience. Neli Latson refused to answer when spoken to by the deputy who approached him, and as a result Latson now sits in jail and awaits sentencing.\textsuperscript{23} Similar situations could easily befall people with ASD who come into contact with a police officer and mimic what the officer says, or who smiles at an inappropriate time (both characteristics of ASD), leading the officer to believe the person is being disrespectful.

3. Repetitive Behaviors

People with ASD often exhibit unusual behaviors. Some examples are behaviors such as repeatedly flapping their arms, or rocking from side to side.\textsuperscript{24} Routine is also extremely important to persons with ASD and any change in a daily pattern could result in a person “losing control” or having a “melt down.”\textsuperscript{25}

B. Diagnosis

\begin{thebibliography}{25}
\bibitem{18}NATIONAL INSTITUTE OF MENTAL HEALTH, supra note 7, at 2.
\bibitem{19}CENTERS FOR DISEASE CONTROL AND PREVENTION, supra note 4.
\bibitem{20}NATIONAL INSTITUTE OF MENTAL HEALTH, supra note 7, at 2.
\bibitem{21}Id.
\bibitem{22}CENTERS FOR DISEASE CONTROL AND PREVENTION, supra note 4.
\bibitem{23}Vargas, supra note \textbf{Error! Bookmark not defined.}.
\bibitem{24}CENTERS FOR DISEASE CONTROL AND PREVENTION, supra note 4.
\bibitem{25}NATIONAL INSTITUTE OF MENTAL HEALTH, supra note 7, at 3.
\end{thebibliography}
The diagnosis of an ASD is conducted in two stages.\textsuperscript{26} The first stage is a developmental screening test done by the child’s physician during a “well-child” check-up.\textsuperscript{27} The second stage of the diagnosis is a comprehensive evaluation done by a multidisciplinary team.\textsuperscript{28} The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) has set forth the criteria for the diagnoses of Autism and Asperger’s Syndrome.\textsuperscript{29} A diagnosis of autism must be supported by the presence of a total of six or more items from three headings.\textsuperscript{30} At least two items must be observed from heading (A), qualitative impairment in social interaction; one item must be observed from heading (B), qualitative impairments in communication; and one must be observed from heading (C), restricted repetitive and stereotyped patterns of behavior, interests, and activities.\textsuperscript{31} In addition to the presence of these items, a child must exhibit delays or abnormal functioning in one of three areas, and the onset must be prior to the child turning three years old.\textsuperscript{32} Those areas are: social interaction, language as used in social communication, and symbolic or imaginative play.\textsuperscript{33} A diagnosis of Asperger’s syndrome is made with different criteria than those used to diagnose autism, although there is significant overlap and similarity between the two. As with autism, at least two items must be observed from category (A), qualitative impairment in social interaction, and at least one item must be observed from a second category, restricted repetitive and stereotyped patterns of behavior, interests, and activities.\textsuperscript{34} The child must also exhibit clinically significant impairments in social, occupational, or other important areas of functioning, but clinically significant delays in language or in cognitive development, self-help skills, or adaptive behavior must be absent.\textsuperscript{35}

C. Treatment

It is important that the treatment of ASD begins early, especially when dealing with an individual who has autism. The goals of treatment are to improve communication and self-help skills, and to reduce disruptive behavior.\textsuperscript{36} Most individuals with ASD respond well to highly structured, individualized programs.\textsuperscript{37} The following are treatment guidelines for those individuals who are diagnosed with autism. These guidelines overlap to a great extent with those applicable to individuals with Asperger’s syndrome.\textsuperscript{38}

1. Educational Approaches

\textsuperscript{26} Id. at 5.
\textsuperscript{27} Id. A “well-child” check up includes a complete physical examination at which time the child’s physician will check on growth and development in order to try and detect problems early. \textit{Well-Child Visits, MEDLINE PLUS}, http://www.nlm.nih.gov/medlineplus/ency/article/001928.htm (last visited April 14, 2011).
\textsuperscript{28} \textsc{National Institute of Mental Health}, supra note 7, at 6.
\textsuperscript{29} \textsc{American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders} (4th ed., Text Revision 2000).
\textsuperscript{30} Id. at 75.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 84.
\textsuperscript{35} Id.
\textsuperscript{37} \textsc{National Institute of Mental Health}, supra note 7, at 10-11.
\textsuperscript{38} Volkmar et al., supra note 36.
Intensive and highly structured special education is extremely important for autistic children. Teaching children with autism is challenging and a low student-to-teacher ratio is recommended. The use of predictable and consistent routines is necessary because an autistic child’s ability to better predict impending activities is usually beneficial in reducing his or her frustration and the disruptive behavior that typically goes along with it. Speech-language therapy is focused on helping the autistic child acquire a vocabulary that is relevant to everyday life so that they can participate in meaningful communication. As these children get older, or for those who are higher-functioning, the focus of educational programs shift to social and communication skills training. This training may be conducted in small groups or in real-world settings.

2. Behavior Therapy

Behavior Therapy utilizes modification techniques to establish desired behaviors and eliminate problematic ones. Applied Behavior Analysis (ABA) has become widely accepted as an effective treatment for people with autism. There are different types of ABA, including (1) Discrete Trial Training, which is step-by-step training through a desired behavior or response; (2) Early Intensive Behavioral Intervention, which is a type of behavioral analysis for very young children; (3) Pivotal Response Training, the aim of which is to increase a child’s motivation to learn, monitor his own behavior and initiate communication with others; and (4) Verbal Behavior Intervention, which focuses on teaching verbal skills. Many children, though not all, significantly benefit from Behavior Therapy.

3. Medication

ASD cannot be cured with medication, nor is there a medication available that can treat the primary symptoms of ASD. Rather, medication is used to treat irritability associated with ASD, such as aggression, self-injurious behavior, and severe tantrums. Risperdal was the first drug approved by the U.S. Food and Drug Administration to treat irritability associated with autism in children. Doctors may also prescribe anti-depressants, anti-psychotics, or medications developed to treat depression or obsessive-compulsive disorder to children with ASD. The safety and effectiveness of the use of these medications in children with autism has not yet been

39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 NATIONAL INSTITUTE OF MENTAL HEALTH, supra note 7, at 11.
47 Centers for Disease Control and Prevention, supra note 4.
48 Volkmar, supra note 36.
49 CENTERS FOR DISEASE CONTROL AND PREVENTION, supra note 4.
50 NATIONAL INSTITUTE OF MENTAL HEALTH, supra note 7, at 13.
51 Id.
52 Id.
proven, and doctors decide on a case-by-case basis whether the use of such medication is beneficial for their ASD patient.\(^{53}\)

II. **Other Mental Illnesses**

In order to better distinguish the unique difficulties related to interactions with the criminal justice system faced by individuals with ASD, this paper will briefly discuss schizophrenia and Tourette’s syndrome.

A. *Schizophrenia*

Schizophrenia is a mental disorder that causes a person to have difficulty thinking logically, having normal emotional responses, behaving acceptably in social situations, and differentiating between real and unreal experiences.\(^{54}\) The characteristic symptoms of schizophrenia, two or more of which must be present for a significant portion of time in a one-month period in order to support such a diagnosis, are delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior and negative symptoms.\(^{55}\) A person must also exhibit social or occupational dysfunction to support a schizophrenia diagnosis.\(^{56}\)

Schizophrenia is most effectively treated with antipsychotic medication.\(^{57}\) This differentiates schizophrenia from ASD in that if properly treated, the symptoms of schizophrenia can be controlled and, depending on the severity of their illness, people with schizophrenia can lead relatively normal and productive lives.\(^{58}\)

From a legal standpoint, people with schizophrenia who commit crimes are often successful in making use of the insanity defense. The *M’Naghten* test, one such insanity defense, is tailored toward an individual who suffers from a mental illness like schizophrenia, and is less readily applicable to a person with the symptoms common to ASD, particularly autism.\(^{59}\)

B. *Tourette’s Syndrome*

Tourette’s Syndrome (TS) is a neurological disorder characterized by tics.\(^{60}\) Tics are repetitive, involuntary movements or vocalizations and are classified as either simple or complex.\(^{61}\) Some complex tics may appear purposeful.\(^{62}\) The most extreme tics may include motor movements that result in self-harm, such as hitting oneself, or inappropriate vocalizations,
such as shouting out swear words. Tics are often exacerbated when a person is excited or anxious.

There were at least 100 criminal cases between the years 1944 and 2009 that involved an individual with TS. As Judge Daniel Ryan comprehensively details in his article on the subject, individuals with TS have been able to argue the irresistible impulse test for insanity with some success. Most courts, however, do not recognize TS as a condition that “impairs a defendant to a degree where they are not competent, diminished or insane at the time they committed the alleged crime.” It is surprising that a disorder which is characterized by involuntary movements is often not found to fit within the scope of the irresistible impulse test. If a person with TS is unable to successfully use such a defense, what hope is there for an individual with ASD, who does not appear to fit within the scope of any of the available insanity defenses?

III. AGGRESSION AND AUTISM SPECTRUM DISORDER

There is very little research that examines the prevalence of aggressive behavior in individuals with ASD. There have been some articles written about Asperger’s Syndrome and criminal behavior, and this section will discuss a few of the findings to come out of those articles as well as anecdotal accounts of individuals with ASD who are accused of crimes.

A. Asperger’s syndrome and criminal behavior

Asperger’s syndrome is a higher-functioning Autism Spectrum Disorder (hfASD) characterized by deficient reciprocal social behavior, both verbal and nonverbal communication deficits, and engagement in excessively focused and repetitive activities. Approximately eighty-five percent of individuals with hfASDs are male, and scholars suggest that, “[g]iven the strong association between male gender and violence, a male preponderance among individuals with hfASDs may also increase the risk for violent criminal behavior in hfASDs.”

Haskins and Silva divide criminal activity associated with hfASD into two categories: (1) deficits in Theory of Mind abilities; and/or (2) abnormal, repetitive narrow interests. “Theory of Mind (or mentalization) refers to the ability to estimate the cognitive, perceptual, and affective life of others as well as of the self.” Because persons with hfASD have deficits in this area, they experience difficulties in reading social cues and in their ability to recognize that another person has “a different cognitive experience of a shared event.” This is also referred to as

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63 Id.
64 Id.
66 See Ryan, supra note 65, at 385.
67 Id. at 403.
69 Id. at 377.
70 Id. at 378.
71 Id.
72 Id. at 378 n.72.
mindblindness.\textsuperscript{73} This could prove especially relevant should an individual with hfASD have an
encounter with a police officer because the individual may not recognize that there is a problem.

Abnormal and repetitive narrow interests can also lead to criminal activity. Individuals with
hfASD may have certain fixations that they do not realize fall outside of typical social mores and
constraints. The inability to recognize that their behavior is unwelcome by others can lead to
serious problems for individuals with autism.\textsuperscript{74} One case cited by Haskins and Silva involved an
individual with hfASD who was fixated on city transit-related activities and was arrested for
driving subway trains and buses in New York City without authorization.\textsuperscript{75} Stalking, hoarding,
and stealing are also criminal behaviors that can arise out of repetitive interests.\textsuperscript{76}

A case study from 2005 illustrates the difficulties encountered in the legal system when
individuals with Asperger’s syndrome are charged with murder.\textsuperscript{77} Most forensic psychiatrists
have little experience diagnosing Asperger’s syndrome,\textsuperscript{78} although there may be more experts in
the field now, due to the growing prevalence in society of ASDs, than there were in 2005. The
importance of having psychiatrists available to diagnose these defendants is paramount when it is
most likely their illness that caused them to commit the crimes with which they have been
charged.\textsuperscript{79}

B. Individuals with autism who have been charged with a crime

Zakhqurey Price was an eleven-year-old fifth grader when he was arrested and charged with
a felony.\textsuperscript{80} On October 30, 2009, Zak, who is autistic, had a behavioral tantrum in class, which
led two staff members to attempt to restrain him.\textsuperscript{81} In the process, the staff members were
injured, and the police were called.\textsuperscript{82} Zak was taken away in handcuffs and the school staff
elected to press charges against him.\textsuperscript{83} The outcome of Zak’s case is unclear.

Trudy Steuernagel was beaten to death by her eighteen-year-old autistic son, Sky Walker.\textsuperscript{84}
Lt. Gregory Johnson testified that the police found Steuernagel unconscious on her kitchen floor,
after colleagues became concerned when she failed to show up for work.\textsuperscript{85} Police found Walker
in the basement, and as he was being taken into custody he kicked a deputy in the face and had to

\textsuperscript{73} Brian Wauhop, Mindblindness: Three Nations Approach the Special Case of the Criminally Accused Individual With Asperger’s Syndrome, 27 PENN ST. INT’L L. REV. 959, 963 (2009) (noting that “[m]indblindness is legally significant because it prevents individuals from perceiving and understanding the effect their conduct has on the emotional and cognitive states of others.”).

\textsuperscript{74} Haskins & Silva, supra note 69, at 378.

\textsuperscript{75} Haskins & Silva, supra note 6968, at 380.

\textsuperscript{76} Haskins & Silva, supra note 6968, at 381.

\textsuperscript{77} Donna M. Schwartz-Watts, Asperger’s Disorder and Murder, 33 J. AM. ACAD. PSYCHIATRY & LAW 390 (2005).

\textsuperscript{78} Id. at 392.

\textsuperscript{79} See id.

\textsuperscript{80} Robin Hansen, Fifth Grade Autistic Boy Charged With a Felony, EXAMINER (December 30, 2009),

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Sarah Netter, Police: Professor Beaten to Death by Autistic Son, ABC NEWS (Feb. 11, 2009),

\textsuperscript{85} Lawyers: Autistic Teen Not Fit to Stand Trial in Beating Death of His Mother, FOX NEWS,
be restrained with handcuffs and pepper spray. Steuernagel died eight days later and Walker was charged with murder and assault on a police officer. Steuernagel had written about the difficulties of living with an autistic son and how she had to cope with his aggressive behavior. At his initial court appearance Walker was required to wear a facemask to prevent him from spitting at deputies. Both the prosecution and defense agreed that he would not have to be present at his arraignment on the murder charge. The attorneys later accepted a mental health evaluation of Walker that concluded he was unable to help in his defense and argued that Walker was not competent to stand trial.

Adam Koumoutseas, a twenty-three-year-old with autism, was out for a drive with his mother when he allegedly head-butted her and then smashed her head against a driveway. Police arrived and when they tried to question Adam, “he responded with grunts and unintelligible sounds.” Adam was charged with assault and battery. Neither Adam’s mother, who survived the attack, nor his father, believes Adam “should be subjected to the legal process when he has no idea what he’s done.”

Zak, Sky, and Adam’s stories are just three examples of how individuals with ASD can be caught up in the criminal justice system.

IV. THE INSANITY DEFENSE

This section begins with a look at the history of the insanity defense in the United States. It next takes a particular look at the insanity defense as it is applied in Virginia, in order to tie back to the story of Reginald Latson discussed in the introduction of this paper. It will conclude with a discussion on competency and how the laws regarding competency are written in Virginia and Florida. Florida has included autism in its statute regarding the competency of a criminal defendant to stand trial.

A. History of the insanity defense

M’Naghten’s Case is the basis for the insanity defense in American jurisprudence. On January 20, 1843, Daniel M’Naghten, a Scottish woodworker who was suffering from paranoid delusions, assassinated British civil servant Edward Drummond. It is generally believed that M’Naghten intended to assassinate British Prime Minister Robert Peel. M’Naghten was found

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86 Id.
91 Netter, supra note 85.
92 Id.
90 Id.
91 Lawyers: Autistic Teen Not Fit to Stand Trial in Beating Death of His Mother, supra note 86.
93 Id.
94 Id.
95 Id.
96 See FLA. STAT. § 916.301 et. seq. (2005).
not guilty by reason of insanity, and public indignation from this result prompted the
development of an insanity standard.\footnote{99}{Id. at 80.} The M’Naghten test provides that a defendant is
presumed to be sane unless it can be shown that he was “laboring 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 that what he was doing was wrong.”\footnote{100}{Price v. Virginia, 323 S.E.2d 106 (1984) (citing M’Naghten’s Case, 8 Eng. Rep. at 722-23).} American courts
adopted the M’Naghten test, and it is still used in the majority of jurisdictions today.\footnote{101}{Id. at 80.} This test
is known as a cognitive test because it focuses on the defendant’s knowledge at the time of the
act,\footnote{102}{Redding, supra note 99, at 81.} and whether he knew right from wrong.

The irresistible impulse test, on the other hand, concerns itself with whether the defendant
could control his actions. This test was first adopted in Parsons v. State.\footnote{103}{Andrew P. March, Insanity in Alaska, 98 GEO. L. J. 1481 (2010).} Under this test, a
defendant can be excused from criminal responsibility, even if he knows right from wrong, if he
can show that by virtue of some mental disease or defect he could not control his actions.\footnote{104}{Parsons v. State, 81 Ala. 577, 2 So. 854 (1887).} This
test fell out of favor in the face of public backlash after John Hinckley, who attempted to
assassinate President Ronald Reagan, was acquitted on the basis of a formulation of the insanity
defense found in the Model Penal Code, a control test.\footnote{105}{Ronald R. Inderbitzen, Criminal Law—The A.L.I. Model Penal Code Insanity Test, 44 TUL. L. REV. 192 (1969).}

The Model Penal Code test for insanity states that, “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 wrongfulness of his conduct or to conform his conduct to the
requirements of the law.”\footnote{106}{Redding, supra note 99, at 85.} Only eighteen states and the District of Colombia currently use this
test; twenty-one states use the M’Naghten test; four states use a combination of M’Naghten and
the Irresistible Impulse test; one state, New Hampshire, uses the Durham test; and five states
have abolished the insanity defense altogether.\footnote{107}{Redding, supra note 99, at 85.}

B. The insanity defense in Virginia

Virginia uses both the M’Naghten test and the irresistible impulse test.\footnote{108}{Orndorff v. Virginia, 691 S.E.2d 177 (Va. 2010).} The Supreme Court
of Virginia expressly adopted the M’Naghten rule in Price v. Commonwealth.\footnote{109}{Price v. Commonwealth, 323 S.E.2d 106 (Va. 1984).} Price was
indicted for murder and use of a firearm while committing murder. He pled not guilty to both
charges, asserting that he was insane at the time of the offense. Price killed Richard Peoples after
a night of drinking, and the defense theory was that Price “suffered from a mental defect which,
combined with the consumption of large quantities of liquor, rendered defendant insane at the
time of the killing.”\footnote{110}{Id. at 106.} Price was found guilty, and appealed, claiming that the judge improperly
instructed the jury regarding the applicability of the insanity defense.
The Supreme Court of Virginia held “that the actual *M’Naghten* test for insanity, stated in the disjunctive, is the rule of Virginia.”\(^{112}\) Therefore, the proper jury instruction to be given was that “the defendant was insane if he did not understand the nature, character and consequences of his act, or he was unable to distinguish right from wrong.”\(^{113}\) The court offered an explanation as to what each of the elements of the *M’Naghten* test relates to:

The first portion of *M’Naghten* relates to an accused who is psychotic to an extreme degree. It assumes an accused who, because of mental disease, did not know the nature and quality of his act; he simply did not know what he was doing. For example, in crushing the skull of a human being with an iron bar, he believed that he was smashing a glass jar. The latter portion of *M’Naghten* relates to an accused who knew the nature and quality of his act. He knew what he was doing; he knew that he was crushing the skull of a human being with an iron bar. However, because of mental disease, he did not know that what he was doing was wrong. He believed, for example, that he was carrying out a command from God.\(^{114}\)

Based on the above explanation of the *M’Naghten* test, it does not seem as if an individual with autism fits into either formulation of this defense. Even with only a basic understanding of ASD, it is clear that individuals on the severe end of the ASD spectrum do not suffer from psychosis and, most likely do not commit their crimes as a result of insane delusions or hallucinations. For example, Neli Latson likely knew he was hitting a human when he assaulted the deputy, and his behavior was most likely the result of a reaction to being grabbed by the deputy, not because he received an instruction from a voice inside his head.

The irresistible impulse test was first raised in Virginia in *Boswell v. Commonwealth*.\(^{115}\) In *Thompson v. Commonwealth*\(^{116}\) the court provided a detailed discussion of the irresistible impulse test. The defendant in *Thompson* was found guilty of murder in the first degree and was sentenced to death.\(^{117}\) The defendant contended that at the time of the killing he was “in insulin shock’ to such an extent that he was insane.”\(^{118}\) His family physician testified that “[Defendant] was probably ‘suffering from some form of psychosis in which he was not mentally normal.’”\(^{119}\)

The court stated:

The irresistible impulse doctrine is applicable only to that class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act.\(^{120}\)

\(^{112}\) *Id.* at 110.
\(^{113}\) Price, 323 S.E. 2d at 107.
\(^{114}\) *Id.* at 110.
\(^{115}\) *Boswell v. Commonwealth*, 20 Gratt. 860 (Va. 1871).
\(^{117}\) *Id.* at 285.
\(^{118}\) *Id.* at 287.
\(^{119}\) *Id.*
\(^{120}\) *Id.* at 292.
The court also cited a Massachusetts case, *Commonwealth v. Clark*, which held that “the doctrine of irresistible impulse is applicable only where the defendant knows that the act is wrong but is driven by an irresistible impulse to commit it.” The *Thompson* court found that there was no evidence to show that the defendant was driven by an irresistible impulse to kill the victim, and therefore he was not entitled to a jury instruction on insanity.

It is difficult to see how a person with ASD would be able to use the irresistible impulse test as a defense to crime. It is more likely than not that individuals on the high end of the ASD spectrum who commit crimes do not understand the “nature and consequences” of their actions. Again, Neli Latson appeared to have acted out as a result of his interaction with the deputy, and did not understand that what he was doing was wrong.

C. Competency

An individual with ASD may never get to the point of having to decide whether to raise an insanity defense if he or she is found incompetent to stand trial. If either party believes that the defendant “lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed . . . .” Such an evaluation could be common for individuals with ASD, as thirty-eight percent of children who have ASD also have an intellectual disability that might support a showing of incompetence. In Virginia, if a defendant is found to be incompetent, the court orders that the defendant receive outpatient treatment until competency is restored. If inpatient treatment is required, the court shall instead order that the defendant receive treatment at a hospital designated as appropriate for treatment of persons under criminal charge. ASD is incurable, and an individual with ASD who is committed may never be released, because it is impossible for his or her competency to be restored.

The state of Florida has responded to this conundrum by amending the state code and the state rules of criminal procedure, adding a provision stating that

If the incompetency to stand trial or to proceed is due to retardation or autism, the court shall dismiss the charges within a reasonable time after such determination, not to exceed 2 years for felony charges . . . unless the court specifies in its order the reasons for believing that the defendant will become competent within the foreseeable future and specifies the time within which the defendant is expected to become competent. The dismissal shall be without prejudice to the state to refile should the defendant be declared competent to proceed in the future.

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122 Thompson, 70 S.E. 2d at 292 (Va. 1952).
123 Id.
The time period for persons with mental illness, as opposed to mental retardation or autism, is “any time after 5 years.” Those persons are also required to go through another competency hearing before the court makes its determination as to whether the charges should be dismissed. The Fourth District Court of Appeal of Florida stated that the legislative purpose for distinguishing between the two rules is that autism and mental retardation are lifelong conditions and people with mental illness are more responsive to treatment.

**CONCLUSION**

The American legal system needs to recognize that the number of individuals with ASD who come before the court is only going to increase. Because of this, there needs to be some mechanism in place, such as an “autism” defense, that these individuals can utilize, to ensure that their well-being is protected. There are sure to be many who disagree with this viewpoint, including people like deputy Calverly, who are the victims of these individuals’ crimes. A discussion of victim’s rights is beyond the scope of this paper, but their rights will have to be considered in order to strike the right balance between what is just and fair, for victims and for individuals with ASD.

If an autism defense were to be adopted, perhaps it would read something like the following:

“Autism defense” – A person shall not be responsible for their criminal conduct where such person suffers from a neurological disorder which is so disabling that the person does not intend, nor comprehends, the results of their actions, and has no control over his or her actions, which are simply a manifestation of the characteristics of the disorder.

Would a person such as Sky Walker benefit from such a defense? Based on the little information gleaned from the articles related to his case, it seems that he could. No one knows exactly what happened in that kitchen with Sky and his mother, but one can speculate, based on a simple understanding of autism, that Sky had no intention of committing a crime or killing his mother. His actions were instead a knee-jerk response to some unwelcome stimuli. The same could be said for Zak Price and Adam Koumoutseas.

Due to the nature of ASD, and the fact that disorders that fall on the spectrum range from mild to severe, certain limits should be put into place as to which individuals with ASD may actually use the defense. This paper focused on the two most prevalent forms of ASD: autism and Asperger’s syndrome. Individuals with autism would have a higher likelihood of successfully asserting the proposed defense. Autism is certainly a more debilitating disorder than Asperger’s syndrome, and it is less likely that individuals with autism understand the nature of their actions. Individuals with Asperger’s syndrome, on the other hand, are likely to have a better developed sense of the consequences of their actions. Accordingly, many individuals suffering from Asperger’s syndrome might not be appropriate candidates for an autism defense. Courts and legislatures that consider implementing the autism defense will have to account for these varying degrees of severity within the ASD spectrum. Reliance on expert testimony and previous diagnoses will be key to these determinations.

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130 *Id.*
Support for such a mechanism within the ASD community is far from universal: At least one online forum\textsuperscript{132} dramatizes the concerns of ASD individuals regarding the way they are linked to crime in the public eye, as well as fears that use of the disorder as a defense to otherwise criminal behavior will result in stereotyping and discrimination.\textsuperscript{133}

Autism, or any ASD, does not quite fit within the parameters of the M’Naghten test, Irresistible Impulse test, or the Model Penal Code test for insanity. This underscores the importance of coming up with a defense tailored to the characteristics of this disorder. ASD is becoming more prevalent in our society, and one can only assume that the number of autistic individuals caught up in the American legal system will rise. Autistic individuals require specialized treatment, and they will not receive this treatment if they are placed in jail. If an autistic individual has the use of an “autism” defense, and can successfully assert it, then they will be assured the opportunity to receive the necessary treatment. They should not be punished for actions they did not intend or comprehend.


\textsuperscript{133} Id.