



# A Dilemma For Neurodiversity

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**Abstract** One way to determine whether a mental condition should be considered a disorder is to first give necessary and sufficient conditions for something to *be* a disorder and then see if it meets these conditions. But this approach has been criticized for begging normative questions. Concerning autism (and other conditions), a *neurodiversity movement* has arisen with essentially two aims: (1) advocate for the rights and interests of individuals with autism, and (2) de-pathologize autism. We argue that denying autism's disorder status could undermine autism's exculpatory role in cases where individuals with autism are charged with a crime. Our argument raises a dilemma for the neurodiversity movement: advocating for the rights and interests of individuals with autism may require viewing autism as a condition that

can be inherently disabling (at least for some individuals). If this is right, autism's disorder status might be maintained (again, at least for some individuals) *without* deriving this result from any general account of disorder.

**Keywords** Autism · Bioethics · Cognitive disability · Neurodiversity · Philosophy of disability

## Introduction

One way to determine whether a mental condition should be considered a disorder is to first give necessary and sufficient conditions for something to *be* a disorder and then see if it meets these conditions. But this approach has been criticized for begging normative questions, particularly the question of whether we should think of any neurological wiring as ideal or best [4, 10].<sup>1</sup> In this paper, the condition in question is autism. A *neurodiversity*

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Kenneth Shields was lead author, writer and researcher. David Beversdorf inspired the legal focus of the paper and verified empirical claims concerning autism. Beversdorf also offered comments, possible replies to objections, and general assistance on numerous drafts of the paper.

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<sup>1</sup> Some have also questioned whether *any* top-down approach can be normative-neutral, as opposed to just the relatively weaker concern that some or many of these accounts are value-laden; See [2] for this more general concern. For general discussion over how best to conceive of health, disorder and disease, see [2, 12, 16, 30, 44]. Thanks to Jake Wright for suggesting these additional sources on this issue. For the sake of this paper, we don't intend to take a stand on either of these critiques—we hope to show that our argument could succeed whether or not any of these criticisms are warranted. We would like to thank a blind reviewer of a previous draft of this paper for their request that we clarify our position here.

*movement* has arisen concerning autism (and a number of other neurological conditions) that has defined itself by the following two aims: (1) advocacy for the rights and interests of neurologically atypical individuals, and (2) de-pathologizing autism [7, 14, 17, 22, 36, 37, 45].<sup>2</sup> We argue that denying autism's disorder status could undermine autism's exculpatory or legally-mitigating role in cases where individuals with autism are charged with a crime. Our argument thus raises a dilemma for the neurodiversity movement: advocating for the rights and interests of individuals with autism may require viewing autism as a condition that can be inherently disabling (at least for some individuals). If this is right, then we will have shown how autism's disorder status might be maintained (again, at least for some individuals) *without* deriving this result from any general account of disorder.

The paper is structured as follows. In [Autism, the Neurodiversity Movement, and the Social Model of Disability](#), we give a brief account of autism and the neurodiversity movement, and we discuss one of the main arguments proponents of the movement give for de-pathologizing autism: that autism is analogous to homosexuality in that any disadvantages associated with it are to be found only in social barriers or prejudice and not with the condition itself. In [Autism and Criminal Behavior: Three Cases](#), we examine autism within the context of criminal law. In particular, we present three cases involving individuals with autism who were charged with crimes despite their illegal behavior being primarily due to their autism. We then present our argument for thinking cases like these raise a dilemma for the neurodiversity movement:

P1: If the rights and interests of these individuals with autism are to be protected, then either their behavior should be legally excused or their culpability mitigated *even in* a sufficiently accommodating society.

P2: If their behavior should be legally excused or their culpability mitigated even in such a society, then there can be some inherently disabling features of autism.

C: Therefore, if the rights and interests of these individuals with autism are to be protected, then there can be some inherently disabling features of autism.

<sup>2</sup> While the movement initially began out of the autism rights movement, the neurodiversity movement is meant to concern other conditions besides autism as well (e.g., dyslexia).

After considering a couple of objections to our argument in [objections](#), we examine to what extent the “[mere-difference](#)” model of disability can restore the neurodiversity proponent's analogy to homosexuality in light of the dilemma raised by our argument. In [conclusion](#), we conclude by highlighting the extent to which the neurodiversity movement's re-conceptualizing aim remains largely unaffected by our argument.

### **Autism, the Neurodiversity Movement, and the Social Model of Disability**

The focus of this paper is autism and whether there might be any non-question-begging reason to view it as inherently disabling, at least for some individuals. Autism is characterized by the presence of difficulties with social communication/reasoning as well as repetitive and stereotyped behaviors arising early in development [1]. Yet within this diagnostic category, there is wide variation in the level of functioning, ranging from the inability to handle any aspects of self-care to individuals with complete functional independence and, in some cases, superior intellect as documented by intelligence testing. However, the impairments in social communication/reasoning and repetitive behavior can remain a challenge at *all* levels. That these challenges can be present across the spectrum is a crucial feature of our argument.

Another crucial feature of our argument draws on the political advocacy that partly defines the neurodiversity movement. As a descendant of the autism rights movement from the 1990s, the neurodiversity movement is usually traced back to Jim Sinclair's autism self-advocacy speech “Don't Mourn For Us”, presented at an autism conference in Toronto in 1993 [14]. Judy Singer coined the term ‘neurodiversity’ in 1998 in her sociology research on the rise of online communities formed by some individuals with autism [37].<sup>3</sup> Singer envisioned neurodiversity as capturing a new political *identity*.<sup>4</sup> Partly

<sup>3</sup> The term was then popularized that same year in an article in *The Atlantic* [11]. And while the self-advocate Nick Walker claims that the political aspects should be kept distinct from the notion of neurodiversity itself (Walker, ‘Neurodiversity’), most scholars use ‘neurodiversity’ in this more normatively-loaded sense. For instance, Baker construes ‘neurodiversity’ as an “inherently public” concept, drawing on the political connotation of ‘diversity’ [5].

<sup>4</sup> As Singer writes, ‘I was dreaming of a grand new social movement for neurological marginalized groups along the lines of the feminist, gay liberation or disability movements.’

thanks to Singer’s work, one of the primary aims of the neurodiversity movement is to advocate for the rights and interests of neurologically atypical individuals as members of an oft-oppressed minority group. The goal is to restructure society in ways that will help these individuals live meaningful, flourishing lives as equally valuable members of society [14, 36].<sup>5</sup>

In addition to this political aim though is the movement’s more conceptual goal of *de-pathologizing* autism, to which we will now turn [17, 22]. Instead of viewing a condition like autism as defective, neurodiversity means seeing autism as merely an expression of natural variation akin to other human diversity markers (e.g. race, gender, or sexuality). Thus, neurodiversity has been championed as a challenge to any presuppositions of a normal brain by which other brains are to be measured and classified [4].

While it may seem open to proponents of the neurodiversity movement to advocate for the above political goals while accepting that autism can sometimes be inherently disabling, most neurodiversity advocates deny this. Nick Walker, a prominent autism self-advocate and speaker on neurodiversity and the neurodiversity movement, emphasizes how genuine proponents of the movement must embrace both aims, not just the political advocacy aim:

[T]here [are] some who advocate for the rights of Autistics [but] who cannot rightly be considered part of the Neurodiversity Movement because they still consider autism to be a medical pathology or “disorder,” a view at odds with the neurodiversity paradigm [45].

Proponents like Walker argue that classifying autism as a disorder ignores the inherently *social* origins of autism’s disabling aspects [7].<sup>6</sup> While some medical conditions are indeed inherently disabling (e.g. dementia),

proponents argue that any and all disabling aspects of autism can be traced to social barriers, neurotypical prejudice, and inadequate social accommodations [7].

This position draws on a conception of disability called the *social model of disability*, a competitor to what is called the medical/pathology model (an alternative to both the social model and the medical model—called the “*mere-difference*” model—will be discussed later in the paper).<sup>7</sup> While the medical/pathology model holds that the disabling features of impairments are inherent to those conditions, the social model (or the simplest version of it, anyway) holds that any and all disabling features stem not from the condition, but entirely from ableist prejudice and/or gaps in accessibility within our current social structures. Once these gaps are filled in and prejudice is washed away, this model holds that the disabling features of the condition will disappear as well.

To give a clear illustration of the social model, consider an individual with a straightforward, mobility impairment: the inability to use stairs [7]. If we place this individual in a world where stairs are the only means of traversing different floors or levels, the impairment may appear to be inherently disabling. But once this individual is placed in a world where there are stair-*alternatives*, the disabling aspects of the impairment will have effectively disappeared. The social model generalizes this point: the presence or absence of a disability depends entirely on whether the environment is sufficiently accommodating or not.

While many within the philosophy of disability literature have recently begun to weaken their commitment to strong forms of the social model [47], prominent proponents of the neurodiversity movement maintain this model to explain all disabling aspects of autism.<sup>8</sup>

<sup>5</sup> In the case of autism, proponents have criticized the myopic focus on finding treatments or genetic markers for autism, instead arguing that more research and funding should go to helping address the daily and life-long challenges faced by individuals with autism. Proponents also argue that more should be done to address the needs of adults with autism, like helping them find and sustain meaningful employment.

We endorse this political aim of the neurodiversity movement wholeheartedly. In particular, we think much more should be done to address the barriers individuals with autism face to finding meaningful work. For instance, Romoser explains that one of the biggest barriers is the traditional interview process, given its primary focus on the kinds of social skills that many individuals with autism lack [32].

<sup>6</sup> See also the Autism Self-Advocacy Network (ASAN) position statement.

<sup>7</sup> The explanation of the social construction of disability view, along with the example mentioned below, is from [7]. For a detailed discussion of the social model of disability and its history, see [47].

<sup>8</sup> Here is an excerpt from a position statement from the leading autism self-advocacy organization, the Autism Self-Advocacy Network (ASAN):

In accordance with the social model of disability, we recognize that disability need not be a tragedy or a misfortune and that barriers to full participation in society often arise not from physical or mental differences, but from cultural attitudes that stigmatize certain types of people as less worthy of inclusion than others. Thus, a person becomes disabled not as an inevitable result of his or her condition, but rather because society has not accommodated his or her needs sufficiently to enable equal participation in the community.

<http://autisticadvocacy.org/about-asan/position-statements/> Accessed 19 July 2017.

So (as the argument goes) if a sufficiently accommodating society would be enough to remove the harms associated with being autistic, then there is no other basis for treating autism as a disorder besides *mere prejudice* for neurotypical ways of living a human life. And here they draw on an analogy to homosexuality: just as we removed homosexuality from the DSM because we eventually realized that homosexuality is simply another way to live a flourishing, human life, so too should we remove autism from the DSM because autism is also not a disease, illness or disorder.<sup>9</sup>

This would present a strong case for de-pathologizing autism only if (a) the disabling features of autism are entirely social in origin and (b) the comparison to homosexuality is apt. But there seems to be at least one context where—by the lights of the neurodiversity movement itself—autism is better understood as a condition that can be inherently disabling: criminal law. *Unlike homosexuality* (and virtually any other diversity-marker), an autism diagnosis can play a legally exculpatory or mitigating role that is sometimes arguably necessary to protect the rights and interests of individuals with autism. That autism may need to play this role—even in a sufficiently-accommodating society—arguably raises a dilemma for the neurodiversity movement: protecting the rights and interests of individuals with autism may sometimes require viewing autism as a condition that can be inherently disabling (at least for those individuals).

### Autism and Criminal Behavior: Three Cases

The occasional criminal behavior among individuals with autism can vary as much as the spectrum itself, from the illegal use of a New York City subway train to homicide [19].<sup>10</sup> And while individuals with autism do

<sup>9</sup> Donovan and Zucker briefly discuss the use of this analogy to sexuality and other diversity-markers [14]. Aside from prominent neurodiversity advocates like Ari Ne’eman and Nick Walker, a similar line of reasoning seems to be pressed by J. L. Anderson, though more in terms of viewing autism as an *essential* property of an autistic individual [3]. We do not address this notion in this paper.

<sup>10</sup> It is worth pointing out that we do not think the neurodiversity movement is committed to allowing individuals with autism to “get away with murder.” But even in such cases, an autism diagnosis has sometimes played a mitigating role in sentencing (e.g. a life sentence as opposed to the death penalty) [34].

*not* appear to be more likely to commit criminal offenses than non-autistic individuals, there is evidence that at least some criminal offenses perpetrated by individuals with autism are primarily the result of autistic impairments [13]. The offensive behavior in much of these cases arguably results from just two disabling features of autism: deficits in social reasoning (understood by many to reflect impairments in Theory of Mind) and obsessive, narrowly-focused interests [19].<sup>11</sup> Theory of Mind impairments can involve difficulties in grasping the subjective experiences of others [7]. This inability to get at the thoughts and feelings of others often results in misunderstanding people’s intentions and concerns, roughly described as lacking social awareness or social reasoning. As a result, individuals with autism may behave in inappropriate ways without realizing it (e.g., harassment, stalking, or putting others at unnecessary risk). To be sure, they are more often the *subject* of inappropriate behavior for the same reasons (e.g. easily manipulated into behaving in undignified or offensive ways).<sup>12</sup> Finally, a particularly intense, narrow interest can become overly consuming for some individuals with autism, leading them to forsake self-care and the care of others to satisfy this interest. While this may typically manifest itself as quirky (e.g. “He loves anything to do with trains.”) or sometimes mildly, or even especially, annoying (e.g. “He always finds a way to steer the conversation to trains.”), an obsessive pursuit of such narrow interests can sometimes lead to illegal behavior.

For the sake of this paper, we will focus on three legal cases— which we will call *Harassment*, *Stalking*, and *Arson*, respectively:

*Harassment:* TN becomes convinced that a woman has ‘fallen in love with him’ after meeting her once at an employment agency during a job interview. TN recalls, ‘our eyes met.’ The woman asks him to leave her alone, but he continues to call her and visit the employment agency to see her. He is

<sup>11</sup> Other frameworks besides ToM have been offered to explain the deficits unique to autism, like Weak Executive Function and Weak Central Coherence. Bambaum gives a review of each of these frameworks [7].

<sup>12</sup> For example, there’s an incident discussed in the literature where a 27-year-old “high-functioning” autistic male was persuaded to have sex with a doll in front of others because he thought it would arouse the women watching and thus make it more likely that they would have sex with him [29]

eventually arrested for harassing this woman, but he is then sent to an institution where he is diagnosed with *ADD* (Attention-Deficit-Disorder) and *AS* (Asperger's Syndrome: a condition that has since been subsumed under Autism Spectrum Disorder, or *ASD*). The institutional psychiatrists successfully argue that TN should not be prosecuted because his harassing behavior was primarily the result of his *illness* [24].

*Stalking*: When KD is introduced to a therapist, he becomes obsessed with this person. KD would make excessive phone calls and write letters requesting help, ultimately culminating in KD threatening the therapist. KD seemed incapable of handling “the limits or the loss of professionals” in his care. Because of this behavior, KD was charged and convicted of stalking, though he did not receive imprisonment [6].<sup>13</sup>

*Arson*: KA is preoccupied with a single radio station which he listens to everyday. But when his family moves to a new place, his favorite radio station doesn't come in as clearly. KA creates a way to better focus the radio station's signal from his new place, allowing him once again to listen to this station. A year later, a religious radio station in the area begins broadcasting on a frequency close to his station's, causing interference with its signal between 7pm and 10pm each day. KA writes multiple letters to this religious station requesting that they stop interfering with the broadcast of his favorite station, only to receive “blessings and Christian tracks in response.” Faced with their refusal to stop broadcasting, KA walks to the station with gasoline and ultimately burns their radio transmitter to the ground. KA was charged and convicted of arson, but he was not sentenced to imprisonment [6].

It is worth highlighting a few details of these cases before presenting our argument.

First, it is important to note that all of these individuals were functionally independent (although KA lived with his mother, both TN and KD lived alone) and all met criteria at the time for *AS* [24]. While these cases occurred prior to

<sup>13</sup> While there are some more details provided concerning these individuals, the details concerning the offending behavior appears to be limited.

the DSM-V's collapsing of *AS* into *ASD*, each would have likely been diagnosed today as having “level 1” *ASD* (formerly called “high-functioning”) [19].<sup>14</sup>

Second, all were deemed fit to stand trial [6, 24].<sup>15</sup> Some cases involving “low-functioning” individuals with autism are simply dropped because the judge deems the individual not competent to stand trial.<sup>16</sup> Without the mitigating factor provided by their autism, both KD and KA would likely have been imprisoned, and TN would have been tried, found guilty, and likely sent to prison.

Third, none of these individuals had any criminal behavior that was *unrelated* to their autism, with only KD having any past criminal charges [6, 24].

Finally, all three individuals seemed incapable of recognizing that their behavior was in any way wrong or inappropriate. Regarding *Harassment*, while the psychiatrists believed TN likely understood that harassment is wrong, they nevertheless argued that his severe impairment in social reasoning prevented him from comprehending how his behavior *counted* as harassment. In fact, TN was said to have interpreted “all of the woman's attempts to reject him as expressions of love and that he viewed this as a genuine and complete relationship” [24].<sup>17</sup> Regarding *Arson*, KA was so confident that his behavior was appropriate that he “proudly informed his mother the next morning that he was responsible for the destroyed radio transmitter” and that he “had no regrets for his actions and was puzzled what all the fuss was about” [6].

As it turns out, this confidence that one's illegal behavior is entirely appropriate appears to be a rather common factor in many cases involving defendants with autism:

In the five cases described [including *Stalking* and *Arson*] all the individuals believed to a greater or

<sup>14</sup> The present classification system divides individuals across the spectrum into three different levels, with level 1 indicating the least severe form of *ASD*.

<sup>15</sup> The psychiatrists involved in TN's case believed that he *was* likely competent to stand trial and follow the proceedings, even though the case was ultimately dropped [24]. Concerning KD and KA, there was some concern that their fitness to stand trial could have been tied to both the lack of complexity and the minor severity of their cases [6].

<sup>16</sup> For instance, a relatively recent case in Florida involving a man with autism and charges of internet child pornography was dropped after the judge deemed the 25-year-old man not competent to stand trial [48].

<sup>17</sup> A reviewer of a previous draft has suggested that this feature of TN's case seems more likely due to some form of delusion than TN's deficits in social reasoning. Information available from documentation of this case does not make clear how explicit the communication was made regarding the rejection, or whether the woman was trying to be polite about it in a manner he did not understand.

lesser extent that their actions were appropriate and justified responses to the situation. All were surprised by the reactions their actions evoked in others and had difficulty understanding why they were now facing criminal charges [6].

When people with AS are charged with offenses they are quick to confess since they do not feel any guilt *and are convinced that their actions were suitable to the situation*. In addition they are very honest and true people and they are not aware of the social and legal implications of their confession [24].

(We will return to this possibly unique feature of autism later in “*Mere-Difference*” Model when we examine whether the “mere-difference” model of disability can resurrect the homosexuality analogy in spite of our argument).

With the above details in mind, we suggest that even in an *ideally structured* society—where all stigma and prejudice has been removed and where all necessary accommodations are present—cases like *Harassment*, *Stalking*, or *Arson* could still arise. Even in such an autism-friendly society, someone like TN, KD or KA could still behave inappropriately and yet be confident that they are faultless (at least, at the time of their offense). But if that is right, it then seems that only an appeal to their autism diagnosis could help mitigate their responsibility or sentencing. And if *that* is right, then excusing their behavior must involve (by stipulation) citing *inherently* disabling features of autism—not merely ones due to social barriers, prejudice, or insufficient accommodations (for the purposes of this paper, the notion of an inherently disabling feature of autism signifies a feature that (a) partly defines autism as a condition, and (b) functions as the primary cause of the disadvantage in question).

Our argument is thus a hypothetical syllogism with only two premises, the conclusion of which is a dilemma for the neurodiversity movement:

P1: If the rights and interests of these individuals with autism are to be protected (TN, KD, KA), then either their behavior should be legally excused or their culpability mitigated *even in* a sufficiently accommodating society.

P2: If their behavior should be legally excused or their culpability mitigated even in such a society,

then there can be some inherently disabling features of autism.

C: Therefore, if the rights and interests of these individuals are to be protected, then there can be some inherently disabling features of autism.

While our argument references these three cases in particular, this is primarily for the sake of clarity. This argument should generalize to any case that is sufficiently similar in the relevant respects, where the individual’s illegal behavior is arguably the consequence of their autism and not the by-product of neurotypical prejudice, stigma or absence of necessary social accommodations.

In defense of P1: If we accept the psychiatrists’ assessment that these individuals could not appreciate how their behavior was inappropriate given their condition (at least, not at the time of the offense), it seems protecting their rights requires excuse or mitigation of legal responsibility. The issue is not simply that they lacked criminal intent; an individual could still be justifiably held accountable for their illegal behavior despite lacking such intent.<sup>18</sup> Rather, it is that their condition interfered with their ability to grasp the very nature of their own behavior.<sup>19</sup> This also explains why there likely could *not* be any feasible social accommodation that would make such an excuse or mitigating role unnecessary in a more autism-friendly society. The clearest example of this may be in *Stalking*, where no society could (or even *should*) guarantee that a particular therapist remain working with KD simply at his insistence. While we could perhaps reduce the likelihood of this behavior by way of better training for both the individuals themselves and the people around them, we presumably couldn’t eliminate this behavior entirely without essentially *treating* or effectively *fixing* the relevant impairments. If their behavior was primarily due to their autism, and if they are to remain autistic in these hypothetical societies such that no accommodation is able to mitigate their autism fully, then there will presumably remain some risk (however diminished) of their

<sup>18</sup> Thanks to Kevin Timpe for raising this point, particularly as it concerns *Harassment*.

<sup>19</sup> Michael Smith argues that ascribing (moral) responsibility for bad behavior requires that we have evidence that the agent had the capacity to behave correctly but ‘failed to exercise’ that capacity [40]. Presumably the psychiatrists involved in these cases would argue that their condition gives us strong enough reason to doubt that they had the requisite capacity, at least in those situations at that time. This is not to say that these individuals couldn’t learn, in retrospect, that their behavior was inappropriate.

behavior flouting unquestionably reasonable laws. So, protecting the rights and interests of these individuals could still require such excuses or mitigation even in (or *especially* in) the most autism friendly of societies.

In defense of P2: If their behavior warrants an excuse or mitigation because their autism is disabling in this case, and if the source of this disabling feature cannot be found in any neurotypical or ableist prejudice, unnecessary social barrier, or lack of feasible accommodation, then the social model of disability falls short of giving a complete explanation of their disability. Instead, what is likely the best explanation is the one offered by the clinicians involved in each case: that their behavior was primarily the consequence of their condition. In *Stalking*, for instance, KD's behavior is described as the result of "a combination of an obsessive personality, poorly developed socialization, and the familiar difficulty in appreciating the consequences of his actions" [6]. So, insofar as their behavior is better explained as primarily a consequence of their autism, then their excuse or mitigation in culpability is more likely grounded in our being sensitive to how autism can sometimes—at least for some individuals—be inherently disabling.<sup>20</sup>

Cases like *Harassment*, *Stalking* and *Arson* seem to pull the movement in opposing directions. Removing autism from the DSM risks ignoring how autism's impairments were disabling for these individuals, likely leaving them to be held fully accountable for their behavior. But given the facts of the case, it seems only excusing or mitigating their responsibility would protect their rights and interests. Yet such mitigation of responsibility seems to require accepting that there can be some disabling features of autism that are not mere artifacts of an ableist, neurotypically-prejudiced society. At least for some individuals, the disabling features are likely inherent to the condition itself. Thus, proponents of the neurodiversity movement seem to be faced with a

<sup>20</sup> Heather Strickland argues that some individuals with autism may benefit from an "autism defense", which she says could look something like the following:

"Autism defense" – A person shall not be responsible for their criminal conduct where such person suffers from a neurological disorder which is so disabling that the person does not intend, nor comprehends, the results of their actions, and has no control over his or her actions, which are simply a manifestation of the characteristics of the disorder [42].

Strickland suspects that individuals with AS "might not be appropriate candidates for an autism defense" because they are "likely to have a better developed sense of the consequences of their actions" [42]. But the three cases described above seem to embody many of the features cited in Strickland's autism defense proposal (notwithstanding the "control over his or her actions" condition, of course).

dilemma: either de-pathologize autism at the expense of inadequately protecting the rights and interests of some individuals with autism, or protect these individuals at the cost of accepting that autism can sometimes, at least for some individuals, be inherently disabling.

## Objections

*Objection to P1* If autism must play an exculpatory role to protect these individuals' rights, then that just shows that the relevant accommodations are still wanting. A *sufficiently* accommodating society would be one where an autism diagnosis would not prevent an individual from being held fully accountable for their behavior.<sup>21</sup>

*Reply* It should first be noted that this objection, if put forward as simply *analytic*, seems question-begging. Whether autism would still need to play an exculpatory role even in a sufficiently accommodating society cannot be settled by the meanings of our concepts alone. What matters is whether social structures can be feasibly altered in ways that would make this exculpatory role unnecessary.

With that said, it is worth highlighting what this objection gets right. There are clear cases where autism should play an exculpatory or mitigating role only because society is *not* yet autism-friendly. Let's look at one case that seems to exhibit the kinds of concerns the objector may have in mind:

*Accomplice*: a young autistic woman (age unknown) lends her car to a stranger who says he needs it to get groceries for his family. Instead, he uses it to commit some serious crimes and the young woman is arrested as an accomplice. During her trial, she shows little concern for the proceedings, and when asked if she knew what the man was going to do with her car, she answers "yes." The judge interprets her lack of affect as insulting and cites her affirmative answer to the question of whether she knew of the man's intentions as evidence of her guilt. She is found guilty and sentenced to prison [15].

<sup>21</sup> The objections we consider here have been drawn from discussions with many people, specifically Jami Anderson, Neil Levy, Deborah Barnbaum, Kevin Timpe, Elizabeth Barnes, and the attendees at the presentation of this paper at the Society for Philosophy and Psychology 2017 conference meeting in Baltimore, Maryland.

*Accomplice* is discussed by the organization Autism Speaks as an illustration of how autism is “always relevant” in cases where an autistic individual has run afoul of the law. For instance, they cite *mindblindness* as a more plausible explanation of the young woman’s lack of setting-appropriate facial expressions and overall demeanor during the court proceedings (having little facial expressions—or a constant smirk—is not uncommon among individuals with autism, as well as having a monotone speaking voice). If correct, this would mean that the judge was wrong to interpret this lack of affect as an expression of apathy. Further, they suggest two alternative interpretations for her answering ‘yes’ to whether she was aware of the man’s criminal intent. One possibility is that the woman could not help but interpret the question *literally*, such that she took the question to be asking if she knew what the man *had said* he would do with her car. Of the individuals with autism who have some mastery of language, it is common for some to have difficulties grasping linguistic expressions in non-literal ways [15]. Another possibility they suggest is that the woman was incapable of understanding that there was once a time when she did not know what she *now* knows. Though much less common than the impairment in interpreting non-literal expressions, failing to distinguish past knowledge from one’s present knowledge can also be a challenge for some individuals with ASD [15].

Assuming these more autistic-sensitive interpretations of the woman’s behavior in *Accomplice* are correct, we think her imprisonment is unjust. Her autism likely should have been cited both as an explanation for why she lent the car to the stranger in the first place and as an explanation of her behavior and testimony during her trial. But does this show that her autism would have needed to be cited even in a sufficiently accommodating society? Not necessarily. If the woman’s innocence could have been demonstrated simply by having greater awareness of autism-related behaviors, mannerisms, and ways of thinking and communicating, then the injustice here appears to be less due to the woman’s condition and more a matter of the court system lacking appropriate accommodations. The judge mistook the woman’s mannerisms as expressions of apathy, and the judge misunderstood why she would say she knew of the man’s intentions even if she did not actually know those intentions at the time. Without these errors of interpretation, the woman may well have been exonerated. But even if she was still found guilty—if, for example, there was

perhaps incriminating evidence unrelated to her autism—just having these autism-sensitive interpretations in place seems to fill the gap, making it unnecessary for autism to play an exculpatory or mitigating role in the legal process.

There are many other features of autism that seem, at least in principle, to raise no greater challenge to social accommodations than those featured in *Accomplice*. For instance, a judicial system could develop appropriate accommodations for impairments like hypo/hypersensitivity to sound, light, touch, smell or taste, or for meltdowns and the scenarios that trigger them.<sup>22</sup> But the question is whether any and all possible cases can be handled in this way. And it is to this question that we take a more pessimistic outlook.

While we have imagined how a society might have prevented *Accomplice* by simply being more understanding of autism, it is not clear how a simple increase in understanding and accommodations would be enough to prevent our three cases. The issue here is what best explains why the individual’s autism should play a mitigating role in each case. In *Accomplice*, autism functions more like a translation barrier, creating confusions among the court participants not essentially different than the various meanings different cultures ascribe to the “OK” hand gesture.<sup>23</sup> Such confusions can, at least in principle, be addressed by way of accurate translation. But in *Harassment, Stalking and Arson*, autism functions more like a classic excuse: the condition itself provides a reason to doubt that these individuals should be held fully responsible for their behavior. Notice that our doubt does not arise out of a desire to avoid misinterpretation, as it would in *Accomplice*. One could easily imagine a variation of *Accomplice* where we get good evidence that the woman did indeed have criminal intent and was in fact sufficiently aware of how her actions would aid in criminal activity. In such a case, her guilty verdict need not have turned on misinterpreting her behavior and testimony during her trial. In this variation, it would be consistent with protecting the rights and interests of this woman to find

<sup>22</sup> In his The New York Times Op-ed, Steve Silberman makes the case that law enforcement officials need to become more aware of exactly these kinds of features of autism in order to avoid misinterpreting the behavior of individuals with autism [35].

<sup>23</sup> Again, this seems to be the issue raised by Silberman concerning law enforcement and confusion about how to interpret the behavior of individuals with autism [35]. For various interpretations of gestures cross-culturally, see [43].



her guilty. But it is not so clear that an analogous variation can be imagined for our original three cases. It is not because we do not have enough evidence in their cases, or that the evidence we do have is based on misinterpretations of their speech or mannerisms. If excuse or mitigation of culpability is warranted in these cases, it is because their autism played a *causal* role in their behavior. And if this is right, then there is not a scenario where finding them guilty or sentencing them to prison would still be consistent with protecting their rights and interests as individuals with autism. But if there is no scenario where they can be held fully criminally responsible for their behavior *when we hold fixed their impairments*, then they cannot be held fully criminally responsible even in a sufficiently accommodating society. Thus, while there are perhaps many cases where autism's exculpatory or mitigating role can be eliminated given a more autism-friendly society, it is not obvious—and surely not *analytic*—that such a role can be *completely* eliminated.

It is worth noting in this context how autism can often function as an *invisible* disability, particularly for individuals with autism who are functionally independent and have a mastery of written and spoken language. Invisible disabilities bring with them challenges somewhat inverted from those faced by more visibly-disabled individuals, as Wasserman et al. explain:

Whereas visibly disabled people must deal with being instantly classified as “different” and inferior, people with invisible disabilities are often placed in the stressful and exhausting position of having to convince others that they are “really” disabled and not asking for special treatment. The alternative is to keep quiet and forgo needed assistance, which carries other costs, such as the stress of keeping a secret or trying to decide if a particular disclosure is safe [47].

In these cases, their other capacities, particularly their mastery of speech communication and their functional independence, threaten to mask their impairments or cause others to misconstrue their behavior as emblematic of a character flaw. As Haskins and Silva attest,

In our experience, this group is the easiest to fail to recognize. It is possible that their social oddness and poor social comprehension are not recognized as evidence of a psychiatric disorder [19].

Concerning *Harassment*, even TN himself did not realize that he was operating under such a deficit [24].

That autism can sometimes function as an invisible disability may also be part of the reason why Autism Speaks advises law enforcement to assume that autism is *always* relevant when interacting with individuals with autism [15]. The effect is perhaps an inverted (though justified) form of profiling: law enforcement should first assume that the questionable behavior of this individual (e.g. avoiding eye-contact; a seemingly suggestive smirk) is more likely the result of autism and not the person's intentions or overall character.

Finally, it is worth noting in this context that the issue is not that the necessary accommodation might be too costly [46]. While one might argue that implementing certain accommodations would place too great a burden on the rest of society, our concern here is not of this kind. Rather, it is the impossibility of *any* accommodation that could either (a) completely remove the factors that lead to illegal behavior of this kind, or (b) adequately protect these individual's rights and interests while nevertheless holding them fully responsible for their behavior. Part of the problem is that any successful effort to accommodate mental impairments of this kind must ultimately influence the *mental* life of these individuals: their thoughts, feelings, intentions, desires, and overall perspective of themselves and the social world around them. But any accommodation that had this effect risks basically *treating* their condition—so it would not strictly speaking be an *accommodation* after all.

*Objection to P2* Why not see the exculpatory function as the social accommodation? On this reading, excusing these individuals would not reveal any inherently disabling features of autism any more than using ramps reveals any inherently disabling features of being wheelchair-bound.

*Reply* The difference between using a ramp versus having one's behavior legally excused or mitigated is more than just a difference of medium. Ramps allow wheelchair-bound individuals a form of maneuvering multi-level surfaces that is *functionally equivalent* to stairs. In this way, activities that were inaccessible prior to the placement of ramps now become accessible to these individuals. But excusing or mitigating one's behavior does not make certain activities accessible to the autistic individual. It does not remove a barrier to their freedom, nor does it provide a functionally equivalent tool that

opens up more opportunities for autonomous choice. To be sure, a judicial system that takes into account an individual's autism diagnosis is in some sense being accommodating. But the point is simply that this accommodation does not remove the disabling aspect of the impairment in question. In each case, the individual's autism prevented them from grasping the true nature or consequences of their behavior, leading them to harass someone, or stalk someone, or destroy private property. Excusing their behavior does not remove this consequence of their impairments, nor does it provide them with functionally equivalent work-arounds.

Now a more typical exchange between defenders of the medical approach to autism and proponents of the social model might go like this. The medical model defender will point to some behavior or incapacity as exemplifying an intrinsically disabling feature of the condition. Then the social model proponent will highlight the *norm* grounding the expectation that humans behave in that way, or the expectation that humans have that capacity, and they will then argue that this norm is merely rooted in neurotypical or ableist prejudice.<sup>24</sup> Finally, that the norm is prejudicial in this way is said to be sufficient reason to cast doubt on the original suggestion that the behavior or incapacity in question exemplifies anything *intrinsically* disabling about the condition at all.

We suggest that one of the unique things about the three cases above is that the norms grounding expectations concerning anti-harassment, anti-stalking, or protection of private property are *not* likely rooted in neurotypical or ableist prejudice.<sup>25</sup> We likely have independent reason to maintain these expectations (though we will not argue for this here). But even if these expectations were rooted in neurotypical bias of some kind, it should at least be admitted that not *every* law of the kind that individuals might inadvertently flout as a result of their autism is merely rooted in such bias. If this is right, then our original seeming about the intrinsic

nature of these disabling features is likely free of such bias.<sup>26</sup>

But even supposing that autism must sometimes play this exculpatory or mitigating role, one might wonder whether it must do so *qua* disorder. Isn't it just the associated impairments that justify this role, not the fact (if it is a fact) that those impairments stem from a *disordered* condition? We concede that our argument doesn't entail that autism *must be* viewed as a disordered condition. And as we will see in the next section, there are still open empirical questions about autism and whether certain impairments should be considered part of autism proper or part of conditions distinct from autism. But it's worth emphasizing that the original tension for neurodiversity concerns whether protecting the rights and interests of all individuals with autism requires viewing autism as inherently disabling for some individuals (as opposed to disabling due *merely* to prejudice or lack of accommodations). If some of the impairments that partly define autism as a condition are also the ones that make the condition inherently disabling for some individuals, removing the disorder label arguably won't relieve this tension. But perhaps what's needed is just a different conception of disability, to which we now turn.<sup>27</sup>

### The “Mere-Difference” Model

In her article “Valuing Disability, Causing Disability,” Elizabeth Barnes sketches an account of disability she calls the “mere-difference” model. This account agrees with social models of disability concerning the ways in which the surrounding environment (physical and cultural) in effect create many of the disadvantages of disabilities. However, unlike extreme forms of the social model, the mere-difference model grants that some conditions can be inherently disabling in some contexts and possibly pathological in nature [8]. What this model maintains, however, is that many disabilities make no meaningful difference—*on balance*—to one's living a flourishing life [8]. After eradicating prejudice, creating appropriate accommodations, and *averaging* contexts

<sup>24</sup> Elizabeth Barnes suggests that ableist conceptions may have so permeated our understanding of disability that even our *intuitions* about such matters are bound to have been shaped by such prejudice [8]. As a result (Barnes argues) philosophical reflection in this domain risks being question-begging from the outset [8]. For a criticism of Barnes' argument, see [23].

<sup>25</sup> One might be tempted to say that TN did not actually harass the woman because he did not have harassing intentions. But the standard approach to harassment is that the intent to harass is not necessary for behavior to count as harassment, nor is the lack of intent sufficient to excuse such harassment. Thanks to Kevin Timpe for raising this issue.

<sup>26</sup> Thanks to Deborah Barnbaum for pressing us to clarify this point.

<sup>27</sup> Thanks to an anonymous reviewer for pressing us on whether it's necessary that autism be considered a disorder in order for autistic impairments to play a role in assigning legal accountability. We don't think that this is strictly necessary, but we also don't think that this removes the dilemma for neurodiversity.

where the condition is a benefit to the bearer with those contexts where the condition is admittedly a burden, the mere-difference model maintains that many disabilities ought to be viewed as just one among many alternative ways to live a flourishing, human life. While there remains controversy over both the viability and the scope of the mere-difference model, in this section we will evaluate this model's applicability to autism and the dilemma we raise for the neurodiversity movement.

It is worth noting first that, regarding the neurodiversity movement, one major drawback of the mere-difference model is its allowing conditions to be both *inherently* disabling (in at least some contexts) and possibly *pathological* in nature. Insofar as the de-pathologizing aim must be maintained to be a genuine neurodiversity proponent—as self-advocates like Nick Walker claim—the mere-difference model would be a non-starter. However, it is partly this feature of the mere-difference model that could help restore autism's place as merely a diversity-marking condition in spite of our argument. In other words, if the mere-difference model could be successfully applied to all individuals with autism, then there needn't be any tension between allowing certain traits associated with autism to play legally mitigating or exculpatory roles while nevertheless treating autism (disorder or not) as simply a different way of living a flourishing, human life.

So the question then seems to be this: to what degree does autism's playing a legally mitigating or exculpatory role undermine autism's mere-difference status? One of the things that initially intrigued us about autism playing this exculpatory role is precisely that traditional diversity markers do *not* (or *should not*) play such a role (at least in an idealized society). Everyone is (or *should be*) equal in the eyes of the law, regardless of race, gender or sexuality. So if labeling the feature 'mere-difference' is meant to capture the full-throated endorsement of autism as merely another diversity marker among the rest, it is at least *prima facie* difficult to see how this can be sustained while also retaining this mitigating or exculpatory role. That there does not appear to be any non-controversial example of a diversity-marking condition that nevertheless justifiably grounds legal exculpation or culpability mitigation provides some support for this contention.

But does this set the bar too high? After all, as proponents of the mere-difference model of disability point out, there do appear to be relatively non-controversial examples of diversity-marking conditions that are inherently disabling in at least some *reasonably important* contexts. For example, homosexual partners are naturally prevented

from having biological children together in ways that heterosexual partners are not; yet this fact does not seem to diminish homosexuality's claim to being a mere-difference.<sup>28</sup> So (the argument goes) if diversity-marking conditions can admit of disabling features in reasonably important contexts without detracting from their mere-difference status, then perhaps autism's exculpatory role also need not detract from its mere-difference status.

Perhaps this rejoinder would succeed if legal responsibility were just another important context among the rest. But we deny this. We are suggesting (though not here arguing) that any condition that essentially diminishes one's equality before the law marks a *bad* difference (to use Barnes' terminology), and thus not a *mere* difference, for *that particular individual*.<sup>29</sup> So, insofar as autism diminishes one's equality before the law, then this would indeed mark a bad difference for those individuals.

But is this really plausible? With enough imagination, couldn't we elevate virtually *any* condition to mere-difference status? We just need to build in enough benefits from society to be a counter-weight to the associated burdens. For instance, suppose we imagine a society that treats people suffering from dementia as *gods*. Wouldn't any burdens from dementia be clearly outweighed by the benefits gained? So even if such dementia-sufferers lacked *equality before the law*, dementia would still count as a mere-difference. And if that's right, then why think that *any* condition should fail to count as a mere-difference simply because that condition diminished one's equality before the law?<sup>30</sup>

There seem to be at least three worries for this approach to the mere-difference view.

<sup>28</sup> Thanks to an anonymous reviewer for pressing this point.

<sup>29</sup> We've used this caveat throughout the paper; it's important to note that we are *not* denying the possibility that autism can be a mere-difference for some individuals. ASD is a very broad spectrum, perhaps unique in its breadth when compared to other neurological conditions. But it's also perhaps this feature of autism that makes space for the dilemma we are defending here.

<sup>30</sup> Thanks to an anonymous reviewer of a previous draft for suggesting this example and pressing this defense of the mere-difference view. The reviewer's original worry was that the medical/social dichotomy is a false one since there's unlikely to be any condition that is disabling across all counterfactual contexts. It's worth emphasizing that the mere-difference view doesn't require that the disabling features of a condition be entirely due to social factors—Barnes admits that some conditions may well be inherently disabling in some contexts, no matter how condition-friendly the society may be. The mere-difference claim is simply that the overall impact of a condition's disabling features on life's value *washes out* once society is sufficiently condition-friendly and the benefits/burdens of the condition are weighed together.

First, there are clearly feasibility issues with ever implementing such a society, perhaps aptly captured in the proverb “if wishes were horses then beggars would ride.”<sup>31</sup> To be sure, this worry may not be enough to undermine the conceptual challenge (compare the feasibility of ever successfully ridding a society of all racial or sexual prejudice). Even so, it may at least be enough to give some meaningful sense to an impairment being inherently disabling relative to such feasibility constraints.

Second, there are likely what can be called *moral* constraints on implementing such a society, such that other peoples’ rights or interests would likely need to be violated in order to ensure the greater benefit-to-burden ratio for those with dementia. For the mere-difference account to be plausible at all, the condition-friendly societies it envisions must be within the bounds of morality. This morality constraint alone is enough to rule out one way to make autism a mere-difference for our three individuals: it would be out of bounds to suggest a society that simply legalizes or condones the behaviors in *Harassment*, *Stalking* and *Arson*.

Third, the reasoning here seems to rely on the following assumption: that *any* bad experience can in principle be compensated for by simply adding more good experiences. But this doesn’t seem obviously true. Consider how the death of one’s child harms the parents. Even if we imagine a society where we treat these parents as gods, this wouldn’t *obviously* balance things out.<sup>32</sup>

Concerning neurological conditions, we suspect (though again, we don’t have space here to argue for it) that any claim to mere-difference status could be plausible only if the condition in question doesn’t necessarily involve significant interference with one’s *agency*. By ‘agency’ in this context, we mean only to gesture to something in the vicinity of what philosophers like Sartre and P. F. Strawson discuss. For Sartre, it is our being ‘condemned to be free’ because we are responsible for everything we do [33]. This dimension of being human has sometimes been expressed as our *right to be blamed*.<sup>33</sup> And for Strawson, it is perhaps a suite of capacities that mark us as an appropriate subject

of reactive moral attitudes [41].<sup>34</sup> No matter how many other benefits one added, any condition that denied its bearer one’s right to be blamed seems to leave an uncompensated remainder. Insofar as autism’s exculpatory/mitigating role must sometimes involve denying individuals with autism their equality before the law, or their right to be blamed more generally, then the mere-difference view won’t likely be able to relieve the tension our argument raises for neurodiversity.

But must autism’s exculpatory or mitigating role sometimes require this denial of equality before the law? To answer this new question, let us return to our three cases. Is each an instance of an individual being denied equality before the law due primarily to his autism? This may be inherently difficult to determine. Even assuming that their behavior ought to be excused, or their culpability mitigated, because it was primarily the result of their autism, it need not follow that this allowance must deny them equality before the law. To see this, consider a fictional case involving a Deaf<sup>35</sup> individual who mistakenly walks on a movie set, reasonably believes he is witnessing a real mugging taking place—though in reality they are just actors—and shoots and kills the “mugger” in spite of the film crew’s unsuccessful attempts to get his attention by yelling at him. Let us call this fictional case *Mugging*. While an excuse may be justified primarily due to the individual’s deafness, it seems clear that this individual remains equal before the law. The offensive behavior in *Mugging* was no more than an extremely tragic accident.<sup>36</sup>

But are our three cases like *Mugging*? In other words: was the offensive behavior in each case no more than a tragic accident of circumstance? The answer seems to turn on the nature of the individuals’ impairments, the role these impairments played in their behavior, and whether the offense-relevant impairments should be attributed to their autism, or to some other condition, or to their moral character. But these considerations all turn on presently open *empirical* questions regarding the nature of autism itself. Thus, we will not be able to

<sup>34</sup> Richman and Bidshahri argue that some individuals with autism likely are missing some of the capacities necessary for full moral responsibility on the Strawsonian reactive attitudes account; see [31], specifically p.48–9.

<sup>35</sup> Using the upper-case ‘D’ in ‘Deaf’ denotes that the individual identifies with being Deaf in a shared identity with a larger community of other Deaf individuals; the lower-case ‘d’ is used to simply denote an individual who happens to be deaf. See [27].

<sup>36</sup> Thanks to an anonymous reviewer of a previous draft for both suggesting this fictional scenario and for pressing us on this point.

<sup>31</sup> Thanks to Jake Wright for suggesting this response.

<sup>32</sup> This is an objection to hedonistic views of value generally; see [38].

<sup>33</sup> Sousa, R. (pre-publication draft). ‘Is Contempt Redeemable?’, <http://homes.chass.utoronto.ca/>. Accessed 1 September 2017. Thanks to Neil Levy for pointing us to this expression.

presently determine whether our cases are in fact sufficiently like *Mugging*, and thus whether excusing these particular individuals requires denying them equality before the law. However, we can at least show how certain answers to these empirical questions would affect the comparison.

On what is likely the best outcome for the mere-difference model, autism will turn out to be no more than a kind of social-awareness deficit coupled with unusually intense (but *not obsessive*) narrow interests. Let's call this outcome *autism-thin*: it retains the kind of "personality quirks" associated with level 1 (or "high-functioning") autism while removing the legally-compromising impairments (at least within an autism-friendly society). On this account, autism would not be that dissimilar—at least from a purely functional standpoint—to color blindness or deafness (narrow interests notwithstanding). The only essential impairment of autism would be the impaired ability to read social cues. If *that* is all that autism turns out to be, then some of our cases would seem like *Mugging* in that the offensive behaviors could essentially be tragedies of circumstance. In fact, it might even lead us to hold the individual fully accountable! For instance, concerning *Arson*, *autism-thin* seems to remove the primary reason for not sentencing KA to prison. Merely failing to read certain social cues and having narrowly-focused interests doesn't seem to provide enough reason to sidestep accountability for intentionally burning down a radio transmitter. So if *autism-thin* turns out to be the right account of autism proper, then it may be even more reasonable to fully blame these individuals for their behavior, prison sentences and all. At the very least, with this empirical question settled in favor of *autism-thin*, one could more plausibly relegate some of their offensive behavior to conditions distinct from autism *without begging the question at hand*.<sup>37</sup>

But the *autism-thin* account is not a foregone conclusion. At least at the time of this writing, the consensus is that autism involves much more problematic impairments and deficits than mere challenges with social reasoning (at least for individuals like those in our three cases).

First, if the social reasoning impairments are highly interrelated with a broader deficit in theory of mind (as Baron-Cohen argues), then we seem to get a clear break between deafness and autism.<sup>38</sup> For instance, Barnbaum

argues that this deficit likely prevents the formation of autistic communities that would be genuinely analogous to Deaf communities:

What, after all, would it mean to talk about the Autistic community? One of the challenges facing individuals who lack a theory of mind is the failure to enter into reciprocal relationships. A community is not merely a collection of individuals who happen to have interests in common; rather, they have *common interests*: they share their interests, engage with each other, care for, or at the very least would care for each other were they aware of their commonality' [7]

We find this to be too sweeping of a conclusion—some individuals with autism can enter into reciprocal relationships. And even if it did apply absolutely, it wouldn't necessarily show that the criminal behavior of these individuals can't always be explained in terms of a tragedy of circumstances. But it does caution us against simply reading certain intentions (or lack thereof) off of mere behavior, assuming that theory of mind deficits play an essential role in defining autism.

Second, *autism-thin* seems to discount the extent to which the narrow interests of these individuals can become obsessions. This impairment might help explain both TN's and KD's rather unnerving persistence, in *Harassment* and *Stalking* respectively, without impugning their character. This would also better explain KA's behavior in *Arson* when the religious group built a new radio transmitter that prevented KA from listening to his favorite radio station between 7 and 10 pm. It seems incomplete to describe KA's radio consumption here as merely reflecting a very strong *preference*. Further, this aspect of autism is frequently cited in the majority of cases involving criminal behavior of individuals with autism [13, 18, 19, 29, 49]. To be sure, the extant evidence here is tricky because of the prevalence of co-occurring conditions [21, 28]. But there are at least some reasonably clear cases where our best explanation of the criminal behavior cites the obsessive aspect of the individual's behavior (e.g., illegally commandeering a subway train) [19].

Finally, another impairment missing from the *autism-thin* account is a disposition for rigidity or concreteness in thought. This rigidity in thought can sometimes lead individuals with autism to heavily discount alternative

<sup>37</sup> These are essentially empirical questions, after all.

<sup>38</sup> For issues related to mindblindness, see [9].

perspectives [14].<sup>39</sup> Manifestations of this impairment can include insisting on going one particular route to the store or becoming very upset when it is perceived that a rule is not being applied with absolute consistency. Changes in the routine can also cause significant distress as a result of this rigidity, leading to meltdowns. This kind of one-sided, concrete thinking is represented across the autism spectrum, including those classified in level 1.<sup>40</sup> This impairment would help explain, for instance, this rather striking, though not uncommon, feature of *Arson*: KA had *no* regrets concerning his action, despite being informed of the damages caused to the victims. He was so sure that what he did was perfectly appropriate that he proudly informed his mother of his action. And in all three cases, the individuals did not seem to fully-appreciate the consequences of their actions. By contrast, in our imagined case of tragically killing an actor, presumably the Deaf individual would regret this behavior and may feel it necessary to provide compensation, if possible. And even in cases where individuals with autism come to grasp the inappropriateness of their behavior, comprehension here is typically more akin to learning a new social rule (and the consequences of infractions) than with internalizing this normative perspective.

The takeaway seems to be this: if autism can sometimes problematically affect an individual's agency in ways that prevent even the most autism-friendly society from treating such individuals as equal before the law, then the comparison of *Mugging* to our three cases wouldn't be apt, and thus this defense of the mere-difference approach to autism would fail. The Deaf individual in *Mugging* clearly retains this equality status precisely because the Deaf individual's *deafness* is *not* playing an essential role in the legal excuse—what's doing the work is the tragedy of circumstances itself. Presumably a similar legal excuse might be justified if the tragic killing was done by an individual who just happened to have loud music playing through their headphones at the time, holding every other detail of the case fixed. But if this more pessimistic account of autism turns out to be correct, excusing or mitigating legal responsibility in our three cases may require citing

<sup>39</sup> It's possible that this impairment is simply due to the interplay of social reasoning deficits and obsessive, narrowly-focused interests. Even so, it would still count as its own impairment, possibly interfering with legal responsibility in ways that are incompatible with the mere-difference account.

<sup>40</sup> For general issues with mental flexibility, see [20].

the individual's autism directly. Perhaps the clearest example of this would be cases where the defendant with autism emphatically denies that they've done anything wrong and has no regrets concerning their actions or the harm they've caused. The individual might even scoff at the legal process itself, perhaps dramatically expressed in the language of civil rights. Consider the following observation made from a psychologist assessing a case involving an individual with autism who was charged with marital assault:

The period of inpatient assessment has demonstrated the extent to which problems in [sic] executive function and understanding others' beliefs can disable someone who is otherwise intellectually very able. Thus his rigid belief in his illegal detention has resulted in long periods of time when Mr. [Smith]<sup>41</sup> has refused to interact with members of the multidisciplinary team. He has refused to read letters sent to him by his legal team, maintaining that he is already a free man and that these letters have no interest or value to him (despite patient explanation that they related to the ongoing appeal process) . . . maintaining instead that our only function was to 'appraise the trauma suffered by an innocent man in prison' . . . [18]<sup>42</sup>

When faced with such a defendant in even an autism-friendly society, we would still be left with an existentialist-like choice regarding how best to interpret the individual's defiance. Should we interpret their denial as reflecting a substantive disagreement with society's laws, norms and legal proceedings? Is this really a genuine act of civil disobedience? Or should we instead interpret their denial as primarily the result of their autism? If autism-*thin* turns out to be the right account, then perhaps the dilemma disappears. If such defiance couldn't plausibly be tied to anything essential to autism, and we hold everything else equal, then perhaps equality before the law can indeed be maintained. We needn't cite their autism

<sup>41</sup> While other sources use initials or pseudonyms for the identity of the individual, this source appears to use the individual's actual last name. We've chosen to simply create a pseudonym—"Smith"—to use instead.

<sup>42</sup> This is admittedly a strange case given that the offending behavior concerns this individual's treatment of his spouse, and there doesn't appear to be much detail concerning the offending behavior itself. Nevertheless, we think the observation provided by this clinician helps capture some ways rigidity in thought raises possibly unique challenges for protecting these individual's rights within a criminal justice context.

over and above their circumstances and their agency. But if autism turns out to be essentially constituted by an interaction between other impairments like rigidity in thought, obsessive interests, and deficits in theory of mind, then we should feel at least some skepticism about the source of the individual's resistance. In this case, to treat it at face value would arguably look antithetical to protecting this individual's rights and interests. If their resistance is primarily the result of their autism, then protecting their rights and interests likely requires legal systems to *discount* it to some degree, if not altogether. But presumably what justifies this is the court's sensitivity to something over and above the tragic combination of circumstances. It would be necessary for the court to look past this person's individuality in order to properly appreciate their defiance as itself a consequence of their condition. Otherwise such an essentially *paternalistic* action would not likely be justified. But it is precisely this kind of paternalism that brings such an individual's equality before the law into question.<sup>43</sup>

## Conclusion

We have argued that the neurodiversity movement faces a dilemma when individuals with autism are charged with criminal behavior: advocating for the rights and interests of these individuals may sometimes require viewing autism as a condition that can be inherently disabling, at least for some individuals. If our argument is sound, then the endorsement of one of the movement's aims complicates the endorsement of the other.

Faced with this dilemma, one could argue that the movement should soften its de-pathologizing stance in order to more completely fulfill its political aim. Moreover, even if autism (or some variant of it) should remain in the DSM, it's worth highlighting how much of the

<sup>43</sup> This also has implications for whether it's possible to tie any legal exceptions to the impairments themselves instead of to the condition as a whole. If the paternalism in this case makes sense only because of the court's sensitivity to the combinatorial effect of these impairments, such that it's not any single impairment that justifies the excuse or mitigation, then citing the impairments instead of the condition looks like a distinction without a difference. But whether this is so admittedly turns on whether these impairments do in fact define autism proper. And again, while we think our argument suggests some reason to retain autism's disorder status, it doesn't necessarily entail this conclusion. Thanks again to an anonymous reviewer of a previous draft of this paper for pressing us to clarify this point.

movement's re-conceptualizing aim remains unaffected by our argument.

First, consider the various contentions and debates concerning autism, neurodiversity, and disability in general that our argument likely sidesteps entirely:

Should autism be treated?<sup>44</sup>

Ought neurodiversity only to apply to level 1 or "high-functioning" individuals with autism?<sup>45</sup>

Should we continue to use functioning labels at all?<sup>46</sup>

Should we adopt X account of disorder/disease?<sup>47</sup>

Can individuals with autism engage in the intrinsically valuable activities that make up the good life?<sup>48</sup>

Should we conceive of mobility or otherwise *non-cognitive* disabilities as merely different ways of living a human life?<sup>49</sup>

Do individuals with autism have the same intrinsic worth as their neurotypical peers?<sup>50</sup>

Can at least some individuals with autism be full-fledged moral agents?<sup>51</sup>

Do autistic communities count as distinct cultures?<sup>52</sup>

<sup>44</sup> Anderson argues that certain kinds of treatments or "cures" are either conceptually impossible or deeply unethical [3].

<sup>45</sup> Jaarsma and Welin argue that the scope of neurodiversity should not be expanded to the "low-functioning" part of the spectrum [22].

<sup>46</sup> Ari Ne'eman claims that the high/low functioning distinction merely reflects neurotypical biases and ableist prejudice [14]. Presumably Neeman's concerns would carry over to the new, three-tier classification system of 1–3 levels.

<sup>47</sup> For a classic defense of a neutral-theoretical account of disease, see [12]. For an argument *against* the possibility that biological considerations could somehow provide a neutral-theoretical account of what is functionally normal, see [2]. For general discussion on this question, see [16, 30, 44].

<sup>48</sup> For a good overview of this debate, see [7].

<sup>49</sup> In personal communication, Barnes herself is hesitant to apply her "mere-difference principle" to autism. She thinks first-person testimony provides the most powerful reason to adopt the "mere-difference" principle to disabilities, and she worries about the difficulties inherent in obtaining such testimony from non-verbal/non-communicative individuals with autism. Still, she grants that the view could hold for individuals with autism.

<sup>50</sup> For a more general defense of the intrinsic worth of people with cognitive disabilities, see [26].

<sup>51</sup> For discussion, see [7, 25, 39].

<sup>52</sup> For some plausible necessary conditions for a group's way of life to count as a culture (given within the context of assessing Deaf communities), see [27]. For an argument that there likely couldn't be genuine autistic communities, see [7].

That our argument doesn't beg any of these questions is a dialectically attractive feature of our approach, precisely because it means that much of the re-conceptualizing aim of neurodiversity could still be sustained even if our argument is sound.

Second, the movement can also maintain its challenge to the idea that there is such a thing as a *normal* brain, at least insofar as this is supposed to be derived from some perfectly general theory about how human brains *ought* to function. Proponents have argued that neurodiversity signifies a challenge to any general account of ordered or disordered minds that assumes there is a single kind of neurological wiring that represents what is healthy, ideal, or in some meaningful sense *best* for mankind.<sup>53</sup> If our argument is sound, part of what we will have shown is simply that it may be possible to view autism as a condition that can be inherently disabling—at least for some individuals, in some cases—*without* having to derive this conclusion from any general account of disorder or disability, or from any other controversial claim about ideal neurological wiring.

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<sup>53</sup> As Armstrong writes, 'How absurd it would be to label a calla lily as having "petal deficit disorder" or to diagnose a person from Holland as suffering from "altitude deprivation syndrome." There is no normal flower or culture. Similarly, we ought to accept the fact that there is no normal brain or mind' [4].



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