

# AUTISM, CRIMINAL LIABILITY AND THE NEURODIVERSITY PARADIGM

## INTRODUCTION

**Neurodiversity:** The 'neurological diversity' of all human beings.

**Neurodiversity paradigm:** A set of three principles articulating the philosophical foundations of the neurodiversity movement and a means of applying neurodiversity theories in science and sociology.

There is evidence of an ongoing **paradigm shift** in areas of scientific and sociological understanding of autism towards the neurodiversity paradigm. The **traditional approaches of criminal law** have arguably been slow to keep up the pace, esp. when determining the **criminal liability of autistic defendants**.

Under the **traditional approaches of criminal liability**, autistic defendants would be **held to standards** (aimed at ensuring equality before the law) **based on what a neurotypical person would have done** in a given situation.

## ANALYSIS OF CASES

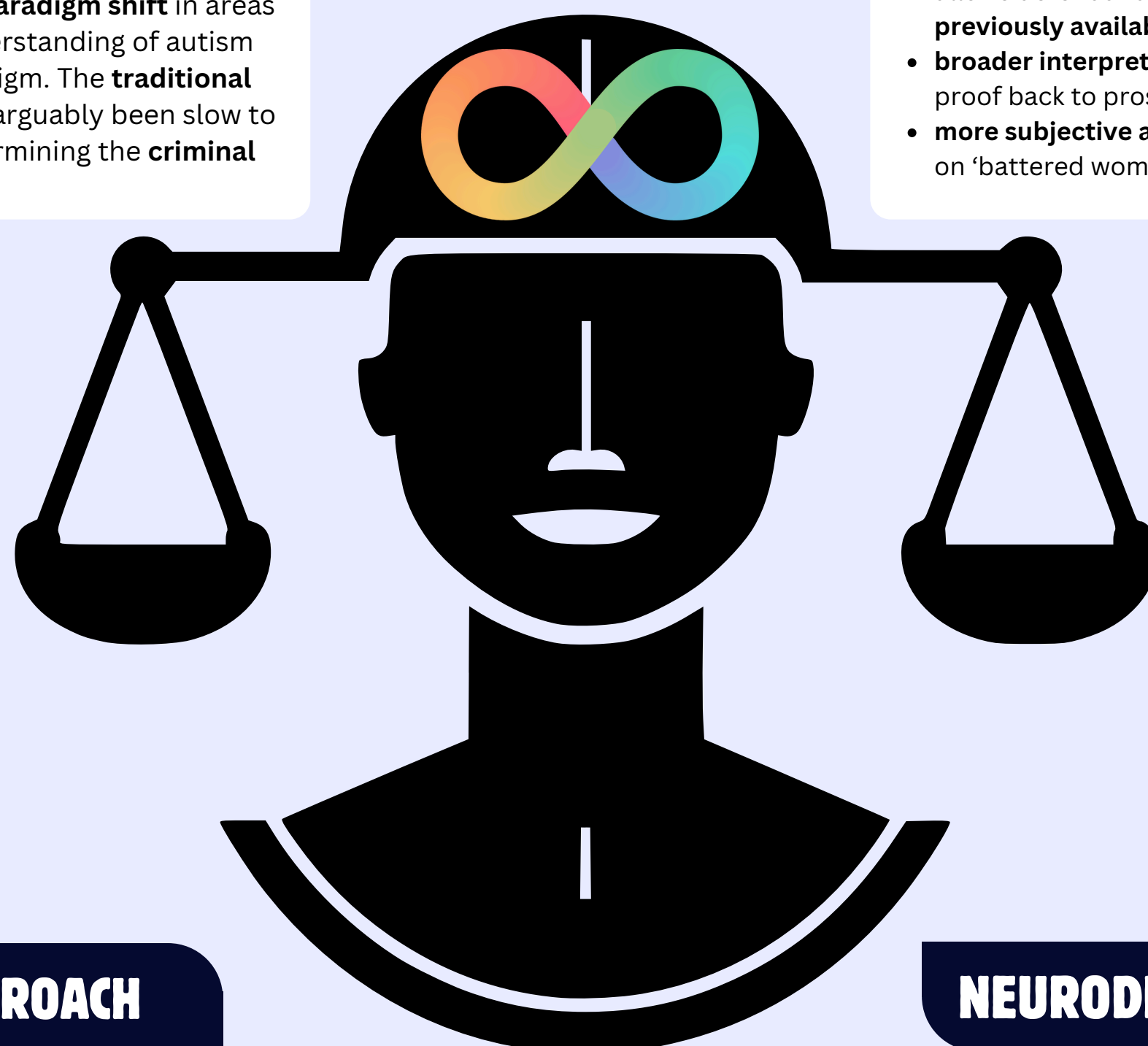
Analysed around **20 appellate cases** since 2004 involving autistic defendants from several common law jurisdictions, grouped according to **four main themes**: Insanity; Reasonable Person; Consent; Communication.

Courts initially **more lenient** towards D's autism diagnosis evidence in the **2000s**:

- provides a **fuller picture** of defendant;
- allows defendant to put forward a **defence not previously available** at trial;
- **broader interpretations of 'intent'** shifting burden of proof back to prosecution;
- **more subjective approaches to 'reasonableness'** based on 'battered women syndrome' cases.

**Much stricter approaches from the 2010s onwards:**

- courts clarifying that Autism diagnosis **by itself is not an excuse**;
- clearer guidance on **probative value** of autism diagnosis;
- courts still bound by **old precedent** failing to keep up with the times;
- courts **returning to former precedent**, having initially progressed;
- debates continuing among judges, with many **dissenting opinions**.



## TRADITIONAL APPROACH

'[W]hen men live in society, a certain average of conduct, a **sacrifice of individual peculiarities going beyond a certain point**, is necessary to the general welfare. If, for instance, a man is **born hasty and awkward**, is always having accidents, and hurting himself or his neighbors, no doubt **his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty intent**. His neighbors accordingly require him, at his proper peril, **to come up to their standard**, and the courts which they establish decline to take his personal equation into account.'

– Oliver Wendell Holmes, Jr. (1881)

## NEURODIVERSITY PARADIGM

1. Neurodiversity is a **natural and valuable form** of human diversity.
2. **The idea that there is one 'normal' or 'healthy' type of brain or mind**, or one 'right' style of neurocognitive functioning, is a **culturally constructed fiction**, no more valid (and no more conducive to the overall well-being of humanity) than the idea that there is one 'normal' or 'right' ethnicity, gender, or culture.
3. The **social dynamics** (including the dynamics of social power inequalities) that manifest in regard to neurodiversity are **similar to the social dynamics that manifest in regard to other forms of human diversity** (e.g. diversity of ethnicity, gender, or culture).

– Nick Walker (2021)

## PHILOSOPHICAL PROPOSALS

- Traditional objective approaches of criminal liability are **incompatible with the neurodiversity paradigm**.
- Is judging the criminal liability of autistic defendants by these standards **truly** 'equality before the law'?
- Aim towards achieving **substantive equality before the law** for autistic defendants: see Minkowitz (2014), Lollini (2018).
- Explore a new branch of **Critical Legal Theory** based in **Neurodiversity Studies** (a branch of Critical Disability Studies).

## PRACTICAL PROPOSALS

- **Abolish the insanity defence** (see e.g. its abolition in Sweden in 1965).
- Extend the availability of **Registered Intermediaries** to autistic defendants: see Taggart (2021).
- Improved (and **autistic-led**) **autism training** for judges and lawyers.
- Reconsider the premise of the 'reasonable person' and use of more **subjective approaches** to determining criminal liability.