Autism Spectrum Disorder in the Criminal Justice System: A Review for Caregivers and Professionals

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Abstract

Autism Spectrum Disorder is the fastest growing developmental disability in the United States. Characterizations can include: impaired social skills, disordered communication abilities, and repetitive or obsessive behavior. Symptoms may place individuals at greater risk for involvement in the criminal justice system. Parents, defense attorneys, and other advocates must actively educate criminal justice professionals (e.g., judges, prosecutors, and probation officers) about Autism Spectrum Disorder. Successful advocacy may minimize the likelihood of adverse consequences and prolonged involvement in the criminal justice system.

Keywords: Autism Spectrum Disorder (ASD), criminal justice system, legal professionals
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Autism Spectrum Disorder (ASD) is the fastest growing developmental disability in the United States (Centers for Disease Control & Prevention, 2015; Van Naarden Braun et al., 2015) with rates of diagnosis increasing 10-17% per year (Baio, 2014). The Centers for Disease Control (CDC) estimates one in every 68 individuals has been diagnosed with ASD in the general population (2015). Although the exact causes of ASD are unknown, symptoms usually appear prior to age three, with a growing number being diagnosed in all age groups.

Individuals with ASD share varying degrees of common characteristics, including, but not limited to, a lack of social skills, disordered communication abilities, and repetitive or obsessive behaviors (Allen et al., 2008; American Psychiatric Association, 2013; Lecavalier, 2016; Mayes, 2003; Woodbury-Smith, Clare, Holland, Kearsn, Staufenberg, & Watson, 2005). The most common manifestation of ASD is impaired social skills (Anckarsäter, Nilsson, Saury, Rastam, & Gillberg, 2008). For example, some individuals with ASD may fail to respond to their name, avoid eye contact with others, and may have difficulty initiating or maintaining appropriate social interactions. Some may have difficulty understanding what others are thinking or feeling (Anckarsäter et al., 2008; Higgs & Carter, 2015), which might appear as having a lack of empathy. This difficulty is primarily driven by a limited ability to identify and decipher social cues (i.e., tone of voice or facial expressions) (Higgs & Carter, 2015), often due to brain structure or neurological chemistry (Ramachandran & Oberman, 2006). While as many as 38% of those with ASD may have impaired cognitive functioning, difficulty with communication and lack of social skills does not presume an intellectual disability coexists (Baio, 2012).

Experts estimate as many as 25% of children with ASD may never develop verbal language skills (Baio, 2014; Philip, Dauvermann, Whalley, Baynham, Lawrie, & Stanfield, 2012). Individuals with ASD may display non-traditional social skills that persons other than their caregivers may not understand. Even the most highly functioning or mildly impacted individuals diagnosed with ASD, who obtain verbal language, may have difficulty communicating, particularly when subjected to the stress and anxiety of complex and ambiguous situations like an emergency event (The National Autistic Society, 2008). Autism Spectrum Disorder is a life-long disorder with varying degrees of impairments present into adulthood, especially in the absence of appropriate services and supports (Allen, Evans, Hider, Hawkins, Peckett, & Morgan 2008; Hall & Bernal, 1995; Payne & Hollin, 2014). With difficulty communicating and understanding social norms, problematic outcomes may occur including involvement in the criminal justice and legal systems (Crane, Maras, Hawken, Mulcahy, & Memon, 2016).

**ASD and the Criminal Justice System**

Individuals with ASD may be more likely to enter the criminal justice system compared to the general population (Allen et al., 2008; Cashin & Newman, 2009; Freckelton, 2013; Kroncke, Willard, & Hucklebee, 2016; Scragg & Shah, 1994). Those entering the criminal justice system can do so as a witness, victim, suspect, or perpetrator.
Deficits commonly associated with ASD and other secondary conditions that may contribute to criminal justice involvement for this population includes: social skill limitations, limited range of interests, obsessional tendencies, and disruptive behaviors. Comorbid mental health and substance misuse disorders among individuals with ASD may indirectly bring the individual into contact with the criminal justice system (Alexander et al., 2015; Freckelton, 2012; Langstrom, Grann, Ruchkin, Sjostedt, & Fazel, 2009). Impaired social skills can cause conflict because an individual may not understand appropriate social norms of interaction, misunderstand personal space, lack appropriate conversation skills, or have limited understanding of cause-effect and consequences. A limited range of interest could lead to criminal acts when the interest is focused on atypical or socially unacceptable acts, such as fire setting, pornography, hoarding, and stealing. This could also include a fascination with a particular person, possibly leading to stalking or unwelcome sexual advances. Aggressive behaviors by those with ASD may lead to criminal justice involvement (Freckelton, 2012; Haskins & Silva, 2006), to include: self-injurious behaviors (e.g. head-banging, hitting or biting oneself), grabbing, hitting, kicking, pinching, scratching, biting, throwing objects, and property destruction, particularly when placed in over-stimulating, chaotic, or unfamiliar situations.

Recognizing someone with ASD is not as easy as simply looking at the individual. At first encounter, criminal justice professionals may believe they are coming into contact with a neurotypical individual (i.e., a person of the mainstream population who does not have a developmental or cognitive disorder). It may seem the individual is not cooperating or resisting an officer, but in reality they may not understand the situation due to ASD associated impairments. Many criminal justice professionals are often ill equipped to recognize and understand how ASD impacts the way the individual feels, thinks, and acts. Some believe the inappropriate behaviors (resulting from ASD) that result in law violations can be “corrected” or “rehabilitated” with traditional criminal justice based approaches. These professional often try to convince the individual to adopt normative behaviors without truly grasping the nature of this disorder (Allen et al., 2008).

All professionals working within the justice arena (e.g., corrections, law enforcement, legal, probation) must acquire the necessary training and skills in order to better recognize and understand how ASD impacts the arrest stage, criminal trial process, confinement, and community supervision. Typically, individuals with ASD need advocates, such as parents, caregivers, defense attorneys, medical or treatment personal, or expert witnesses, who understand their disability (King & Murphy, 2014). Such an increased awareness among advocates and professionals should lead to improved outcomes for individuals with ASD who become involved in the criminal justice and legal systems.

**Juvenile Involvement in the Criminal Justice System**

Deficits associated with ASD may contribute to involvement in the criminal justice system at an early age (King & Murphy, 2014; Kroncke, Willard, & Huckabee 2016). Federal law requires public schools to provide special education services to students with disabilities in the least restrictive environment possible (Individuals with Disability Education Act, 1997). Nonetheless, school staff members often rely on law
enforcement (e.g., school resource officers) for assistance when a student with a disability displays behavioral problems (e.g., aggression, making threats, or attempting to leave school premises). It is not uncommon for a child with ASD to have contact with the criminal justice system as a result of aggressive behaviors. One study found over two-thirds (68%) of children with ASD had aggresed towards caregivers, such as parents, family, and teachers (Kanne & Mazurek, 2011). These behaviors may be a product of the symptoms of ASD, such as feeling frustrated with the lack of ability to communicate, feeling anxious, uncontrollable impulsiveness, or a reaction to hyper or hypo-sensitivity. In fact, a child with ASD may not yet understand his or her body and unknowingly regress to primitive actions to express themselves, especially when under stress.

Once law enforcement becomes involved, caregivers may lose much control over the situation (Mayes, 2003). Few juveniles understand their right to remain silent (Miranda Rights) and often make self-incriminating or false statements (Freckleton, 2013; Woodbury-Smith & Dein, 2014). These statements, along with other evidence such as interviews with school staff are sometimes forwarded to a prosecuting attorney for review. The decision to charge a juvenile with a crime is then in the hands of a single individual. This individual may not have information regarding the disability or how it affects the juvenile’s behavior or decision-making processes (Crane, Maras, Hawken, Mulcahy, & Memon, 2016; Freckleton, 2013; King & Murphy, 2014; Mayes, 2003). If the situation proceeds to juvenile court, parents/guardians, defense attorneys, and other advocates must play significant roles in educating legal professionals about the juvenile’s disability at the earliest stages possible (Freckleton, 2013). Before proceeding in any case involving an individual with a cognitive impairment or developmental disability, competency must be determined if they are to be tried for a crime.

**Competency Testing.** Competency tests typically focus on a juveniles’ ability to: (1) consult with his or her attorney with a reasonable degree of rational understanding and; (2) have a rational and factual understanding of the proceedings against him or her (Bath, Reba-Harrelson, Peace, Shen, & Lie, 2015; Mayzer, Bradley, Rusinko, & Ertelt, 2009). A juvenile that does not possess these two basic abilities may be declared legally incompetent and not tried on the law violations in their present case (Bath et al., 2015; King & Murphy, 2014; Mayzer et al., 2009). Competency evaluations need to be performed by qualified professionals (i.e., licensed psychologists or psychiatrists) who understand the entire legal process (Pirelli, Gottidiener, & Zapf, 2011). If not satisfied with the competency evaluation report, the judge may permit an evaluation by another qualified expert.

**Sentencing.** In juvenile court, the sentencing or “dispositional” phase of a case presents an opportunity to educate the judge about appropriate sentencing options for defendants with ASD (Freckleton, 2013; Woodbury-Smith & Dein, 2014). Consequences range from community service, confinement to a detention center, or obtaining treatment to address such issues as anger management or chemical dependency (Woodbury-Smith & Dein, 2014). Preparing courts to better understand the complexities of ASD in juvenile justice populations place judges in positions to make better-informed decisions within this special population. This could enhance community safety by ensuring the individual with ASD is sentenced appropriately due to his or her disorder’s
impairments, in turn reducing the individual’s risk for re-offending. If probation is a consequence, probation officers should seek education regarding the juvenile’s diagnosis (Freckleton, 2013; Mayes 2003), allowing the parameters of probation at reasonable and understandable goals for someone with ASD. Terms of probation may require frank and direct communication, perhaps with visual guidelines, to reduce the parameters of probation being misinterpreted or misunderstood.

**Adult Involvement in the Criminal Justice System**

Adults with ASD face similar challenges in the criminal justice system as juveniles (Freckleton & List, 2009; Lerner, Haque, Northrup, Lawer, & Bursztajn, 2012). Police officers, prosecutors, and probation agents generally expect law violators to develop insight into their unlawful actions and be able to display normative behaviors. However, this might not be possible for some adults with ASD. The court may also look for the defendant to exhibit remorse for the crimes he or she has committed. Likewise, some individuals with ASD may have difficulty comprehending the offense or showing remorse for their actions. In some instances, the individual may appear to be unempathetic, possibly due to the impairments causing disengagement from others (Shamay-Tsoory, Tomer, Yaniv, & Aharon-Peretz, 2002). Similar to juveniles, adults may benefit from having advocates who understand their disability and can help them effectively navigate the criminal justice system (Bishop, 2008; Cea, 2014; Freckleton & List, 2009; Browning & Caulfield, 2011). Such advocates may include professionals from the criminal justice system, as well as family, friends, or community members.

**Competency.** Autism Spectrum Disorder must be understood at all stages of the criminal justice system, especially when someone with the disorder is accused of a crime. As in juvenile court, an attorney for an adult defendant with ASD may request a competency evaluation. If the individual does not meet the standards for legal competency, the state will typically dismiss the case or suspend prosecution of the defendant (Batten, 2010). Depending on the severity of the crime, a prosecutor may request a hearing at a later date, allowing mental health professionals to attempt to restore the defendant’s competency (Batten, 2010; Stepanyan, Sidhu, & Bath, 2016). A determination by a judge stating a defendant has been restored to capacity, may allow the state to resume prosecuting the individual (Batten, 2010).

**Sentencing.** Sentencing is particularly sensitive for individuals with ASD (Katz & Zemishlany, 2006; R v MDW, 2001), because many factors are taken into account to ensure liability for the charged wrongful action is accurate. Some important factors to consider may be mental age (versus actual age), accountability of actions, subjectivity to vulnerability, such as manipulation or persuasion, and the lack of understanding of social norms and legal laws. Adults with ASD convicted of a crime will often receive community supervision (i.e., probation and parole), incarceration, or a combination of the two (Cea, 2014; Shtukaturov v. Russia, 2008). A defense attorney may negotiate a plea agreement with a prosecutor that does not require the individual to serve a prison sentence. If no such plea agreement can be made, the judge’s decision determines if the defendant should serve a sentence. At a sentencing hearing, a defense attorney has the
opportunity to argue why probation is a more appropriate consequence than prison. The attorney may also introduce exhibits (e.g., treatment plans) and call witnesses (e.g., treatment providers and employers) to testify in support of the defendant. Another crucial step in this process is the use of assessments completed by skilled clinical professional. These individuals should be able to effectively communicate to the court the defendant’s mental functioning level and the impact ASD has on the defendant’s actions.

A main concern for adults with ASD in the criminal justice system is whether they can be successful if placed on community supervision. A sentence of probation means the individual’s incarceration time is stayed for a certain period of months or years. The individual will never be incarcerated on charges if conditions of probation are complied with. Typical conditions of probation may include:

- Regularly reporting to a probation officer
- Electronic home monitoring
- Completing chemical dependency treatment
- Abstaining from alcohol and chemicals
- Taking medications as prescribed
- Getting permission from a probation officer before leaving the state if need be
- Paying restitution
- Having no contact with the victim
- Performing community service
- Maintaining full-time employment or student status
- Attending regularly scheduled programming or treatment
- Sustaining from committing any other violations or unlawful acts

This array of probation conditions can be quite difficult for individuals with ASD to manage, due to communication impairments and social deficits. Consequences for probation violations can include: additional community service, in-patient chemical dependency treatment, or even incarceration. If probation violations are frequent and severe enough, a judge may revoke probation and order the person to serve the full period of incarceration. To prevent such outcomes, advocates may be used to support and help individuals’ complete probation. This network of advocates and professionals may also play a role in explaining to the judge how the individual’s deficits may have contributed to problematic behaviors and poor decision-making.

**Recognizing Signs of ASD**


1. “Stimming” – self-stimulating behavior that is more unusual or extreme, such as hand-flapping, body-rocking, twirling, or repetitive speech.
2. Repetition – repetitive behaviors that may be related to “stimming” but could also include behaviors with objects, such as spinning objects or lining them up in patterns. Lashley noted that these behaviors should not be interfered with.
3. Acclimation – many individuals need to acclimate to an unfamiliar environment. This can include wandering around, touching objects, or touching people. They may also invade personal space, but the goal for these individuals is to make sure the environment is safe.

4. Delayed response – In response to commands, they may react more slowly. Lashley noted this is not due to stubbornness, but rather an increase in time needed for processing the information and complying with commands.

5. Dissociated speech – Some have no or limited ability to communicate verbally. Others may reply with seemingly meaningless answers or discuss irrelevant topics. This is not an attempt to be noncompliant, but instead is an attempt to socialize given the skills possessed.

6. Unusual tone of voice – Tone and volume of voice may not be appropriate for the situation. For example, the voice may be too loud or soft, they may interrupt or talk over others, or the voice may not demonstrate the appropriate emotion for the situation (or be monotone).

7. Lack of eye contact – may make little or no eye contact. This is not a sign of disrespect or lack of attention and individuals interacting with them should not force eye contact on someone with autism.

8. Unusual or unbalanced gait – may have an unsteady stance or gait and difficulty balancing (Lashley, 2009, pp. 6-17).

**Education and Training for Criminal Justice Staff**

Multiple online resources exist about ASD for criminal justice and law enforcement professionals, such as Autism Speaks, which provides information, advocacy, and research in the area of ASD. The section titled “Resources for Law Enforcement” provides training videos, presenters, and other helpful information. Many state operated or funded organizations exist that provide comprehensive online information that may be helpful for criminal justice professionals. Additional sources include: professional journals, such as the Journal of Autism and Developmental Disorders, books, videos, and experts willing to present on the topic of ASD, (e.g., psychologists, parents, social workers, and psychiatrists).

**Discussion**

Preemptive measures aimed at preventing juveniles or adults with ASD from entering the criminal justice system are imperative. Many factors can lead a juvenile or adult with ASD to become involved in the criminal justice system. For example, a teacher or neighbor may call the police regarding maladaptive behaviors at school or in the neighborhood. Once a call is initiated, the person with ASD will likely come in contact with multiple professionals, such as the police officer who may interview them or the prosecutor assigned to their case. An incident leading to involvement in the criminal justice system can be stress provoking and confusing for the individual, due to impairments associated with the disorder. Some of these impairments include difficulty comprehending social interactions and advocating for themselves throughout the various stages of the criminal justice process. With advocates such as parents, caregivers, and
attorneys who understand the ASD diagnosis and impairments of the disorder, an individual with ASD may feel more supported and his or her limitations can be readily communicated to all involved.

Criminal justice professionals should become aware of ASD and recognize the influential actions and behaviors that often contribute to criminal justice and legal involvement. Archer and Hurley (2013) suggest autism awareness training for all public sector staff (i.e., law enforcement professionals, probation officers, judges, teachers, paramedics, social workers, prison health and education staff, accident and emergency staff, child protective services). Future research efforts are needed in formulating trainings and informative measures for criminal justice professionals to better understand disorders such as ASD. Criminal justice professionals with advanced knowledge and competencies regarding ASD are better equipped to make more informed interviewing, diversion, sentencing, and probation decisions for individuals impacted by this disorder.

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