

Incorporating Neurodiversity into Therapeutic Jurisprudence: Exploring the Policy Diffusion Potential of Pennsylvania's Autism Training Law for Juvenile Court Judges



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Abstract

Many persons with autism encounter criminal justice practitioners over the course of their lives, just as neurotypical persons do. Autistic persons face distinct challenges in such a context, however: a lack of eye contact may communicate suspicious behavior (at best) or outright defiant and disrespectful behavior (at worst) to a police officer or a judge. While many policing agencies implemented autism-training curriculums, judicial training for autism lags behind police training. The following policy analysis draws upon innovation in a single jurisdiction – Pennsylvania – requiring mandatory autism training for magisterial district court judges (MDJ's) to explore the policy diffusion potential of this innovation to juvenile courts in other jurisdictions and to other levels of the Pennsylvania judiciary.

Introduction

Many people experience contacts with law enforcement over the life course, particularly when they are young (Wiley & Esbensen, 2016). Salience of law enforcement contacts resonate for all persons, but particularly for persons of color,

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indigenous persons, and humans of diverse sexual identities owing to their historical oppression by law enforcement (Perry, 2009; Stein, 2019; Taylor, 2019). An emerging constituency in this coalition involves neurodivergent individuals. Neurodivergence conceptualizes variability in human cognitive functioning regarding learning, attention, social communication, and personality disposition as differences in human brain functioning rather than destabilizing behaviors undermining human efficacy (Singer, 1999). Autism comprises a neurodivergent condition characterized by repetitious behaviors (i.e., self-stimulating behaviors or 'stims'), lack of direct eye contact, limited verbal communication, and difficulties with social interactions (American Psychiatric Association, 2013). Aside from these typical expressions, persons with autism (and autistics) can express other variations unique to each individual (Silberman, 2015). Causes of autism exhibit great complexity, with neuroscientists and geneticists articulating a substantive genetic component (Persico & Napolioni, 2013) along with intricate interactions between genes and environment (Fakhoury, 2015).

Given these complexities, police officers can misinterpret autistics' (or persons with autism) behaviors, sometimes resulting in serious injury or death (Fufaro, 2018; Hollow, 2020). Such critical incidents prompted development of police training curriculums raising officer awareness about autism, incorporating autism knowledge into de-escalation strategies when police act under color of authority (Copenhaver et al., 2020; Debbaudt, 2001; Gardner & Campbell, 2020; Salerno-Ferraro & Schuller, 2020). Yet, police are simply the 'front door' to the criminal justice system. Youth processed by the police are typically referred to juvenile court, which centers around a distinctive criminal justice actor: the juvenile court judge (Bartollas & Miller, 2013). In the United States, the juvenile court judge has both legal and social impacts over the administration of juvenile justice by embodying the "kind and just parent" foci of the court (Edwards, 1992). Unlike the adult system, the juvenile court judge addresses both the child's circumstances ("plight of the child") as well as the root causes for their behavior. Juvenile court judges bear responsibility for balancing procedural due process with therapeutic jurisprudence, prompting the following question: How do the judiciary do their duty when defendants have autism?

In the following paper, I explore how juvenile court judges across the United States can enhance their knowledge of autism and integrate it into judicial practice. I draw upon Pennsylvania's innovation – mandatory autism training for juvenile court judges – to illustrate how it implemented policy change in the administration of juvenile justice to broaden judicial understandings of youth with autism. I apply

policy diffusion theory to this case in hopes of identifying characteristics of jurisdictions conducive to implementing such a change in judicial training.

Judicial Understandings of Autism

Scholarly writing on the importance of autism awareness and training for police populate both the disability and policing literatures (e.g., Chown, 2010; Crane et al., 2016; North et al., 2008), yet the judiciary receives comparatively less attention from scholars regarding autism awareness and training. Berryessa's recent work (2021, 2018, 2017, 2016, 2014) provides positive momentum for the scholarly analysis of this critical stakeholder's understandings of autism and its co-occurring conditions (e.g., sensory sensitivities, anxiety, and epilepsy to name a few). As mentioned previously, the judiciary play an important role in American jurisprudence. For youth processed by the juvenile justice system, the juvenile court judge functions as a source of legal, social, and emotional support while they hold youth accountable for law-violating behavior. For adults participating in therapeutic specialty courts (e.g., drug courts), the judge is the sovereign legal authority in the courtroom workgroup, but also a source of social support, creative problem solving, accountability, and oversight for model fidelity (Hora, 2002). These examples are but two applications of therapeutic jurisprudence – a legal theory emphasizing the power of legal infrastructures to maximize clients' psychological, emotional, and personal well-being while protecting their individual rights (Perlin, 2014). In order to practice therapeutic jurisprudence in the course of juvenile justice, judges use their legal power to improve the aforementioned dimensions of young offenders' psyches while safeguarding their rights and assisting them in repairing the harms of their law-violating behavior (Wexler, 2008).

Given the intensive therapeutic aspects of these judicial tasks in both the adult and juvenile systems, acknowledging the role that 'theory of mind' plays in such interventions – e.g., the difficulty in anticipating the needs, emotions, and desires of other humans – is critical when engaging justice-involved persons with autism. Judges must also be aware of individuals whom are participating in a specialty court or a juvenile court, but struggle with the basic therapeutic tasks associated with these activities. Strong working knowledge of neurodivergence – autism in particular – enriches judicial capacities to deliver procedural due process, as judicial awareness of neurodivergent offenders' needs can enhance the courts' communication with and understandings of defendants' actions. Such responsivity promotes procedural due process when neurodivergent defendants are engaged by the court during legal proceedings.

The variable nature of autism's expression of intensity among individuals, in addition to the fact that this neurological difference is clinically diagnosed exclusively through behavioral observations, poses a challenge to criminal justice practitioners. Judges may regard an individual with autism (or autistic individual) as neurotypical because they are unaware of the nuanced way it presents among the populace (Brown et al., 2016). Officers of the court (including judges) must uphold the law and implement criminal procedure in an ethical and fair manner, but doing so in the presence of defendants interacting with the court exhibiting non-traditional communication styles - lack of eye contact, inappropriate social responses to questions from the bench, 'stimming' such as fidgeting or finger-flapping - carries risks for all.

Judges may narrowly interpret individuals' neurological differences - including autism - as disabling characteristics intensifying motivations to violate laws that they simply cannot control (e.g., stalking of a desired romantic partner, inappropriate speech or communication unwanted by the complainant). Persons perceiving a disabled individual as fundamentally limited in all dimensions of thought, action, and reason - independent of the localized nature of the disability - engage in essentialist thinking about disability (Carling-Jenkins, 2014). An essentialist perspective on disability may consider an individual who is deaf (hearing disabled) as intellectually, socially, and politically inferior to non-hearing disabled persons - despite any evidence to the contrary (e.g., even if they compose symphonies, as Beethoven did). Such narrowness illustrates binary thinking about human beings - people are either disabled (abnormal) or normal (Carling-Jenkins, 2014, p.1).

Genetic essentialism is a conceptual framework through which criminal defendants with mental health conditions may be viewed adversely by the judiciary. Mental health conditions such as autism, bipolar disorder, major depression, schizophrenia, anxiety disorder, and major depression lie on a spectrum, meaning their expressions among humans range from slight difference to discernible difference to definitive difference, relative to persons designated clinically 'normal.' Persons using a genetic essentialist lens engage in a reductionist cognitive process whereby the nuanced expressions of these conditions are discarded in favor of one-dimensional, largely limiting perceptions of individuals. Such narrow perceptions are characterized by immutability (the unchangeable nature of a genetic condition), binary expression of the condition (e.g., it exists in an observable way or does not), or informativeness (genetic characteristics communicate a lot about a person's nature) (Haslam, 2011, in Berryessa, 2018, pp. 2-3).

The myriad ways such narrow corridors of human cognition about mental health conditions affect judicial discretion is largely an empirical question, with varied results. Berryessa (2018) explored how judges employing the genetic essentialist perspectives expressed above used perceptual shorthand known as bias or stigmatization, conceptualized as judicial pessimism about affected offenders' capacities to change, perceived danger to the public, or determinism about future outcomes based offenders' family histories, to make sentencing decisions about these offenders. Drawing on qualitative data of Pennsylvania Municipal District Judges (MDJs), she found that many study participants for whom genetic essentialism regarding mental health conditions enhanced biases (or stigmatizations) of said persons, lead to harsher sentencing outcomes aligned with incapacitation or deterrence to protect communities. A smaller subset of her sample articulated no influence of genetic essentialism on sentencing outcomes, and an even smaller proportion of judges in the sample whom articulated genetic essentialist views preferred sentencing outcomes providing rehabilitative activities or treatment for the affected individuals – reasoning that “some treatment is better than no treatment” (Berryessa, 2018, p. 22).

Some evidence indicates that judges' personal characteristics mediate the relationships between genetic essentialism, stereotyping, and sentencing outcomes. For example, Berryessa (2018) found that judges who had personal experiences with genetics – either direct or vicarious – engaged in stereotyping and biased behavior of persons with mental health conditions but used their discretion over criminal sentencing of said defendants to attain treatment opportunities for them. Judges who hold strong beliefs in the power of scientific determinism also stereotyped and expressed biased viewpoints toward persons with mental disorders, yet such deterministic beliefs did not affect their sentencing decisions in these cases. Finally, judges who lacked any personal experience with mental health conditions engaged in little to no stereotyping nor bias of these defendants with no negative effects on sentencing (Berryessa, 2018).

Judicial perceptions of autism in particular are also subject to stereotyping consistent with genetic essentialism, bias, and variable impacts on criminal intention, criminal culpability, and sentencing (Berryessa, 2021, 2014). Judges may view defendants with this neurological difference as having immutable traits diminishing criminal culpability but requiring some type of therapeutic intervention to assist the offender and increase public safety. When viewed as a mitigating factor (Berryessa, 2016, 2014), judges may order intensive levels of counseling with court oversight and monitoring – perhaps even ordering the offender to participate in cognitive behavioral therapy (a recommendation consistent with the responsivity

principle of evidence-based practice – see Andrews & Bonta, 2017). However, ‘theory of mind’ challenges in autism described earlier may complicate the efficacy of a therapeutic approach for autistics (Higgs & Carter, 2015; Melvin et al., 2020).

When the judiciary view the social communication deficits of autism as immutable yet recommend a therapeutic approach for an autistic offender under the guise of providing assistance and holding the autistic individual (or individual with autism) accountable, judges may unwittingly set autistic offenders up for failure. Recent research indicates that judges exhibit curiosity about the challenges mental health conditions such as autism pose to ensuring procedural due process for affected defendants. In a small survey of California Superior Court judges, Berryessa (2016, 2014) found that nearly three-quarters expressed interest in learning more about High Functioning Autism (HFA) and that desire for such knowledge signaled a willingness to learn more about the impact of neurological differences with genetic origins on both legal decision-making as well as jurisprudence in general. Expert testimony regarding potential impacts of neurodivergent conditions with genetic origins on criminal culpability provide one method of educating judges about these factors (see Berryessa, 2016, pp. 9-10). Yet, judges need training and education on these conditions to engage expert testimony in an efficacious manner. One jurisdiction addressed this basic knowledge issue with mandatory autism training for a subset of its judiciary.

Pennsylvania’s Coalition of Change: Legislators, Issue Stakeholders, and Autism Advocates

Per Pennsylvania’s Constitution, the juvenile court resides within the Courts of Common Pleas (court of general jurisdiction), with Magisterial District Judges (MDJ’s) presiding over matters involving children and families (The Unified Judicial System of Pennsylvania, n.d.). MDJ’s are not required by law to possess a doctorate of jurisprudence (JD); those without the terminal degree are required to pass a certification exam (Unified, n.d.). Given the diversity of formal legal training among MDJ’s, continuing education is of paramount importance.

In 2005, the state initiated a census of autism prevalence to measure uptake of services related to autism. These data showed an increase the prevalence of autism in the first decade of the millennium (ASERT, 2014) as well as an increase in juvenile justice system contact among youth with autism (Shea, 2014, p. 13). Additionally, critical incidents in both the adult and juvenile systems highlighted the need for better autism training by police (Kelly & Hassett-Walker, 2016; Taylor et al., 2009). In 2015, the Pennsylvania State Legislature amended training certification law for

municipal district judges (MDJ's). Specifically, Title 42 of the Pennsylvania Judicial Code now includes the following mandate for MDJ's:

[Section] 3118 Continuing Education Requirement: Magisterial District Judges

Every magisterial district judge shall complete a continuing education program each year equivalent to not less than 32 hours per year in such courses or programs as are approved by the board. At least every six years, the program shall include the identification of mental illness, intellectual disabilities and autism and the availability of diversionary options for individuals with mental illness, intellectual disabilities or autism. (Pennsylvania Judicial Code, 2017, Title 42, Section 3118, Subsection 1)

The policy change codified in the revised judicial training statute for MDJ's reflected the confluence of several factors. Among the legislative branch of the government, Representative Thomas Caltagirone (D-Berks County, PA 127th Legislative District 1976-2019) sponsored the bill to expand autism training for judges after learning of an incident in Pasco, Washington, where an adult with major depression was fatally shot by police officers poorly trained in working with the mentally ill (Smydo, 2015). Representative Caltagirone advocates for the mentally ill and persons with neurodivergent conditions by promoting legislation conducive to a high quality of life in their respective communities (Smydo, 2015).

His legislative efforts did not exist in a research, training, and advocacy vacuum, however. Pennsylvania conducts an autism census to assess the prevalence of autism among residents of the state (Shea, 2014). Beginning in 2009, the Pennsylvania Autism Census Project documented the prevalence of this neurological condition through partnerships with the Pennsylvania Department of Public Welfare (PDW) and the Autism Services, Education, Resources and Training Collaborative (ASERT) (Shea, 2014). Census reports in both 2009 and 2014 serve to educate the public about the prevalence of autism among children and adults, measure the use of public services by persons with autism (or autistic persons), the geographic distribution of ASD among residents of the state, and trends in autism prevalence since 2005 [census baseline] (Shea, 2014). Taken together, such expertise provided critical background information for the adoption of this innovative approach to judicial training about autism (Makse, 2021).

Given the increasing prevalence of autism in Pennsylvania between 2005 and 2014 (Juvenile Justice Policy, Practice, & Statistics, n.d.) as well as the intersections of autism with poverty, justice system involvement, and child welfare agencies, multiple issue stakeholders advocated for quality-of-life improvements among individuals and families with autism. Some of these stakeholders are professional

issue stakeholders – individuals who are members of professional associations (private or public) whose careers involve advocating for the rights of individuals with disabilities (including autism) [ASERT is an example here] (Baker, 2011). The Pennsylvania legislation requiring judges to be trained on interacting appropriately with autistics (or people with autism) expands professional issue stakeholders to the justice sector as well: judicial compliance with the training law resides with the Pennsylvania Supreme Court. Moreover, the impact of autism judicial training on justice-involved autistic persons (or persons with autism) expands to the private sector: scholars at Duquesne University (Gordon, 2016) are under contract to provide and assess how education efforts affect juvenile justice outcomes among autistic youth (and youth with autism) in Pennsylvania.

The amended Pennsylvania law requires autism training of MDJ's for the purposes of implementing jurisprudence in a fair and just manner for individuals on the autism spectrum. The spirit of the legislation ensures protection of a negative right – the right to be free from coercive, negligent, or abusive treatment by the State on the basis of a disability. In other words, the judicial training protects the civil and political rights of autistic people (including youth with autism). Another dimension of the spirit of the law is autism awareness. Recall that autism is a neurological condition with myriad expressions, most often involving difficulties in social communication, intensely narrow interests, difficulty in social interactions, repetitive behavior patterns (such as stimming), and sensory sensitivities (American Psychiatric Association, 2013). Autism's expression among individuals varies widely, with some persons mildly affected and others profoundly so. As research and theory on autism progressed, scholars classified individuals with autism along a spectrum or a continuum, depending upon the intensity of limited social interactions, communication deficits, and restricted interests (Wing & Potter, 2002, p. 153).

Prior research discussed earlier provided evidence that among some judges, genetic essentialism (such as immutability) heightened concerns about future dangerousness to the public, leading to harsher criminal sentencing outcomes for defendants with mental health conditions (Berryessa, 2018). This relationship was substantively mediated by judges' personal experiences with genetics, however. Put differently, judges who experienced screening for genetic conditions or cared for family members with genetic disorders or had vicarious knowledge of genetics – engaged in stereotyping of defendants who had a mental health condition but used sentencing to provide treatment and support for said offenders rather than punishment (Berryessa, 2018, pp 23-24). This research suggests that down-river effects of lived experience with autism can influence sentencing in criminal court by

creating greater awareness and positive engagement with defendants who are perceived by judges to be neuroatypical. Tom Swan, Magisterial District Judge of West Deer Township, Pennsylvania, describes how juveniles with autism (and autistic juveniles) may react to basic questions securing their civil rights in criminal proceedings, drawing upon his experience raising a son with autism: “If you read him his Miranda rights and asked him if he understood those rights, he would say yes....But if you asked him what it means, what those rights mean, he couldn’t tell you” (Signorini, 2016, n.p.).

This anecdote is consistent with prior research suggesting that autistics (or persons with autism) may be more vulnerable than non-autistics to be compliant when questioned by state authorities regarding suspected criminal behavior (North et al., 2008). In their study of susceptibility and compliance traits between high-functioning autistics and neurotypical individuals (controlling for gender and IQ), persons with autism did not exhibit greater susceptibility than controls, nor were they more likely than controls to shift information when receiving negative feedback concerning an original response to a question. Autistics exhibited significantly greater levels of perceived compliance than controls (North et al., 2008, p. 329), suggesting that in a police or prosecutor interrogation situation, autistics may perceive [leading] questions as directives rather than interrogatories rendering their negative rights (civil rights) vulnerable at best. Such interrogatories may be equally fraught with civil rights violations during the course of court proceedings, hence Pennsylvania’s required autism training for MDJ’s. But what of other judges in Pennsylvania and judges in other jurisdictions? Short of a mandate, how might other judges receive autism training?

Bringing Theory Back In: Policy Diffusion Mechanisms and the Pennsylvania Case

Constructivist perspective: United Nations’ Conventions on the Rights of Persons with Disabilities

In their review of policy diffusion applications, Shipan and Volden (2012) characterize governments as laboratories of democracy and policy makers as scientists who learn about policy innovations through observation (p.3). Maximizing the utility of a laboratory approach to policy diffusion requires jurisdictions such as states to build research and data repository infrastructure. Such resources document policy change, chronicle the implementations of said changes, facilitate conducting research studies to assess the impacts of policy change [relative to the intended outcomes], monitor the ongoing nature of the new policy as it is modified

over time and (hopefully) compiles a ‘lessons learned’ module to chronicle missteps during the policy draft and/or implementation process (e.g., the United States Army’s Center for Army Lessons Learned [CALL]).

States with these basic knowledge infrastructures have a distinct advantage over those with less investment, as it relates to policy diffusion. While much of the policy diffusion literature focuses on governments competing with one another to adopt policies attractive to employers and residents (Baybeck et al., 2011); another dimension of this competition concerns the abilities of governments to influence other jurisdictions’ decisions to adopt a particular policy or practice through thorough documentation of policy effectiveness (Shipan & Volden, 2012). These jurisdictions’ reliance on the generation and dissemination of research to implement efficacious policy responses to public problems resonates with the constructivist and learning perspectives of policy diffusion.

In the social constructivist perspective, policy diffusion emerges among nation states when leading nations (e.g., core nations in the Wallersteinian context – see Wallerstein, 2004 [1987]) define policy objectives in a global context as necessary for implementation to achieve humane ends, promote economic goals, or establish a liberty interest among the Earth’s population. Such objectives have normative dimensions: nation states are preferable to clans and fiefdoms as the central organizing body for humans; economic growth, peace, and prosperity achieve sustenance for the world better than territorial conquest, etc. (see Dobbin et al., 2007, pp. 450-459). Nation states establishing and protecting human rights emerged as another normative vision of the ‘good’ under the constructivist perspective of policy diffusion.

In the autism context, the constructivist perspective on policy diffusion promotes the globalization of civil rights to persons with disabilities, including humans with autism. The 2006 United Nations Convention on the Rights of Persons with Disabilities (CRPD) chronicled fifty articles articulating how civil, legal, and political rights apply to disabled persons or persons with disabilities (United Nations, 2007). Ratifying nations pledge to implement these ideals in their legal codes, thereby constructing civil, legal, political, and economic rights for disabled persons as human rights. For example, Article 12 of the CRPD establishes the rights of individuals with disabilities equal recognition before the law – meaning the legal rights to make decisions for ones’ self extends to disabled people and that nations states much acknowledge said rights in their statutes (United Nations – Disability, n.d.). Among ratifying nations, Article 12 transformed the exercise of legal power by persons with disabilities from a substituted decision-making process – where a third party makes decisions on behalf of the aforementioned individual – to a

supported decision making process, where the person with disabilities works with the third party to make legal decisions affecting their lives (Devi, 2013).

Formal justice systems are also within the purview of the U.N.'s historic advocacy for persons with disabilities and the disabled. Article 13 of the CRPD notes that all ratifying nations must provide adequate access to justice system processing for the disabled that is on par with the access afforded to the non-disabled. This includes age-appropriate accommodations as well as supports for persons with disabilities who are either defendants or witnesses. Subsection 2 of Article 13 specifically states: "In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff" (United Nations, n.d., n.p. – emphasis mine).

While the judiciary is not explicitly mentioned in this subsection, scholars consider how this article of the CRPD applies to the judiciary. In her analysis of Article 13's implementation among judges, Waddington (2018) explores how they perceive their role as actors implementing legal codes for nation states as it relates to the CRPD's provisions. Specifically, do they see them as equally binding as the nation states' legal codes or do they see them as optional enhancements to established legal practices? Is the CRPD binding in every legal case involving a person with disabilities (or disabled person) or is it binding only when invoked in a specific legal case in a nation state who ratified the CRPD? Waddington notes that in the absence of the judiciary articulating precisely which domestic laws comply with which CRPD articles, scholars have little understanding of how judges relate the two together when processing a case involving a person with disabilities (2018, p. 580). The Constructivist perspective allows [potentially] adopting jurisdictions to broaden the scope of individuals entitled to human rights; but leaves the mechanisms for implementing such a broad mandate open to interpretation by adopting nations. Another category of policy diffusion – learning – provides greater context for realizing expansion of rights and liberties to persons traditionally excluded from these critical entities.

Learning perspective: Neurodiversity

Learning is a critical theme in the study of policy diffusion. The understanding and perusal of new information across sectors of government can change both policy and the normative beliefs underlying them (Dobbin et al., 2007). In the autism context, the learning perspective intersects with a critically important research development since the early 1980's: the emergence of the neurodiversity paradigm,

a strengths-based approach to understanding, accepting, and celebrating the varying ways human brain functioning enhances humanity (Armstrong, 2010; Singer, 1999). The neurodiversity paradigm broadened human understandings of difference to integrate the benefits of neurodivergent conditions for individual and societal functioning.

The neurodiversity paradigm incorporates research from evolutionary biology and social science to broaden human understanding of neurological differences. Rather than conceiving of autism spectrum disorder, bi-polar disorder, and attention deficit hyperactivity disorder as disabling deviations from typical human cognitive norms, neurodiversity conceptualizes these as differences, not disorders (Armstrong, 2010). Understanding these differences as serving legitimate human functions bringing benefits to the species, rather than deviations from cognitive norms rendering an individual incompletely able to contribute to the greater good, embodies a neurodiverse perspective. Such differences are not deficits nor are they diseases, though historically humans have had great difficulty accepting such a premise (Baker, 2011).

Proponents of the Social Model of Disability (Shakespeare, 2006) argue that much of what is disabling about difference – be it physical or neurological – is the product of narrow physical infrastructures (e.g., curbs and locations of light switches create disability for persons in wheelchairs), hegemonic social codes (eye contact as standard social communication create disability for persons with autism) or standard industrial designs (reliance on fluorescent lights can be disabling for someone with sensory integration disorder). Also known as the Constructivist Model of Disability, the main goal of this paradigm encourages individuals to consider how difference becomes disabling due to hegemonic ways of understanding human abilities. This way of thinking about difference prompts the redesign of public infrastructures, workplaces, and residential designs to incorporate varying levels of mobility and multiple intelligences. How persons with autism (and autistic persons) engage the social, political, and legal entities in societies is an emerging strength for the Social or Constructivist paradigm and an opportunity for the neurodiversity paradigm to educate the public about the diversity of diversities among the human species.

De-pathologizing autism may come with costs for justice-involved autistics, however. Shields and Beversdorf (2021) recognize the achievements of the neurodiversity movement in broadening human understandings of autism as differences rather than disabilities; yet express concern for procedural due process when applying such a perspective to all defendants with autism. What if there are

features of autism that render it disabling for some persons on the spectrum but not others? They argue:

[A]dvocating 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..... autism's disorder status might be maintained (again at least for some individuals) without deriving this result from any general account of disorder. (Shields & Beversdorf, 2021, p. 125)

Drawing on three case studies illustrating this dilemma of the neurodiversity movement, these scholars underscore how the differences associated with autism can be disabling in the narrow context of American criminal law. All three individuals prosecuted under criminal codes in their respective jurisdictions led lives in their communities (e.g., they were not institutionalized), had either no or very limited criminal histories, and were found competent to stand trial for charges of arson, stalking, and harassment. All defendants' charges related to "signature" behaviors associated with autism: narrow interests (fixation on a particular person or activity), inability to understand that persistent requests for contact and persistent attempts to see desired persons were perceived as unwanted by said persons (social deficits associated with 'theory of mind' difficulties), and destruction of property to achieve resumption of narrow interests but an inability to connect such behavior to the criminal charge of arson.

Autistic behaviors forming the cornerstones of these criminal cases were not merely artifacts of social boundaries, bigotry, or incomplete compensation associated with disability (Shields & Beversdorf, 2021). The behaviors in and of themselves are inextricably linked to autism and can therefore be considered disabling – even in an accommodating society such as the United States. Thus, in order to preserve procedural justice for autistics, acknowledgement by both the legal and disability communities that some features of autism for some autistic individuals can be disabling – allows the judiciary (and other justice practitioners) to consider such behaviors as mitigating or exculpatory factors in adjudication and sentencing. If these scholars are correct, educating judges and other justice practitioners about manifestations of autism and its spectral nature are necessary but not sufficient conditions of securing procedural justice for persons with autism. Yet, raising autism education and awareness among these practitioners contributes to the larger distal goal serving as the central research question of this investigation.

Conclusion - Criminal Justice Policy Diffusion, Top-Down vs. Epistemic Go-Betweens, and the Necessary (but not Sufficient) Coexistence of Coercion and Learning Policy Diffusion Mechanisms in Bringing Pennsylvania's Innovation to Other Jurisdictions

In one of the few policy diffusion studies of rehabilitative practice in criminal justice, Douglas et al. (2015) explored factors associated with the spread of drug courts in four U.S. states. They conclude that drug court diffusion in these jurisdictions is the product of macro-level political climates in local jurisdictions interacting with jurisdictions potentially adopting drug courts (Douglas et al., 2015, p. 486). In essence, jurisdictions curious about drug court adoption may be functioning in a political climate conducive to viewing substance abuse as a public health problem that should guide how the legal system engages the offender. Douglas and colleagues considered the micro-level interactions between policy entrepreneurs who adopted drug courts early on as well as the larger policy and legislative environments to identify conceptual actors known as go-betweens – or actors acting across multiple jurisdictions (2015, p. 490). These actors affected the uptake of drug courts through two mechanisms: 1) coercion; and 2) learning.

Top-down go-betweens tended to use coercion as a diffusion mechanism, yielding fiscal power to control the implementation of drug courts by funding drug court training, operations, and evaluations. Epistemic go-betweens take a different approach, using a learning approach to policy diffusion through reliance on substantive experience implementing drug courts. These entities also provide access to specific individuals with extensive expertise in drug court design and implementation and assist with troubleshooting or technology transfer.

In the case of the Pennsylvania law under study, the diffusion mechanism for Magisterial District Judges (MDJs) embodies a coercion perspective on autism education in jurisprudence: MDJ's shall complete autism training as part of their Continuing Legal Education credits (CLE). Failure to complete autism training once every six years potentially bring suspension by the Pennsylvania Supreme Court. If the MDJ has not completed required CLE within six months after being notified of the training deficiency, the Court may declare a vacancy in that judicial district (pending a hearing) (Pennsylvania State Legislature, 2017). Other judges in the Pennsylvania court system are not required to complete autism training as part of their CLE, however. Neither appellate judges in the Superior and Commonwealth Courts nor the justices on the Pennsylvania Supreme Court are required to engage autism training, leaving fertile ground for other policy diffusion mechanisms such as learning.

Pennsylvania state government infrastructure provides robust amounts of research, education, and support for understanding autism from a neurodiversity perspective, embodying a learning perspective on policy diffusion. For example, the Pennsylvania Department of Human Services' Office of Developmental Programs (ODP) houses The Autism Services, Education, Resources, and Training Collaborative (ASERT). The Collective specializes in assisting criminal justice practitioners working with justice-involved autistics (or persons with autism) by providing training videos on how to inform this population of their legal rights. Other resources describe how offices should approach autistics when acting under color of authority, how to take persons with autism into custody (if needed) and provide visuals explaining stages of the criminal justice system.¹

ASERT embodies an epistemic go-between using a learning perspective on policy diffusion to bring neuroethical justice practice to other parts of the judiciary in the State. While Douglas et al. (2015), operationalize epistemic go-betweens as cross-jurisdictional actors, ASERT performs many functions of this entity, although the audience is primarily for persons and organizations in Pennsylvania, justice practitioners in the state develop or adopt innovations within the parameters of state law. As such, Pennsylvania Courts themselves are building capacity to act as an epistemic go-between using a learning perspective on policy diffusion to increase judicial capacities for understanding justice-involved persons with autism. In November of 2020, the Pennsylvania Supreme Court partnered with the Pennsylvania Department of Human Services and ASERT Collective to launch a state wide initiative focused on helping judges better understand and communicate with individuals with autism. Led by Pennsylvania Supreme Court Justice Kevin Daugherty, the Regional Autism Roundtable brings autism scholars, justice practitioners, social workers, autism advocates, and autistics themselves together to exchange information about how best to engage justice-involved persons on the spectrum.²

The Pennsylvania court system also invested in building archives regarding autism and the courts, extending the range of learning opportunities about integrating autism knowledge and training into jurisprudence for any interested party (see link above). Chronicling these webinars and work sessions provides a passive type of learning policy diffusion not unlike that of drug courts through their National Association of Drug Court Professionals (NADCP) website (<https://www.nadcp.org/>). The Pennsylvania case under study illustrates how professional issue stakeholders, researchers, community activists, legislators, and justice practitioners staff entities that are both epistemic go-betweens as well as

top-down go-betweens achieving policy diffusion through both coercion and learning perspectives.

This essay identifies the state of Pennsylvania as an early adopter of autism training for juvenile court judges and explores the policy diffusion potential of this innovation to other jurisdictions (and other levels of the judiciary within the early adopting jurisdiction). While policy diffusion literature in criminal justice seeks to understand the determinants of which jurisdictions adopt which kinds of policies (e.g., Bergin, 2011; Douglas et al., 2015; Sliva, 2016); this essay identifies a series of necessary (but not sufficient) conditions for jurisdictions to implement the policy innovation under study. These conditions are identified within the policy diffusion theoretical area with which they are most consistent:

1. **Constructivist and Learning:** As the Pennsylvania case illustrates, the constructivist and learning perspectives need policy information vectors to support these perspectives. Pennsylvania state government spent years developing an information gathering and sharing infrastructure around autism. For example, the state conducts an autism census to track the prevalence of autism and better understand the depth and breadth of these citizens' needs (as well as those of their families). Epistemic go-betweens such as Pennsylvania's ASERT Collective and the Pennsylvania judiciary's Regional Autism Roundtable provide information, training, advocacy, and support for criminal justice practitioners seeking to incorporate neurodiversity into justice practice. These information gathering and sharing networks are the bedrock of constructivist and learning perspectives on policy diffusion. Jurisdictions dedicating public resources (both dollars and personnel) to research infrastructure, public-private partnerships (e.g., with universities), information training and support, as well as technology transfer are well positioned to explore how best to integrate autism knowledge with justice processing.
2. **Coercion:** Recall that the policy diffusion mechanism of coercion relies on the power of government to incentivize courses of action through the provision of funds to implement a given policy (carrots) or imposition of consequences for failure to implement a given policy (sticks). States requiring continuing legal education (CLE) credits may use coercion to require autism training for certain segments of the judiciary, as Pennsylvania did for Municipal District Judges. In the Pennsylvania case, MDJ's who do not complete autism training according to the statute risk removal from the bench by the Pennsylvania Supreme Court. Moreover, issue stakeholders such as legislators whom have taken up the cause of justice for persons with autism (and autistic persons) may employ coercion by integrating autism training into Continuing Legal Education requirements for

justice practitioners. While the implementation of the policy in Pennsylvania imposed time and money costs on public employees, legislative action was in part driven by a critical incident in Pasco, Washington, in which a man experiencing a major depressive episode was fatally shot by police officers. This action resulted in a \$750,000 judgment against the City of Pasco (Beason, 2018). Thus, mitigating liability (a carrot) is potentially one benefit of the policy costs of legislative action when considering policy diffusion borne of coercion. At the end of the day, in the absence of information networks (epistemic go-betweens) devoted to autism, neurodiversity, and justice practice coercion alone may not be a useful policy diffusion technique.

Issue stakeholders looking to enhance procedural due process for youth with autism through judicial training may incorporate these two policy diffusion perspectives to achieve this goal. Such perspectives are necessary but not sufficient, however. One cannot overlook the importance of coercion as a policy diffusion technique as well. Constructivist, Learning, and Coercion policy diffusion mechanisms forming symbiotic relationships among epistemic go-betweens, coercive go-betweens, and issue stakeholders likely increase the odds of legislation integrating neurodiversity into justice practice. Cases such as Pennsylvania provide but one example of how these policy diffusion mechanisms interact to enhance procedural due process for justice-involved persons with autism.

As the neurodiversity paradigm further integrates itself into therapeutic jurisprudence, state justice systems serve as laboratories illustrating mechanisms by which justice practitioners may achieve neuroethical practice. States with robust autism funding and support networks coupled with efficacious autism training for the judiciary can truly practice therapeutic jurisprudence, or using the power of law to heal both the offender and the community experiencing the offender's legal breach (Wexler, 2008). Autism training is not enough, however - it must be implemented efficaciously, taking into account the affected offenders' needs, strengths, and abilities. Applying autism training through a therapeutic jurisprudence lens with appropriate attention to the autistic offenders' responsivity capacities allows for the power of law to heal rather than harm and promotes the judiciary treating persons with autism with an ethic of care.

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Notes

¹ <https://paautism.org/resource/justice/>.

² <https://www.pacourts.us/learn/autism-and-the-courts>.