

5-1-2009

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Recommended Citation

Wauhop, Brian (2009) "Mindblindness: Three Nations Approach the Special Case of the Criminally Accused Individual with Asperger's Syndrome," *Penn State International Law Review*: Vol. 27: No. 3, Article 23.
Available at: <http://elibrary.law.psu.edu/psilr/vol27/iss3/23>

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Mindblindness: Three Nations Approach the Special Case of the Criminally Accused Individual with Asperger's Syndrome

Brian Wauhop*

I. INTRODUCTION

Imagine moving through life without the ability to comprehend that other people possess different emotional states, cognitive experiences and perceptions than you do. You have a compulsive need to create routines that affect all aspects of your everyday life. You pursue narrow interests, excluding other people and activities. While you communicate the best you can, you always feel misunderstood by others, and you always feel like you cannot understand what others mean when they speak. Imagine the confusion you would experience when faced with the constant reality that your own conduct, while appropriate from your perspective, is often socially unacceptable to others. This is a rough description of the social experience of an individual with Asperger's Syndrome ("AS").¹

AS is a pervasive developmental disorder² closely related to autistic spectrum disorders.³ According to the Center for Disease Control, one out of every 150 children has some form of autism.⁴ While AS was first studied and described over sixty years ago, only recently has the

* Juris Doctorate, Candidate, 2009, The Dickinson School of Law of the Pennsylvania State University. I thank my wife and my parents for their unwavering support, and the editors of the *Penn State International Law Review* for their insight and feedback. I dedicate this article to my brother.

1. See TONY ATTWOOD, *THE COMPLETE GUIDE TO ASPERGER'S SYNDROME* 36, 37 (Jessica Kingsley Publishers 2006).

2. *Id.* at 350 (defining "pervasive developmental disorder" as "a severe impairment in reciprocal social interaction skills and communication skills and the presence of repetitive behavior, interests and activities").

3. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (text revision 2000) (DSM-IV-TR) (hereinafter DSM-IV).

4. See Ranit Mishori, *More Children Are Affected and Controversies Rage: What Do We Know About Autism?*, *PARADE*, Jan. 27, 2008, at 4.

diagnosis gained widespread acceptance.⁵ Current estimates put the prevalence rate of AS possibly as high as one in 250 individuals (.4 percent of the population).⁶ AS individuals experience difficulties coping with everyday life and society and frequently require lifelong coaching.⁷ The social impairment appears to continue into adulthood.⁸ Research suggests that AS sufferers are no more likely to commit crime than neurotypical⁹ individuals.¹⁰

However, studies reveal the prevalence rate of AS individuals in prison populations is much higher, ranging between 1.5 percent and 2.4 percent.¹¹ This overrepresentation suggests that AS individuals are slipping through the cracks in criminal prosecutions.¹² This overrepresentation suggest that an AS individual might be convicted and incarcerated because of the peculiar manifestation of their disorder rather than on any legally culpable conduct.¹³ With a potential prevalence rate of one in 250,¹⁴ the disorder has implications for criminal law systems throughout the world.

The following discussion will analyze how criminal law systems in the United States, England, and Australia currently deal with the criminally accused AS individual. Courts in each of these nations have decided cases wherein criminal defendants have raised the diagnosis of AS in their defense. AS and the legal significance of its characteristic traits, including mindblindness, will be explained, followed by a brief history of criminal culpability requirements. Next, an analysis of recent English, United States and Australian cases will explore the current legal landscape for the AS criminal offender. The discussion will conclude by suggesting potential reforms in criminal law in order to improve the AS offender's access to justice.

5. See ATTWOOD, *supra* note 1, at 14.

6. *Id.* at 46.

7. *Id.* at 57-92.

8. See Ami Klin, *Autism and Asperger Syndrome: An Overview*, 28 REV. BRAS. PSYQUIATR. S3, S10 (2006) (noting that many AS children are able to attend regular education classes with additional support, but the social impairment appears to be lifelong).

9. "Neurotypical" describes people whose neurological development and current neurological state allow for what most people would agree is the "normal" ability to process social cues and language. See Jim Sinclair, *A Note About Language and Abbreviations*, <http://web.syr.edu/~jisincla/language.htm> (last visited Feb. 11, 2008).

10. See ATTWOOD, *supra* note 1, at 335.

11. See Barbara G. Haskins, M.D. & J. Arturo Silva, M.D., *Asperger's Disorder and Criminal Behavior: Forensic-Psychiatric Considerations*, 34 J. AM. ACAD. PSYCH. L. 374, 377, 382 (2006).

12. See *generally id.*

13. See Haskins & Silva, *supra* note 11, at 378.

14. See ATTWOOD, *supra* note 1, at 46.

II. ASPERGER'S SYNDROME

Asperger's Syndrome was first described by Austrian psychiatrist Dr. Hans Asperger in 1944.¹⁵ Dr. Asperger studied four children who were otherwise intelligent but had difficulty with social interactions.¹⁶ He called the condition "autistic psychopathy" to indicate a stable personality disorder marked by social isolation.¹⁷ Dr. Asperger's research was published primarily within German literature,¹⁸ and while his original descriptions of the condition were very clear, he did not articulate diagnostic criteria for the disorder.¹⁹

As a result, widespread application of Dr. Asperger's research was delayed until 1981 when British psychiatrist Dr. Lorna Wing published a review of Dr. Asperger's work.²⁰ The title of Wing's article popularized the term "Asperger's syndrome."²¹ That article spurred interest in Dr. Asperger's work, and new studies on the disorder began.²²

A. Diagnostic Criteria

Gillberg and Gillberg²³ published the first diagnostic criteria ("Gillberg criteria") for AS in 1989, and later revised it in 1991. The criteria identified six traits that must be present in a child to warrant a diagnosis of AS: 1) social impairment; 2) narrow interest; 3) compulsive need for introducing routines and activities; 4) speech and language peculiarities; 5) non-verbal communication problems; and, 6) motor clumsiness.²⁴ Within each trait, one or more of a list of specific characteristics must be present to establish that trait.²⁵

By the mid-90s, AS was starting to become recognized as a legitimate disorder among global health organizations.²⁶ In 1993, the

15. See Hans Asperger, 'Autistic Psychopathy' In *Childhood*, in UTA FRITH, *AUTISM AND ASPERGER SYNDROME* 37-62 (Cambridge University Press 1992).

16. See Klin, *supra* note 8, at S8.

17. *Id.*

18. See generally Lorna Wing, *Asperger's Syndrome: A Clinical Account*, 11 *PSYCH. MED.* 115 (1981).

19. See ATTWOOD, *supra* note 1, at 36.

20. See Nachum Katz & Zvi Zemishlany, *Criminal Responsibility in Asperger's Syndrome*, 43 *ISRAEL J. PSYCH. & RELATED SCI.* 166, 166 (2006).

21. See Wing, *supra* note 18, at 115.

22. See Katz & Zemishlany, *supra* note 20, at 166.

23. See ATTWOOD, *supra* note 1, at 37 (citing the research of Carina Gillberg and Christopher Gillberg, *Asperger Syndrome - Some Epidemiological Considerations: A Research Note*, 30 *J. CHILD PSYCHOL. PSYCHIATRY* 631, 631-38 (1989)).

24. *Id.*

25. *Id.*

26. AS was not listed in the World Health Organization's classification manual until 1993, and AS did not appear in the DSM until 1994. See WORLD HEALTH ORGANIZATION, *INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED*

World Health Organization acknowledged AS for the first time in its diagnostic manual, the International Statistical Classification of Diseases and Related Health Problems (“ICD-10”).²⁷ The ICD-10 distinguishes AS from autism by stating that unlike autistic people, AS individuals have “no general delay [] or retardation in language or in cognitive development.”²⁸

In 1994, the American Psychiatric Association included AS in the Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”).²⁹ Because Asperger’s Syndrome was not listed in the DSM-IV prior to 1994, many United States clinicians (and those foreign clinicians using the DSM-IV as diagnostic criteria) were not formally trained to diagnose this condition in adults.³⁰ The diagnostic criteria for Asperger’s Syndrome in the DSM-IV and ICD-10 are remarkably similar,³¹ though both have been criticized as too restrictive and unworkable in clinical practice.³²

The Gillberg criteria appear to more accurately represent the traits described by Dr. Asperger.³³ Many clinicians in Europe and Australia use the Gillberg criteria when diagnosing AS; clinicians in the United States use the DSM-IV criteria.³⁴ In the view of one expert, clinicians currently detect and diagnose only fifty percent of children who have AS.³⁵ The remaining undiagnosed children with AS are either able to conceal their AS traits during evaluation or are completely misdiagnosed through clinician error.³⁶

The novelty surrounding AS has yet to yield an international diagnostic standard. Current, official diagnostic standards are a “work in progress” with no existing international standard.³⁷ Depending on the criteria used for diagnosis, the prevalence rate for AS may be as high as

HEALTH PROBLEMS (10th ed.) (2006) (hereinafter ICD-10); *see also* DSM-IV, *supra* note 3.

27. *See* ICD-10, *supra* note 26.

28. *Id.*

29. DSM-IV, *supra* note 3.

30. *See* Haskins & Silva, *supra* note 11, at 374.

31. *See* ATTWOOD, *supra* note 1, at 36; *see also* Haskins & Silva, *supra* note 11, at 374 (comparing the diagnostic criteria used by the DSM-IV-TR, ICD-10 and the Gillberg criteria).

32. *See* ATTWOOD, *supra* note 1, at 44-45. The DSM-IV-TR criteria require a diagnosis of autism if those criteria are concurrently satisfied with AS. Attwood notes that based on this hierarchical system, a diagnosis of AS is “almost impossible.” *Id.*

33. *Id.* at 46.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See* ATTWOOD, *supra* note 1, at 45-54.

one in 250.³⁸ With no existing universal diagnostic standard, it is likely that a large number of people with AS remain undiagnosed.³⁹

B. *Legal Significance of the Traits of Asperger's Syndrome*

Despite their differences, the DSM-IV, ICD-10 and the Gillberg criteria all contain references to essentially the same sets of traits. The list below follows the major headings in the Gillberg criteria and explains the legal significance of each trait.

1. Social Impairment

The social impairment typical of AS is satisfied when two of the following characteristics are present: 1) difficulty interacting with peers; 2) indifference to peer contacts; 3) difficulty interpreting social cues; or 4) socially and emotionally inappropriate behavior.⁴⁰ Mentally healthy individuals can be described as neurotypical.⁴¹ Generally, a neurotypical individual possesses the ability to infer the cognitive, perceptual, and affective life of themselves as well as others.⁴² Dr. Simon Baron-Cohen coined the term "mindblindness" to describe the impairment of people who do not have this ability.⁴³

People with Asperger's Syndrome are said to have mindblindness because they frequently misunderstand social cues and cannot comprehend that other people can have different emotional reactions to the same event.⁴⁴ Mindblindness is legally significant because it prevents individuals from perceiving and understanding the effect their conduct has on the emotional and cognitive states of others.⁴⁵ For example, suppose an AS individual completed the physical elements of a particular crime. But because of mindblindness, the individual had no idea how their conduct might affect others. Thus, the individual neither anticipated nor intended to achieve the particular outcome their conduct produced.

38. *Id.* at 46.

39. *Id.*

40. *Id.* at 37.

41. See Sinclair, *supra* note 9.

42. See Haskins & Silva, *supra* note 11, at 378 (referring to this ability as "Theory of Mind" (ToM)).

43. See SIMON BARON-COHEN, *MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND* 51 (The MIT Press, 1996) (1995). Baron-Cohen coined the term "mindblindness" to describe the inability to utilize ToM abilities. *Id.*

44. See Haskins & Silva, *supra* note 11, at 378.

45. *Id.*

2. Narrow Interest Fixations

The presence of at least one of the following characteristics establishes the narrow interest trait of AS: 1) exclusion of other activities; 2) repetitive adherence; or, 3) repetition that is more rote-routine than meaning.⁴⁶ Individuals with AS are likely to gather large amounts of data on narrow topics (for example, “snakes, names of stars, deep fat fryers, weather information, personal information on members of Congress”⁴⁷) in an intense fashion “without genuine understanding of the broader phenomenon involved.”⁴⁸

While there is little research on the origin of the narrow interest compulsion associated with AS, these interests appear to serve several functions for AS individuals.⁴⁹ The narrow interest fixations may help AS individuals overcome anxiety and help them achieve coherence in life.⁵⁰ In addition, a narrow interest fixation may help AS individuals understand the physical world and perceive a sense of identity.⁵¹ Finally, the fixations may help AS individuals relax and serve as a source of happiness and discussion.⁵²

Narrow interest fixations are legally significant because in the event that an AS individual gets into trouble, the narrow interest fixation could be used as extrinsic evidence against them. The individual’s unusual, detailed and extensive narrow interest could be used to show cognizance and comprehension—that the individual is able to interpret and understand things on an advanced level.⁵³ AS individuals are intelligent and have comprehension skills;⁵⁴ but proving intelligence and organization through the conduct surrounding a narrow interest does not necessarily equate to comprehension in other areas.⁵⁵

Further, if a criminal offense parallels or appears to stem from a narrow interest fixation, the likely inference facing the AS defendant is that the crime was premeditated. However, the presence of large amounts of data or material on a specific topic is not dispositive on the

46. See ATTWOOD, *supra* note 1, at 37.

47. See Klin, *supra* note 8, at S9.

48. *Id.* at S10 (noting that while this trait is not easily discernable in children, eventually the interests become more unusual and narrowly focused).

49. See ATTWOOD, *supra* note 1, at 182.

50. *Id.*

51. *Id.*

52. *Id.*

53. See ATTWOOD, *supra* note 1, at 182-88.

54. *Id.*

55. *Id.*

issue of whether an AS individual is planning to commit a crime related to the narrow interest fixation.⁵⁶

3. Compulsion to Routines

AS individuals have a compulsion to establish routines that affect all aspects of the individual's life, and may affect others.⁵⁷ Individuals with AS have poor intuition and lack the ability to spontaneously adapt in social situations.⁵⁸ They have a tendency toward very literal interpretations of what people say.⁵⁹ As a result, they rely on rigid social conventions or formalistic rules of behavior for guidance in social situations.⁶⁰ This reliance gives the impression of social naïveté.⁶¹

The appearance of naïveté makes the AS individual susceptible to suggestion.⁶² Such naïveté, when combined with the social impairment explained above, makes an AS individual especially vulnerable to getting tricked into committing crimes because they were told that the conduct in question was acceptable.⁶³ Interpreting the command literally, the AS individual might follow an order without regard to its inappropriate or illegal nature.⁶⁴

Furthermore, individuals with AS are more likely to overreact when their routines are interrupted.⁶⁵ The overreaction may lead to the commission of a crime that the individual had not contemplated.⁶⁶ Here again, the result is not one that the individual intended.

4. Speech Irregularities

The speech peculiarities associated with AS typically involve at least three of the following characteristics: 1) delayed speech development; 2) superficially perfect expressive language; 3) formal pedantic language; 4) odd prosody, or peculiar voice characteristics; or 5) impairment of comprehension including misinterpretation of literal or implied meanings.⁶⁷ Typically, people with AS lacks inflection and

56. See *State v. Boyd*, 143 S.W.3d 36, 45 (Mo. 2004) (explaining that psychologist testifying that defendant's interest in "odd subjects" does not increase likelihood that defendant would engage in conduct related to the "odd subject").

57. See ATTWOOD, *supra* note 1, at 37.

58. See Klin, *supra* note 8, at S9.

59. See ATTWOOD, *supra* note 1, at 115.

60. See Klin, *supra* note 8, at S9.

61. *Id.*

62. *Id.*

63. See Haskins & Silva, *supra* note 11, at 382.

64. See ATTWOOD, *supra* note 1, at 335.

65. *Id.*

66. *Id.*

67. *Id.* at 37.

intonation in their voice, making them sound almost monotone when they speak.⁶⁸ Their conversations sound tangential or without context, giving the general impression of incoherence.⁶⁹ Individuals suffering from AS are often long-winded, and sometimes fail to make a point even after long discourse.⁷⁰

Speech irregularities are legally significant when considering communication between AS sufferers and law enforcement officials, during hearings, or before a jury or parole board.⁷¹ Undoubtedly, the AS individual will not communicate with others in what is considered “normal” or anticipated styles⁷² (for example, showing “signs of boredom, haste to leave, and [a peculiar] need for privacy”).⁷³ As a result, their odd intonation and flat affect might convey a lack of remorse.⁷⁴ Further, AS individuals have a pattern of immediate confession to crimes.⁷⁵ Believing their conduct is justified, they “cannot understand what all the fuss is about.”⁷⁶ These communication irregularities may serve to reinforce criminal justice officials’ notions of culpability in the person.

5. Nonverbal Communication Problems

The presence of any one of the following characteristics establishes nonverbal communication traits peculiar to an AS individual: 1) limited use of gestures; 2) clumsy/gauche body language; 3) limited facial expressions; 4) inappropriate facial expression; or, 5) peculiar, stiff gaze.⁷⁷ Individuals with Asperger’s Syndrome may react inappropriately or fail to comprehend the context of a social interaction.⁷⁸ Miscues, flat

68. See Klin, *supra* note 8, at S9. AS individuals might exhibit jerky speech or appear to speak too fast with little appreciation for the communicative effect or social perception of the volume of their speaking voice.

69. *Id.* (explaining that the appearance of incoherence is a result of “one-sided egocentric conversational style”).

70. *Id.* (explaining that in spite of verbose conversations, individuals may never come to a point or conclusion).

71. For a thorough and thoughtful analysis of interactions between law enforcement officials and people with autistic spectrum disorders like AS, see generally Elizabeth Hervey Osborn, “What Ever Happened To Paul’s Law”?: Insights On Advocating for Better Training and Better Outcomes In Encounters Between Law Enforcement And Persons With Autistic Spectrum Disorders, 79 U. COLO. L. REV. 333 (2008).

72. See Klin, *supra* note 8, at S9.

73. *Id.*

74. See Haskins & Silva, *supra* note 11, at 382.

75. See ATTWOOD, *supra* note 1, at 339.

76. *Id.*

77. *Id.* at 37.

78. See Klin, *supra* note 8, at S9.

facial expression, and the overall distant affect of AS individuals are often interpreted by other people as insensitivity or a lack of empathy.⁷⁹

The perceived lack of empathy or remorse is legally significant because it might be mistaken as an indicator of psychopathy.⁸⁰ Psychopaths are human predators, while AS individuals are socially naïve and immature.⁸¹ While both give the impression of a lack of empathy, the psychopath actually has no remorse, whereas the AS individual's outward communicative cues simply do not express remorse in expected and anticipated ways.⁸²

6. Motor Clumsiness

Poor performance in a neurodevelopmental test establishes the motor clumsiness criteria associated with AS.⁸³ Individuals with Asperger's Syndrome are often visibly uncoordinated or walk with a stilted or bouncy gait.⁸⁴ They may have been delayed in acquiring motor skills such as riding a bicycle or catching a ball.⁸⁵

Poor motor skills could operate to negate the physical elements, or *actus reus*, of a crime. If the motor clumsiness associated with AS renders a person physically incapable of completing the crime, criminal culpability could not be assigned to that person.

In summary, the AS individual is usually an intelligent and high-functioning person whose developmental disorder hinders their social interactions.⁸⁶ Under certain conditions, the way that the developmental disorder inhibits their cognitive and behavioral abilities may make the AS individual susceptible to criminal prosecutions.⁸⁷ The developmental disorder further compounds their situation once taken into custody, where most law enforcement officials lack training in recognizing AS.⁸⁸

III. CRIMINAL LIABILITY OF THE AS INDIVIDUAL ACCUSED OF A CRIME

Does the presence of AS in an individual effectively negate culpability? If not a complete bar, to what degree is an AS individual liable for criminal conduct? Criminal liability in the United States,

79. *Id.*

80. *See* ATTWOOD, *supra* note 1, at 339.

81. *Id.*

82. *Id.*

83. *Id.* at 37.

84. *See* Klin, *supra* note 8, at S10.

85. *Id.*

86. *See* ATTWOOD, *supra* note 1, at 32.

87. *E.g., id.* at 335; Haskins & Silva, *supra* note 11, at 374; Katz & Zemishlany, *supra* note 18, at 166.

88. *See* ATTWOOD, *supra* note 1, at 338-39.

Australia and England requires the physical performance of the illegal act (*actus reus*) combined with the mental will to engage in that conduct (*mens rea*).⁸⁹ A brief examination of these components of criminal law will help reveal how AS individuals can fall through the cracks of the criminal justice system.

A. Actus Reus—The Physical Conduct Element of Criminal Culpability

Criminal culpability in the United States, Australia and England flows from the completion of the physical act of crime accompanied by a required mental state.⁹⁰ However, if an individual has a handicap that renders them physically incapable of acting, this handicap could operate as a complete bar to criminal culpability depending on physical conduct.

Some level of motor skills delay is a recurring trait of AS individuals.⁹¹ In general, AS does not affect motor function in a way that would impair an individual from completing the physical element of a crime.⁹² AS may make completion of some tasks more difficult, depending on the level of motor skill coordination the task requires.⁹³ However, there is no evidence to suggest that the motor skills delay renders an AS individual physically incapable of committing a crime.

B. Mens Rea—The Mental Element of Criminal Culpability

Criminal law theory in the United States and Australia has been heavily influenced by the English common law model. The following is a brief sketch of the origins of *mens rea* theory in England, and the ways in which the United States and Australia have adopted and modified the theory.

89. See COMMONWEALTH CRIMINAL CODE ACT, 1995, c. 1, div. 4-5 (Austl.) (providing the physical and fault elements for criminal conduct in Australian Commonwealth Criminal Code); see MODEL PENAL CODE §§ 2.01, 2.02 (1962) (providing the physical and mental culpability requirements for crimes as has been adopted in almost forty United States' jurisdictions); see generally *R v. Bateman*, (1925) 19 Crim. App. 8 (Eng.) (providing a test for conduct and mental state resulting in criminal liability).

90. See Commonwealth Criminal Code Act, 1995, c. 1, div. 4-5; see MPC §§ 2.01, 2.02; see generally *Bateman*, 19 Crim. App. 8.

91. See ATTWOOD, *supra* note 1, at 335.

92. See *id.*

93. *Id.* at 259-61.

1. The English Approach to *Mens Rea* in Criminal Law⁹⁴

English statutory law and common law applies the common law maxim “the deed does not make a man guilty unless his mind be guilty.”⁹⁵ In his thirteenth-century treatise, legal scholar Henry Bracton wrote that “[it] is will and purpose which mark *maleficia*” and “a crime is not committed unless the intention to injure exists.”⁹⁶ Bracton’s writings reveal the view that criminal culpability required a culpable state of mind accompanying prohibited conduct.⁹⁷ Further, the criminal’s state of mind must intend injury to occur.⁹⁸ As such, an individual acting with a free mind, when choosing evil over good, was deemed morally blameworthy.⁹⁹

Bracton’s discussions of the culpability of children and the insane further clarify the “willful” component of intent.¹⁰⁰ According to Bracton, infants and the insane are excluded from culpability due to their inability to make rational choices between right and wrong.¹⁰¹ In Bracton’s view, infants are capable only of innocent designs while the insane are considered to be without reason altogether.¹⁰² These observations are known in modern criminal law as “excuse defenses.” In an excuse defense, blameworthy conduct by the actor is excused due to the absence of the requisite state of mind.¹⁰³

94. For an excellent, in-depth study of the evolution of the doctrine of *mens rea* in English criminal law, see Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Past and Present*, 1993 UTAH L. REV. 635, 651-681 (1993).

95. See *R v. Tolson* (1889) 23 Q.B. 168, 187 (Eng.) (Stephen, J., dissenting). Lord Stephen’s impression of the maxim is

The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in a given case, the crime so defined is not committed; or, again, if a crime is fully defined nothing amounts to that crime which does not satisfy that definition.

Id.

96. 2 HENRY D. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans., 1968). Presumably, a royal pardon was no longer required to negate the strict liability punishment of death for accidental killings or self-defense. *Id.*

97. *Id.* at 984-85.

98. See 2 BRACTON, *supra* note 96, at 340-41. Bracton wrote that a person who kills another to save his family from death was not punished for homicide, since the act of killing was unavoidable and performed with “sorrow of heart.”

99. See Francis E. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1019 (1932).

100. *Id.* at 985-86.

101. See 2 BRACTON, *supra* note 96, at 424.

102. See Sayre, *supra* note 99, at 985-86.

103. See, e.g., MODEL PENAL CODE art. 3 (1962) (providing the “justification” defenses of self-defense and choice of evils, justifying otherwise blameworthy conduct in the actor due to surrounding circumstances); MODEL PENAL CODE art. 4 (1962) (providing

In the centuries following Bracton's time, the principle of *mens rea* has been more precisely refined.¹⁰⁴ General requirements of "evil intent" eventually gave way to specifically defined mental states for crimes and common law felonies.¹⁰⁵ By the seventeenth century, convictions for burglary, larceny and arson required a showing of specific intent.¹⁰⁶ These basic *mens rea* principles endure to the present day in English criminal law.¹⁰⁷

Currently, England is one of the very few developed countries without a criminal code.¹⁰⁸ Criminal behavior is defined and prohibited through a combination of legislative action and common law offenses.¹⁰⁹ *Mens rea* requirements for offenses are described in legislative enactments describing and outlawing conduct.¹¹⁰ The specific mental states required for common law offenses have been defined through judicial decisions.¹¹¹ Assessment of *mens rea* is provided for in Section

the "excuse" defenses of mental defect and immaturity to exclude actors from culpability).

104. See Sayre, *supra* note 99, at 989.

105. *Id.* at 994.

106. *Id.* at 994-1004.

107. See *id.* at 1003. Sayre notes that the mental state required for a common law arson conviction has not changed since the seventeenth century, but the general requirement of "malice" has narrowed to a specific intent to burn a building. *Id.*

108. See P.R. GLAZEBROOK, BLACKSTONE'S STATUTES ON CRIMINAL LAW 2004-2005 xxvi (14th ed.) (2004).

109. *Id.*; see also PAUL H. ROBINSON, CRIMINAL LAW CASE STUDIES AND CONTROVERSIES 48 (2d ed. 2005).

110. See GLAZEBROOK, *supra* note 108.

111. See, e.g., R v. Bateman, (1925) 19 Crim. App. 8 (Eng.) The *Bateman* court explained that in order to establish *mens rea* for criminal liability:

The facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

Id. at 11-12; see R v. Cunningham, [1957] 2 Q.B. 396 (Eng.) The court in *Cunningham* stated the *mens rea* standard for recklessness as follows:

In any statutory definition of a crime, malice must be taken . . . as requiring either: (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).

Id. at 399-400; R v. Mohan, (1976) Q.B. 1, 8 (Eng.) The *Mohan* court provided the *mens rea* standard for direct intention: an "aim or purpose"—"a decision to bring about, insofar as it lies within the accused's power, the commission of the offence . . . no matter whether the accused desired that consequence of his act or not." *Id.* (quoting R. v. Hyam [1975] A.C. 55, 74); see also 17 ARCHBOLD: CRIMINAL PLEADING, EVIDENCE, AND PRACTICE §§ 34-66a (James Richardson, ed., Sweet & Maxwell, Ltd. 2004) (describing the requirements needed to establish the specific mental states of with intent to, attempts to, negligently, unlawfully, maliciously, willfully, knowingly, suspects, recklessly, fraudulently, dishonestly, causes, and permits, in English criminal law contexts).

Eight of the Criminal Justice Act of 1967.¹¹² That assessment calls for a “totality of the circumstances” evaluation of what harm the offender intended as opposed to what harm he actually caused.¹¹³

2. Australian Approach to *Mens Rea* in Criminal Law

Like England, Australia’s criminal law system has evolved through Australian judicial decisions and legislative activity. As a former British colony, English criminal statutes became the basis for state and territorial criminal law in Australia.¹¹⁴ The Commonwealth of Australia (or federal government) has its own criminal jurisdiction and criminal code for federal offenses.¹¹⁵ Of the eight Australian states within the Commonwealth of Australia, five have adopted criminal codes.¹¹⁶ The other three are common law jurisdictions that have passed crimes acts listing offenses and punishments.¹¹⁷

One of the eight Australian states, Queensland, has adopted a criminal code that assigns the *mens rea* requirement directly into the offense description.¹¹⁸ Therefore, when no *mens rea* component is listed, the mental state required is irrelevant.¹¹⁹ In contrast, The Commonwealth Criminal Code separates offense elements into “Physical Elements” and “Fault Elements.”¹²⁰ The Physical Elements correspond to *actus reus* requirements and the Fault Elements correspond to *mens rea* requirements.¹²¹ Further, the Commonwealth Code, very similar to

112. See Criminal Justice Act, 1967, c. 80, § 8 (U.K.). The act provides as follows:

- A court or jury, in determining whether a person has committed an offence,
 (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reasons only of its being a natural and probable consequence of those actions; but
 (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

113. See Criminal Justice Act, 1967, c. 80, § 8 (U.K.).

114. See Ian Leader-Elliot, *Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon*, 9 BUFF. CRIM. L. REV. 391, 392 (2006).

115. See Crimes Act, 1914 (Austl.) and Commonwealth Criminal Code Act, 1995 (Austl.).

116. See Criminal Code Act, 1899 (Queensl.) (Austl.); Criminal Code Act, 1902 (W. Australia); Criminal Code Act, 1983 (N. Terr.) (Austl.); Criminal Code Act, 1995 (Austl. Cap. Terr.) (Austl.).

117. See, e.g., Crimes Act, 1900 (N.S.W.) (Austl.).

118. See Criminal Code Act, 1899, c. 5 § 23, § 2 (Queensl.) (Austl.) The subsection provides in pertinent part that “[u]nless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.” *Id.*

119. *Id.*

120. See Commonwealth Criminal Code Act, 1995, c. 1, div. 4-5 (Austl.).

121. *Id.*

the American Law Institute's Model Penal Code, provides definitions for each of the *mens rea* elements for crimes under the Commonwealth Code.¹²²

3. United States' Approach to *Mens Rea* in Criminal Law

Following the Revolutionary War, American colonies adopted a criminal law system modeled after the English system.¹²³ Building on the summaries of existing English common law and criminal law in Blackstone's *Commentaries on the Laws of England*,¹²⁴ American courts developed and refined criminal law.¹²⁵ Because each state has lawmaking autonomy, legislatures crafted their own criminal legislation resulting in great disparity in criminal law across the United States.¹²⁶

Ultimately, the American Legal Institute drafted the Model Penal Code.¹²⁷ This code sets out an analytical framework for the physical and mental elements for specific crimes.¹²⁸ The Model Penal Code provides four levels of intentional conduct: negligent, reckless, knowing and purposeful.¹²⁹ By 2002, forty states adopted the Model Penal Code.¹³⁰

In summary, all three nations' legal systems require an individual to have a certain mental state during the commission of a crime to be found criminally culpable. *Mens rea* doctrine has evolved to require specific intent for certain crimes.

IV. DISCUSSION OF RECENT CASE DEVELOPMENTS

The peculiar impairments associated with AS, particularly mindblindness, interfere with an individual's ability to understand other people's emotional or mental states.¹³¹ As a result, people with AS may engage in criminal violations without the *mens rea* required for the assessment of criminal culpability. Most United States cases where AS is raised to negate *mens rea* end unfavorably for the defendant.¹³² In

122. *Id.*

123. See ROBINSON, *supra* note 109, at 23.

124. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1803, reprinted in 1969).

125. See ROBINSON, *supra* note 109, at 23.

126. *Id.* at 25.

127. See MODEL PENAL CODE (1962).

128. *Id.* §§ 2.01, 2.02.

129. *Id.* § 2.02.

130. See MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 50 (2002).

131. See BARON-COHEN, *supra* note 43; Haskins & Silva, *supra* note 11, at 378.

132. United States cases where AS has been unsuccessfully raised as a defense or mitigating factor include: Martlett v. State, 2007 WL 4555274, at *4 (Ind. App. Dec. 28, 2007) (explaining that impairments attributed to AS do not warrant overwhelming weight in assessment of his character); United States v. Lange, 445 F.3d 983, 987 (7th Cir. 2006)

England, the courts consider AS a factor that can mitigate sentencing or result in an order for new trial.¹³³ Courts in Australia have very seldom dealt with AS in criminal contexts, but the cases they have decided are revealing. To better understand the legal implications of AS, this section will explore a number of cases involving defendants with AS and how that factor was considered at trial.

A. *United States Cases*

According to the Autism Society of America, only twenty-two cases exist in the United States where AS was raised to show diminished capacity and avoid conviction of a criminal offense.¹³⁴ One notable example involved Robert Durst, a wealthy eccentric with AS, who was acquitted of murder charges for killing his neighbor.¹³⁵ The following cases involve defendants with AS and how that factor was considered at trial.

1. *State v. Boyd*: AS Offered as Evidence Defendant Did Not Commit the Crime

In June 2004, the Missouri Court of Appeals ordered a new trial for an AS defendant convicted of murder.¹³⁶ In *State v. Boyd*, James Boyd was accused of murdering a sixteen-year-old boy.¹³⁷ Boyd denied

(explaining that AS impairment held insufficient to prove lack of volition necessary for establishment of diminished capacity defense); *Schoenwetter v. State*, 931 So.2d 857, 875 (Fl. 2006) (explaining that AS impairment rejected as a mitigating factor in multiple homicide); *People v. Youngerman*, 838 N.E.2d 103, 111-13 (Ill. 2005) (explaining that defendant's diagnosis of AS subsequent to involuntary commitment insufficient to warrant release from commitment); *State v. Santiago*, 634 S.E.2d 23, 28-29 (S.C. App. 2006) (holding that expert testimony that defendant had AS not admissible to establish that defendant did not have requisite mens rea to commit murder; South Carolina does not recognize diminished capacity defense).

133. See, e.g., *R v. Dusic*, [2006] EWCA(Crim) 2511, ¶¶ 29, 30 (Eng.); *R v. Malik* [2006] EWCA(Crim) 2349, ¶¶ 13, 14, 21 (Eng.); *R v. Smith*, [2004] EWCA(Crim) 2531, ¶¶ 5, 8, 9 (Eng.); *R v. Grey*, [2004] EWCA(Crim) 1446, ¶¶ 8, 11, 14, 17 (Eng.); *R v Reynolds*, [2004] EWCA(Crim) 1834, ¶¶ 6, 17, 18 (Eng.) (reducing sentences in each case due to introduction of evidence showing defendants had AS). One recent case presented evidence of AS as part of a diminished capacity defense to homicide. See *R v. Jama*, [2004] EWCA(Crim) 960, ¶ 33 (Eng.) (ordering new trial for defendant due to improper instructions by trial judge on the relationship between provocation and AS in diminished capacity defense).

134. See Brian R. Ballou & Michael Levenson, *School Killing Stuns Suburbs*, BOSTON GLOBE, Jan. 20, 2007, at 1A.

135. See Lucy Bannerman, *Millionaire who cut up body is freed; Killing was an accident, says eccentric*, THE HERALD (Glasgow), Nov. 12, 2003, at 10.

136. See *State v. Boyd*, 143 S.W.3d 36, 38 (Mo. 2004).

137. *Id.*

participation in the crime altogether.¹³⁸ At trial, Boyd sought to introduce evidence that he suffered from AS to prove four points relevant to his claim of innocence.¹³⁹ First, he argued that he was too uncoordinated to overpower and subdue a victim twice his size.¹⁴⁰ Second, he argued that he could not have navigated the forty-acre tract of woods to lead other people to the location of the body.¹⁴¹ Next, he argued that AS offered an innocent explanation for his unusual interest in violent books.¹⁴² Last, he argued that AS made him particularly gullible and susceptible to manipulation by others.¹⁴³ The trial court excluded the expert testimony because it related to a mental illness.¹⁴⁴ Such evidence is barred in Missouri when introduced to establish a diminished capacity defense.¹⁴⁵ As a result, Boyd was convicted.¹⁴⁶

On appeal, the appellate court noted that Boyd was not seeking to enter the evidence under a diminished capacity defense.¹⁴⁷ Such a tactic would have invoked the legislation and case law relied on by the trial judge.¹⁴⁸ Instead, Boyd claimed he did not commit the murder,¹⁴⁹ and presented evidence of AS to support this defense theory.¹⁵⁰ As such, the appellate court found the trial court's determination that the evidence had to be evaluated according to Missouri diminished capacity evidence rules was erroneous.¹⁵¹ The appellate court held that the trial judge's decision to exclude the evidence was erroneous.¹⁵² The case was reversed and a new trial ordered.¹⁵³

2. *State v. Burr*: Evidence of AS Relevant to Show that Defendant Did Not Understand Social Cues and Acts Inappropriately as a Result

In *State v. Burr*, the New Jersey Superior Court ordered a new trial for Franklin Burr.¹⁵⁴ Burr had been convicted of second-degree assault

138. *Id.*

139. *Id.* at 39.

140. *Id.*

141. *Boyd*, 143 S.W.3d at 39.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Boyd*, 143 S.W.3d at 36.

147. *Id.* at 44.

148. *Id.*

149. *Id.*

150. *Id.* at 39-40.

151. *Boyd*, 143 S.W.3d at 39.

152. *Id.* at 47.

153. *Id.*

154. *See State v. Burr*, 921 A.2d 1135, 1159 (N.J. Super. 2007).

and third-degree endangering the welfare of a child for inappropriately touching one of his pupils.¹⁵⁵ At a preliminary hearing, Burr appeared in court with bag draped over his head.¹⁵⁶ When questioned about his appearance, he replied with quotations from the book of Deuteronomy.¹⁵⁷ Subsequently, Burr underwent a psychiatric evaluation and was diagnosed with Asperger's Syndrome.¹⁵⁸ At trial, Burr attempted to introduce expert testimony about the AS diagnosis to help the jury understand why he might act in a way that appears socially unacceptable or inappropriate to others.¹⁵⁹ The trial judge refused to admit the testimony, opining that it was not relevant to the issue of culpability.¹⁶⁰

On appeal, the Superior Court reversed, holding that evidence showing Burr suffered from AS was relevant in determining how Burr thought about his actions, and that such evidence could have impacted the jury's decision.¹⁶¹ The appellate judge ordered a new trial.¹⁶²

B. *English Cases*

The following English cases involve appeals where the particular impairments of AS were raised as mitigating or exculpatory factors.

1. *R v. Heather*: Reduction in Culpability for Arson Resulting from Narrow Interest Fixation

On February 4, 2000, John Heather was sentenced to three years imprisonment for setting a garbage dumpster on fire.¹⁶³ Heather had

155. *Id.* at 1137-38.

156. *Id.* at 1142, n. 5.

157. *Id.*

158. *Id.* at 1142. The court went on to paraphrase the American Psychiatric Association's diagnostic criteria for AS:

The American Psychiatric Association recognizes Asperger's Disorder as a distinct diagnosis. According to the DSM-IV, the "essential features" of the disorder are "severe and sustained impairment in social interaction . . . and the development of restricted, repetitive patterns of behavior, interests, and activities." In order to constitute Asperger's Disorder, the "disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning."

Id. (quoting the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 75-77 (4th ed. 1994) (DSM-IV)).

159. *Burr*, 921 A.2d at 1143.

160. *Id.*

161. *Id.* at 1149.

162. *Id.* at 1159.

163. See *R v. Heather*, 2000 WL 1421166, ¶ 2 (Eng. July 31, 2000). The defendant pled guilty to one count of simple arson and not guilty to arson with reckless endangerment to life. *Id.*

been convicted of arson three times in the past,¹⁶⁴ and he was punished with probation for each conviction.¹⁶⁵ Heather had been diagnosed with AS,¹⁶⁶ and one of his AS-related behavior patterns was a compulsion to start fires.¹⁶⁷ The sentencing judge reviewed reports from a consulting psychiatrist and a consulting psychologist regarding Heather's mental condition.¹⁶⁸ The sentencing judge concluded that a three-year sentence would both protect the public and minimize the time Heather would be incarcerated.¹⁶⁹

After serving almost twelve months of his sentence, Heather's case was heard by the appellate court.¹⁷⁰ The appellate court quashed the prison sentence in exchange for a three-year probation order and released Heather subject to certain conditions, including receiving treatment and obeying a curfew for six months.¹⁷¹

2. *R v. Gibson*: Recent AS Diagnosis Contributes to Reduction in Sentence

On December 15, 2000, Simon Gibson was sentenced to eighteen months imprisonment for burglary in a cemetery and disinterring a body.¹⁷² Gibson and two accomplices had entered and disturbed a crypt three separate times at the Arnos Vale Cemetery in Bristol, England.¹⁷³ Gibson admitted to taking pieces of bone, a skull and a memorial vase out of the cemetery and opening a coffin to view its contents.¹⁷⁴ The trial judge heard evidence that Gibson suffered from AS.¹⁷⁵ However, the trial judge sentenced him to eighteen months in jail.¹⁷⁶

164. *Id.* ¶ 5. The defendant was known in his neighborhood as the "fire-lighter" for his tendency to start fires. *Id.*

165. *Id.*

166. *Id.* ¶ 4.

167. *Id.*

168. *Heather*, 2000 WL 1421166, ¶ 6.

169. *Id.* Heather had lived all his life at home with his mother, who was over eighty years old at the time of sentencing. She indicated at sentencing that having John live with her was becoming too great a responsibility for her, and the sentencing judge indicated that the Court of Appeal may have "greater powers than he" to place Heather in a group residence. *Id.* ¶ 7.

170. *Id.*

171. *Id.* ¶ 9. In summary, the conditions were that Heather receive psychiatric services and care as instructed by the probation team, that he reside where the probation officer instructs him to and that he abide by an electronically monitored curfew for six months. *Id.*

172. *See R v. Gibson*, [2001] EWCA (Crim) 656, ¶ 1 (Eng.).

173. *Id.* ¶ 3.

174. *Id.*

175. *Id.* ¶¶ 10, 12. When the defendant was four years old, his father committed suicide. The defendant lived at home with his mother and younger brother. The brother

On appeal, the appellate court noted that even though the punishment was correct in principle, Gibson's exceptional circumstances should have produced a different sentence.¹⁷⁷ The appellate judge focused on the defendant's narrow interest in bones and death.¹⁷⁸ A report from a psychiatrist who examined Gibson stated that his continuing obsession with death is a "manifestation of Asperger's Syndrome."¹⁷⁹ This obsession with death made Gibson unable to resist the temptation to take the bones.¹⁸⁰ Further, expert analysis also revealed that Gibson's death obsession had led him to make several attempts against his own life.¹⁸¹ The consensus among people evaluating Gibson was that a prison sentence would carry with it a very high risk of suicide for him.¹⁸²

After considering these issues, the appellate court concluded that a probation order conditioned on treatment would have been the appropriate sentence.¹⁸³ Accordingly, the court reduced the sentence to six months which effectively released Gibson for time served.¹⁸⁴

3. *R v. TS*: AS Presented as Fresh Evidence of Cognitive Impairment Results in New Trial

On August 12, 2005, a defendant identified as "TS" was convicted of rape and indecent assault.¹⁸⁵ TS had engaged in sexual conduct with his ex-wife, which he claimed was consensual.¹⁸⁶ His ex-wife claimed that the encounter was not consensual, amounting to assault and rape.¹⁸⁷ When instructing the jury on the *mens rea* element of rape, the judge mentioned the possibility for misunderstanding in a situation where a woman did not make clear that she did not consent to the sexual activity.¹⁸⁸ However, the judge instructed the jury that there was no

had Downe's Syndrome. The defendant spoke of attempting suicide again in the future, stating that he felt life had "nothing to help him." *Id.*

176. *Gibson*, EWCA (Crim) 656, ¶ 1.

177. *Id.* ¶ 7.

178. *Id.* ¶¶ 9, 16.

179. *Id.* ¶ 16.

180. *Gibson*, EWCA (Crim) 656, ¶ 9.

181. *Id.*

182. *Id.* ¶¶ 14, 16, 18.

183. *Id.* ¶ 19.

184. *Id.* ¶ 20.

185. *See R v. TS*, 2008 WL 168748, ¶ 1 (2008) (Eng. Crim Jan. 23, 2008).

186. *Id.* ¶ 7.

187. *Id.* ¶ 6.

188. *Id.* ¶ 9.

room for doubt or misunderstanding in this case.¹⁸⁹ The jury found TS guilty.¹⁹⁰

TS's *pro se* appeals were denied,¹⁹¹ and his mental and physical condition began to deteriorate as he began to serve his prison sentence.¹⁹² An application from a legal aid worker and a letter from the diagnosing physician was sent to the judge on behalf of TS, explaining the recent diagnosis of AS.¹⁹³ Counsel was appointed to the defendant and a new appeal was allowed.¹⁹⁴ During the appeal, TS argued that AS impaired his ability to accurately determine other people's intentions, beliefs or desires "in ambiguous situations."¹⁹⁵ He also argued that AS impaired his ability to understand signs and straightforward indications from other people.¹⁹⁶

The appellate court held that the new evidence could have affected the trial in one or more of the following ways.¹⁹⁷ First, it would have enabled a defense based on the requirements of *mens rea*.¹⁹⁸ Second, the evidence showing TS suffered from AS would have helped the jury understand why he acted under an honest and reasonable belief in what he believed the situation to be, even if the facts were otherwise.¹⁹⁹ Finally, the AS diagnosis could have helped the jury understand why TS acted strangely at trial.²⁰⁰ As a result, the appellate court ordered a retrial.²⁰¹

189. *Id.*

190. *TS*, 2008 WL 168748, ¶ 1.

191. *Id.* ¶ 12. The defendant's grounds for appeal included ineffective counsel, improper suppression of evidence by the trial judge of the defendant's psychological problems and fresh evidence from the defendant's sister to the effect that the victim told her no rape had occurred. *Id.*

192. *Id.* The defendant refused to take the anti-psychotic medicine he was prescribed and denied he had any mental health problems. He claimed he was wrongfully imprisoned because he believed he had prevailed in his *pro se* appeals. He was transferred to a medium security forensic hospital where he was diagnosed with AS. *Id.*

193. *Id.* ¶¶ 14-16.

194. *Id.*

195. *TS*, 2008 WL 168748, ¶ 22.

196. *Id.*

197. *Id.* ¶ 34.

198. *Id.*

199. *Id.*

200. *TS*, 2008 WL 168748, ¶ 34.

201. *Id.* ¶ 1.

C. *Australian Cases*

1. *R v. Wood*: Impairments of AS Reduce Objective Criminality

On November 28, 2002, George Wood was convicted of manslaughter by criminal negligence in the death of his mother.²⁰² Wood was sixty years old with no prior criminal record when he was convicted.²⁰³ Wood lived his whole life with his mother and sister and had little outside social contacts.²⁰⁴ In 1998, the defendant's mother was hospitalized twice for various medical problems including mild dementia.²⁰⁵ Her assessment upon discharge called for constant care including regular hospital appointments or home visits.²⁰⁶ The mother was a domineering person who insisted on having things her way.²⁰⁷ In the past, she resisted all efforts to arrange home care or hospitalization.²⁰⁸ The family situation from 1998 onward left Wood in charge of taking care of his mother.²⁰⁹

In April 2000, Wood called an ambulance to take his mother to a hospital.²¹⁰ When emergency personnel arrived at the scene, they found the home in a state of utter disrepair.²¹¹ They also found Wood's mother bedridden, covered with human waste and other body fluids, and suffering from serious bedsores.²¹² Wood had not been taking proper care of his mother which resulted in her condition. Despite hospital treatment, the woman died.²¹³

202. See *R v. Wood*, (2004) 149 A. Crim. R. 38, 40 (Austl.).

203. *Id.*

204. *Id.* The defendant's sister was developmentally disabled. Evidence showed the defendant had dropped out of school and had only recently gained employment; he had a short-lived relationship with a woman; he recently became involved at a local church; and he had an obsessive interest with trains. *Id.*

205. *Id.*

206. *Id.*

207. *Wood*, 149 A. Crim. R. at 40.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* The appellate court recounted the scene at the homestead:

There was evidence to the effect that the garden was seriously overgrown and unkempt, and that the interior was a mess with rubbish and papers, some of which were kept in bags, piled up in many rooms. The shower had not worked for some time and it appeared that the bath was not working either. Newspapers were stacked in the shower recess. The toilet leaked. Thick dust and cobwebs were evident throughout.

Id.

212. *Wood*, 149 A. Crim. R. at 40.

213. *Id.*

At a bench trial, Wood offered the testimony of a doctor whose examination of the defendant revealed the presence of nearly all the diagnostic criteria for AS.²¹⁴ This evidence was offered to explain why Wood would have a lack of understanding of the consequences of his acts or omissions and an inability to show remorse.²¹⁵ The doctor also testified that Wood did not appear to appreciate the effect his actions had on his mother.²¹⁶

The judge evaluated the culpability of the defendant according to the standard for criminally negligent manslaughter, which requires reckless conduct combined with the realization that serious injury or death are possible outcomes from such conduct.²¹⁷ Applying that standard, the judge found Wood criminally responsible for creating the circumstances which “caused, contributed or accelerated” his mother’s death, and that he owed her a duty of care.²¹⁸ The trial judge stated that he did not believe Wood to have impaired intellectual capacity and “[did not] regard him as having suffered from any serious psychiatric or personality disorder.”²¹⁹ The judge further stated that Wood was “in complete denial concerning the pain and distress that his mother must have experienced over an extended period,” and that he displayed “no remorse for his actions whatsoever.”²²⁰ The judge found Wood guilty of manslaughter by criminal negligence and sentenced him to seven years imprisonment.²²¹ Wood appealed the sentence, claiming that the judge had failed to give adequate weight to the evidence regarding the defendant’s possible AS diagnosis, and that the sentence was manifestly excessive under the circumstances.²²²

On appeal, the appellate court reasoned that the evidence of a mental abnormality tending to explain the offense or “the offender’s

214. *Id.* at 43.

215. *Id.* Another doctor (presumably from the government) testified that in her opinion, the defendant did not present any symptoms warranting a diagnosis of AS. The defendant presented with a “mood disorder” resulting from his socialization. However, in her final conclusion, she does mention that the defendant’s psychopathology was “possibly complicated by some variant of autism.” *Id.*

216. *Id.*

217. *Wood*, 149 A. Crim. R. at 42. The trial judge applied this standard of criminal negligent manslaughter:

The degree of criminal culpability is set by saying that the accused, having realised that death or serious injury are possible, must then act recklessly in relation to those consequences. Further, the test is subjective so far as concerns the omission to act.

Id. (quoting *R v. Stone*, [1977] Q.B. 354, 357 (Eng.)).

218. *Wood*, 149 A. Crim. R. at 40.

219. *Id.* at 43.

220. *Id.*

221. *Id.*

222. *Id.* at 44-46.

inability to understand the wrongfulness of his actions, or to make reasonable judgments, or to control his or her faculties and emotions, will impact on the level of culpability of the offender, even where the [mental] illness does not amount to an excuse at law.”²²³ The court found Wood’s disorder “impaired his capacity to respond to his responsibilities,” and that this made the defendant less criminally culpable.²²⁴ The appellate court found the trial judge to be in error for failing to give adequate consideration to the defendant’s mental abnormality. In addition, the appellate court reasoned that punishment exacted against persons with mental disabilities does little to personally deter them from future wrongdoing if they are unable to appreciate the wrongfulness of their actions.²²⁵ Accordingly, the appellate court reduced Wood’s sentence to three years and six months.²²⁶

2. *Hopper v. The Queen*: Social Cues Clear Enough that AS Cannot Be Raised to Mitigate Conduct

On March 10, 2003, Bradley Hopper was convicted of several sexual offences and sentenced to four years imprisonment.²²⁷ Hopper, a teenager from England, was in Australia for a vacation with his family.²²⁸ One night he went out with his cousins and a female friend and became intoxicated.²²⁹ When his female friend mentioned she was ready to go, Hopper offered to walk her home.²³⁰ As the two walked down a street, Hopper kissed her.²³¹ He then attempted to have intercourse with her, despite her repeated objections.²³² Hopper continued his advances for about five minutes before he stopped.²³³ Under interrogation the next day, Hopper provided the following explanation for his actions: “Once I realised what I was doing, I stopped. I thought, ‘what the hell am I doing?’”²³⁴ A medical examination confirmed that the woman had been sexually assaulted.²³⁵

223. *Wood*, 149 A. Crim. R. at 45. (quoting *R v. Israil*, 2002 WL 1435905, ¶ 23 (Austl.)).

224. *Id.*

225. *Id.*

226. *Wood*, 149 A. Crim. R. at 45.

227. *See Hopper v. The Queen*, 2003 WL 21694438, ¶ 32 (Austl. Ct. Crim. App. July 18, 2003).

228. *Id.* ¶ 37.

229. *Id.* ¶ 34.

230. *Id.*

231. *Id.*

232. *Hopper*, 2003 WL 21694438, ¶ 34.

233. *Id.*

234. *Id.* ¶ 35.

235. *Id.*

At trial, Hopper offered evidence showing he suffered from various psychological disabilities including difficulty understanding social cues.²³⁶ He argued that the effects of alcohol aggravated his misunderstanding of social cues.²³⁷ Hopper had not yet obtained a diagnosis of AS.²³⁸ He was found guilty of two counts of sexual penetration without consent and one count of indecent assault.²³⁹ The judge adjourned the court for ten days to consider the appropriate punishment.²⁴⁰ At sentencing, the judge stated that his decision was based on the demeanor of the defendant that he observed in the videotaped police interview.²⁴¹ The judge considered the other evidence tending to show Hopper's disabilities, but concluded that the mitigating effect of these disabilities was "only peripheral."²⁴² The judge found the offences to be serious enough to warrant a prison sentence.²⁴³

Hopper appealed, alleging error on the part of the trial judge for failing to make inquiries into how the defendant's disabilities could be a mitigating factor.²⁴⁴ Further, Hopper argued that the trial judge erred by failing to adequately consider other mitigating factors.²⁴⁵ Hopper also offered new evidence that after sentencing, he was suffering from AS.²⁴⁶ However, the appellate court found that despite the defendant's impairments, the victim had been clear and unambiguous about her wishes not to have sex with Hopper.²⁴⁷ Accordingly, the appellate court dismissed the defendant's appeal against the sentence.²⁴⁸

D. Analysis

As demonstrated above, defendants have tried to use AS as a defense to criminal charges in a number of ways. The recurrent themes

236. *Id.* ¶ 38.

237. *Hopper*, 2003 WL 21694438, ¶ 38. In addition to the social cues comprehension problem, the defendant introduced evidence that he had "impairments in cognitive functioning," dyslexia, his reading level was equivalent to a ten year old, he had memory problems, and he has difficulty understanding and interpreting verbal instructions. There was also evidence that showed the defendant to be shy, immature and anxious, and gullible. He had been bullied and had difficulty functioning in a group setting. *Id.*

238. *Id.* ¶ 40.

239. *Id.* ¶ 32.

240. *Id.* ¶ 41.

241. *Id.* ¶¶ 43-44.

242. *Hopper*, 2003 WL 21694438, ¶ 44.

243. *Id.* ¶¶ 45, 46.

244. *Id.* ¶ 47.

245. *Id.* ¶ 47.

246. *Id.* ¶ 40.

247. *Hopper*, 2003 WL 21694438, ¶ 55.

248. *Id.* ¶ 72.

can best be organized as failure of proof defense, mistake in fact defense, and mitigation of offense level.

1. Failure of Proof Defense

AS has been advanced as evidence proving that the defendant cannot satisfy the *mens rea* element for the charged offense. In one case, the physical impairments associated with AS were raised to cast doubt on the defendant's capacity to satisfy the *actus reus* element. In this context, the impairments of AS operate as a failure of proof defense to criminal culpability.²⁴⁹

In *R v. Wood*, discussed *infra*, the defendant was ignorant of the consequences of his conduct on many levels: he was not capable of keeping a house clean, much less caring for his elderly, invalid mother. Considering that the defendant's mother was a domineering person and the defendant was prone to literal interpretations of her commands, the defendant's care of his mother can hardly be termed intentional. How can someone be held morally blameworthy for a result they could not conceive of because they did not know the underlying facts necessary to form such a conception? Both the trial judge and the appellate court missed this essential point. The defendant was less than negligent because he did not possess enough commonsense facts about health and hygiene to understand how to apply those facts to his situation. He simply had no mental state regarding the condition of his mother. As such, the defendant's lack of understanding negates any finding of culpability necessary to prove the *mens rea* elements of the crime.

Conversely, in *State v. Boyd*, the trial court overlooked the effects AS may have on the defendant's physical ability to carry out a crime. In *Boyd*, the defendant tried to introduce expert testimony that the physical impairments associated with AS made it impossible for him to have committed the murder.²⁵⁰ Part of the testimony included assertions that it would be "impossible" or "inconceivable" for someone with AS to lead people to the site where the body was found in the middle of a forty-acre tract of woods.²⁵¹ Further, the defendant openly advanced the notion that the motor skill delay associated with AS prohibited the defendant from physically completing the crime. This is a failure of proof defense to *actus reus*, a claim that the defendant could not have physically

249. See, e.g., MODEL PENAL CODE § 1.2(1) (requiring all elements of an offense be proved beyond a reasonable doubt for a person to be held criminally responsible); Commonwealth Code 1995 § 3.2 (providing that all physical and fault elements of an offense must be proved to create guilt for criminal conduct).

250. See *State v. Boyd*, 143 S.W.3d 36, 38 (Mo. 2004).

251. *Id.* at 45.

performed the accused criminal act. The expert testimony did not actually state that the defendant was physically incapable of overpowering the victim. Instead, in the expert's opinion, the defendant's ability to navigate the forest to lead others to the crime scene was too complex a task to expect an AS individual to complete.²⁵²

Yet, other courts have held that new evidence of an AS diagnosis could negate culpability for lack of the requisite *mens rea*. By granting a new trial in *R v. TS*, the appellate court essentially agreed with the defendant's failure of proof argument. The defendant maintained a consistent version of events throughout the trial and appeal, claiming that the sexual encounter was consensual, not a sexual assault or rape.²⁵³ If the defendant believed the encounter was consensual, and the impairments of AS contributed to this mistaken belief, then evidence of AS could negate the presence of the culpable mental state required for the defendant's convictions. The appellate court held that new evidence of the defendant's recent AS diagnosis could prove the absence of requisite *mens rea*, and a new trial should be held to determine the mental state of the defendant at the time of the offense.²⁵⁴

The appellate court in *R v. Wood* explained the futility of punishing defendants like those found in *Wood* and *R v. TS*. First, punishing someone who fails to understand the potential consequences of his conduct and is unlikely to re-offend is of little value as a means of personal deterrence.²⁵⁵ Second, punishing those who have a limited appreciation for the wrongfulness of their conduct make them poor examples for the general deterrence of crime.²⁵⁶ A prison sentence is essentially meaningless to an individual such as this; assigning criminal culpability and punishment does not serve the needs of the offender or society.

2. Mistake in Fact

The effects of AS (especially mindblindness) can result in conduct based on an honest and reasonable but mistaken belief of facts. Individuals who engage in criminal conduct based on such a "mistake-in-fact" are sometimes excused from culpability.²⁵⁷

252. *Id.* at 46.

253. *See R v. TS*, 2008 WL 168748, ¶ 33 (2008) (Eng. Crim Jan. 23, 2008).

254. *Id.* ¶ 34.

255. *See R. v George*, (2004) 149 A. Crim. R. 38, 45 (Austl.).

256. *Id.*

257. *See* 21 AMJUR 2D CRIMINAL LAW § 152 (2007); 17 ARCHBOLD: CRIMINAL PLEADING, EVIDENCE, AND PRACTICE § 10 (James Richardson, ed., Sweet & Maxwell, Ltd. 2008); CRIMINAL CODE OF THE NORTHERN TERRITORY §§ 31(1), 32 (Austl.). Each of these materials relate the contours of United States, English and Australian mistake-of-

In *State v. Burr*, evidence of the defendant's AS diagnosis was introduced to show that the defendant did not know the inappropriateness of his behavior.²⁵⁸ In other words, the defendant was operating under the mistaken belief that what he was doing was acceptable.²⁵⁹ The defendant did not argue that his AS diagnosis provided support for a diminished capacity defense.²⁶⁰ Instead, the evidence was offered to rebut the prosecution's allegation that the defendant was engaging in "grooming" behavior designed to lower the victim's social barriers in preparation for molestation.²⁶¹ This defense strategy effectively sneaks the evidence of AS in through "the back door." Presented this way, the evidence is not offered for a diminished capacity defense, but the jury still gets to hear how AS "diminishes" the defendant's "capacity" to comprehend social cues and what types of behavior are appropriate. This avenue avoids the tangled evidence rules often associated with the presentation of a diminished capacity defense.

However, AS cannot shield a defendant from criminal culpability in all cases. In *Hopper v. The Queen*, the appellate court agreed that AS could impair a defendant's ability to correctly interpret social cues.²⁶² But, the court rejected the defendant's assertion that his impairment prevented him from understanding that the victim wanted him to stop what he was doing.²⁶³ The court noted that the victim had resisted the defendant's advances for five minutes, telling him "no," "go away," and "stop it."²⁶⁴ The appellate court concluded that the victim was clear and unequivocal in declining the defendant's advances, such that there was no room for any kind of misinterpretation of her wishes.²⁶⁵ The court effectively ruled that the victim's rejections were clear enough to penetrate this defendant's cognitive impairment.²⁶⁶ At minimum, *Hopper v. The Queen* stands for the proposition that the impairments

fact doctrine, which generally provides that a person is excused from criminal responsibility for an act if it is completed under an honest and reasonable but mistaken belief that other facts are in existence, and if that belief were correct, the conduct would not be criminal. The doctrine holds that an actor is held no more culpable for the criminal conduct completed under this mistaken view than if the facts actually were as the actor believed them to be.

258. See *State v. Burr*, 921 A.2d 1135, 1143 (N.J. Super. 2007).

259. *Id.* at 1142-43.

260. *Id.* at 1146-47.

261. *Id.* at 1143.

262. See *Hopper v. The Queen*, 2003 WL 21694438, ¶¶ 40, 54, 55 (Austl. Ct. Crim. App. July 18, 2003).

263. *Id.* ¶¶ 16, 17, 55.

264. *Id.*

265. *Id.* ¶ 55.

266. *Id.* ¶¶ 54, 55.

attributable to AS cannot shield a defendant from mistaking clear, unequivocal and repeated commands to stop.

Conversely, the court in *R v. TS* held that evidence showing the defendant suffered from AS would have helped the jury understand why the defendant acted under an honest and reasonable belief in what he believed the situation to be, even if the facts were otherwise.²⁶⁷ Like the defendant in *Hopper v. The Queen*, the defendant in *R v. TS* was allegedly told to stop what he was doing.²⁶⁸ The defendant consistently maintained that the encounter was consensual.²⁶⁹ However, in *R v. TS*, the appellate court found the situation sufficiently vague enough that AS could compromise the defendant's ability to adequately understand the intention of the victim.²⁷⁰ At maximum, *R v. TS* stands for the proposition that AS can operate to justify a mistake in fact defense when the intention of the parties is unclear.

3. Reduced Responsibility Resulting in Mitigation of Sentence

Some courts have considered the impairments associated with AS to be mitigating factors at sentencing. English courts have embraced this trend- AS defendants commonly have their sentences reduced on appeal.²⁷¹ In contrast, United States courts rarely reduce sentences based on impairments associated with AS.²⁷²

In *R v. Heather*, the trial judge recognized that the defendant was less culpable for his actions as a result of the narrow interest fixation and lack of foresight, impairments associated with AS. Interestingly, the trial judge seemed to leave the door open for the appellate court to quash and modify the sentence in the event that appropriate living arrangements and care could be arranged for the defendant.²⁷³

267. See *R v. TS*, 2008 WL 168748, ¶ 34 (2008) (Eng. Crim Jan. 23, 2008).

268. *Id.* ¶¶ 6, 7, 17. There was conflicting evidence as to whether the victim had consented to the intimacy. The victim claims to have told the defendant, "[t]here's no point, you're not going to have sex with me. Don't even try because it's not going to happen." *Id.*

269. *Id.* ¶ 33.

270. *Id.* ¶ 34.

271. See cases cited *supra* note 133.

272. See, e.g., *United States v. Kamen*, 491 F.Supp.2d 142 (D. Mass. 2007) (considering AS diagnosis in decision to vacate original guilty verdict of knowing receipt of child pornography and substitute lesser included sentence of receipt of child pornography); *Martlett v. State*, 2007 WL 4555274 (Ind. App. Dec. 28, 2007) (factoring AS into decision to reduce prison sentence from seventeen to fifteen years).

273. See *R v. Heather*, 2000 WL 1421166, ¶ 6 (Eng. Crim July 31, 2000). The trial judge appeared to only grudgingly send Heather to prison; the trial judge wondered whether the appellate court "might have greater powers than he" to find an alternative residence for Heather. *Id.*

The court in *R v. Gibson* reduced the sentence partly for a lack of culpability, but mainly for humanitarian reasons. First, the court recognized the actual offense was driven not by a criminal desire but by an obsession beyond the control of the defendant.²⁷⁴ Second, the court concluded that the defendant's narrow interest fixation on death, combined with his other impairments, could effectively push him to suicide in a prison setting.²⁷⁵

The crimes in both *R v. Heather* and *R v. Gibson* involved damage to property. Mitigation in these cases could be explained due to the fact that the crimes did not involve personal injury. However, English courts have considered AS a mitigating factor that can justify reduced sentences for property crimes and crimes involving harm to individuals.²⁷⁶

V. CONCLUSION

In summary, each nation is experiencing an increase in criminal defendants with AS. This is no doubt another result traceable to the global shift away from institutionalization of the mentally disabled.²⁷⁷ More importantly, medical and legal communities are gaining awareness of the diagnosis. Will this awareness generate an evolution in criminal law to deal with people who have mindblindness?

The unique facts of each case will have a big impact on the outcomes, but several things seem to be clear. First, English courts are more tolerant of AS-based defenses. This could be the result of the way that forensic psychology and psychiatry are employed in the English criminal justice system, or it could be the result of the concentration of researchers in England who are studying Asperger's Syndrome. Whatever the cause, the English are leading the way in unlocking the riddle of culpability in the AS offender. For example, in *R v. Heather*, the appellate court observed that AS is a developmental disorder, not a mental illness.²⁷⁸ This moves people who have AS outside the scope of the Mental Health Act of 1983 which provides for treatment of individuals who undergo commitment and treatment for mental illness.²⁷⁹ If AS is not treatable like mental illness, yet AS offenders are not morally blameworthy for certain crimes, what is the appropriate disposition for an AS individual charged with a crime? One answer

274. See *R v. Gibson*, [2001] EWCA (Crim) 656, ¶ 9 (Eng.).

275. *Id.* ¶ 20.

276. See cases cited *supra* note 133.

277. See JAMES R. P. OGLOFF, ET AL., IDENTIFICATION OF MENTAL DISORDERS IN THE CRIMINAL JUSTICE SYSTEM 9 (2006), available at <http://www.aic.gov.au/crc/reports/2006-ogloff.pdf>.

278. See *R v. Heather*, 2000 WL 1421166, ¶ 4 (Eng. Crim July 31, 2000).

279. *Id.*

emerging from the English trend is that an AS diagnosis may be sufficient to warrant a reduction in sentence when the crime matches the peculiar traits of the AS defendant.

Second, the defenses of mistake in fact, failure of proof, and diminished capacity are employed in United States, English and Australia courts with mixed results. This inconsistency signals the need for a clear, cohesive approach to the AS individual accused of a criminal offense. Two solutions may allow criminally accused AS individuals greater access to justice. One is the responsibility of the criminal justice system and the other is the responsibility of the global AS community.

A. Prophylactic Measures for Persons with Mindblindness.

The crimes AS offenders are likely to commit are predictable, but not preventable at this point. Each AS offender's understanding of the consequences of their conduct will vary based on the extent of their socialization. Two possible scenarios could cause an AS individual to run afoul of criminal law. First, with knowledge or comprehension of the underlying facts essential to completing a criminal act, they intentionally do something that they know is wrong. Second, without knowledge or comprehension of the underlying facts essential to completing a criminal act, they intentionally do something not knowing it is wrong. In the first instance, there is no question on the course of action: prosecute and punish the individual. The second instance is much more complicated. To separate the culpable AS individuals from the non-culpable, a two-prong test should be used. Individuals who satisfy the two prongs of the test would be either exempt from criminal prosecution or subject to reduced punishment.

The first prong involves screening to detect AS individuals upon arrest. While in custody, if the offender presents behaviors that satisfy three of the six Gillberg criteria, that person would qualify for a full AS screening. If the screening results in an AS diagnosis, the first prong has been satisfied. The first prong is automatically satisfied if the offender has been diagnosed with AS prior to arrest. This prong serves a channeling function by identifying AS individuals accused of crime within the criminal justice system.

The second prong evaluates the AS offender's knowledge and comprehension of the consequences of personal conduct. If the AS offender demonstrates understanding of the basic, common sense facts (factual knowledge which would be essential to complete the crime) and the consequences of their conduct, then that individual could be prosecuted for the charged offense. In this instance, AS would not be considered a bar to criminal prosecution or an imposition of criminal

culpability. If the offender cannot demonstrate knowledge of basic underlying facts and an understanding of the consequences of personal conduct, then criminal culpability would not attach. Such individuals would receive the “Mindblindness Exemption”²⁸⁰ from criminal prosecution, which would substantially mitigate punishment or eliminate criminal culpability altogether. This is a classification function, designating which AS offenders are subject to reduced punishment.

For example, consider that the defendant in *R v. Wood* did not know what a bedsore was or what conditions could create life-threatening bedsores.²⁸¹ If the defendant in *R v. Wood* had no knowledge of a potential injury and did not understand how his conduct would cause it, he simply lacked the subjective knowledge required to prevent himself from acting either recklessly or negligently. Punishing lack of foresight based on honest ignorance of facts is not an acceptable goal for criminal law.²⁸²

This analysis amounts to a subjective test of a person’s commonsense, “worldly” knowledge. Critics would argue that extending the Mindblindness Exemption would result in unwarranted acquittals for AS individuals who intended criminal conduct. AS individuals are capable of and do commit criminal conduct. Within the group of children Dr. Asperger studied, he identified a small subgroup that acted with intentional malice and deliberation.²⁸³ Dr. Tony Attwood, a leading AS researcher, postulates that these individuals utilized threats of violence to gain superiority in social situations in an effort to compensate for the social alienation they experience do to AS.²⁸⁴ The Mindblindness Exemption would not be available to these individuals because they have acted with intentional malice. Critics would also point out that some people could pass the two-pronged test by feigning the traits of AS. However, the test would ferret out those who fake AS traits to avoid prosecution; it requires both a legitimate AS diagnosis *and* a demonstrated lack of underlying facts and comprehension. In addition, AS individuals’ eagerness to please and inability to read what the tester is truly trying to measure would likely expose any ruse.

The lack of objective “worldly” factual knowledge, combined with mindblindness, results in conduct that would be immoral to punish as criminal. Society and criminal justice do not benefit by punishing individuals who are truly without blame. The challenge for the AS

280. The “Mindblindness Exemption,” used as a term to denote immunity from criminal prosecution, was coined by the author on January 21, 2008.

281. See *R v. Wood*, (2004) 149 A. Crim. R. 38, 46 (Austl.).

282. See VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 251 (Oxford Univ. Press 2005).

283. *Id.* at 335.

284. *Id.*

individual is twofold. First, they must try to get along in social situations in an intuitive vacuum,²⁸⁵ and second, to know enough of “the facts of life” to keep from unintentionally hurting others or their property. AS sufferers carry a higher burden to carry than the average citizen, because the average citizen is assumed to know those two things AS individuals often do not understand. Therefore, it is necessary to protect AS individuals from unjust criminal prosecutions. The Mindblindness Exemption would properly identify AS offenders who do not possess the *mens rea* necessary to assess criminal culpability.

B. Early Intervention

Dr. Asperger studied children instead of adults. The identification of diagnostic criteria for adults is a recent development.²⁸⁶ AS is not a mental illness; it is a developmental disorder.²⁸⁷ That means that treatment takes the form of instruction and life skills coaching from an early age.²⁸⁸ If a child with AS is not properly diagnosed and coached through childhood and adolescence, the impairment of AS on adult functioning will be more pronounced.²⁸⁹

Dennis Debbault is a former police officer who has been researching the interactions of offenders with autistic spectrum disorders and the criminal justice system since 1991.²⁹⁰ It is his experience that most offenders do not know they have AS until after they have been arrested and charged with an offense. Thus, the diagnosis comes later.²⁹¹ Further complicating the issue is the relatively low public understanding

285. See ATTWOOD, *supra* note 1, at 91.

286. See Simon Baron-Cohen, et al., *The Adult Asperger Assessment (AAA): A Diagnostic Method*, 35 J. OF AUTISM AND DEV. DISORDERS 807, 808-09 (2005). Diagnostic criteria for evaluating Asperger's Syndrome in adults was not available before 2005.

287. See, e.g., WORLD HEALTH ORGANIZATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS (10th ed. ICD-10) (2006); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (text revision 2000) (DSM-IV-TR).

288. See ATTWOOD, *supra* note 1, at 91-92.

289. See *id.*

290. Telephone Interview with Dennis Debbault (Jan. 21, 2008). Debbault is the author of *AUTISM, ADVOCATES AND LAW ENFORCEMENT PROFESSIONALS: RECOGNIZING AND REDUCING RISK SITUATIONS FOR PEOPLE WITH AUTISM SPECTRUM DISORDERS* (Jessica Kingsley Publishers 2002) and *AVOIDING UNFORTUNATE SITUATIONS: A COLLECTION OF EXPERIENCES, TIPS AND INFORMATION FROM AND ABOUT PEOPLE WITH AUTISM AND OTHER DEVELOPMENTAL DISABILITIES AND THEIR ENCOUNTERS WITH LAW ENFORCEMENT AGENCIES* (Way/SAC 1994). Debbault's website provides advice for the AS community to better cope with law enforcement officials. See *Avoiding Unfortunate Situations* <http://policeandautism.cjb.net> (last visited Feb. 14, 2009).

291. *Id.*

of AS.²⁹² Once the AS offender has been diagnosed, “society wants to know why [they have AS] and who gave them the diagnosis.”²⁹³ Debbault’s website encourages parents and families of people with AS to prepare for potential encounters with law enforcement.²⁹⁴ It is Debbault’s belief that the AS community must demonstrate its willingness to be proactive in educating and guiding AS individuals in order for society to make exceptions for the AS community.²⁹⁵

In the words of Dennis Debbault, “if it is not possible for these people to learn, everything I am doing is for nothing.”²⁹⁶ This statement applies equally to criminal law. *Mens rea* theory continues to evolve over time. Criminal law must learn to accommodate AS offenders and punish only those who satisfy the *mens rea* element required to assess criminal culpability.

292. *Id.*

293. *Id.*

294. See Dennis Debbault, Police and Autism: Avoiding Unfortunate Situations, <http://policeandautism.cjb.net> (follow “B. Avoiding Unfortunate Situations” hyperlink) (last visited Feb. 14, 2009).

295. Telephone interview with Dennis Debbault (Jan. 21, 2008).

296. *Id.*

