

Neurodevelopmental Conditions and the NGRI Defense

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Guina *et al.* summarize the literature on neurodevelopmental conditions and crime, focusing on the use of the insanity plea for this population. There have been a small number of cases in several jurisdictions, using both cognitive and volitional prongs, generating questions about the use of the defense for people with neurodevelopmental conditions. There are theoretical scenarios in which the defense seems appropriate, such as the argument that higher order moral reasoning is contingent on a series of developmental steps, including the development of theory of mind. Other lines of argument could be based on differences in conceptual thinking, reasoning, language, memory, attention, executive functioning, emotional regulation, and impulsivity. There are multiple barriers, however, to the use of the defense, including its antiquated language, which does not reflect our current conceptualizations of mental conditions and disorders. Another barrier is associated with the implicit stigmatization of defining a different way of being as a disorder, a position at the core of the important and burgeoning neurodiversity movement. It is not clear whether neurodevelopmental conditions will become the basis for an increasing number of insanity pleas, but more information in the form of primary data and good analysis is a critical next step.

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In this issue of *The Journal*, Jeffrey Guina and his colleagues have contributed an over-arching review article discussing the relationship between neurodevelopmental conditions, criminality, and criminal responsibility.¹ Guina *et al.* review the literature describing the relationship between neurodevelopmental conditions and crime, and conclude that, while there is increased (and increasing) involvement between the population and the criminal justice system, there are an array of variables which complicate any conclusions about causal links. As an example of a complicating variable, defendants with neurodevelopmental conditions are more apt to give confessions without consulting a lawyer even when innocent, which may lead to higher rates of conviction. Drizin and Leo² provide a good background for further exploration of this topic.

Much of the Guina *et al.* article is devoted to a rich discussion of the use of the not guilty by reason of

insanity (NGRI) plea for defendants with neurodevelopmental conditions. Traditionally the NGRI defense has been used in cases of psychosis or mania, where the defendant's thinking is untethered from reality in a dramatic and obvious way, even to the casual observer. These are symptom clusters which are linked to fluctuating psychiatric conditions, and, at least in theory, amenable to treatment. But in the United States the defense is also the sole mechanism by which a serious crime (for which diversion is not an option) committed by a competent, guilty defendant can result in a forensic disposition rather than a carceral one. And there is substantial evidence that people with neurodevelopmental conditions are particularly and disproportionately vulnerable to poor outcomes in the carceral system, regardless of the nature of their crimes.³ Furthermore, in situations in which defendants will ultimately be released, they are much more likely to gain the kind of structured supports and behavioral intervention that reduce recidivism in a forensic setting than in a carceral one. So, there is good reason to consider the NGRI defense at least from an advocacy perspective.

As Guina *et al.* note, the situations in which the defense has been used for someone with a

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neurodevelopmental condition involve a mixture of comorbidities (e.g., psychosis)¹ and, as a result, an analysis does not give clear direction for whether neurodevelopmental conditions alone qualify for the defense. There have been very few cases in which the defense has been used when the only diagnostic consideration is a neurodevelopmental condition.⁴ On the other hand, there have been a number of publications which have discussed *mens rea* and neurodevelopmental conditions, laying the groundwork for this type of defense.⁵⁻⁹

In some jurisdictions, the NGRI defense can be made either on the basis of a cognitive explanation or a volitional (conformity) explanation. Many jurisdictions use the cognitive prong alone. The cognitive argument is a variant of the claim that defendants lack the capacity to understand the wrongfulness of their actions. The conformity argument involves defendants who are unable to conform their conduct to the law. These two aspects of the NGRI defense, cognition and conformity, line up well with the diagnostic criteria for autism spectrum disorder, one of the neurodevelopmental conditions.¹⁰ Autism is defined as a social disability coupled with rigid, repetitive, or constricted patterns of behavior. With respect to the social disability aspect of autism, understanding the wrongfulness of actions in a social situation (of the type which underlie most legal cases) can depend on fully understanding the social implications of one's actions, something that is a *de facto* limitation in autism. And with respect to the conformity prong, rigid patterns of behavior may conflict with legal mandates in myriad ways.

Guina and colleagues¹ outline a variety of other scenarios in which aspects of neurodevelopmental conditions might underlie an NGRI plea. These aspects include problems with conceptual thinking, reasoning, language, memory, attention, executive functioning, emotional regulation, and impulsivity.

One particularly interesting possibility is whether a difference in the capacity for higher order moral reasoning could be a basis for an NGRI claim. Clearly, higher order moral reasoning is at the core of individuals' ability to understand the wrongfulness of their actions. And high order moral reasoning is built on the foundation of theory of mind, the capacity to understand intuitively that other people have agency and perspectives. Theory of mind, in turn, depends on a delicate feedback loop of social-visual engagement, something that most people accrue across their

childhoods without even noticing, but which can cause excruciating difficulty for people for whom it does not develop naturally.

Put another way, to be able to understand what someone (e.g., a victim) might experience in a situation requires being able to take the other's perspective. To do this depends on a cascade of developmental milestones, which may not be met in some neurodevelopmental conditions.

Clearly there are at least a few ways in which an NGRI might be related to neurodevelopmental conditions. As Guina *et al.* summarize the matter, "psychosis is not the only means by which someone's sense of reality may be inaccurate or distorted" (Ref. 1, p 362). Given the many ways in which an NGRI might be applicable to people with neurodevelopmental conditions, it is curious that the defense is not used more regularly.

One factor may be the open question of the suitability of the defense itself from a legal standpoint, and whether the wording is broad enough to encompass neurodevelopmental conditions. The NGRI defense was formed around psychotic and mood conditions, the presentations of which generally fluctuate. Part of the rationale for a specialized defense for people with fluctuating mental conditions was that their bouts of insanity might be punctuated by periods of sanity and, as a result, they were accorded the full rights of society, including justice, on the basis of the implicit assumption that at a future point they might be in full grasp of their faculties.

On the other hand, people with the precursor conditions of neurodevelopmental disabilities, which differ from psychotic and mood conditions in that they are immutable, were not in this position. Until the mid-1800s there was not even the concept of a spectrum of function, a notion of individual strengths and weaknesses, but at best a benevolent dismissal of the population as overall unworthy of basic rights. This attitude is captured in David Hume's *An Enquiry Concerning The Principles of Morals*: "[W]e should be bound, by the laws of humanity, to give gentle usage to these creatures, but should not, properly speaking, lie under any restraint of justice with regard to them, nor could they possess any right or property. . ." (Ref. 11, p 23).

Part of the complexity of the use of the insanity defense for individuals with neurocognitive disorders is that, from the standpoint of the criminal justice system, dismissive benevolence remains effectively

the default. For people with significant intellectual impairments who are charged with crimes, there are mechanisms in place, up to the assessment of competency to stand trial, which channel them away from the criminal justice system. But this is not so for people with neurodevelopmental conditions with anything other than sub-average intellectual function, whatever the severity of the other aspects of their condition. The person who is competent, guilty, and not “insane,” is not eligible for anything other than prison. There is nothing in between.

Perhaps the problem is as simple as word choice. In many contexts, the terms “psychotic” and “insane” are either conflated or taken to be synonymous. But the essence of insanity from the perspective of the legal system is whether the defendant’s understanding of the world aligns with the way it does for most other people. For those who think that the police officers entering their house are an alien attack force to be confronted, their subjective experience is easy to align with psychosis and, by extension, insanity.

But consider someone who, by virtue of a neurodevelopmental condition, does not understand the agency of other people, and cannot take their perspective. This is not psychosis. And it is not insanity in the sense of the word that is conflated with psychosis. But it is surely insane in the minimal sense that the person has at least a wholly different way of understanding the world, as different as thinking that the police are alien invaders. And this different way of understanding has ramifications for all aspects of the way such individuals conduct themselves in the world. We should also expect it would have profound legal ramifications. Maybe if the insanity defense were called something else, some other name which marked the fact that we have moved away from the old concept that psychotic illness alone is severe enough to justify the deployment of an NGRI, it would solve the conceptual problem.

But there is another concern much larger than semantics. At the core of this concern is stigma. As a society we have a regrettable history of how we treat people with neurodevelopmental conditions, including benevolent dismissal, but also eugenics with all its horrific implications. We are only beginning to move in the right directions. But we could easily backslide.

People who care about populations with neurodevelopmental disabilities, including parents and self-advocates, recognize this and fight to reduce stigma.

They are acutely aware of how hard-won progress in integration has been, and how game-changing the Individuals with Disabilities Educational Act has been.¹² Many advocates are resistant to anything which portrays the population with neurodevelopmental conditions negatively, including reworking the NGRI defense to encompass these populations.¹³ In part the concern is that doing so will reify the position that there is an association between neurodevelopmental conditions and criminal behavior. In addition, people are concerned that this step would infantilize a population already facing substantial challenges by suggesting that, by virtue of their condition, they should be held less culpable for their behavior.

At the core of the problem is how we conceptualize neurodevelopmental conditions. This has become an important question with the increasing momentum of the neurodiversity movement,¹⁴ which argues that neurodevelopmental conditions (and really all of humanity) have strengths and weaknesses. The strengths should be embraced and celebrated. And the weaknesses should not be pathologized but rather should be used to identify areas where support can be offered. This represents a push toward a nondisease model of these conditions. From the perspective of neurodiversity, an effort to expand the NGRI might be too close to pathologizing differences to be acceptable.

Whether neurodevelopmental conditions gain traction as part of defense strategies remains to be seen. Certainly, more primary data needs to be gathered and digested in the form of summary articles like the one Guina and colleagues¹ have written. It is to be hoped that the groundwork for any progress on this front will be tested in courts quietly, without sensationalism, in cases in which the nature of the offense does not force a specific outcome.

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