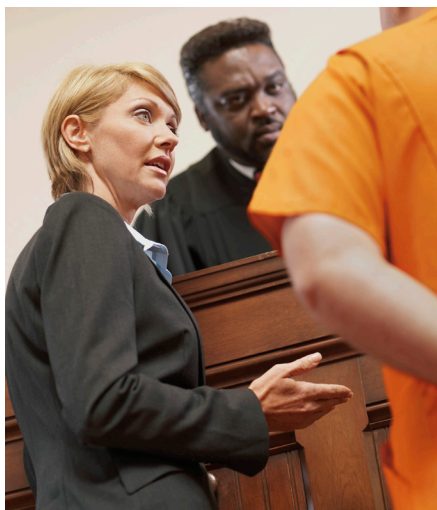


5 Facts Attorneys Need to Know

When Representing or Working With Citizens with Intellectual and Developmental Disabilities (I/DD)



1. People with I/DD are vulnerable at every stage in the criminal justice system. Be aware of systemic cracks at every point where your client (or witness) comes into contact with the criminal justice system.

2. If competency issues are even remotely possible, test! To be found competent to stand trial, the defendant must have both a rational and factual understanding of the nature of the proceedings against them, and be able to effectively assist counsel in preparing a defense. If there is any doubt, test!

Remember: a diagnosis involves more than just a low IQ score—adaptive functioning is equally important. Adaptive behavior = conceptual skills + social skills + practical skills.

3. People with low IQ are generally unable to waive Miranda. The *Miranda* rights are generally found to be at a 7th grade level—someone with an intellectual disability with an IQ around 70 may read at a sixth grade level or below.

4. False Confessions are much higher among people with I/DD.

Generally, people with intellectual disabilities are:

- More likely to respond to coercion and pressure
- Highly suggestible to leading questions and false information
- Particularly vulnerable to atmosphere
- Unable to understand concepts of blameworthiness and culpability

5. Sex Offenses by a person with I/DD are often not the result of sexual deviance. These offenses generally do not result from unusually strong sexual drive as some mistakenly believe. Often, sex offenses are the result of counterfeit deviance. Factors influencing this inappropriate behavior include:

- Not having enough opportunities for appropriate sexual expression and limited availability of partners
- Ignorance of what is considered appropriate and inadequate social education
- A history of sexual or physical abuse
- Difficulty projecting consequences of behavior

Individuals with disabilities who are charged with sexual offenses may engage in acceptable sexual behaviors but with someone who is not an appropriate age—this is called “age discordant sex play.”



National Center on Criminal
Justice & Disability NCCJD™

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website at:

www.thearc.org/NCCJD

Contact us:

Phone: 202.433.5255

Toll free: 800.433.5255

Email: NCCJDinfo@thearc.org



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For more information on this topic, see the Pathways to Justice™ Training.

5 Facts Attorneys Need to Know

When working with a victim/witness or suspect/offender with I/DD, identification, communication, and accommodation are the three keys to better outcomes.

Identification

Check the person's history for and ask "Does/did the person":

- Graduate high school? Have an IEP? Work after high school? Cook, clean, and do laundry?
- Are there past psychological evaluations or other assessments available?

Observe your interactions for possible signs of I/DD including:

Difficulty Communicating

- Seem responsive and able to understand your conversation?
- Have trouble understanding abstract concepts?
- Have difficulty with reading or writing or have a short attention span?
- Struggle to give accurate directions, count money, or tell time?

Consequences of Actions

- Seem aware of the seriousness of the situation?
- Seem eager to please or easily persuaded by others?

Inappropriate Behavior

- Smile inappropriately, make other non-verbal cues that are atypical, have issues with personal space, or make inappropriate facial expressions?

Communication

- Clearly identify yourself—who are you and why are you there? Repeat if necessary
- Use simple wording—no complex terms
- Take time giving or asking for information and repeat questions if necessary
- Always use open-ended, non-leading questions in a straightforward, non-aggressive way
- Consider setting aside additional time pre-trial and during the trial to explain events
- Check with support personnel and the client about assisted communication and devices

Communicating Lengths of time

Consider using a calendar with events important to the person included for reference.

Social Stories

Discuss expectations of behavior in new situations. I.E. A victim/witness might read a story about Sam, who testified bravely in court while wearing a nice suit.

Accommodation

Each courthouse is required to have an ADA coordinator who ensures ADA standards are met.

Pre-Trial

- Be sure to discuss appropriate court room behavior and attire in detail. Visit the court room prior to trial.
- Simplify language on documents
- Ask that client be called first on the docket to avoid additional anxiety.

Trial

- Have everyone talk slowly or write, and repeat information when necessary
- Take periodic breaks
- Present information in concrete, step-by step ways
- Allow videotaped testimony or video conferencing
- Use interpreters, alternative text formats, or note takers to aid in comprehension
- Consider alternative seating arrangements or modified schedules
- Move for a support person or emotional support animal to aid the person during trial

Post-Trial

- Sentencing terms provided at appropriate developmental level
- Safe placement during incarceration or appropriate alternatives to incarceration.

Remember

- Incarceration is disproportionately harmful to people with disabilities.
- Non-traditional communication ability does not indicate unreliability of a witness or victim to testify.
- **Mitigate**—all the life circumstances of a person with a disability should be examined to determine culpability, actual (not perceived) threat to public safety, and appropriate correctional placement.

This project was supported by Grant No. 2013-MU-MX-K024 awarded by the Bureau of Justice Assistance, a component of the Office of Justice Programs. Point of views or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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Connection between Childhood ADHD diagnosis and Adult Methamphetamine Use

Denise Arellano to: zzFDOml_Helpdesk,
zzFDOml_Non-Capital Mitigation

03/28/2016 03:18 PM

Dear Colleagues:

Thanks to everyone who sent their ideas and suggestions to me regarding research on childhood ADHD and adult meth use. I received so many responses from people wanting this information that I thought I would send it to the entire email list. Below are the links I received about this subject. Interestingly enough, there is a great deal of scholarship on whether giving child stimulant-based ADHD medication might or might not create a substance use disorder as an adult. According to the articles that received, there does not appear to be a link.

The best short, relatively recent research received is at <https://www.ucdmc.ucdavis.edu/publish/news/newsroom/6944> This is the research of Catherine Fassbender and her colleagues at the UC-Davis MIND Institute. The research indicates people with ADHD are at a greater risk for substance dependence, particularly methamphetamine dependency.

Fassbender's CV is at https://www.ucdmc.ucdavis.edu/mindinstitute/ourteam/faculty_pdf/catherine_fassbender.pdf

Other links received are as follows:

<https://www.drugabuse.gov/publications/principles-adolescent-substance-use-disorder-treatment-research-based-guide/frequently-asked-questions/does-treatment-adhd-stimulant-medications-ritalinr-adderallr-increase-risk-substance-abuse-later-in>

<https://www.drugabuse.gov/publications/principles-adolescent-substance-use-disorder-treatment-research-based-guide/references>

http://journals.lww.com/jonmd/Abstract/1997/08000/Attention_Deficit_Hyperactivity_Disorder_ADHD_is.1.aspx

<http://archpsyc.jamanetwork.com/article.aspx?articleid=1691781>

<http://www.sciencedirect.com/science/article/pii/S0272735811000110>

<http://onlinelibrary.wiley.com/doi/10.1111/j.1440-1819.2005.01340.x/full>

http://www.dea.gov/druginfo/all_fact_sheets.pdf

<https://www.ncjrs.gov/App/publications/Abstract.aspx?id=181348>

<https://search.usa.gov/search?query=adhd+methamphetamine+use&op=Search&affiliate=justice>

Suggested articles were:

Jaffe, C. Saxon, A.J., Meredith, C., Bush, K.R., Straits-Troster, K.A., Romwall, L.: A pilot comparison of methamphetamine users with and without ADHD. *Journal of Addictive Diseases*, Vol 23 (2), p. 139, 2004.

Biederman J, Wilens T, Mick E, Milberger S, Spencer T, Faraone S
(1995) Psychoactive substance use disorders in adults with attention deficit hyperactivity disorder (ADHD): effects of ADHD and psychiatric comorbidity. *Am J Psychiatry* 152:1652–1658

Thanks, everyone, for your assistance.

Sincerely,

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Defendants With Autism Spectrum Disorder In Criminal Court: A Judges' Toolkit

Colleen M. Berryessa*

ABSTRACT

This Article acts as a toolkit for members of the judiciary on defendants with Autism Spectrum Disorder (ASD), and specifically looks to equip judges with knowledge, evidence, and resources on recognizing and understanding symptoms of ASD in order to better identify and evaluate diagnosed defendants and their offending behavior. This will allow judges to have impactful and beneficial interactions with defendants, potentially make appropriate procedural and sentencing adjustments before and during the legal process, and better ensure more positive and appropriate legal outcomes for defendants with ASD. First, this Article discusses ways in which judges can identify defendants with ASD in court by recognizing and understanding both distinctive characteristics of offending and courtroom behavior that may be exhibited in cases involving defendants with ASD. Recognizing the limited previous research on judges' understanding of ASD's legal relevance, this Article additionally provides judges guidance on three aspects of the legal process in which ASD may be forensically significant for defendants: fitness to stand trial, negating criminal elements necessary for criminal liability, and sentencing decisions. Finally, this Article puts forth recommendations for judges in order to improve the legal process for defendants with ASD.

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CONCLUSION

INTRODUCTION

Autism Spectrum Disorder (ASD) is a neurodevelopmental disorder marked by impairments in social interactions, communication, hypersensitivity, and systematic patterns of behavior.¹ As its name indicates, the presentation and symptomology of ASD vary widely.² Individuals with ASD with intellectual disability often have difficulty with basic life skills, such as living on their own or dealing with personal finances, and may also be nonverbal.³ Individuals with ASD without intellectual disability often hold jobs and have independent lives, but show a variety of characteristic social and communication impairments.⁴ There are many well-written overviews,⁵ both general and clinical, of issues related to the identification, presentation and psycho-social impact of ASD, which provide fuller, more detailed understandings of ASD than I could ever provide here.

Although the great majority of individuals with ASD are thought to be law-abiding,⁶ there are still a number of people with ASD that enter the criminal justice system as offenders,

¹ *What is Autism Spectrum Disorder?*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> (last visited Aug 27, 2020).

² C. P. Johnson & S. M. Myers, *Identification and Evaluation of Children With Autism Spectrum Disorders*, 120 PEDIATRICS 1187 (2007).

³ Ami Klin et al., *Social and Communication Abilities and Disabilities in Higher Functioning Individuals with Autism Spectrum Disorders: The Vineland and the ADOS*, 37 J. AUTISM & DEVELOPMENTAL DISORDERS 748–752 (2006).

⁴ Susanna Baldwin, Debra Costley & Anthony Warren, *Employment Activities and Experiences of Adults with High-Functioning Autism and Asperger's Disorder*, 44 JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS 2440–2441 (2014).

⁵ See generally Anne Masi et al., *An Overview of Autism Spectrum Disorder, Heterogeneity and Treatment Options*, 33 NEUROSCIENCE BULLETIN 183–193 (2017); Samata R. Sharma, Xenia Gonda & Frank I. Tarazi, *Autism Spectrum Disorder: Classification, diagnosis and therapy*, 190 PHARMACOLOGY & THERAPEUTICS 91–104 (2018); Lonnie Zwaigenbaum & Melanie Penner, *Autism Spectrum Disorder: Advances in Diagnosis and Evaluation*, 361 BMJ k1674 (2018).

⁶ Svend Erik Mouridsen et al., *Pervasive Developmental Disorders and Criminal Behaviour*, 52 INTERNATIONAL J. OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 196 (2007). M. R. Woodbury-Smith et al., *High Functioning Autistic Spectrum Disorders, Offending and Other Law-Breaking: Findings from a Community Sample*, 17 J. FORENSIC PSYCHIATRY & PSYCHOLOGY 108 (2006).

and ultimately defendants in cases, in the criminal court system.⁷ The involvement of individuals with ASD as defendants in our criminal justice system raises important questions in regards to their legal status and the appropriate legal response to offending behavior of diagnosed individuals.⁸ This presents challenges for even the most experienced criminal justice professionals, who are tasked with acting as their own “experts” in such cases.

This Article can be used as a tool kit for members of the judiciary in their interactions with defendants with ASD, and specifically looks to equip judges with knowledge, evidence, and resources on recognizing and understanding the symptoms of ASD to ensure judges better identify and handle diagnosed defendants. This will allow judges to ascertain effective communication with defendants, make appropriate accommodations in the legal process, and better guarantee just and fair consequences for defendants with ASD.

Part I of this Article focuses on how judges can identify defendants with ASD in court, focusing on understanding the distinctive characteristics of offending and courtroom behavior that may be exhibited by defendants with ASD. Part II focuses on the role of the judiciary in handling defendants with ASD in court. In addition to reviewing the limited previous research on judges’ experiences with offenders with ASD in criminal court, this article identifies three specific considerations that judges must account for: (1) whether a defendant’s fitness to stand trial is affected by an ASD diagnosis, (2) whether a defendant’s ASD may negate criminal elements necessary for criminal liability, and (3) whether an ASD diagnosis should affect choices in and objectives of sentencing. Finally, this article puts forth three recommendations for

⁷ See generally Rachel L. Fazio, Christina A. Pietz & Robert L. Denney, *An Estimate of the Prevalence of Autism-Spectrum Disorders in an Incarcerated Population*, OPEN ACCESS JOURNAL OF FORENSIC PSYCHOLOGY (2012).

⁸ *Id.*

judges, related to expert assistance and procedural and sentencing adjustments, in order to improve the legal process for defendants with ASD.

I. IDENTIFYING DEFENDANTS WITH AUTISM SPECTRUM DISORDER IN COURT

Unfortunately, existing research and caselaw demonstrates that judges are often unaware of the potential significance of ASD and its symptomology in contextualizing defendants' offending and courtroom behavior.⁹ In fact, many defendants' diagnoses are not known to the court.¹⁰ Thus, the potential nexus between features of ASD and involvement in the criminal justice system, both related to offending and behavior observed in court, may be overlooked during the legal process.¹¹

As such, unusual or maladaptive behaviors either demonstrated during offending or in court by a defendant with ASD may be misinterpreted, which may skew dispositional outcomes or potentially lead to prejudicial impressions.¹² Thus, the court can avoid misapprehension of behaviors and characteristics typical of those with ASD, as evidence of guilt, indifference, or lack of remorse, if judges can identify patterns and characteristics of offending and courtroom behavior that are common to defendants with ASD due to their symptomatic presentations—especially if their diagnoses are not known.¹³

⁹ Ian Freckelton, *Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts*, 26 JOURNAL OF APPLIED RESEARCH IN INTELLECTUAL DISABILITIES 420–421 (2013).

¹⁰ Sheena Foster, *Autism Is Not a Tragedy-Ignorance Is: Suppressing Evidence of Asperger's Syndrome and High-Functioning Autism in Capital Trials Prejudices Defendants for a Death Sentence*, 2 LINCOLN MEMORIAL UNIVERSITY LAW REVIEW 19–21 (2015).

¹¹ Eddie Chaplin, Jane McCarthy & Andrew Forrester, *Defendants with Autism Spectrum Disorders: What is the Role of Court Liaison and Diversion?*, 3 ADVANCES IN AUTISM 220–223 (2017).

¹² Clare S Allely & Penny Cooper, *Jurors' and Judges' Evaluation of Defendants with Autism and the Impact on Sentencing: A Systematic Preferred Reporting Items for Systematic Reviews and Meta-analyses (PRISMA) Review of Autism Spectrum Disorder in the Courtroom*, 25 J. OF L. AND MEDICINE 107–110 (2017).

¹³ Colleen M. Berryessa et al., *Impact of Psychiatric Information on Potential Jurors in Evaluating High-Functioning Autism Spectrum Disorder (hfASD)*, 8 J. MENTAL HEALTH RESEARCH IN INTELLECTUAL DISABILITIES 140–144 (2015). Colleen M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism*, 5 J. INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR 97–100 (2014).

A. Distinctive Offending Characteristics

Although evidence has been greatly mixed and limited by methodological choices in research,¹⁴ individuals with ASD without intellectual disability may demonstrate an elevated propensity toward arson,¹⁵ stalking,¹⁶ interpersonal violence,¹⁷ sexual offenses,¹⁸ or computer-related crime.¹⁹ However, as research on the predisposition of individuals with ASD toward the commission of specific crime typologies is both inconsistent and inconclusive,²⁰ conclusions are inherently limited on how ASD diagnoses may overlap with specific crime typologies.

Instead, judges will likely gain a much better understanding of the offending perpetrated by individuals with ASD through examining the characteristics of offenses, rather than types of offenses, committed by this population.²¹ Particularly, individuals with ASD without intellectual disability are those who are more likely to offend, relative to those individuals with ASD with intellectual disabilities.²² They most often offend in accordance with the presentation of ASD

¹⁴

¹⁵ Clare Sarah Allely, *Firesetting and Arson in Individuals with Autism Spectrum Disorder: A Systematic PRISMA Review*, 10 JOURNAL OF INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR 89–101 (2019).

¹⁶ Johanna E. Mercer & Clare Sarah Allely, *Autism Spectrum Disorders and Stalking*, ahead-of-print JOURNAL OF CRIMINAL PSYCHOLOGY (2020).

¹⁷ Niklas Långström et al., *Risk Factors for Violent Offending in Autism Spectrum Disorder*, 24 JOURNAL OF INTERPERSONAL VIOLENCE 1358–1370 (2008). Michelle A. Fardella, Priscilla Burnham Riosa & Jonathan A. Weiss, *A Qualitative Investigation Of Risk And Protective Factors For Interpersonal Violence In Adults On The Autism Spectrum*, 33 DISABILITY & SOCIETY 1460–1481 (2018).

¹⁸ Melanie Clark Mogavero, *Autism, Sexual Offending, And The Criminal Justice System*, 7 JOURNAL OF INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR 116–126 (2016).

¹⁹ Kathryn C. Seigfried-Spellar, Casey L. Oquinn & Kellin N. Treadway, *Assessing The Relationship Between Autistic Traits And Cyberdeviancy In A Sample Of College Students*, 34 BEHAVIOUR & INFORMATION TECHNOLOGY 533–542 (2014). Katy-Louise Payne et al., *Is There a Relationship Between Cyber-Dependent Crime, Autistic-Like Traits and Autism?*, 49 JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS 4159–4169 (2019).

²⁰ Svend Erik Mouridsen, *Current status of research on autism spectrum disorders and offending*, 6 RESEARCH IN AUTISM SPECTRUM DISORDERS 83 (2012). Claire King & Glynis H. Murphy, *A Systematic Review of People with Autism Spectrum Disorder and the Criminal Justice System*, 44 JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS 2718–2719 (2014).

²¹ Allely, *supra* note 10, at 105–110. NEIL BREWER & ROBYN YOUNG, CRIME AND AUTISM SPECTRUM DISORDER: MYTHS AND MECHANISMS 152–158 (2015).

²² Marc R. Woodbury-Smith et al., *A case-control study of offenders with high functioning autistic spectrum disorders*, 16 JOURNAL OF FORENSIC PSYCHIATRY & PSYCHOLOGY 16–20 (2005).

symptoms, namely: (1) poor impulse and motor control, (2) narrow fixation on specific interests, (3) theory of mind deficits, and (4) lack of understanding of social and empathy cues.²³ Some of these symptoms and how they may coalesce with offending behavior are covered in this Article, including case examples.

Deficiencies in social interaction, associated with difficulties interpreting and responding to social cues, have been described as some of the most significant and enduring features of ASD in offending behavior.²⁴ Characteristics of ASD, including social naiveté and deficits in socioemotional reciprocity, may impair individuals with ASD in interpreting and responding to social situations appropriately, which may precipitate engagement in offending.²⁵ The British psychologist Simon Baron-Cohen uses the phrase “zero degrees of empathy” to characterize the difficulties and deficiencies in empathic concern for others that may be exhibited by defendants with ASD.²⁶

Often, individuals with ASD have difficulty in identifying the emotional or mental states (e.g., fear, anxiety) of others, and how to respond appropriately, which may contribute to offenses.²⁷ For example, a man named Nick with ASD without intellectual disability was convicted of the possession of child pornography after coming across it while using the internet

²³ Berryessa, *supra* note 11, at 97–100. Daniel C. Murrie et al., *Aspergers Syndrome in Forensic Settings*, 1 INT’L J. OF FORENSIC MENTAL HEALTH 59–70 (2002). Justin B Barry-Walsh & Paul E Mullen, *Forensic Aspects of Aspergers Syndrome*, 15 JOURNAL OF FORENSIC PSYCHIATRY & PSYCHOLOGY 96–107 (2004).

²⁴ King, *supra* note 17, at 2718. Tessa Grant et al., *Criminal Responsibility In Autism Spectrum Disorder: A Critical Review Examining Empathy And Moral Reasoning*, 59 CANADIAN PSYCHOLOGY/PSYCHOLOGIE CANADIENNE 65–70 (2018).

²⁵ Mouridsen, *supra* note 17, at 80–81. Barry-Walsh, *supra* note 19, at 96–99.

²⁶ SIMON BARON-COHEN, SCIENCE OF EVIL: ON EMPATHY AND THE ORIGINS OF CRUELTY 45 (2012).

²⁷ *Id.* at 15. Woodbury-Smith, *supra* note 6, at 109-110.

to explore his sexual identity.²⁸ However, as shown by his own reflection, Nick showed a severe lack of awareness of the full implications of accessing such materials:

At the time, I didn't understand that downloading free images on my computer in the privacy of my residence could lead to the severe legal consequences I later experienced. I also didn't understand at the time that the children in the images had been victimized in the process of creating those images. I honestly had no idea that I was causing harm to anyone. It is very embarrassing to admit that I needed to have this information spelled out for me, as I wasn't able to make that connection on my own. After my arrest, [my psychologist] spent considerable time explaining the issue of victim awareness to me. I was horrified to learn that these minors had been mistreated and that I had not been able to see that.²⁹

Social deficiencies associated with ASD, specifically naiveté or the inability to recognize the intentions of others, can also lead to offending.³⁰ Individuals with ASD may have difficulties making friendships, and may mistake malevolent intentions with friendship, leading to their risk of exploitation.³¹ In one case, police arrested a man with ASD after they saw stolen goods lined up in his apartment front window; it was later found that a local gang frequently used him to store items that they had stolen in exchange for allowing him to hang out with them.³²

Insensitivity to social cues and perspective taking (i.e. being able to understand a situation from another person's view) also renders individuals with ASD unable to respect or understand common, unspoken social rules, such as refraining from looking in people's windows, touching other people's possessions, or standing too close.³³ Further, social niceties may be mistaken as signs of romantic interest, leading to the pursuit of unwanted romantic

²⁸ TONY ATTWOOD, ISABELLE HENAULT & NICK DUBIN, *THE AUTISM SPECTRUM, SEXUALITY AND THE LAW: WHAT EVERY PARENT AND PROFESSIONAL NEEDS TO KNOW* (2014).

²⁹ *Id.* at 99.

³⁰ Murrie, *supra* note 19, at 62–67.

³¹ PATRICIA HOWLIN, *AUTISM AND ASPERGER SYNDROME: PREPARING FOR ADULTHOOD* 323–324 (2004).

³² *Id.* At 306.

³³ Daniel P. Kennedy & Ralph Adolphs, *Violations of Personal Space by Individuals with Autism Spectrum Disorder*, 9 PLOS ONE 1–10 (2014).

relationships.³⁴ In one case, a man with ASD was charged with assault after rubbing a stranger's body after she briefly smiled at him as his attempt to try to "get to know her, to see if something would come out of it; a relationship or something."³⁵

Finally, those with ASD commonly exhibit repetitive or systematic behaviors, including "rituals" with unusual focuses, to reduce anxiety by enhancing predictability and routine.³⁶ Such behaviors may lead to offending however, when such behaviors or routines are disrupted—as individuals with ASD may exhibit reactive aggression when they are unable to complete their rituals.³⁷ For example, a man with ASD named "Joey" broke into a neighbor's house to watch a washing machine after the closure of his local laundromat.³⁸ Joey systematically watched the washing machines at the laundromat every day because it soothed him, and he needed to find another way to fulfill this routine when his laundromat closed.³⁹ However, when police officers arrived to escort him from the neighbor's home, he reactively punched one of the officers in his attempt to stay, resulting in additional assault charges.⁴⁰

B. *Social and Communication Impairments in the Courtroom*

In addition to offending characteristics, the courtroom behavior of defendants with ASD may also be affected by the symptomatic presentation of the disorder and may be misconstrued

³⁴ Michal Post et al., *Understanding Stalking Behaviors by Individuals with Autism Spectrum Disorders and Recommended Prevention Strategies for School Settings*, 44 J. OF AUTISM AND DEVELOPMENTAL DISORDERS 2698–2702 (2012).

³⁵ Ian Freckelton & David List, *Aspergers Disorder, Criminal Responsibility and Criminal Culpability*, 16 PSYCHIATRY, PSYCHOLOGY AND LAW 26 (2009).

³⁶ Santhana Gunasekaran, *Assessment and Management of Risk in Autism*, 6 ADVANCES IN MENTAL HEALTH AND INTELLECTUAL DISABILITIES 314–320 (2012).

³⁷ Howlin, *supra* note 27, 137-172.

³⁸ *Id.* 144, 304.

³⁹ *Id.* 144, 304.

⁴⁰ *Id.* 144, 304.

without knowledge of its symptoms. Social and communication impairments are the two main symptomatic features that may affect the courtroom experience of defendants with ASD.⁴¹

As individuals with ASD often have difficulty in appreciating the perspectives or subjective experiences of other people, defendants with the disorder may not exhibit expressions of empathy or may show inappropriate facial expressions that are counter to what is occurring in court at the time.⁴² For example, in one case, a defendant with ASD read a book while his alleged victim spoke on the stand, and smiled at her when she gave him eye contact during her testimony.⁴³

Other similar cases have involved defendants laughing when talking about victims or crimes in court proceedings.⁴⁴ Such behaviors may make defendants with ASD appear “cold and calculating,” or lacking remorse for their actions, when in fact they are often unable to react in typical or socially accepted ways.⁴⁵ Defendants with ASD may also say things that appear to be inappropriate and callous.⁴⁶ Indeed, without knowledge of ASD, these expressions could very well be misinterpreted as indicative of arrogance, dishonesty, or guilt.⁴⁷

Defendants with ASD also may show no interest in court proceedings, such as avoiding eye contact with judges, attorneys, or other individuals in the courtroom during pretrial hearings and trial proceedings.⁴⁸ Individuals with ASD often reduce eye contact in stressful situations as a

⁴¹ Colleen M. Berryessa, *Educator Of The Court: The Role Of The Expert Witness In Cases Involving Autism Spectrum Disorder*, 23 PSYCHOLOGY, CRIME & LAW 589, 594–596 (2017).

⁴² DENNIS DEBBAUDT, AUTISM, ADVOCATES AND LAW ENFORCEMENT PROFESSIONALS: RECOGNIZING AND REDUCING RISK SITUATIONS FOR PEOPLE WITH AUTISM SPECTRUM DISORDERS 18 (2002).

⁴³ *Sultan v R*, EWCA Crim 6 (23 January 2008).

⁴⁴ Allely, *supra* note 10, at 108.

⁴⁵ *Id.* at 120.

⁴⁶ *Id.* at 107–109.

⁴⁷ Freckelton, *supra* note 31, at 31. Barbara G. Haskins & J. Arturo Silva, *Asperger's Disorder And Criminal Behavior: Forensic-Psychiatric Considerations*, 34 J. AM. ACAD. PSYCHIATRY LAW 379 (2006).

⁴⁸ Nigel Archer & Elisabeth Ann Hurley, *A Justice System Failing The Autistic Community*, 4 J. OF INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR 53 (2013).

way to help reduce the extent of their stimulation and potential anxiety.⁴⁹ However, observers may mistakenly interpret such behavior as shame or evidence that they cannot own up to their behavior.⁵⁰

Aside from atypical social behaviors, individuals with ASD may exhibit uncommon verbal or speaking patterns.⁵¹ Sometimes their phrasing is unusual, nonsensical, and exceedingly formal.⁵² They may take a long time to answer questions, which may appear evasive.⁵³ They may also suddenly shout out unrelated words or phrases, which might come across as rude; they may misinterpret or “nit-pick” questions asked of them during questioning or cross-examination.⁵⁴ For instance, defendants may fail to pick up on cues which signal the end of a line of questioning, or attempt to shift the conversation to a topic of their interest.⁵⁵ Such behavior may be misunderstood as the defendant being “cagey,” or unwilling to discuss a particular area or answer questions.⁵⁶ As another example, when questioned in his jury trial, a defendant with ASD instigated “arguments with the prosecutor over comparatively trivial detail, while failing, unless re-directed, to confront the underlying and critical question.”⁵⁷ Indeed, when interacting with individuals during the court process, defendants with ASD may exhibit difficulties in understanding or responding to non-literal language, such as metaphors, irony, or sarcasm.⁵⁸

⁴⁹ Allely, *supra* note 10, at 109.

⁵⁰ *Id.* at 109–110.

⁵¹ Joanne Mccann & Sue Peppé, *Prosody In Autism Spectrum Disorders: A Critical Review*, 38 INT’L J. OF LANGUAGE & COMMUNICATION DISORDERS 325–350 (2003).

⁵² Freckelton, *supra* note 31, at 30.

⁵³ Allely, *supra* note 10, at 109

⁵⁴ *Id.* at 108–109, 118.

⁵⁵ *Id.* at 109.

⁵⁶ Murrie, *supra* note 19, at 60.

⁵⁷ *Thompson v R*, EWCA Crim 836 (02 May 2014).

⁵⁸ Allely, *supra* note 10, at 108.

In addition to language, individuals with ASD may also display odd or pedantic speaking rhythms.⁵⁹ Defendants with ASD may show flat, monotonous verbal affect, including when talking about emotional topics.⁶⁰ In one case, a man on trial for the murder of his mother exhibited monotonous speaking patterns with an awkward, “robotic rhythm” during his questioning.⁶¹ His attorney worried that his manner of speaking may cause him prejudice in sentencing.⁶²

II. EVALUATING DEFENDANTS WITH AUTISM SPECTRUM DISORDER IN COURT: THE ROLE OF JUDGES

In addition to judges’ general unawareness of the potential significance of ASD in contextualizing defendants’ offending and courtroom behavior, literature has expressed concerns about how the court’s lack of understanding on the forensic relevance of ASD may also negatively impact legal decisions made on behalf of defendants with ASD.⁶³ The relatively little research on judges’ views of defendants with ASD, as reviewed below, indicates that judges are often unsure if and how ASD and its symptoms should affect their evaluations of a defendant at different stages of the legal process.⁶⁴

In order to provide some guidance on aspects of the legal process in which ASD may be forensically significant, this Article discusses three areas that judges must consider: (1) whether an ASD diagnosis affects a defendant’s fitness to stand trial, (2) whether a defendant’s ASD may

⁵⁹ Uta Frith, *A New Look At Language And Communication In Autism*, 24 INT’L J. OF LANGUAGE & COMMUNICATION DISORDERS 123–150 (1989).

⁶⁰ Haskins, *supra* note 39, at 19. Freckelton, *supra* note 31, at 32.

⁶¹ Freckelton, *supra* note 8, at 421. See *State of Western Australia v Mack*, WASC 445 (2012).

⁶² *Id.*

⁶³ Allely, *supra* note 10, at 110-119.

⁶⁴ See generally Berryessa, *supra* note 11, at 97-104. Colleen M. Berryessa, *Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism*, 46 J. OF AUTISM AND DEVELOPMENTAL DISORDERS 2770–2773 (2016). Colleen M Berryessa, *Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders*, 3 INT’L J. OF CRIMINOLOGY AND SOCIOLOGY 45–60 (2014).

negate criminal elements necessary for criminal liability, and (3) whether an ASD diagnosis should affect choices in and objectives of sentencing.

A. *Previous Research*

Only a few interview-based, qualitative studies have examined how judges think about ASD as it relates to the criminal court process.⁶⁵ These few studies have come from the same sample of interviews of trial court judges in California, but do span a variety of different issues that judges may encounter in cases involving defendants with ASD.⁶⁶

Some judges in these studies reported some previous case experience with defendants with ASD, but the majority had never seen the diagnosis in their courtrooms.⁶⁷ Almost all judges, however, did have some type of personal experience with ASD, which they believed they had previously and would continue to draw from in potential forensic considerations involving the disorder.⁶⁸ However, personal experiences did not mean that judges felt they were familiar or knowledgeable about ASD, and admitted they generally knew very little about it and its potential forensic relevance.⁶⁹

One inquiry examined judges' perceptions of how a diagnosis with ASD may affect a defendant's capacity to control behavior and whether it may impact the ability to formulate criminal intent (i.e., *mens rea*).⁷⁰ In discussing these issues, judges described their understanding that individuals with ASD may be "predisposed" to behave in certain ways or exhibit particular behaviors because of the symptomology of the disorder.⁷¹ However, judges also expressed

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Berryessa, *supra* note 11, at 100.

⁶⁸ *Id.*

⁶⁹ *Id.* at 104.

⁷⁰ *Id.* at 102–104.

⁷¹ *Id.* at 102–103.

uncertainty with regard to how this “predisposition” may be relevant to evaluating criminal intent or even important for sentencing decisions, and were unsure of how to factor it in to their considerations.⁷² Additionally, judges were unsure of how the disorder may act as a mitigating factor to either responsibility or sentencing by altering the ability to commit a “willful criminal act.”⁷³

Another study with this sample examined judges’ perceptions of how a defendant’s diagnosis with ASD may affect their choices in sentencing.⁷⁴ Most judges reported that a defendant’s diagnosis with ASD would be a significant consideration in sentencing decisions, particularly because it is important to understand if the offending behavior was related to the diagnosis.⁷⁵ Judges were mixed, however, as to whether the diagnosis’s connection to offending would be considered mitigating or aggravating to sentencing.⁷⁶ Most judges questioned whether a defendant’s responsibility for his actions may be mitigated if they are influenced by his symptomatic presentation.⁷⁷ They also believed that the prison environment may be toxic and potentially useless for defendants with ASD, and that they would likely attempt to prioritize alternatives to incarceration for defendants with ASD.⁷⁸

Yet, a few judges said they might consider a diagnosis with ASD to be aggravating to sentencing, in so far as it may lead an individual to be at a higher risk to offend in the future, due

⁷² *Id.* at 103–104.

⁷³ *Id.* at 102.

⁷⁴ Berryessa (2016), *supra* note 53.

⁷⁵ *Id.* at 2771–2772.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 2772.

to the disorder's impairments to impulse control in certain situations.⁷⁹ Judges believed this could pose an issue to public safety, which could lead to the choice to incarcerate.⁸⁰

Overall, although sympathetic to those with the diagnosis, judges were unsure if and how information on ASD should inform their sentencing decisions, or even what types of information they should draw on in such decisions.⁸¹ Additionally, even those that supported alternatives to incarceration were still unsure of which types of sentences may be appropriate, and if the criminal justice system even has the ability or resources to offer such diversionary measures.⁸²

A final study, using the same interview sample, investigated judges' views on how knowledge of ASD may be skewed by media coverage and "myths" about the disorder and its relationship to criminality, and how such views may impact both public and criminal contexts.⁸³ Judges generally believed that the media is one of the main ways that the public, as well as other judges, learns about ASD and its features.⁸⁴ However, sometimes media coverage can be misleading and harmful when it connects the diagnosis with acts of violence.⁸⁵

Around the time these interviews were conducted, the Sandy Hook shooting in Newtown, Connecticut had recently occurred.⁸⁶ Judges were specifically asked to discuss the ways in which media coverage of the shooting, and the media's connection between the perpetrator's alleged ASD and his actions, had impacted their and the public's views of ASD.⁸⁷ Although they stated that their views were unaffected by such coverage, they expressed concern that coverage of the

⁷⁹ *Id.* at 2772–2773.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2772.

⁸³ Berryessa (2014), *supra* note 53, at 46–60.

⁸⁴ *Id.* at 53.

⁸⁵ *Id.*

⁸⁶

⁸⁶ *Id.* at 49.

⁸⁷ *Id.* at 50.

shooting misled and negatively informed the public, and other judges, on the relationship between ASD and violence.⁸⁸ Judges did express fear that such media coverage could negatively affect the legal process by fueling misperceptions of the disorder and its relationship to criminality.⁸⁹

B. *Considerations for Judges*

Given this existing research suggests that judges need guidance on the forensic relevance of ASD in their evaluations of an autistic defendant in different stages of the legal process, this Article provides three considerations that judges should contemplate during the legal process in cases involving defendants with ASD. Specifically, judges must consider the significance and effects of ASD before prosecution even begins (fitness to stand trial), in responsibility determinations for criminal liability (criminal elements), and in sentencing proceedings.

1. *Fitness to stand trial*

Judges should consider how symptomology of ASD may complicate an individual's participation in and comprehension of the legal process during criminal proceedings. Difficulties in understanding and integrating nuanced language may create problems for defendants with ASD in interpreting questions asked by judges or attorneys, or the implications of legal decisions made on their behalf.⁹⁰ Studies of defendants with ASD have identified a range of difficulties related to their fitness to stand trial, including (1) poor understanding of the legal process, (2) the nature of the charges against them, (3) the roles of the judge, attorneys, and other courtroom

⁸⁸ *Id.* at 54–56.

⁸⁹ *Id.* at 53–54.

⁹⁰ Kimberly Taylor, Gary Mesibov & Dennis Debbaudt, AUTISM IN THE CRIMINAL JUSTICE SYSTEM AUTISM RISK MANAGEMENT 4 (2009), https://www.autismriskmanagement.com/wp-content/uploads/2016/07/Autism_Criminal_Justice.pdf (last visited Aug 28, 2020).

personnel, (4) implications of pleas, and (5) difficulties communicating with legal representation.⁹¹

Further, anxiety incurred by the court process may lead defendants with ASD to stop speaking or engaging in the legal process, and they may show maladaptive coping behaviors.⁹² Unfortunately, this may impact whether they are able to meaningfully participate in their trials or aid their lawyers in their defenses.⁹³ Notwithstanding these issues, literature that has reviewed cases involving defendants with ASD suggests that most often they are ruled fit to stand trial without question.⁹⁴

For these reasons, judges should be careful in potentially overestimating and overlooking the fitness of defendants with ASD to stand trial. This is primarily important for defendants with ASD who have average or above average intelligence and whose level of impairment may not be readily apparent.⁹⁵ Rather, judges should consider how the court may accommodate defendants with ASD with respect to their abilities to understand and follow the legal process. Accommodations that may “restore” fitness to stand trial need not be lofty—they can be as simple as attorneys, judges, or others in the courtroom taking steps to familiarize the defendant with the courtroom, simplifying language used during questioning, and effectively communicating about the nature and nuances of the legal process.⁹⁶ One defendant with ASD, commenting on his ability to understand the legal process, said it was his lawyer and other court

⁹¹ David Allen et al., *Offending Behaviour in Adults with Asperger Syndrome*, 38 JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS 748–758 (2007). R. J. Brewer, G. M. Davies & N. J. Blackwood, *Fitness to Plead: The Impact of Autism Spectrum Disorder*, 16 JOURNAL OF FORENSIC PSYCHOLOGY PRACTICE 182–197 (2016).

⁹² Taylor, *supra* note 89, at 4–9.

⁹³ *Id.*

⁹⁴ Barry-Walsh, *supra* note 19, at 96–107. Allen, *supra* note 90, at 748–58.

⁹⁵ Taylor, *supra* note 71, at 3–9.

⁹⁶ Jenny Talbot, FAIR ACCESS TO JUSTICE? SUPPORT FOR VULNERABLE DEFENDANTS IN THE CRIMINAL COURTS (2012), <http://www.prisonreformtrust.org.uk/Portals/0/Documents/FairAccessstoJustice.pdf> (last visited Aug 28, 2020).

personnel that made all the difference: “[my lawyer] explained the court process to me, and the other couple of guys who saw me...they explained everything to me.”⁹⁷ Although such strategies may slow the trial process, they will be integral to ensuring the to ensuring defendants with ASD, and particularly those without intellectual disability, will be able to stand trial and will be treated more equitably.

2. *Negating criminal elements*

In cases involving ASD, judges should consider whether the disorder may negate the essential criminal elements that are necessary for establishing a defendant’s criminal liability. Previous research has found that although judges may understand that defendants with ASD “view the world” in a unique way, they still are unsure if and how the disorder and its symptomology may affect a defendant’s ability to formulate intent, and how to consider it in their rulings.⁹⁸ Indeed, judges should consider whether ASD may affect and potentially negate a defendant’s ability to formulate the appropriate state of mind to commit certain criminal acts (i.e., *mens rea*, meaning “guilty mind”).⁹⁹

This consideration is likely most relevant for specific intent crimes, which are crimes in which the prosecution must prove that the defendant had the desire to commit a specific crime in order to accomplish a specific outcome.¹⁰⁰ ASD may alter a defendant’s specific intent, in that the symptomology of the disorder may hinder an individual from controlling or projecting the full potential and consequences of his actions.¹⁰¹ For example, in *U.S. v. Cottrell*, the U.S. Court

⁹⁷ Allen, *supra* note 72, at 755.

⁹⁸ Berryessa, *supra* note 11, at 99-104.

⁹⁹ Christine N. Cea, *Autism and the Criminal Defendant*, 88 ST. JOHN'S LAW REVIEW 505–506 (2014).

¹⁰⁰ *Id.* Specific intent, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/specific_intent (last visited Aug 29, 2020).

¹⁰¹ Cea, *supra* note 79, 505–506.

of Appeals for the Ninth Circuit reversed the district court’s decision to exclude expert testimony regarding the defendant’s ASD diagnosis.¹⁰² The defendant was charged with aiding and abetting—a specific intent crime.¹⁰³ The Ninth Circuit reasoned that the defendant’s ASD diagnosis was relevant because it “was aimed at defeating an inference of Cottrell’s intent from the circumstances.”¹⁰⁴ Thus, the conviction was vacated because the defendant’s ASD diagnosis was improperly excluded.¹⁰⁵

In one case, a defendant with ASD, whose ASD diagnosis was excluded in his original trial, appealed his conviction for crimes related to aiding and abetting an arson, which is a specific intent crime.¹⁰⁶ The court found that evidence of the defendant’s ASD was relevant to specific intent and could have affected the court’s determination of whether his disorder negated the specific intent required for his crimes, as intent is subjective, and vacated his conviction based on the exclusion of his diagnosis in the original trial.¹⁰⁷

Judges may also want to reflect on how a defendant’s ASD may negate the actus reus, meaning “guilty act,” of his or her crimes because the symptomology may provide an alternative explanation for the action itself.¹⁰⁸ A prime example of this involves a case in which a defendant was arrested and convicted of driving under the influence of a controlled substance by demonstrating impairment.¹⁰⁹ The arresting officer testified that the defendant “appeared shaken

¹⁰² United States v. Cottrel, 333 F. App’x 213, 216–17 (9th Cir. 2009).

¹⁰³ *Id.* at 216.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ United States v. Cottrel, 333 F. App’x 213–216 (9th Cir. 2009).

¹⁰⁷ *Id.*

¹⁰⁸ Cea, *supra* note 79, 504–505.

¹⁰⁹ State v. Suber, No. A06-2438, 2008 WL 942622 1–5 (Minn. Ct. App. Apr. 8, 2008).

and jittery” by not giving him eye contact, and the defendant performed poorly during a sobriety field exercise by exhibiting “robotic type movements.”¹¹⁰

Upon appeal, evidence of the defendant’s ASD became known, including how his symptomology presented itself as “stiff, wooden, and mechanical” movements and social anxieties, including a lack of eye contact.¹¹¹ Ultimately the conviction was reversed, as the court reasoned that there was insufficient evidence that the defendant had actually been under the influence and the arresting officer had not considered how the defendant’s ASD may have affected his behavior and sobriety test at the arrest.¹¹² The defendant’s “impairment” was actually due to his diagnosis, and not marijuana as the arresting officer had thought.¹¹³ Thus, judges must consider whether ASD symptomology may provide an alternative explanation not only for the defendant’s state of mind, but also for the action itself.

3. *Sentencing*

Judges who have participated in previous ASD research have expressed disparate views as to the ways in which they believe ASD may impact sentencing deliberations, which could potentially lead to differential outcomes.¹¹⁴ Judges should consider how a defendant’s ASD may change both the objectives of and choices in sentencing.

Judges should consider weighing whether a defendant’s ASD should be a mitigating factor to sentencing. Although considered a statutory mitigating factor in some states,¹¹⁵ the mitigating impact of an ASD diagnosis often relies on the sentencing judge’s discretion and

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* at 3.

¹¹² *Id.* at 5–6.

¹¹³ *Id.*

¹¹⁴ Berryessa (2016), *supra* note 53, at 2771–2772.

¹¹⁵ Cea, *supra* note 79, 522.

consideration regarding the facts of the case, clinical history, and expert testimony.¹¹⁶ ASD diagnoses are often raised as mitigating factors because the symptomology of ASD may reduce the moral blameworthiness of an offender, who may not be able to understand the impact of his actions.¹¹⁷

Research suggests that although individuals with ASD may cognitively understand that their behavior is considered illegal, they often still do not appreciate its social and emotional implications, especially for victims of their crimes.¹¹⁸ In one case, a woman with ASD wrote letters to classmates in search of friendship, and was arrested when the letters, after having gone unanswered, became threatening .¹¹⁹ She continued to send these letters, despite warnings from the police and clear communication from the letters' recipients that she should stop, demonstrating her inability to perceive and understand the impact of her actions on the letter recipients.¹²⁰

Judges should also consider the potential impact of a prison or jail sentence on a defendant with ASD. Prison or jail settings can cause anxiety, acting out, and reactive aggression in response to stressors, while social naïveté may increase defendants' likelihood to be victimized, exploited, or manipulated by other prisoners.¹²¹ Misinterpretation of unwritten social cues and rules may cause conflict between defendants with ASD and other prisoners, and

¹¹⁶ Thomas A. Mayes, *Persons with Autism and Criminal Justice*, 5 J. OF POSITIVE BEHAVIOR INTERVENTIONS 95 (2003).

¹¹⁷ Freckelton, *supra* note 31, at 32–35.

¹¹⁸ Lorna Wing, *Aspergers Syndrome: Management Requires Diagnosis*, 8 J. OF FORENSIC PSYCHIATRY 255 (1997).

¹¹⁹ Luke Beardon, ASPERGER SYNDROME AND PERCEIVED OFFENDING CONDUCT: A QUALITATIVE STUDY, SHEFFIELD HALLAM UNIVERSITY RESEARCH ARCHIVE (SHURA) 139–145 (2008), <http://shura.shu.ac.uk/7155/6/10694214.pdf> (last visited Aug 29, 2020).

¹²⁰ *Id.* at 141–145.

¹²¹ Caitlin E. Robertson & Jane A. McGillivray, *Autism Behind Bars: A Review Of The Research Literature And Discussion Of Key Issues*, 26 J. OF FORENSIC PSYCHIATRY & PSYCHOLOGY 723–730 (2015).

potentially result in physical injuries.¹²² Further, communication deficits associated with ASD may hinder interactions with prison staff, security staff, and other inmates.¹²³

Finally, judges should consider weighing whether a defendant's ASD should affect the objective of a sentence all together¹²⁴. In one case, a defendant with ASD was found guilty for possession of child pornography and was sentenced to eight years in prison.¹²⁵ A defense expert testified that due to the defendant's disorder, he likely would be victimized by other inmates and staff might misunderstand his behaviors due to his social impairments.¹²⁶ The expert also testified that the defendant likely would not gain any benefit from being incarcerated.¹²⁷

Ultimately, when asked about his time in prison, the defendant explained that he completed math questions in prison and learned that his math skills could bring him a lot of money when he got out of prison.¹²⁸ He only understood how prison benefited him, and did not express any understanding that he or his actions were wrong or that incarceration helped him learn his lesson or change his life.¹²⁹

Ultimately, punishment for individuals with ASD should be "just long enough for the message to be effective."¹³⁰ However, the previous defendant's response suggests that incarceration may not always provide the appropriate message, or objective, in punishment, regardless of sentence length, to allow for change.

¹²² *Id.* at 725–726.

¹²³ *Id.* at 725, 729–730.

¹²⁴ For more information on theories of punishment that sentences aim to achieve (i.e. retribution, deterrence, incapacitation, restoration, rehabilitation), see generally Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME AND JUSTICE 1–52 (2006).

¹²⁵ *United States v. Morais*, 670 F.3d 891 (8th Cir. 2012).

¹²⁶ *Morais*, (No. 11-1793), 2011 WL 2604025, at 12–15.

¹²⁷ *Id.*

¹²⁸ *Id.* 21–23.

¹²⁹ *Id.*

¹³⁰ JOHN CLEMENTS & EWA ZARKOWSKA, BEHAVIOURAL CONCERNS AND AUTISTIC SPECTRUM DISORDERS: EXPLORATIONS AND STRATEGIES FOR CHANGE 212 (2001).

III. RECOMMENDATIONS

The involvement of individuals with ASD as defendants in our criminal justice system presents challenges for even the most experienced judges.¹³¹ In order for judges to establish effective communication with defendants and make appropriate accommodations in the legal process, this Article provides three recommendations for judges—utilizing expert assistance, and making procedural and sentencing adjustments—to improve the legal process for defendants with ASD.

A. Reliance on Expert Assistance

Knowledge of ASD and its symptoms is fundamentally imperative for judges in trials involving defendants with the disorder.¹³² Having a basic background knowledge on the disorder and its forensic relevance, as laid out in this Article, is important. However, judges should additionally utilize expert assistance to assess how ASD may be relevant to understanding offending behavior and sentencing considerations, and whether any procedural adjustments to the legal process are necessary.

Expert witnesses are often thought of as “educators” to the court, and have significantly more information and training in their respective areas than members of the court.¹³³ Experts have years of past case and often clinical experiences that shape their perspectives on what information is relevant and necessary for judges and other members of the court to know.¹³⁴

For example, one of the objectives in a criminal case involving a defendant with ASD is to identify the ways in which a defendant’s disorder may have been associated with the

¹³¹ Taylor, *supra* note 71, at 1.

¹³² Berryessa, *supra* note 34, at 578.

¹³³ John A. Auxier, *The Role of the Expert Witness*, 117 RADIATION RESEARCH 178–180 (1989).

¹³⁴ Berryessa, *supra* note 34, at 593–597.

commission of the alleged offense.¹³⁵ Experts are able to use their knowledge store and training on ASD to act as “reconstructionists” by retroactively assessing the forensic relevance of the disorder to the crime on trial.¹³⁶ Another role that experts may fulfill is that of “myth-dispellers” by using education to dismiss inaccurate misunderstandings about ASD and its symptoms.¹³⁷

Yet, arguably the most important role of experts is that of “communicators” who educate the court on the legal aspects of ASD and distinctive ways in which the symptoms of ASD affect behavior and daily life.¹³⁸ Experts are able to communicate to judges about not only how a defendant’s ASD may be forensically relevant to offending and fact finding, but how it may manifest in the courtroom or should be considered in legal outcomes. For example, experts may be able to explicate if and how a defendant’s ASD may affect choices with regard to if and what environment may be appropriate for an individual with ASD in sentencing.¹³⁹

Experts have stressed that their services are often necessary to edify the court on ASD in order to better ensure more positive outcomes for defendants with ASD, and have expressed concerns that judges and other court personnel may rely on limited or inaccurate knowledge of ASD in decision-making without expert assistance.¹⁴⁰ Thus, although having a basic understanding of ASD’s forensic relevance is fundamental, judges should benefit and take advantage of such proficiency, experience, and knowledge by calling in clinical and legal experts on ASD whenever necessary.

B. *Procedural Adjustments*

¹³⁵ *Id.* at 584–585.

¹³⁶ *Id.* at 594.

¹³⁷ *Id.* at 595–596.

¹³⁸ *Id.* at 594–596.

¹³⁹ *Morais*, *supra* note 101, at 12–15.

¹⁴⁰ Berryessa, *supra* note 34, at 590–591.

As defendants with ASD may have difficulty understanding the legal process and in conforming their behavior to social norms in the courtroom, judges should consider whether procedural adjustments are necessary to the legal process in cases involving ASD.

Certain modifications to ensure defendants with ASD are fit to stand trial, such as familiarizing the defendant with the courtroom, simplifying language used during questioning, or effective communication during the legal process, have been discussed above.¹⁴¹ More generally, judges should adopt general adjustments to verbal communication in court by requiring court personnel to speak in a clear, calm, and non-threatening manner, avoid providing complex instructions that may be misinterpreted, avoid body language that may be perceived as threatening to those with ASD and cause them anxiety, and be patient and repeat things when necessary.¹⁴² Accordingly, judges should provide some sort of specific training of court personnel on how to enact such behaviors in court.

Sometimes noisy or overly stimulating environments may overwhelm individuals with ASD; even something neurotypical people may never even think twice about, like overhead lights, can be too stimulating for those with ASD.¹⁴³ As such, judges should consider making adjustments to the courtroom, as a sensory environment, such as limiting distractions, lowering lighting, or removing anything or anyone that may lead to a “sensory overload.”¹⁴⁴

Finally, comprehension will likely not be “one size fits all.” It is important to remember that defendants with ASD may understand one question perfectly but be unable to understand the meaning or content of other questions, even if they are related or about similar things.¹⁴⁵ Judges

¹⁴¹ See *supra* Section II.B.1.

¹⁴² Taylor, *supra* note 71, at 1, 6.

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 3, 9.

should consider whether they or other court personnel should write or draw something in order to aid in a defendant's comprehension, especially if he or she has overwhelming difficulties with verbal communication.¹⁴⁶

C. Sentencing Alternatives

In conjunction with the discussion on sentencing above,¹⁴⁷ judges should consider whether defendants with ASD may be more likely to benefit from alternative, non-incarceration-based sentences with more holistic, and less retributive, objectives. As incarceration may increase the risk of a defendant with ASD being exploited, physically harmed, or socially isolated,¹⁴⁸ this vulnerability should be considered when weighing whether prison is appropriate for a defendant. For individuals with ASD, non-incarceration-based sentences may be more effective to rehabilitate the defendant, whereas incarceration may be more taxing and toxic for defendants with ASD as compared to other prisoners.¹⁴⁹

Rather, if possible, defendants with ASD may benefit from diversion or probation programs that provide clear expectations and guidelines for defendants to follow, integrate the participation of families or other trusted contacts, and work to rehabilitate and change, rather than punish, offending behavior.¹⁵⁰ Such programs may be far more effective than incarceration in preventing defendants with ASD from making future contact with the justice system again.

However, if an individual with ASD is incarcerated for any period of time, it is important to notify corrections personnel about the defendant and his disorder, and even suggest potential

¹⁴⁶ *Id.* at 6–7.

¹⁴⁷ *See supra* Section II.B.3.

¹⁴⁸ *See generally* Robertson, *supra* note 97.

¹⁴⁹ Cea, *supra* note 79, 525–527.

¹⁵⁰ Cristian Raggi et al., *Adults with Autism Spectrum Disorder And Learning Disability Presenting With Challenging Behaviour: How Tolerant Should We Be?*, 4 J. OF INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR 42 (2013).

modifications.¹⁵¹ For example, judges may want to recommend that a defendant be segregated from general population, or monitored by prison doctors or medical personnel. Apprising corrections officials of a defendant's ASD is absolutely imperative in order to provide more appropriate prison or jail conditions and services if a defendant is to be incarcerated.

CONCLUSION

Although the knowledge, considerations, and recommendations put forth here for judges should begin to help build some groundwork on these issues, this Article is only a first step. Judges have admitted that they have limited knowledge on the forensic relevance of ASD, which impairs their abilities to make fair and informed legal decisions.¹⁵² They should ask their jurisdictions to develop and implement specially designed education programs, conferences, and workshops on ASD. This will provide at least a foundational understanding of how to identify a defendant's ASD, if undiagnosed, and the potential legal considerations that may arise if a defendant has ASD.

In order to tackle complicated cases involving more technical knowledge, existing research across a variety of topical areas increasingly suggests the need for judicial training and education in cases involving complex and scientific subject matter that is likely outside of a judge's wheelhouse.¹⁵³ Judicial training on ASD is no different, and should cover both legally-relevant and clinical facets, such as symptomology, offending, implications for sentencing, and best practices for judges and other legal professionals.

¹⁵¹ Taylor, *supra* note 71, at 8.

¹⁵² Berryessa, *supra* note 11, at 104.

¹⁵³ E.g. Colleen M. Berryessa, *Judges' Views On Evidence Of Genetic Contributions To Mental Disorders In Court*, 27 J. OF FORENSIC PSYCHIATRY & PSYCHOLOGY 586–600 (2016). Colleen M. Berryessa, *Potential Impact of Research on Adolescent Development on Juvenile Judge Decision-making*, 69 JUVENILE AND FAMILY COURT JOURNAL 19–38 (2018). Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 L. & SOC. REV. 202–238 (2018). Colleen M. Berryessa & Jillian Reeves, *The Perceptions of Juvenile Judges Regarding Adolescent Development in Evaluating Juvenile Competency*, 110 J. OF CRIMINAL LAW AND CRIMINOLOGY 550–591 (2020).

Ultimately, judges must be equipped with appropriate awareness, evidence, and resources to be able to recognize and understand the symptoms of ASD and to better identify and communicate with diagnosed defendants. Not only does this allow for judges to make appropriate accommodations in the legal process, but a more holistic understanding of ASD's forensic relevance to each aspect of the legal process will maximize positive outcomes and legal consequences for defendants with ASD in our criminal court system.

Anders Breivik: Extreme Beliefs Mistaken for Psychosis

Tahir Rahman, MD, Phillip J. Resnick, MD, and Bruce Harry, MD

The case of Anders Breivik, who committed mass murder in Norway in 2011, stirred controversy among forensic mental health experts. His bizarrely composed compendium and references to himself as the “Knights Templar” raised concerns that he had a psychotic mental illness. Beliefs such as Mr. Breivik’s that precede odd, unusual, or extremely violent behavior present a unique challenge to the forensic evaluator, who sometimes struggles to understand those beliefs. Psychotic disorder frequently is invoked to characterize odd, unusual, or extreme beliefs, with a classification that has evolved over time. However, the important concept of overvalued idea, largely ignored in American psychiatry, may better characterize these beliefs in some cases. We discuss the definitions of delusion and overvalued ideas in the context of Anders Breivik’s rigidly held extreme beliefs. We also review the British definition of overvalued idea and discuss McHugh’s construct, to introduce the term “extreme overvalued belief” as an aid in sharpening the forensic evaluator’s conceptualization of these and similar beliefs.

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The 2011 case of Anders Breivik, the man responsible for the bombing and shooting deaths of 77 mostly young people in and near Oslo, Norway, rekindled the controversy of how forensic psychiatrists evaluate violent criminal behavior.^{1–5} The first team of forensic evaluators (Team One) issued a diagnosis of paranoid schizophrenia and opined that Mr. Breivik was legally insane. Their opinion reverberated negatively throughout Norway, such that the Oslo district court then appointed a second pair of psychiatrists to evaluate Mr. Breivik. This second team (Team Two) found him to be nonpsychotic and held that he was sane at the time of his crimes.^{1,4,5}

In this case, both teams of psychiatrists agreed that Mr. Breivik did not have grossly disorganized behavior, hallucinations, a natural history consistent with a severe mental disorder, or a serious cognitive impairment affecting his daily life.^{4–6} Further, a media account of the trial revealed that Mr. Breivik defended

his behavior and clearly relished being the center of what he believed was a political opportunity to further his agenda.⁷ Absent other evidence, it then appears that the nature of his beliefs, most of which were mass distributed by e-mail just hours before his attacks, is the major basis on which this distinction was made.^{1,4,5}

For this discussion, we first looked briefly at Mr. Breivik’s beliefs as he shared them with others just before he committed his crimes. We then reviewed the historical context of the term “psychosis” to help understand and better define the scope of psychotic disorder as it is used in modern forensic evaluations. As part of our consideration of psychosis, we also considered the American and British notions of delusion. We looked at the concept of an overvalued idea. We now propose a new term, “extreme overvalued belief,” for future consideration in cases such as Breivik’s.

We acknowledge that there are ethics-related challenges regarding the controversial Goldwater rule, proclaiming that it is unethical for a psychiatrist to offer a professional opinion about an individual’s mental condition unless that psychiatrist has conducted an examination of the individual and has been granted proper authorization (§ 7.3 of the

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Disclosures of financial or other potential conflicts of interest: None.

American Psychiatric Association's Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry).⁸ However, given the large volume of information that is publically available about Mr. Breivik, including data from some of the professionals who examined him, and considering the professional and social interests that may be served by an analysis of his case and discussion of new perspectives on forensic assessment in cases such as his, we believe we are within the boundaries of ethics.¹

Mr. Breivik's Beliefs

On July 22, 2011 hours before the attacks, Mr. Breivik e-mailed a 1500-page compendium to several thousand people. Entitled "2083: A European Declaration of Independence," the compendium opposed multiculturalism, Marxism, and the Norwegian Labor Party. Mr. Breivik wrote that he was a "savior of Christianity" and claimed that he was part of an order called the "Knights Templar."^{4,5} Ensuing investigations by Norwegian and other international law enforcement agencies found no convincing evidence that the Knights Templar, a medieval order that was disbanded centuries ago, was in existence in 2011.^{1,4,5}

Although Mr. Breivik created his compendium over several years, there is general agreement that he copied large sections from other sources, such as the manifesto of the Unabomber (Theodore John "Ted" Kaczynski). In addition, he has been reported to have included some of the espoused ideas of Karl Marx, Tony Blair, Osama bin Laden, and George W. Bush. Further, he selectively altered single words and phrases in some of the copied passages.^{1,4}

Recall that both teams of evaluators assessed Mr. Breivik as having no gross disorganization or auditory hallucinations. However, they agreed that he had pathological grandiosity. Team One opined that the ramblings in his online manifesto represented neologisms and disorganized thoughts. Team Two believed that his so-called ramblings actually were copied and then carefully edited by him to emphasize his extremist views. Team One also pointed out that he had shown symptoms of social withdrawal before the attacks, which they interpreted to be negative symptoms of schizophrenia. However, Team Two regarded his behavior as surreptitious planning for the attacks. The evaluation teams also offered differing interpretations of Mr. Breivik's espoused beliefs

regarding the Knights Templars and his duty as a "foot soldier."^{1,4,5}

Team Two attributed Mr. Breivik's grandiosity to a severe narcissistic personality disorder combined with *pseudologia fantastica* (compulsive or pathological lying). They opined that he was not psychotic during their interviews, during the six months of observation, or at the time of his crimes, thus making him ineligible for a finding of criminal nonresponsibility under Norwegian law.^{1,4,5} The court ultimately concurred with Team Two's opinion,⁴ referencing Chapter 3, § 44, of the General Civil Penal Code of Norway, which states:

A person who was psychotic or unconscious at the time of committing the act shall not be liable to a penalty. The same applies to a person who at the time of committing the act was mentally retarded to a high degree [Ref. 6].

As the *Breivik* case suggests, current clinical guides may inadequately equip modern forensic psychiatrists to agree with sufficient reliability upon what constitutes delusions versus nondelusions. Classifying disorders only by symptoms and examiner interpretations of observable behaviors may account for some of this discrepancy. A different approach to understanding Mr. Breivik's beliefs may have simplified matters at the outset. Dietz discusses the use of his threshold for finding psychosis: "I draw a crisp line between psychotic mental illness and other disorders such as pedophilia or anti-social personality disorder" (Ref. 9). The challenge is to provide new contours for this line.

Therefore, we proceed to offer what we believe will allow for a crisper line to be drawn by discussing some of the kinds of extreme, odd, or unusual beliefs encountered in psychiatry. We then suggest a method by which forensic psychiatrists might more thoughtfully tease apart beliefs that generate odd or extreme violent behavior. We begin by looking at the kinds of beliefs associated with what are currently recognized to be the most severe mental illnesses, the psychoses.

Odd, Unusual, or Extreme Beliefs

Psychosis

The term psychosis has historically encompassed a confusing array of interchangeable constructs such as narcissistic neuroses, psychoses, dementia praecox, and schizophrenia. For example, Waelder¹⁰ considered a narcissistic personality to be a muted variant of

schizophrenia. Regardless, delusions are one of the fundamental characteristics of the psychotic mental illnesses.¹¹

In the last half of the 20th and into the 21st century, the Diagnostic and Statistical Manual of Mental Disorders (DSM) arguably began to place psychotic illnesses along a spectrum of disturbances. First published in 1952, DSM-I¹² featured descriptions of disorders referred to as reactions. This term offered the psychobiological view that mental disorders represent reactions of the personality to psychological, social, and biological factors. Among these reactions, the DSM included psychotic disorders characterized by fundamental disturbances in reality, relationships, and concept formations, with affective, behavioral, and intellectual disturbances of varying degrees and mixtures. DSM II,¹³ essentially extended the work of the original DSM.^{14,15}

Subsequently, a group of psychiatrists at Washington University in St. Louis began deriving more objective criteria based on descriptive and epidemiological considerations. In 1967, at the urging of then-resident John Feighner, the group began meeting with the initial goal of writing a review of prior contributions to psychiatric diagnosis. In their meetings over the next year, the task soon shifted to the development of a set of new diagnostic criteria. Their work, then, gave rise to DSM-III.¹⁶ DSM-IV and DSM-IV-TR^{17,18} essentially continued to use similar criteria, but added more diagnoses and further emphasized familial and other causes of or contributions to the major mental disorders.^{14,15}

The chapter, "Schizophrenia and other Psychotic Disorders," in DSM-5¹⁵ includes abnormalities in one or more of the following domains: delusions, hallucinations, disorganized thinking (speech), grossly disorganized or abnormal motor behavior (including catatonia), and negative symptoms. DSM-5 further organizes the psychotic disorders along a spectrum: schizotypal (personality) disorder, delusional disorder, brief psychotic disorder, schizophreniform disorder, schizophrenia, and schizoaffective disorder. This spectrum continues to classify these disorders by symptom- and sign-based criteria, not the underlying putative causes. (As used in Norway, the International Classification of Diseases and Related Health Problems (ICD)-10 has a similar section on psychotic disorders).¹⁵ Thought disorder has also been described as an important topic in severe psychopathology. Blatt and Auerback¹⁹ differenti-

ated three major types of thought disorder according to degrees of boundary disturbance and demonstrated that the types form a continuum of severity. For example, patients with borderline personality disorder often have cognitive distortions and an unstable affect, and they may alternate between idealizing and then devaluing others.

While not specifically intended for forensic use, the DSM and ICD are regularly used to describe conditions seen in civil and criminal forensic psychiatric cases,¹⁵ including Mr. Breivik's. Eastman²⁰ pointed out that the two traditions of law and psychiatry combine with differing models of the mind to determine essential disjunctions when the disciplines are drawn into an apparently common purpose. We believe that psychotic spectra, which may be helpful in clinical settings to make a differential diagnosis, may unintentionally contribute to confusion for the forensic psychiatric examiner, and, ultimately, for the legal system.

The psychotic spectrum of disorders also does not yet have rigorous scientific data supporting a definitive line between schizophrenia and some types of personality disorders. Schizophrenia is a neurodegenerative disease with a growing body of genetic, biochemical, and anatomic marker research.^{21,22} However, putative endophenotypes do not necessarily reflect genetic origin, as these biological markers may be environmental, epigenetic, or multifactorial in origin.^{23,24} For example, people with schizotypal personality disorder share phenomenological, genetic, and cognitive abnormalities with people who have chronic schizophrenia.²⁴ Temporal volume reductions appear to be common to both groups, although there may be a preservation of frontal lobe volume in schizotypal personality disorder compared with schizophrenia.²⁵ Psychosis may also result from a brain injury, a metabolic condition, anabolic steroids (Mr. Breivik reportedly had used these¹), or an infectious disease.^{11,15} Therefore, the current nosology of a spectrum of psychotic disorders leaves open the possibility for rigidly held non-delusional beliefs to be regarded as evidence of psychosis, as opposed to extreme beliefs, as seen in some personality disorders.

Obsessions

Obsessions consist of unwanted (once called *ego alien*) intrusive thoughts, which the person himself recognizes as odd, unusual, or extreme, and which he

actively resists. For example, such thoughts may lead the afflicted individual to go out of his way to resist recurrent thoughts of killing others. Although their thoughts may appear odd, unusual or extreme to some observers, those persons who have obsessions typically do not present a threat to others.²⁶

Political, Cultural, Religious, and Spiritual Beliefs

Although not to be equated one with the other, politics, culture, religion, and spirituality are some of the important ways in which many people organize their understanding of the world. Each forms a configuration of ideology, ritual, and practice that profoundly affects the way lives are led and experienced.²⁷ In addition, some people feel so strongly about their associated beliefs that they are moved to take extreme actions based at least in part on their beliefs. In most cases, it can be relatively straightforward to make a distinction between psychotic phenomena and political, cultural, religious, and spiritual beliefs, but sometimes making such a distinction can be quite challenging. We believe this occurred in the *Breivik* case.

Parker²⁸ reviewed the literature, case law, and information obtained from both the Southern Poverty Law Center and the Anti-Defamation League to trace the origins and history of “sovereign citizens.” Its followers believe that the existing government in the United States is illegitimate, and they seek a minimalist government. Sovereign citizens wage war against the government and those in authority by using harassment, refusal to pay taxes, and intimidation tactics, and they occasionally resort to violence. Parker explains that so-called sovereign citizens “present with a variety of idiosyncratic legal theories and political beliefs that may appear delusional” (Ref. 2828, p 346). He then discussed this somewhat heterogeneous population as persons who vehemently hold extreme beliefs, but the “beliefs are shared by a large group of adherents, so they are best understood as an extremist political philosophy and not as a psychotic belief system” (Ref. 2828, p 346). He went on to advocate that a useful framework for evaluating such defendants is to view the evaluation in cross-cultural terms. We believe such an interpretation applies, by extension, to the case of Mr. Breivik.

Further, with respect to religious beliefs, Sims²⁹ has put forth a practical guide, in which psychiatric

morbidity of those religious beliefs would be suggested by the following:

Both the subjective experience and the observed behavior conform to psychiatric symptoms—i.e., the self-description of this particular experience is recognizable as being the symptomatology of a known psychiatric illness (for example, it has the form of a delusion)

There are other recognizable symptoms of mental illness in other areas of life, such as other delusions, hallucinations, mood disturbances, thought disorders, and so on.

The lifestyle, behavior, and direction of the personal goals of the individual subsequent to the event or religious experience are consistent with the natural history of a mental disorder rather than with a personally enriching life experience.

The personality is disordered when assessed on evidence other than the manifestation of religious behavior²⁹.

We believe that Sims’ guidelines also could be applied to assessing the potential of psychopathology with other extreme beliefs, such as those espoused by Mr. Breivik. However, we also would underscore that related functional impairment preceding and unrelated to the act itself must be present in a manner consistent with Sims’ criteria but well before the commission of the act. The use of a narrative to formulate forensic cases builds on McHugh and Slavney’s idea that mental disorders can arise from biological insult, dimensional attributes, maladaptive behaviors and the patient’s own life story.¹¹

Drawing a Crisper Line

Mr. Breivik’s rigidly espoused beliefs were ultimately thought to be the source of his extreme violence. Similar rigidly espoused beliefs resulting in violence have been seen in Islamic, antiabortionist, and proenvironmental terrorism. The violence committed by Timothy McVeigh and Terry Nichols, whose homemade fertilizer bomb blew up the Murrah Federal Building in Oklahoma City, is another example. In 2012, FBI Director Robert Mueller stated: “Over the past few years, we have seen increased activity among extremist individuals. These individuals have no typical profile; their experiences and motives are often distinct. But they are increas-

ingly savvy and willing to act alone, which makes them difficult to find and to stop” (Ref. 30). With the increasing prevalence of such violent behavior, a better understanding and definition of nondelusional but rigidly held beliefs is critical. In the next section, we reintroduce and then expand upon the notion of “overvalued idea,” first used over a century ago, which we believe can help forensic psychiatrists to draw a sharper line.

Overvalued Idea

Carl Wernicke (1848–1905) was a German neuropsychiatrist who is best known for his work with discrete brain lesions that cause aphasias. He was honored by having syndromes named after him, such as Wernicke’s (receptive) aphasia and Wernicke-Korsakoff syndrome. He also tried to identify many different clinical psychiatric concepts by using his patients as examples. He proposed the concept of *überwertige Idee* (overvalued idea) in 1900.³¹ This term is mentioned only in passing in British textbooks and is largely ignored by American psychiatrists.³²

Veale³² has extensively reviewed the various historical definitions of an overvalued idea, which he points out have evolved over time and are not universally accepted. The DSM-5 definition states that it is “an unreasonable and sustained belief that is maintained with less than delusional intensity (i. e., the person is able to acknowledge the possibility that the belief may not be true). The belief is not one that is ordinarily accepted by the other members of the person’s culture or subculture” (Ref. 15, p 826). The British definitions are quite different. The *Oxford Textbook of Psychiatry* states that it is “an isolated, preoccupying belief neither delusional, nor obsessional in nature, which comes to dominate a person’s life for years and may affect his actions” (Ref. 33, p 267). McKenna, at Cambridge, stated that it is a preoccupying abnormal belief which often appears following a key event and which comes to single-mindedly preoccupy an individual, often indefinitely.³⁴ Sims,²⁹ in London, wrote that an overvalued idea is a solitary, abnormal belief that is neither delusional nor obsessional in nature, but which is preoccupying to the extent of dominating the sufferer’s life. It is usually associated with abnormal personality. A highly abnormal religious belief could sometimes be regarded as an overvalued idea. For example, an individual repeatedly desecrated

churches because he believed they displayed images of which he disapproved.²⁹

In the wake of the 9/11 terrorist attacks, McHugh at Johns Hopkins used Wernicke’s concept of overvalued idea to describe the ideology behind the attacks:

An overvalued idea differs from an obsession in that, although it dominates the mind as an obsession does, the subject does not fight an overvalued idea but instead relishes, amplifies, and defends it. Indeed, the idea fulminates in the mind of the subject, growing more dominant over time, more refined, and more resistant to challenge [Ref. 35, p 243].

This description appears to be an accurate portrayal of the right-wing, anti-Muslim extremist views of Mr. Breivik, who boastfully asserted that he was a knight dedicated to stemming the tide of Muslim immigration into Europe.^{1,4,5} Overvalued ideas are also described in literature pertaining to anorexia nervosa, where the desire to be slim is the result of beliefs that are shared by others in society (that slimness is desirable). However, these individuals have extreme beliefs that fulminate and dominate their minds to the point of starvation.^{31,32} In addition, overrideational, obsessive-compulsive, and paranoid features have long been described in severe pathological personality disorders.^{15,19}

Taken in historical context, overvalued ideas may be seen as paving the way for something “good” or just. For example, the founders of the United States are among the most proudly celebrated people in America. However, at least some of the founders arguably broke the English law of high treason. Assuming current legal standards, were George Washington or Thomas Jefferson charged with treason today, they probably would be found competent and criminally responsible. Similarly, the abolitionist John Brown and the prohibitionist Carrie A. Nation used unconventional and often violent means to further their respective causes.

By contrast, on a much darker side, Adolf Hitler wiped out millions of Jews. Islamic extremists such as Osama bin Laden have recruited terrorists to carry out violent plots. Mr. Breivik, referring to Mr. bin Laden in his own compendium, hoped to inspire his readers to become knights who would carry out independent operations with the help of the detailed information he provided about acquiring weapons, body armor, poisons for hollow bullets, and preparation of explosive charge.¹ Durkheim, describing his concept of collective conscience stated that we must

not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it.³⁶

Psychiatrists have sometimes referred to people who espouse overvalued ideas as fanatics.^{35,37} Winston Churchill³⁸ stated “A fanatic is one who can’t change his mind and won’t change the subject.” According to most definitions, the overvalued idea is solitary; it is not accompanied by delusions of reference, other delusions, or misinterpretation of reality. However, any definition of an overvalued idea or delusion is problematic. The DSM series has definitions of terms such as delusion and overvalued idea in its glossary; however, when taken in the context of the current forensic analysis, those definitions may fall short. One problem is that there are no essential elements to a delusion (it is a problem of epistemology). Discussing such concepts then becomes a problem of semantics. However, in a forensic framework, the evaluator arguably has the responsibility of offering something more substantial than a semantic debate. For example, the federal definition of insanity calls for examiners to assess whether a defendant was unable to appreciate the nature and quality or the wrongfulness of his acts. Each of these terms (e.g., unable, appreciate, nature, and quality) has both legal and common meanings; the courts look at only the legal meanings. Given what is known about the case, we argue that Mr. Breivik’s extremely violent behavior perhaps can be better understood to be a manifestation of his overvalued ideas that take the form of fanaticism. We believe that such fanaticism is better explained by dimensional models of personality disorders,^{11,15} which assert a spectra of normal and abnormal personality function. Personality traits such as “pathological narcissism” in the *Breivik* case might be better explained by extremes of character and temperamental traits. These traits do not fit easily into diagnostic categorical systems such as the DSM. They tend to require formulations and a narrative³⁹ or life story¹¹ assessment, and this necessity renders forensic work performative and inherently more complicated than merely recounting the findings elicited during psychiatric examinations.³⁸ Such checklist styles of psychiatric formulations have gained popularity among

psychiatrists, but may tend to blur important natural diagnostic distinctions.⁴⁰

Extreme Overvalued Belief

The court ultimately had to draw a line with respect to Mr. Breivik. It concluded that Mr. Breivik’s grandiose beliefs were not bizarre or delusional, noting that the evaluators who opined that he was not criminally responsible should have consulted experts on right-wing ideologies before concluding that his grandeur was culturally implausible.^{4,5} This finding is consistent with the original European meaning of overvalued idea.

To describe the beliefs seen in the *Breivik* case (and similar cases discussed herein), we propose the term “extreme overvalued belief” to convey Wernicke’s original concept of a nondelusional, strongly held belief. We believe this term helps avoid confusion with the DSM-5 glossary’s definition of overvalued idea.¹⁵ It conveys, as British psychiatrists have emphasized, a belief separate from either a delusion or an obsession. We go further by adapting from McHugh a proposed definition for future discussion of this term:

An extreme overvalued belief is one that is shared by others in a person’s cultural, religious, or subcultural group. The belief is often relished, amplified, and defended by the possessor of the belief and should be differentiated from a delusion or obsession. The idea fulminates in the mind of the individual, growing more dominant over time, more refined, and more resistant to challenge. The individual has an intense emotional commitment to the belief and may carry out violent behavior in its service. It is usually associated with an abnormal personality.

We believe that Mr. Breivik’s behavior is an example of violence stemming from extreme overvalued beliefs. The evidence suggests he had vehement emotions regarding Muslims, immigrants, and liberal political parties. It appears to have dominated his mind. Based on our review of the data, Mr. Breivik’s beliefs were unaccompanied by other cardinal symptoms seen in severe mental illness, and his beliefs were not considered bizarre by the court, especially in the context of right-wing ideologies. His manifesto was not a form of disorganized speech, but rather a series of beliefs that he had sought out, copied, selectively altered, and incorporated and thereby “relished, amplified, and defended”³⁴ throughout his trial.

Conclusion

The case of Anders Breivik illustrates the importance of considering extreme overvalued beliefs when conducting a forensic evaluation. The DSM places the psychoses on a spectrum that can lead to the misidentification of rigidly held, nondelusional beliefs as being delusions. American forensic psychiatrists may be unaware of the European concept of the overvalued idea as being distinctly separate from an obsession or delusion. We propose a definition of extreme overvalued belief, which conveys this important concept of rigidly held nondelusional beliefs. Although forensic psychiatrists may not always agree on a particular individual's motives, this concept may help to sharpen their differential diagnosis in challenging cases such as Mr. Breivik's. Forensic psychiatrists should be aware of the powerful and destructive forces that extreme overvalued beliefs can unleash in any culture, subculture, political affiliation, or religion. They also should be aware of the differences in interpreting the diagnostic significance of such beliefs.

We believe that the DSM-5 may prove to be important in characterizing odd, unusual, or extreme violent behavior. The more rigid multiaxial system has been eliminated, allowing for the use of revised personality functioning criteria defined across disorders by typical impairments in personality functioning and the presence of pathological presentations of personality traits in individuals who are not optimally described as having a particular personality disorder. These DSM-5 innovations, coupled with the definition of extreme overvalued beliefs described herein, allow the examiner to provide a personality narrative for the rigidly held beliefs seen in cases such as Mr. Breivik's. Future cases will undoubtedly require a similar analysis of such extreme beliefs. The fact that a defendant committed a crime because of a delusional belief is a common basis for an insanity defense. It is therefore critically important that forensic psychiatrists properly identify a defendant's belief as either a delusion or as an extreme overvalued belief.

Acknowledgments

The authors wish to convey their gratitude to: Paul R. McHugh, Oliver Freudenreich, Jeff Janofsky, Niels Beck, John Lauriello, George Parker, Olaf Schmidt and the anonymous reviewers.

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Competence to Stand Trial Evaluations of Sovereign Citizens: A Case Series and Primer of Odd Political and Legal Beliefs

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Sovereign citizens hold a variety of beliefs that challenge the legitimacy of the United States government and criminal justice system. In criminal cases, sovereign citizens typically raise a variety of seemingly strange objections to the proceedings that can cause court participants to believe the defendant is not competent to stand trial. The author's case files were reviewed to identify all defendants who espoused sovereign citizen beliefs during a court-ordered competence-to-stand-trial evaluation. This case series consisted of nine evaluations completed between 2003 and 2012. A review of the outcomes in these cases showed that sovereign citizens typically have the capacity to understand criminal proceedings and assist an attorney.

J Am Acad Psychiatry Law 42:338–49, 2014

Sovereign citizens hold a variety of beliefs that challenge the legitimacy of the United States government and the criminal justice system. When people who hold these beliefs come in contact with the courts, they can pose serious challenges to the judges and attorneys who must work with them as part of the proceedings. In particular, in criminal cases, sovereign citizens typically raise a variety of seemingly odd and nonsensical objections to the proceedings, which may cause court participants to believe they are not competent to stand trial. When such defendants are referred for assessment of competence to stand trial, the evaluator is faced with the dilemma of trying to understand the defendant's unusual beliefs about the legal system, which in essence requires the evaluator to decide whether the defendant's beliefs are delusional or represent a cultural belief system. This article will present data drawn from a case series of sovereign citizens referred by judges in Marion County (Indianapolis), Indiana, for evaluation of competence to stand trial. To the best of my knowledge, this

case series is the first publication on sovereign citizens in the medical and psychological literature.

Sources of Information

Reliable information on the sovereign citizen movement is difficult to find. Use of the search term *sovereign citizen* yielded no pertinent results on both PubMed and PsycInfo in July 2014. Using the search term *competence to stand trial* led to 264 citations on PubMed and 42 citations on PsycInfo; none of the citations included any reference to sovereign citizens. Sovereign citizens often appeal unfavorable court decisions, and therefore appellate court decisions can be a useful source of information on how sovereign citizens interact with the court system. A 2013 Lexis search of court decisions using the search term *sovereign citizen* identified 101 decisions, 71 of which involved the sovereign citizen movement. The few books in print on sovereign citizens have been written about the perpetrators of dramatic, high-profile, violent incidents and have had small press runs. Extensive searches of the Internet made it clear that only a few websites could be considered objective sources of information on sovereign citizens, as most sites identified by the search engines were those devoted to the causes of the sovereign citizen movement. In

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Disclosures of financial or other potential conflicts of interest: None.

particular, the Southern Poverty Law Center (SPLC) and the Anti-Defamation League (ADL) are civil rights organizations with good reputations and a long history of investigating and tracking groups with extreme and possibly dangerous beliefs. The websites of the SPLC and the ADL each contain substantial information on the development of the belief system of sovereign citizens over the past decades. Additional information on sovereign citizens can be found on the website of the Federal Bureau of Investigation (FBI).

Background

To understand the sovereign citizen belief system, one must understand the history of the movements that preceded and accompany it, including the Christian Identity, tax protest, Posse Comitatus (power of the county), and patriot/militia movements. The Christian Identity movement has its origins in 19th century England, where religious writers advanced the theory that modern European people were the descendants of the lost tribes of the Old Testament.^{1,2} This belief was introduced into the United States by speakers from England in the late 19th century and was adopted by a small number of people. It became more popular during the Great Depression in the 1930s, when it began to evolve into an anti-Semitic philosophy, particularly on the West Coast, where its primary leader, Wesley Swift, was also active in other extremist groups, including the Ku Klux Klan. In its present form, many Christian Identity adherents believe the nonwhite races were created before Adam and Eve and thus have no soul. They also believe the world is very likely in its last days and thus have little faith in secular institutions, which makes Christian Identity an attractive theology for people who hold antigovernment beliefs, including sovereign citizens and militia members. The Christian Identity theology spread rapidly through right-wing extremist groups in the 1960s, including segregationist groups, the Posse Comitatus movement, and the Aryan Nation. Christian Identity declined as a separate movement in the 1990s, as extremist groups were dismantled by arrests and prosecutions. It is currently believed to be strongest in the Pacific Northwest and the Midwest.¹

The tax protest movement began in the 1950s and 1960s and continues to exert a strong influence in right-wing extremist ideology.^{3,4} This movement coalesced in the late 1950s around the proposed Liberty

Amendment to the U.S. Constitution, which would have banned income, estate, and gift taxes. With the failure of this effort, the more extreme opponents of income taxes moved on to develop arguments that the income tax was nonetheless illegal. In the 1960s, Arthur Porth put forward the argument that the Sixteenth Amendment, which authorized the federal income tax, violates the Thirteenth Amendment, which banned slavery, as citizens were placed into involuntary servitude by their obligation to pay income taxes. Porth later adopted the strategy of writing on his tax form that he was invoking his Fifth Amendment right of avoiding self-incrimination.³ Since then, tax protestors have brought forth a variety of creative strategies and explanations to avoid paying taxes, many of which have been adopted by people who also hold sovereign citizen beliefs. Many tax protestors ended up in court due to their refusal to pay federal taxes, and the courts have not been sympathetic to their arguments. In 1991, the U.S. Supreme Court, in *Cheek v. U.S.*,⁵ ruled that tax protestors could not use a good-faith argument to excuse their failure to pay taxes after adopting tax protestor beliefs; this defense was also raised by actor Wesley Snipes and was rejected on appeal.⁶ The tax protest movement is believed to be an entry point into other extremist belief systems, including Christian Identity and the sovereign citizen philosophy.³ The Internal Revenue Service (IRS) began to challenge tax protest efforts aggressively in the early 1980s, but this focus diminished in the late 1990s, in response to congressional hearings on allegedly abusive practices employed by IRS investigators and cuts in the IRS budget.⁴

In the late 1960s, the Posse Comitatus movement brought together elements of the Christian Identity and the tax protest movements into secretive, decentralized, and loosely organized extremist groups.⁷ This movement apparently began as two separate groups in the late 1960s, one led by Henry Beach and the other by William Potter Gale. The latter was a Christian Identity minister who had championed the tax protest movement and became one of the recognized leaders of Posse Comitatus.^{7,8} Its adherents hold a strong anti-government philosophy and believe that the only legitimate forms of government are those of towns and counties. The common law, as they understand it, is the basis of government, rather than constitutional law, and the sheriff, as the highest legitimate elected official, is supposed to enforce this

common law. This movement began in the United States Northwest but became popular in the Midwest during the 1980s, when the U.S. farm economy, particularly small farmers, struggled with a combination of low prices, high debt burdens, and high interest rates, which led to many farm foreclosures.⁷ In assisting farmers facing foreclosure, Posse Comitatus members tried to intimidate local officials with threats of physical violence and so-called paper terrorism. The latter strategy consisted of filing false liens on the property of targeted officials, filing multiple court documents in an attempt to overwhelm and frustrate the court process, and issuing indictments from common law courts created by local Posse chapters. One Christian Identity and Posse adherent, James Wickstrom, preached to beleaguered farmers that the federal government and taxes were illegal; driver's licenses were a form of tyranny; and, as a sovereign citizen, one could use false money orders to pay taxes.⁹ Around the same time, Frederick Saussy created the idea of using "public office money certificates," which he claimed were "redeemable in dollars of the money of account of the United States upon an official determination of the substance of the money of account" to pay taxes.⁴ The Posse Comitatus movement faded when many of its leaders were convicted of a variety of offenses, ranging from tax evasion and impersonating public officials to plotting assassinations and bomb attacks. A few Posse members violently resisted efforts to arrest them; in 1983, Gordon Kahl, while fleeing federal tax charges, killed three police officers before he was killed in another shootout with police.³ Media reports on these and other high-profile incidents publicized the racist and anti-Semitic underpinnings of the Posse Comitatus and Christian Identity movements, which contributed to their decline in popularity.

The militia movement is the ideological heir to the Posse Comitatus movement. Posse members often engage in paramilitary training in preparation for the struggle to bring the government back to the people, and Posse leaders often call their groups unorganized militias, referring to language in federal and state laws created after the end of compulsory military service.¹⁰ The militia movement did not directly derive from the Posse Comitatus movement, but instead grew from anger about the federal government's role in the violent incidents at Ruby Ridge in 1992 and Waco in 1993. These events mobilized

Christian Identity and sovereign citizen adherents and catalyzed the growth of armed militias, particularly among those who held radical gun rights beliefs and regarded members of militias as exempt from federal gun laws. Militia members and individual militia groups were quite diverse but were united in their fear of and opposition to the federal government, which they believed was part of a vast conspiracy to strip Americans of their rights. As a result, ideas common to sovereign citizens were popular within these groups. In particular, many militia groups held a strong belief that the United States had a common law heritage that had been abrogated by the federal government and feared that U.S. courts had become military courts. Some of these groups advocated the use of paper terrorism tactics as retaliation and issued fraudulent monetary instruments on their own authority. One of these groups, the Montana Freeman, gained a degree of notoriety in 1996 when they engaged in an 81-day standoff with federal and state law enforcement that ended peacefully.⁸

The militia movement grew in the mid-1990s, even after law enforcement agencies greatly increased their focus on domestic terrorism in response to the 1995 Oklahoma City bombing.¹⁰ However, by the end of the 1990s, many militia groups had disbanded, and many members were put in prison for violation of firearms laws. The movement did not disappear, however, and appears to have strengthened in recent years.^{11,12} The recession in 2008, which was accompanied by increased unemployment and many home foreclosures, facilitated the growth of the militia, tax protest, and sovereign citizen movements. Observers of these groups have observed a gradual coalescence of the beliefs of the tax protestors, sovereign citizens, and militia members and have described the combined beliefs as the patriot movement. In addition, anti-immigrant minuteman groups have moved toward the ideology of the patriot movement and have begun to promote sovereign citizen beliefs.^{13,14} As these movements have grown and come together, they have attracted the attention of federal law enforcement agencies. After Jerry Kane and his son, both sovereign citizen adherents, killed two police officers during a routine traffic stop in 2010, the FBI described extremist sovereign citizens as "a domestic terrorism movement" and a potentially serious threat to law enforcement staff.¹⁵ The number of people who hold sovereign

citizen beliefs is difficult to measure, given their strong antigovernment beliefs, but the SPLC has tracked a significant increase in the number of patriot movement groups, from 149 in 2008 to 1,274 in 2011; they estimated that 300,000 Americans held sovereign citizen beliefs and 500,000 shared tax protest beliefs.¹¹ Another recent development in the spread of sovereign citizen beliefs has been the growth of these ideas in African-American and prison populations.¹⁶ African-American adherents typically subscribe to the belief that they are Moorish American, which gives them privileged legal status, but otherwise hold many sovereign citizen beliefs, such as redemption theory, and apply similar tactics, including misuse of liens and creation of false accounts.¹⁷

Methods

I reviewed my case files from 2001 to 2012 seeking to identify defendants who had espoused sovereign citizen beliefs during a court-ordered evaluation of competence to stand trial. Demographic information was collected during the competence evaluation and was corroborated by court documents, including the probable cause affidavit. The diagnosis of each defendant was based only on the clinical interview; medical records were not available as a collateral source, as none of the defendants was receiving mental health treatment in jail, and the two defendants who reported any history of mental health treatment provided only vague information about being treated years earlier. The clinical diagnosis was based on the defendant's report of symptoms during the interview; the interviewer used a semi-structured interview format, guided by the criteria in the Diagnostic and Statistical Manual of Mental Diseases, Fourth Edition, Text Revision (DSM-IV-TR).¹⁸ The criminal charges for each defendant were identified from the probable cause affidavits, and the outcome of each case was found in public court records. Each defendant's competence to stand trial was assessed in a semistructured interview format based on the McGarry criteria.^{19,20}

The sovereign citizen beliefs held by the defendants were identified from the court reports, and each element was used as a search term on Google, to find additional information about each belief. As discussed above, a search of the medical and psychological literature with similar search terms was also completed. A search of the Lexis legal database for cases

involving sovereign citizens was completed by a law library reference librarian.

This study was approved by the Institutional Review Board (IRB) of Indiana University in February 2012. The IRB conducted a full review of the proposed study and, because of the small sample size, required strict de-identification of the data. No case summaries and no information that might be used to identify a defendant were permitted to be used in publications, and data based on the defendants' demographic information could be presented in aggregate form only.

Results

Case Information

Nine cases of defendants with sovereign citizen beliefs were identified over the period of 2001 to 2012, in 1,081 competence evaluations completed by the author during that period. The cases came from 2003, 2007 (two cases), 2008, 2009 (three cases), 2010 and 2011. All of the cases came from Marion County, which encompasses the city of Indianapolis, and had a population of 860,454 in 2000 and 903,393 in 2010.²¹ The average age of the defendants was 39.1 years, all but one was male, and 67 percent were African American. All of the defendants had prior arrest records and all but one had multiple prior arrests; two had served time in prison. None of the defendants had been prescribed psychiatric medication in jail.

Three defendants (two male, one female) refused to participate in the clinical interview; the refusals occurred in 2009 (2 cases) and 2011. Three of the six defendants who completed the interview had been raised by both of their parents, two had experienced divorce at a young age, and one was raised by his mother. One of the six defendants was physically abused by his father and stepfather and another defendant witnessed serious trauma, but no other history of abuse or trauma was reported. Of the six defendants who completed the interview, all had passed the GED (General Educational Development) test or had graduated from high school, three had attended college, and one had a master's degree. Three of the six defendants were self-employed at the time of their arrests, two were in the towing and repossession business, and one ran a retail store; three were unemployed at the time of their arrest; none of the six had been on disability. One of the defendants

had served in the military, but was given an other-than-honorable discharge after one year. Two of the six defendants who completed the interview had a history of mental health treatment: one had been treated with antidepressant medication for depression and anxiety, and one had been treated with antidepressant medication for depression and suicide attempts.

On mental status examination, the six defendants who completed the interview showed no significant cognitive deficits. Each defendant was generally oriented to person, place, and time; had intact short-term memory, recalling at least three of four words on delayed recall; had intact concentration, based on the ability to state the months of the year in reverse order; and had an adequate fund of knowledge, based on recall of between 4 and 13 recent U.S. presidents.

On the basis of the clinical interview, two of the six defendants who completed the interview had diagnoses of psychiatric disorders: one had delusional disorder and one had recurrent depression. The defendant with delusional disorder was the first sovereign citizen evaluated by the author and was the only sovereign citizen defendant ruled incompetent to stand trial. Three defendants had diagnoses of substance abuse disorders (two with alcohol and cannabis abuse and one with alcohol dependence, cannabis abuse, and opiate abuse). One defendant had no diagnosis.

The underlying charges for the nine defendants ranged from attempted murder to refusal to identify. Three defendants were charged with at least one violent offense (attempted murder, burglary, and battery); the others were charged with nonviolent offenses (check fraud, driving under the influence, probation violation, refusal to identify, possession of marijuana, or driving with a suspended license). The most serious charge faced by each defendant was: B felony (one defendant), C felony (2 defendants), D felony (4 defendants), and misdemeanor (2 defendants). Each of the defendants eventually pleaded guilty to or was found guilty of one or more charges, although one defendant was ordered to a diversion program after pleading guilty. The charges against two defendants were dismissed, but each simultaneously pleaded to or was found guilty of separate charges. Two defendants appealed their convictions up to the Indiana Supreme Court, without success.

During the competence evaluations, the defendants raised a variety of sovereign citizen beliefs (Table 1), and each defendant put forward a unique

Table 1 Sovereign Citizen Beliefs of Individual Defendants

| Sovereign Citizen Belief | Defendant |
|--|------------|
| Uniform Commercial Code | 2, 3, 5, 7 |
| Immune due to status as corporation | 1, 3, 5 |
| Admiralty court | 4, 5, 7, 8 |
| Gold fringe on flag | 4, 5, 7 |
| Copyright on or value to name | 2, 6, 9 |
| Use of capital letters in writing name | 2, 5 |
| Accepted for value | 3, 6 |
| Office of the person | 4, 7 |
| Secured party | 7, 8 |
| Fourteenth Amendment | 1 |
| Redemption | 2 |
| Moorish American | 3 |
| Gold standard and House Resolution 192 | 8 |
| Driver's license not needed | 9 |

combination of such beliefs. Although three defendants refused to complete the clinical interview, two of them engaged in a brief discussion of their sovereign citizen beliefs during their refusal; information on the third defendant's beliefs was drawn from the reason she stated for her refusal and from the probable cause affidavit. Four defendants made reference to the Uniform Commercial Code, three of whom believed they were corporations and thus immune from prosecution. Four defendants believed the criminal courts were actually admiralty courts; three of these defendants mentioned the gold fringe on the U.S. flag in courtrooms as evidence of this status.

Court Decisions

All of the 71 court decisions identified by Lexis with the search phrase sovereign citizens were from federal courts. There were nine decisions from U.S. courts of appeal: four from the Seventh Circuit and one each from the Second, Fifth, Sixth, Ninth and Federal Circuit Courts. Four decisions came from U.S. tax courts and four from courts of federal claims. The remaining 54 decisions came from U.S. district courts in 25 states and the District of Columbia: 9 decisions came from New Jersey, 5 from North Carolina, 4 each from California and Georgia, 3 from Michigan, Missouri, Texas, and Wisconsin, and 2 from Florida, Maryland, and South Carolina; 13 states and the District of Columbia had one decision each. A majority of the decisions (47, 66%) were handed down in this decade: 11 (15%) in the 2000s, 10 (14%) in the 1990s, 2 (3%) in the 1980s, and 1 (2%) in the 1970s.

The claims involved in the court decisions reflected the political leanings of sovereign citizens and the growth of sovereign citizen beliefs in African-American and prison populations. Of the 54 district court decisions, 16 (30%) cases involved nonpayment of taxes, 15 (28%) involved Moorish-American claims, 9 (17%) involved a mortgage or foreclosure, 6 (11%) came from traffic violations, and 4 (7%) were filed by prisoners; the remaining 4 cases did not fit in any of these categories. All nine of the New Jersey District Court decisions involved Moorish-American claims, and all were decided in 2011 or 2012. All but 2 of the 15 cases involving Moorish-Americans were decided in 2011 or 2012. Of the nine appellate court decisions, three involved tax cases, two involved convictions for mail fraud related to false liens, two involved traffic violations, and one each involved a claim of admiralty court jurisdiction and a federal murder trial. The federal claims court cases concerned a prison inmate who claimed redemption, as well as cases involving a civil claim for \$185,000,000, a challenge to birth certificates and social security numbers, and a claim for a tax refund. Overall, 27 (38%) of the 71 identified cases involved taxes.

Two of the decisions involved competence to stand trial. In a 2011 case, *United States v. Cordell*,²² the defendant was found incompetent to stand trial after a brief examination by a psychiatrist found him to be paranoid and delusional. The defendant made a statement to the court after the finding, in which he mentioned “secured party,” “creditor status relative to the government,” and “corporate fiction.” He later submitted a letter to the court referring to “conditional acceptance for value,” referring to “proposed settlement of the case as a commercial party.” The psychiatrist then completed a more extensive evaluation of the defendant that showed “evidence of a thought disorder, specifically paranoid and grandiose delusional thinking” which would “interfere with his ability to assist his counsel in his defense.” During the interviews, the defendant claimed “his birth certificate had been pledged to the Secretary of the Treasury” and that court participants in the case were violating copyright law. The defendant was subsequently evaluated by a Bureau of Prison (BOP) psychologist, who, after administering several tests, including the Evaluation of Competency to Stand Trial-Revised (ECST-R), found that the defendant did not have a mental disease or defect. The psychol-

ogist testified that he was familiar with sovereign citizens, had previously evaluated adherents to these beliefs, and had found that such defendants do not necessarily have a mental disease. The magistrate who heard the case recommended that Cordell be found competent to stand trial, although “The Court has no doubt that Mr. Cordell is a difficult client.” The magistrate’s report and recommendation were subsequently approved and adopted by the court.²²

In 2012, the magistrate judge’s report and recommendation in *United States v. Hall*²³ was handed down. The defendant, charged with possession of cocaine with intent to distribute, had been ordered to undergo evaluation of competence and sanity at a federal detention center, but was uncooperative with the testing. The forensic psychologist who evaluated the defendant testified that Hall did not have a mental disorder and that his defense strategy “is not based on confused or delusional thinking.” The magistrate noted that, instead, “Defendant appears to have chosen a strategy increasing in popularity among criminal defendants in Federal Courts,” in which they claim the court does not have jurisdiction, based on the United States’ abandoning the gold standard in 1933, or they invoke the Uniform Commercial Code, or they use the phrases “secured party creditor” and “sovereign citizen.” Hall had adopted a “pattern of non-cooperation and frivolous motions.” The magistrate observed that Hall “exhibited organized, rational, sequential, and coherent thought processes” and, based on his observation and the psychologist’s report and testimony, recommended that Hall be found competent to stand trial. The court later adopted this report.²³

Sovereign Citizen Beliefs

Common Law Courts

Common law generally refers to a system of law based on precedents and not statutes. Sovereign citizens, however, believe that common law derives from the American Revolution, which freed the colonists from the British monarchy and made each colonist sovereign over his own property. Under this definition of common law, no court ruling or government statute or regulation can deprive a citizen of his common law rights, particularly with regard to property.²⁴ Thus, to sovereign citizens today, common law refers to a separate system of laws, designed to protect individual property rights. They also be-

lieve that these rights have been eroded by the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866, which sovereign citizens believe transformed the U.S. court system from its common law heritage into a corrupted system based on commercial or admiralty law. Common law courts created by sovereign citizens and militia groups are based on their understanding of common law and have been used as instruments of paper terrorism to issue summons, impose fines, and dismiss convictions from other courts.²⁴

Common Law Liens

Common law adherents use the tactic of filing common law property liens to attack lawyers, judges, and government officials who seek to challenge the authority of the common law courts or to enforce tax laws and government regulations, such as zoning laws. To sovereign citizens, the filing of a lien on a target's property is an attractive strategy, for it avoids any interaction with the judicial system. Sovereign citizens believe the filing of the lien means the target "must either successfully rebut [the] commercial law affidavit, convene a common law jury, or pay the lien."²⁴ Such liens are not legitimate but require considerable time, effort, and money to remediate, once they are discovered.

The Fourteenth Amendment

The Fourteenth Amendment was ratified in 1868 and guaranteed U.S. citizenship to former slaves, among other important rights. To sovereign citizens, though, the Fourteenth Amendment shifted all Americans from the status of being citizens of individual states to being citizens of a corporate entity, the federal government. However, they believe that this change in status can occur only if a citizen voluntarily agrees to give up common law rights by seeking licenses or permits, paying taxes, or holding a Social Security number. A citizen can revoke these licenses and numbers and thus regain common law rights and become a sovereign citizen, immune to the judicial system and state and federal government.¹² One offshoot of this interpretation of the Fourteenth Amendment is the belief among white supremacist sovereign citizens that African Americans are not eligible to be sovereign citizens, as they did not hold common law rights before passage of the Fourteenth Amendment.

African-American sovereign citizens, though, often claim they are Moorish American or members of

a Moorish church, which they believe gives them privileged status, equivalent to that of Native Americans and similar to that of a sovereign citizen.¹⁷ These sovereign citizens overlook the deeply racist foundation of the sovereign citizen movement and instead build on the holdings of the Moorish Science Temple of America, which is a small religious sect founded in 1913 by a man who changed his name to Noble Drew Ali. Ali was not antigovernment but believed Moorish Americans should be recognized as full citizens of the United States, not as descendants of slaves, as was very common at the time. The group splintered after Ali's death in 1929 but remains active to this day. African-American sovereign citizens who claim they are Moorish American often add Arab suffixes (e.g., -El, -Bey, and -Ali) to their names and claim that the police and courts have no jurisdiction over them. They may carry unique driver's licenses or cards proclaiming their right to travel freely.¹⁷

The (Missing) Thirteenth Amendment

Sovereign citizens often use "hidden history" as justification for their beliefs, and the idea that lawyers, judges, and legislators have conspired to obscure important laws is a prominent theme in sovereign citizen writings.²⁴ The "missing" Thirteenth Amendment holds a prominent place in this pantheon, as this proposed amendment, which was never adopted, would have denied American citizenship to anyone who possessed or accepted a title of nobility. Since sovereign citizens believe that lawyers hold a title of nobility, signified by the use of Esq. after their names, in sovereign citizens' eyes lawyers are not legal citizens of the United States. Sovereign citizens typically represent themselves in court proceedings and are loathe to accept the assistance of attorneys.

Admiralty Law

Sovereign citizens believe that, because of the corruption of the common law by the Fourteenth Amendment and the abandonment of the gold standard in 1933, the state and federal courts in the United States are actually military or admiralty courts that administer both the law of the sea and the law of international commerce.²⁵ To sovereign citizens, the key symbol of the true identity of the court system is the presence of a gold fringe on the American flag in all courtrooms. Despite the more reasoned analysis of the subject by flag experts, which holds that the gold fringe is purely decorative and has no inherent mean-

ing or symbolism, adherents persist in their interpretation of the fringe on the flag.²⁶

Redemption Theory

Sovereign citizens believe the U.S. government went bankrupt in 1933 when it passed House Resolution 192, which took the currency off the gold standard. Instead of gold, the government backed the dollar with the “full faith and credit” of the U.S. government, which means, to sovereign citizens, that the federal government collateralized its own citizens as payment for the debt created by the bankruptcy of the United States.¹¹ To use individuals as collateral, the sovereign citizen believes that the government files the birth certificates of its citizens as registered securities with the Department of Commerce, thus creating a secret U.S. Treasury account for each citizen with a value of \$630,000, or some larger value.²⁵ They hold that proof of the role of the birth certificate is evident in the use of all capital letters for the name, the security paper used, and the presence of registry numbers on the certificate.²⁵ In their theory, individuals can gain access to their secret treasury accounts, which are known as strawman accounts, by freeing themselves from this corporate entity and becoming a sovereign citizen, or flesh-and-blood human being. By doing so, the sovereign citizen can use this account to pay his bills, thus redeeming the value of the account.

Accepted for Value

Once an individual becomes a sovereign citizen, he can gain access to his secret account by filing the appropriate documents with the U.S. Treasury. Although this strategy has never actually succeeded, the key documents are believed to be a bill of exchange and a copy of one’s birth certificate, along with other key forms. The identity and preparation of the appropriate forms to send to the U.S. Treasury to access one’s secret account has spawned an ongoing scam of selling these forms and the instructions to complete them, often in seminars or classes.²⁷ Once the process is completed, sovereign citizens believe that they can write “accepted for value” on bills to pay them from their secret treasury account. In addition, since the courts are under either admiralty or commercial law, all court transactions are commercial in nature and can be discharged by writing the phrase on the document.²⁵

Uniform Commercial Code (UCC)

The UCC holds particular significance for sovereign citizens, as they believe it is the mechanism that converts legal events into commercial transactions. Sovereign citizens believe filing forms under the Uniform Commercial Code, particularly the UCC-1, with state authorities, is another strategy to gain access to one’s secret treasury account.²⁵ Adherents may also use the UCC-1 to file liens based on the judgments of common law courts. This tactic has prompted several states to pass laws allowing prompt resolution of such fraudulent claims.²⁸

Use of Capital Letters

Sovereign citizens believe the name of a flesh-and-blood person is written with initial capital letters only and that the use of all capital letters refers to the corporate entity or strawman. Since the use of all capital letters for names is common on birth certificates and legal documents, including probable cause affidavits, to sovereign citizens, the use of the upper case means that these documents refer to corporate entities and not to the actual sovereign citizen.²⁵ In addition, the use of punctuation in a person’s name is thought to signify that the holder is a flesh-and-blood person.²⁵

Office of the Person

This is a variation on the idea that the government has conspired to prevent its citizens from being free men and women. Sovereign citizens argue that because the statutory definition of person does not include man or woman, criminal statutes apply only to those who hold the office of the person. Governments appoint people to the office of the person through the use of licenses, permits, and state benefits and thus gain the authority to regulate them. People accept this status by answering questions posed to them by state officeholders or government officials, including judges, attorneys, police, and bureaucrats. Sovereign citizens who follow this belief system do not answer questions, particularly those posed by police, attorneys, and judges, but only pose them to others.²⁹

License Plates and Drivers Licenses

Sovereign citizens believe they have a God-given and constitutionally guaranteed right to travel over the land and reject the use of driver’s licenses and license plates, to free themselves from the control of the corporate government. They then create their own

license plates and driver's licenses, which can prompt traffic stops by observant police officers. These stops often lead to a frustrating discussion between the officer and the sovereign citizen, who presents a pastiche of quasi-legal, oddly worded arguments to justify his use of false plates and license. While many of these stops are routine, a few have had tragic results, when extremist sovereign citizens, like Jerry Kane, violently resist police efforts to issue a traffic citation.³⁰ To decrease the risk of such incidents, watchdog organizations and law enforcement agencies have publicized the warning signs that an officer may have pulled over a sovereign citizen.³¹

Discussion

Based on this case series, which was collected by one evaluator over a period of 10 years, sovereign citizen defendants hold a variety of idiosyncratic legal theories and political beliefs that may appear delusional. One must be cautious about drawing conclusions based on a small case series, but examination of the nine competence assessments showed that each defendant held a unique combination of sovereign citizen beliefs. It therefore appears likely that there is no typical sovereign citizen; rather, there is a core group of beliefs that are adopted and adapted by each sovereign citizen. Within the case series, all but one of the sovereign citizen defendants referred for competence evaluation were male and reasonably well educated; most were middle aged, which is consistent with what little is known about sovereign citizens.¹⁶ None of them had a known history of psychosis and, of the six who cooperated with the evaluation, most appeared to have had a relatively normal upbringing. None showed any significant cognitive deficits on mental status examination. From a clinical perspective, the defendants in this group were unremarkable.

The background information on sovereign citizen beliefs was primarily drawn from the websites of two prominent civil rights watchdog organizations and the FBI, and their contents were consistent with one another and appeared reliable. Based on these sources, sovereign citizen beliefs are shared by a large group of adherents, so they are best understood as an extremist political philosophy and not as a psychotic belief system. This puts sovereign citizens into the realm of cross-cultural forensic assessment,³² based on their shared belief system and their status as outsiders relative to American culture in general. Given

this perspective, it is interesting to note that all of the defendants in this case series came from an urban county and a majority (67%) were African American, even though sovereign citizen beliefs have been, until recently, typically associated with rural settings, and the history of the sovereign citizen movement has strong racist themes. The extension of sovereign citizen beliefs to urban African Americans may be explained by the popularity of these beliefs within jails and prisons, where they are learned from other inmates.¹⁶ Such beliefs gained prominence during high-profile murder trials in Maryland in 2005–2009³³ and in Arizona in 2012.³⁴ The results of a Lexis search were consistent with the recent growth of sovereign citizen beliefs among African Americans, as most of the cases came from the current decade and many of the 2011 and 2012 cases involved Moorish-American claims.

It should be noted that the Anti-Defamation League has reported the spread of sovereign citizen adherents to other countries, including Canada, Australia, New Zealand, and Great Britain,¹⁶ even though the legal systems in those countries are rather different from the U.S. system. Evaluations of defendants who hold sovereign citizen beliefs are facilitated when the evaluator recognizes these beliefs as strongly held political beliefs and discusses them in a nonjudgmental manner, in essence treating them as a cultural identity. As this case series showed, defendants who have sovereign citizen beliefs come from a variety of backgrounds and hold very individual interpretations of the sovereign citizen movement. A forensic clinician who evaluates a sovereign citizen should consider his competence report on such a defendant as a cultural interpretation of the sovereign citizen political culture for the court. It is incumbent on the evaluator to explain the context of the defendant's claims so that the court can make an informed decision about the defendant's competence to stand trial.

The first sovereign citizen evaluated was diagnosed with delusional disorder, based on the fixed nature of his evidently false beliefs about the legal system. In retrospect, it is quite likely that this defendant did not truly meet criteria for a diagnosis of delusional disorder, in that his beliefs were not as unique as they appeared to be on first impression. Similarly, the first evaluator in *United States v. Cordell* believed the defendant was delusional and incompetent; a subsequent evaluator, who was familiar

with sovereign citizen beliefs, made no diagnosis of a mental disorder and felt that the defendant was competent to stand trial.²¹ Since sovereign citizen beliefs are akin to a shared belief system, sovereign citizens can be understood as members of a cultural group. They thus do not qualify for a diagnosis of a psychotic disorder based only on the nature of the shared beliefs. The first sovereign citizen defendant evaluated was also thought to be incompetent to stand trial at the time of the evaluation, because of his apparent delusional disorder, although in retrospect, with the benefit of additional information about sovereign citizen beliefs, this defendant was almost certainly competent to stand trial. Once it became clear that defendants who espouse sovereign citizen beliefs share a set of quasi-legal beliefs that are derived from an extreme political philosophy, subsequent defendants who held similar beliefs were not diagnosed with a psychotic disorder and were not ruled incompetent to stand trial.

The diagnoses of the six sovereign citizen defendants who completed the interview were all based solely on the clinical interview portion of the competence evaluation, which is typically achieved in one session lasting one to two hours. Given the relative brevity and the forensic context of the assessments, additional clinical interviews of the defendants might have revealed more diagnoses, particularly in the realm of the personality disorders. Collateral interviews of friends and family might have yielded pertinent information about possible diagnoses as well.

It is important to note that during the study period sovereign citizen beliefs were a rare cause for assessment of competence to stand trial in Marion County, Indiana, as only a handful of cases were identified out of the nearly 40,000 criminal cases processed every year in the Superior Court system.³⁵ Indeed, this case series was self-limiting; as judges became aware of sovereign citizen beliefs and were able to recognize them in court, referrals for evaluation of competence declined. Based on the SPLC estimate of the prevalence of people who hold sovereign citizen beliefs in the United States, the cases in this series thus likely represented only a very small percentage of such individuals in Marion County. Indeed, sovereign citizen beliefs are thought to be fairly common in Indiana, for in 2012 the Indiana Secretary of State reported that his office regularly

received documents requesting recognition as a sovereign citizen.³⁶

When the topic of sovereign citizens was presented to an Indiana Judicial Conference meeting in April 2012, all of the nearly 50 judges in the room, most from rural counties, had had direct experience with sovereign citizens in their courtrooms, in both criminal and civil matters, which is consistent with the general understanding of sovereign citizen beliefs as being most strongly supported in rural settings. The rural judges' familiarity with these beliefs and their adherents most likely contributed to the report of most that they had adopted strategies for handling the idiosyncratic beliefs, statements, and behaviors of sovereign citizens, by simply rejecting their strange interpretations of the Constitution and state laws and reminding the defendants of the authority of the court. Indeed, very few of these judges had requested psychiatric evaluation of sovereign citizens, and none of the judges from rural counties had done so. The defendants in the current case series were referred by judges who were not familiar with sovereign citizen beliefs. From that perspective, although the defendants in the cases in this series may seem inconsistent with the larger population of sovereign citizens, they may be typical of the defendants who could be seen as incompetent by a particular court. The Indiana judges at the conference all agreed that their sovereign citizen cases had presented significant challenges to their courts, as these cases often required more time than usual to resolve, both in court and administratively. The time consumed in these matters is not trivial, as sovereign citizens often attempt to overwhelm the court by filing multiple and extensive motions and court documents, as has been recently noted in Indiana and Oklahoma.^{37,38} The judges also noted that frustrated prosecutors may dismiss a case against a sovereign citizen to prevent further waste of resources, which in turn emboldens sovereign citizens to persist in use of their strategies.

Conclusion

Familiarity with the basic tenets held by sovereign citizens, should prevent inaccurate assessment of defendants who hold these beliefs if they are referred for evaluation of competence to stand trial. Based on the findings of this case series, a defendant who puts forward sovereign citizen beliefs in court or during a

competence assessment is unlikely to lack the capacity to understand the nature and objectives of criminal proceedings or to be unable to assist his attorney.

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