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AUTISM, CULPABILITY AND THE CRIMINAL LAW

Although the criminal justice system now strives to accommodate defendants with autism, the criminal law remains the domain of the 'reasonable man' and struggles to define culpability in neurodiverse individuals



Over the past decade, there have been considerable strides in recognising the issues faced by individuals with a diagnosis of autism spectrum disorder (hereinafter 'autism'). Alongside social changes and increased public awareness, the criminal justice system has become alert to potential challenges inherent in dealing with autistic suspects, defendants and witnesses. However, the criminal law itself is based on the premise of the (neurotypical) 'reasonable man' and it is argued that this results in the potential for inconsistency and injustice. This article considers the relevance of autism to the criminal justice system, before providing a critique of the current legal tests to determine criminal intention and culpability (in particular regarding rape), when applied to defendants with autism.

Autism in the criminal justice system

The current diagnostic criteria for autism are 'persistent difficulties with social communication and social interaction' and 'restricted and repetitive patterns of behaviours, activities or interests' (which includes sensory behaviour), present since early childhood, to the extent that these 'limit and impair everyday functioning' (DSM-5, 2013). These factors in combination, alongside the co-occurring learning impairments and mental health issues which many autistic individuals present with (Mannion & Leader, 2013), provide real challenges in determining the appropriate level of criminal culpability of individuals with autism. There is no evidence that autism itself is a causal factor in offending behaviour, but features of the condition may predispose some autistic individuals to have contact with the criminal justice system. These include poor understanding of social rules and cues, suggestibility, impulsivity, reduced ability to feel empathy, reactive aggression when anxious, and an obsessive pursuit of specific interests (Woodbury-Smith & Dein, 2014).

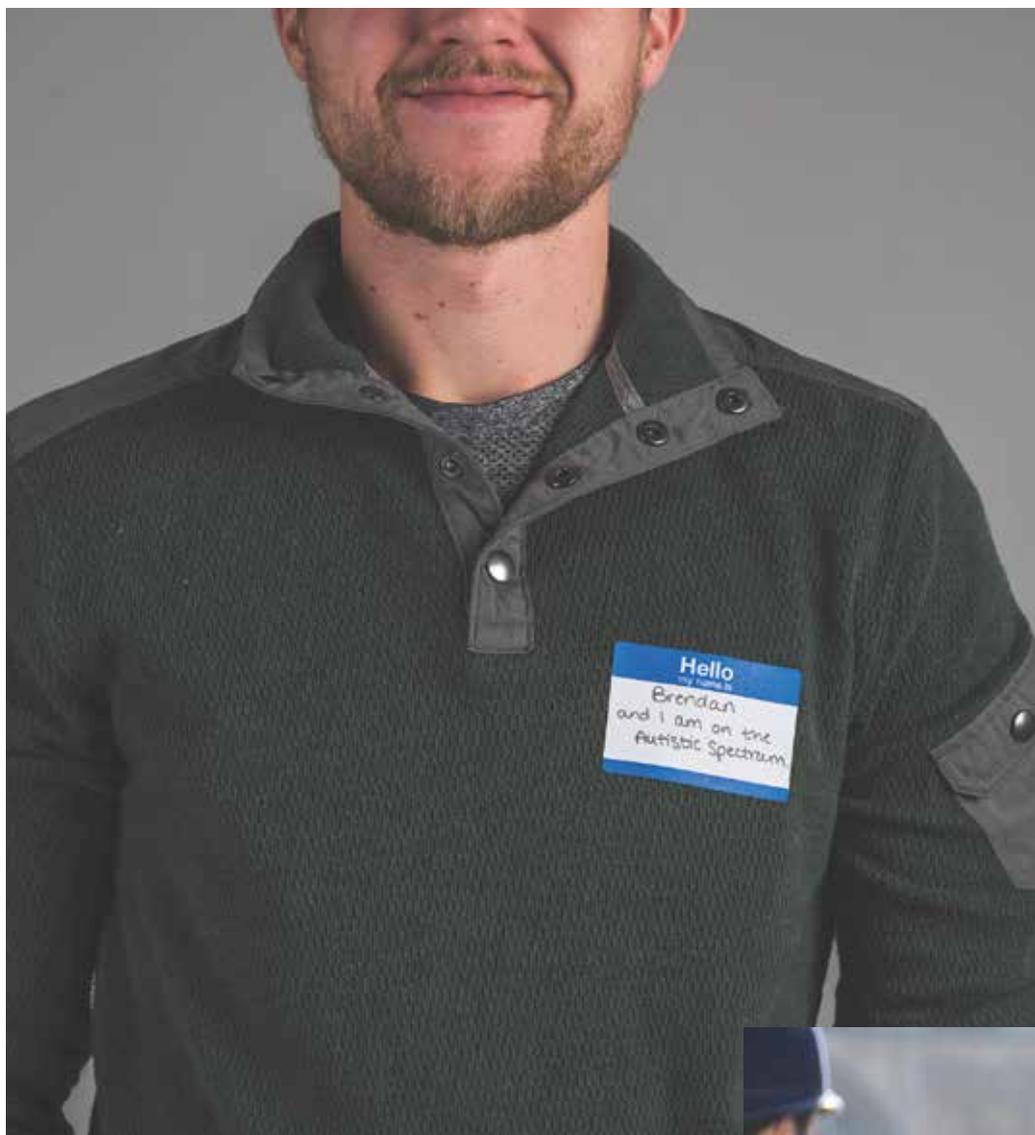
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The criminal justice system in England and Wales has responded with a range of guidelines and best practice recommendations for professionals within the criminal justice system, for example, toolkits and training for advocates, police and the judiciary (Allely, 2015). These developments are welcomed, although inconsistencies and gaps remain. For example, women and thus female suspects and defendants with autism may present differently and are underdiagnosed and underrepresented in the research (National Autistic Society, 2015). Nonetheless, despite progress within the criminal justice system, it is the criminal law itself which determines whether certain behaviours amount to an offence, and there are no specific provisions for autism or related neurodevelopmental disorders in criminal legislation. However, case law such as Gary McKinnon's high profile battle against extradition to face computer hacking charges (*McKinnon v The United States of America* [2008] UKHL 59) has highlighted some of the tensions in reconciling autism with understandings of criminal culpability and punishment.

Mens rea and the 'reasonable man'

In order to ascribe culpability, the criminal law relies on two fundamental elements: the *actus reus* (guilty act) and the *mens rea* (guilty mind). Although there are some exceptions, it is a basic tenet of English criminal law that both elements must be present in order for a defendant to be guilty of an offence, but it is the *mens rea* which is key, and provides the moral justification for punishment (Horder, 2016). The definition of *mens rea* varies greatly, and, depending on the offence in question, may be dependent upon a defendant's intention, recklessness, or occasionally, negligence. These categories of *mens rea* are in turn interpreted differently across different offences so that, for example, recklessness in criminal damage is defined differently to recklessness in manslaughter. The result is that a variety of objective, subjective and twofold tests operate within the criminal law, in order that juries and the judiciary may assess the culpability of a defendant's 'guilty mind' against the specific criteria for the offence with which they are charged.

Critics have long argued that this renders the criminal law irrational and unprincipled, but that the ostensible justification for this lack of consistency is that it allows justice to be done in individual cases (Horder, 2016). However, it is argued here that even where a defendant's



subjective state of mind may be considered as part of the *mens rea*, the law's assumption of neurotypical cognitive processes and social communication operates against autistic defendants. It is an established principle of criminal trials that unless a defendant is unfit to stand trial, they are considered to be able to function within a normal range of cognitive abilities (Horder, 2016). Fitness to stand trial is defined as the ability to give, receive and understand instructions relating to a criminal trial (*Robertson* [1968] 1 WLR 1767); a low bar which many autistic defendants, even those with moderate learning difficulties, will pass. They will thus be judged against the criteria of the law's 'reasonable man', who is not an 'ordinary' man but rather a legal fiction, capable of weighing up actions carefully and rationally (Moran, 2003).

Mens rea, rape and autistic defendants

By way of an example of how presumptions around *mens rea* may impact differently on autistic defendants, it is instructive to consider the *mens rea* of rape. The literature on autism's relationship with offending has identified sexual offending as



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a potential issue, given the social communication inherent in an understanding of consent (Cea, 2014). The Sexual Offences Act (2003, s.1) provides that in order to be guilty of rape, a defendant must intentionally penetrate the complainant's mouth, vagina or anus with his penis, without a reasonable belief in the complainant's consent. Two issues arise here: firstly the meaning of an 'intentional' penetration, and secondly how the law determines a defendant's lack of reasonable belief in consent. Regarding the requirement for an intentional penetration, it can be argued that impulsivity and a lack of understanding of bodily boundaries and privacy (Attwood, 2007) could lead to a defendant not being able to form the *mens rea* of intentional penetration. Nonetheless, case law to date has defined this provision as relating solely to the physical act; an understanding of the consequences is irrelevant (Ormerod & Laird, 2018).

The second issue is more complex. How can we reliably assess an autistic defendant's culpability for an offence whose *mens rea* is the absence of a reasonable belief in another party's state of mind, when it is precisely this lack of understanding of social communication and empathy which forms part of the diagnostic criteria for autism? Section 1(2) of the Sexual Offences Act provides that '[w]hether a belief is reasonable is to be determined having regard to all the circumstances' and it is this caveat which renders the *mens rea* not wholly objective, which is relevant to autistic defendants. Lord Justice Hughes ([2013] EWCA Crim 3) gives the example of a situation in which reasonableness of a belief could turn on a defendant's ability to read subtle social signals, and indeed in Sultan ([2008] EWCA Crim 6) the defendant was granted a retrial after evidence of his Asperger's Syndrome had not been considered by the jury in the course of his rape trial.

However, the characteristics of a defendant which may be considered in the course of establishing a reasonable belief are far from settled. A 'wholly irrational' or 'delusional' belief in consent is unlikely to be deemed reasonable (Horder, 2016), but the line between an autistic defendant's obsessive compulsions and the jury's perception of an irrational or delusional belief may be a very fine one. Freckleton (2012, p. 372) argues that the key to such cases is expert evidence about the 'nexus between such conditions and accused persons' criminal responsibility'. Given the wide spectrum of the condition, some autistic rape defendants will have an adequate understanding of consent; some may, depending on the context, and others may have extremely limited understanding despite functioning well in other respects. The only workable standard of 'all the circumstances' then becomes a subjective one, supported by medical evidence. However, this was not Parliament's intention in drafting the law, which was expressly intended to achieve a more objective *mens rea* for rape; the appellate courts are likely to be presented with further difficult cases as a result.





Conclusion

Despite an increasingly nuanced understanding of autism within the criminal justice system, the criminal law struggles to apply consistent and objective criteria to the criminalisation of autistic defendants. As the example of the *mens rea* for rape illustrated, case law has made allowances, but these are piecemeal, and subject both to judicial discretion and the faith of the jury in expert evidence. It may not be possible – nor desirable – to legislate for the full range of human responses to situations which fall under the remit of the criminal law, but the law's continued reliance on the 'reasonable man' looks increasingly fragile.

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