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INCARCERATING DISABILITY: HOW SOCIETY-WIDE STRUCTURAL VIOLENCE DIMINISHES JUSTICE FOR PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES

The history of people with intellectual and developmental disabilities (I/DD) is saturated with dehumanizing practices, including incarceration in one form or another. Unquestioned and rampant ableism¹ creates inequities for people with these disabilities² in a range of social institutions, including education, employment, and the criminal justice system. These inequities are some of the most persistent, yet often unrecognized, forms of structural violence in American society.

Structural violence, as defined by anthropologist Paul Farmer, refers to “social and economic inequities that determine who will be at risk for assaults and who will be shielded from them” (Farmer 2003, 17). This form of violence is socially and culturally constructed and, thus, entirely preventable. The insidious and ubiquitous nature of the structural violence faced by people with I/DD makes this form of violence particularly difficult to address. Inequalities in treatment and outcomes are assumed to be ‘natural.’ Most people do not question the practice of placing people into hierarchies of social worth based on cognitive, intellectual, and behavioral capacities. This hierarchy has a long history and has been thoroughly embedded into many modern, Western social institutions.

Intellectual and developmental disabilities have been deemed a marker of a devalued state of being. We see this in media portrayals of people with I/DDs as unidimensional characters designed to send moralistic messages (Ellis 2015) as well as through persistent scientific efforts to eradicate these disabilities with cures and treatments. These are subtle and explicit messages that people with I/DDs are not appreciated members of the community. For many, this marker justifies the range of negative outcomes associated with I/DDs, from poor education to poverty to abuse and murder, that are generally overlooked and widely accepted.

In order to fully grasp the extent of ableist structural violence in our social institutions targeting people with I/DDs, we must explore the ways in which these institutions relate to and rely on each other. Education, employment, housing, government, and medicine are all areas of social and civic life that fail to support, and often actively harm, people with I/DDs. These institutions have deep connections with each other and often serve to feed into outcomes in other areas—better education, for example, means better employment opportunities which can lead to safer housing and better health. With better health and permanent housing, people are better able to participate in communities and in civic life by, for example, having an address with which to register to vote.

The criminal justice system is often overlooked in discussions about how people with I/DDs experience structural violence. Very little work from scholars or advocates exists in this area and, of the work out there, much centers on death penalty considerations (Chafetz 2015) and police trainings about these disabilities (Viljoen et al. 2017). While these issues are important, there are a host of other concerns with the ways the American criminal justice system understands and responds to people with I/DDs. This holds true whether one comes in contact with the system as a victim or the accused and is deeply connected to important historical trends in the ways people with disabilities have been cared for in the U.S.

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¹ Ableism is discrimination and prejudice based on the presence of disability and the preference for people who do not have disability.

² The definitions of intellectual and developmental disabilities vary somewhat. Here, I am using the term to encompass people whose cognition and/or development is different from the general—or neurotypical—population. Typically, this includes people who have diagnoses such as autism, Down syndrome, fetal alcohol syndrome, cerebral palsy, general cognitive disability, and attention disorders like ADHD.



The current paper argues that disability-related disparities in the criminal justice system have not occurred in isolation, but rather are a consequence of disparities and systemic inequities throughout American society and history. Here, I review what is known about the interaction between people with I/DDs and criminal justice settings and professionals, and place that knowledge into conversation with the structural violence inherent in some of our other social institutions, focusing on education and employment. These two institutions are deeply connected to criminal justice involvement as well as a range of other disability outcomes and are useful analogues for this analysis. However, a similar analysis could be done with a focus on civic participation, family life (particularly as it relates to parenting and sexuality), or other aspects of social life, such as transportation and leisure. My analysis is informed by and includes examples from interviews I conducted with people with I/DDs about their experiences with criminal justice. Only by centering their perspectives and reforming the social institutions that contribute to the risk of criminal justice involvement can we ensure people with I/DDs experience justice.

1. The disenfranchisement of I/DDs in education and employment

The ways our current social institutions construct I/DDs as a devalued state of being is reliant upon early foundational philosophical notions regarding people with non-normative minds.³ Plato and Aristotle were concerned with personhood in order to discuss moral worth. Both relied to some extent on ‘rationality’ or ‘reason.’ In other words, there seemed to be some threshold of intellectual capacity or ability that was a prerequisite for membership into the human, moral community. Though neither our modern concepts of intellectual disability nor the rejection of people with these disabilities were present during this era, an emphasis on reason in discussions of personhood and euthanasia indicates some early concepts important to the history behind modern constructions of disability and ableism (Kiefer 2014). For example, Plato claimed ignorance deformed the soul and noted that “the ignorant [are] to follow” while “the wise man [is] to take the lead a rule.” This, he noted as “nature’s own ordinance,” thus proposing a natural hierarchy of man based on some kind of intellectual or reasoning ability. Aristotle relied on intellectual virtues, including rational capacity for his concept of flourishing. Without these virtues, one can still be a moral being, but one of notably inferior status (Stainton 2002, 454, 456).

Threads of these sentiments are seen throughout Western philosophy. St. Thomas Aquinas, John Locke, and Emmanuel Kant continued to use intellectual disability to think about the limits of personhood, and modern philosophers and ethicists do so to this day. Many consider personhood to be reliant on certain capacities, including sentience, a concept of self, and the ability to engage in goal-directed behavior, which requires a sense of time (Kittay and Carlson 2010; Carlson 2010; Taylor 2017). Specifically, recent work on speciesism, which argues against preferring humans based on their biological and genetic membership to our species, often pits people with significant and/or intellectual disabilities against non-human animals in determinations of moral worth (Singer 1977; Taylor 2017).

As the foundation of Western thought, these works helped construct the contemporary social systems with which we all come in contact. Thus, ableism was embedded within the construction of modern society. Importantly, this work led to the theory and practice of eugenics, the roots of which can be traced back to Plato but peaked in Western intellectual thought at the end of the 19th and beginning of the 20th century (Stainton 2002). Eugenics, as conceived of by Sir Frances Galton, was an attempt to direct human evolution and improve the human race through practices such as selective breeding. Before being embraced by the Nazi party, eugenics became very popular in America and eventually came to encompass a range of tools, including forced sterilization, segregation, and murder, all of which targeted people with I/DDs (Garland-Thomson 2015; Stainton 2002).

While widely condemned throughout the world today, legacies of eugenics and the philosophies behind this approach persist in many social institutions. Disability scholar Fiona Campbell calls modern-day eugenics “more insidious and covert” and centered on compelling individuals to control or manage themselves within

³ I am using this term to refer to people who have a range of cognitive or psychiatric differences with the understanding that it is a problematic term itself. It suggests there is something as a ‘normative’ mind against which people who have the disabilities I am writing about are contrasted. However, I find it useful in the context of this paper to demonstrate and emphasize the assertions of cognitive and psychiatric hierarchies inherent in the systems and philosophies I am discussing.



ableist systems and assumptions (Campbell 2000, 57). In addition to reproductive technologies aimed at reducing or eradicating disability from our communities, such as prenatal testing and gene editing, certain social structures and policies have been implicated in this trend by working to socially segregate people with disabilities. The US education system, for example, classifies children based on various properties. Some are classified using psychometric testing, several of which were developed as eugenic tools (Chitty 2017, 71; Kornhaber 2012, 2149), and others are more implicitly classified by class and race through discriminatory school districting policies (Kornblau 2019). These classifications lead to varying qualities of education. The special education system in particular is criticized for being built on eugenic practices that serve to segregate students with disabilities (Baglieri et al. 2011; Baker 2002; Riddell 2006), or, in the contemporary moment of mainstreaming, a certain 'level' of disability. These students are then trained for unskilled work for which compliance is a primary skill to hone (Erevelles 2000). While special education is intended to provide a better education for students with disabilities, in reality, being placed in these programs means lowered expectations, a more restricted curriculum, and overall poorer adult outcomes (Artiles et al. 2010; "Students from Low-Income Families and Special Education" 2018; Newman et al. 2011).

It is important to note here that these outcomes are themselves uneven and discriminatory such that students who are disabled as well as poor and/or of color experience heightened risk throughout our educational system as well as the other social institutions. Black and brown students are overrepresented in special education (Houtrow 2015; Stein, Siegel, and Bauman 2010) as are students who come from impoverished families (Bal et al. 2013). These outcomes are not mutually exclusive; poverty, in which many people of color live, is associated with higher rates of disability (Houtrow 2015; Stein, Siegel, and Bauman 2010).

Regardless, the American education system is a site of structural violence and disenfranchisement for students with disabilities. The well-documented school-to-prison pipeline, which funnels students into the criminal justice system through overly punitive practices and failures to keep some students at schools, is widely known to disproportionately impact students of color. However, what is less discussed is how it overly impacts students with disabilities, who are more likely to be suspended, coerced into criminal activity, or referred to officers for disciplinary reasons (Mallett 2016). The impact is so stark, we perhaps should be talking about the special education-to-prison pipeline.

Students with disabilities have lower graduation rates, more difficulties finding employment after high school, and experience more un- and underemployment. Even when employed, people with disabilities earn lower wages and are twice as likely to live in poverty (Taylor 2018; Minkler, Fuller-Thomson, and Guralnik 2006, 700). These outcomes mean people with disabilities are not as able to participate in community living, which, along with difficulties accessing transportation and living in segregated facilities, means they are more likely to be excluded from society.

Finally, in the United States it is legal to pay disabled workers subminimum wage under Section 14(c) of the Fair Labor Standards Act, which is most often used for employees with I/DD (Whittaker 2005, 1). This act "authorizes the employment of workers with disabilities at subminimum wages when their disabilities impair their productivity for the work being performed." Acts such as these do not only perpetuate the poverty existent in the disabled community, but also harken to those early philosophical works arguing that people with non-normative minds are not fully equal in their humanity and worth.

As noted above, our social institutions have been created with the foundations of Western liberal philosophy. Built from the same base, these institutions are mutually reinforcing. The histories and current state of the education of and employment opportunities for people with I/DDs are not only deeply connected to each other and to people's socioeconomic status, but to histories of housing and caring for this community. Thus, we must review the history of institutionalization and deinstitutionalization to fully explore the relationships between people with I/DDs, criminal justice involvement (as victims and the accused), and to modern-day mass incarceration.

2. Institutionalization, crime, and I/DDs

People with intellectual and developmental disabilities have long been inmates. Starting with the rise of industrialization in post-revolutionary America, people with I/DDs have been held behind locked doors of some sort. Prior to this time, there were no institutions and people with these disabilities, who classified as 'idiots,' 'morons,' 'imbeciles,' or 'feebleminded,' were a part of daily life, cared for by family and community



members (Grob 1973, 12). There was also a general consensus that people must have free will and an understanding of right and wrong to be held responsible for crimes. Thus, those deemed ‘idiots’ were often saved from the corporeal punishments of the time (Carey 2009, 45). However, even then, poverty and vagrancy were criminalized. So when a family could no longer care for their disabled members, they often ended up in a local almshouse or jail (Grob 1973, 12; Trent 1994, 8; Carey 2009, 45).

This practice was eventually expanded and special facilities for people with intellectual, psychiatric, and developmental disabilities emerged in the 18th century. These early institutions resembled prisons in that people were in locked rooms and wards and provided only their basic needs. However, by the end of the 18th century and into the 19th century, innovators such as William Tuke and Thomas Kirkbride developed and promoted the approach of moral treatment as a more humane way to cure those committed to asylums and institutions. This approach centered around strict routines, hard work, etiquette, and self-discipline. Inspired by Enlightenment ideals of scientific practices and progress, liberty, and social welfare as well as a distrust in the harsher, physical treatment methods of the time, inmates at these early institutions were treated through manual work, structured leisure time, and a family-style environment with the intent of preparing them to return to community life (Grob 1973, 43; Trent 1994, 117).

With the rise of degeneracy theory in the 18th century, crime and I/DD became linked through the well-known Italian criminologist Cesare Lombroso’s work on the heritability of crime. He claimed links between ‘feeble-mindedness,’ crime, and heredity based on assumptions of moral, rather than intellectual, flaws (Trent 1994, 87). Thus, early theories about the relationship between I/DDs and crime were deeply reflective of early Western philosophical traditions of marking people with these disabilities as at the edge of the human moral community. They were also reflective of the emerging alliance between science and medicine with the law and criminal justice, one that marked certain people as irreparably monstrous and dangerous (Foucault 2003, 56).

By connecting people with intellectual and developmental disabilities to crime via a moral failing rather than an intellectual one, the link became deterministic rather than rehabilitative. In other words, when it came to people with I/DDs, criminality was not a trait that could be changed through reasoning or hard work. As historian James Trent (1994) noted, using the vernacular of the time, “Within the population of feeble-minded, then, most moral imbeciles were bright enough to get into trouble, but not bright enough to stay out of it” (87). Thus, involuntary commitment in the absence of any criminal activity was common. Around the same time, moral treatment was declining. In an effort to increase the legitimacy of the field of psychiatry by being more aligned with medicine, more biology-based interventions were introduced. During this time, commitment to an institution often led to treatments focused on the body, rather the spirit and mind, such as hot or cold water baths, isolation, tooth removal, and physical restraint. These practices were considered to be the height of modern scientific thought at the end of the 19th century, as the era of eugenics was ushered in (Carey 2009, 65).

Over time, it became clear that people were not returning to their communities, and their communities did not want them. A 1911 letter from a superintendent of an Illinois asylum described this shift, stating: “Society only desires to get rid of [inmates at the institutions] and be protected from them when the older ideas were to uplift them by every means that could be used” (Trent 1994, 97). Meanwhile, Americans became increasingly reliant on institutions as they moved from rural areas to cities. Populations at institutions grew, but staff and space did not (Grob 1973, 202). Overcrowding, abuse, and neglect increased.

In the 1950s, institutionalization reached its peak; half a million people were interned in asylums and institutions in 1955 (Harcourt 2011, 64). Despite deteriorating conditions at institutions and asylums, these facilities continued to be filled with people, as psychiatric diagnosis and subsequent institutionalization were also used politically to create social order during the American civil rights movement (Rembis 2014; Metz 2009). The persistence of ideas about the diminished moral agency and personhood of people with I/DDs and other psychiatric disabilities, which is traceable to early Western moral philosophy, allowed for these facilities to warehouse and dehumanize vast amounts of people—even though such facilities were not well supported, having little funding and poorly trained staff. Further, inmates had little hope of leaving. Given that people in these institutions were taught explicitly and implicitly that they were not deserving of humane treatment and justice, abuses were not reported or investigated. And even when these practices were exposed, the response and solutions failed to resolve these issues or lead to true community integration, as evidenced by the problems noted above in our education and employment structures.



3. The era of deinstitutionalization and transinstitutionalization

Deinstitutionalization, the nationwide effort to remove people from large institutions and asylums into communities, began in the 1950s in response to a variety of social shifts, including the discovery of psychotropic medications, which made community-based care seem more tenable, and exposés of horrific practices at these facilities (Harcourt 2011, 53). Around this time, criticisms of “total institutions,” a term used by prominent sociologist Erving Goffman to refer to the prison-like conditions of asylums and institutions, developed. Importantly, Goffman⁴ noted that institutionalization impacted not only the inmates, but also the staff such that all knew their role in the process of control and regulation (Goffman 1962, 285). Simultaneously, parents and family members began speaking out about the conditions at the institutions they placed their children and siblings.

Inspired by these movements as well as the personal experience of his sister Rosemary’s institutionalization and lobotomy, President Kennedy publicly contributed to shed light on the issues impacting people with I/DDs (Trent 1994, 248). He created a President’s Panel on Mental Retardation, whose recommendations for more community-based care inspired the creation of the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963. This act was designed to create mental health care centers in communities to enable people with I/DDs and psychiatric disabilities to be appropriately cared for in their home communities, instead of institutions (Carey 2009, 130). These nonprofit centers would not only distribute psychotropic medications, but also emergency care and educational services. Although President Carter signed the Mental Health Systems Act to expand the care these centers provided, President Reagan repealed this act along with a host of other social programs in 1981, contributing to a lack of community-based services today (Davis et al. 2012, 260).

By this time, disability advocacy was well underway, influencing the move to deinstitutionalization. Family members and self-advocates were organizing and helping propel the shuttering of the facilities in which they were residing (Friedman and Beckwith 2014). Public outcry was bolstered by media exposure about the poor conditions professionals and families were beginning to question. The most recognizable was the 1972 on-air report about the Willowbrook State School in New York by then journalist Geraldo Rivera. In it, Rivera exposed the abusive and inhumane practices to which the children living at Willowbrook were subjected.⁵ This report was picked up nationally and garnered the highest ratings of any local news special thus far, with an estimated two and half million viewers (Trent 1994, 258). Reports like these helped to fuel a shift in public attitudes about how people with intellectual and psychiatric disabilities were being treated (Harcourt 2011, 69).

These shifts included the development of several disability rights organizations and movements, which started in the 1960s but really took off in the 1970s and 1980s (Friedman and Beckwith 2014). The Independent Living Movement is one result of these efforts, which spurred the establishment of centers nationwide that are staffed and run by people with disabilities and aim to help people with disabilities find employment, housing, education, and other services needed to live in the community (Carey 2009, 176). However, these centers are scant and underfunded. Today, many people with disabilities remain unhoused, unemployed, and at risk of poor outcomes including homelessness and incarceration (Davis et al. 2009, 262). These situations perpetuate the risk of both victimization and incarceration for people with I/DDs. Such outcomes are intertwined with high levels of poverty and unemployment as well as poor education in the disability community.

4. Experiences of criminal justice for people with I/DD

4.1 As victims

Being disabled is a risk factor for abuse and victimization. Throughout the life course, people with disabilities are more likely than nondisabled people to be physically, emotionally, and sexually abused; bullied; and taken advantage of (Palusci 2017; Haydon et al. 2011; Breiding and Armour 2015; Braaten 2018). These rates are highest for people with I/DDs (Thornberry and Olson 2005; Baladerian et al. 2013, 9).

⁴ Goffman was not the only one writing about this subject at the time. Others such as Thomas Szasz, Franco Basaglia, R.D. Laing, and George Alexander were also critical of these practices. These outcries became the foundation of the anti-psychiatry movement of the mid-20th century.

⁵ The full report can be found at <http://index.geraldorivera.com/folio/willowbrook>.



While some people with I/DDs live with or get support from trusted family members and caregivers into adulthood, for many these options are not available. Family members may not be alive, in touch, or able to afford good care. Since adults with I/DDs are vastly under- and unemployed, their options for safe living situations are severely restricted, putting them at risk for varied forms of victimization. Further, the abusers are often people the victims know and rely on, including intimate partners, family members, or hired care professionals and other service providers (Joyce 2003, 609; Baladerian et al. 2013, 6).

There are myriad barriers of justice for this population and many instances go unreported (The Arc and AAIDD 2014). The 2012 National Survey on Abuse of People with Disabilities found only 37.3% of victims reported crimes against them to authorities; this percentage goes up to 51.7% if a family member finds out about the crime and reports it on behalf of the victim (Baladerian et al. 2013, 9). Many people believe that even if they do report, nothing will happen. This assumption, unfortunately, is based on fact. The 2012 survey also found that of cases of abuse that were reported, only 47.1% resulted in any kind of action and only 9.8% ended in arrests (Baladerian et al. 2013, 10).

The lack of reporting these crimes is fueled by several important factors grounded in the culturally-driven dehumanization of people with I/DDs. First, many fear retribution from abusers or other caretakers whose care work is undervalued. People with I/DDs are deeply reliant on their caretakers and partners. These interdependent relationships can and should be mutually rewarding (Kittay 2015), but a lack of resources on the part of caregivers prevents this. Intimate partners may not get the respite help they need and hired caretakers are often undertrained, underpaid, and overworked. These conditions can lead to frustration and abuse. Victims may not report abuse because they are afraid that the abuser will retaliate or, in the case of hired caretakers, the abuser's supervisors and coworkers will. Failing to respond to our current system that puts people with I/DDs at constant risk of victimization in all areas of life, including their homes, reflects the ways our society values, or fails to value, people with non-normative minds.

Second, people with I/DDs have often been socialized to do what authority figures say without question, complaint, or argue. Disability scholars Mark Friedman and Ruthie-Marie Beckwith described how this forced compliance was a major challenge for people living in institutions as the disability rights movement got underway. "For most of their lives," they stated, "the members [of the early disability rights organizations] had been conditioned to be passive and patient—perpetually waiting for other people to make decisions about their lives" (Friedman and Beckwith 2014, 239). They were not taught self-advocacy. This was particularly true in the early days of the disability rights movement, which was often led by people with physical and sensory disabilities. This early activism focused on infrastructural change, such as curb cuts or ramps, which were less useful to people with I/DDs. Further, early leaders found it difficult to navigate the intellectual and communicative differences that needed to be addressed to empower people with I/DDs. Thus, people with these disabilities continue to struggle with, as Friedman and Beckwith called it, the "learned helplessness" (2014, 239) that accompanies a lack of empowerment and equal consideration.

Third, people with I/DDs may also not report because they do not know how to report or because they are not aware that a crime occurred. If people are not taught how to identify abuse and neglect or that they should not be subjected to abuse, then they will not know they have the right to report it (Carey 2009, 186). It is only recently, for example, that some people with I/DDs are given any kind of formal sex education (Gill 2015). Assuming people with I/DDs are not interested in sex and sexual pleasure and denying them basic sex education is yet another form of structural violence, which then discredits the humanity of people with I/DDs. Failing to teach people with I/DDs about sex, consent, abuse, and justice drives the enormously high rates of victimization throughout this community.

The low rate of justice for this community is also a direct result of testimonial injustice, a term coined by Miranda Fricker to refer to instances in which a person is not listened to or believed because of some feature of their identity (Fricker 2007, 36). Testimonial injustice drives much of the dehumanization and structural violence against people with I/DDs. In the case of reporting abuse or victimization of people with I/DD, many caretakers and criminal justice professionals either do not believe the allegations or think the victim has the communication and cognitive abilities to accurately report a crime (Joyce; Petersilia 2001; Fogden et al. 2016).

A middle-aged African-American woman with multiple intellectual disabilities I interviewed recounted the time she called the police when her partner was hitting her. The police arrived and, she told me, "[the officer] was listening to his story and then my story and then next thing I know I was in handcuffs." Her abuser falsely



claimed she hit him first. She spent two days in jail. It appears that, as in many other cases, her disability, as well as her race and gender, made her unreliable from the start.

This injustice alone is reason enough to ensure that all criminal justice professionals have better training on disability and that people with I/DDs are taught a reliable communication method. It has been shown that if an interview is done thoughtfully and with attention to the accommodation needs of the victim, people with I/DDs are able to accurately report important life events (Morales et al. 2017; Beail 2002). First responders must be taught how to provide these accommodations.

Abuse and victimization among people with I/DDs are astoundingly prevalent. There are regular news items about sexual and physical abuse in residential facilities, yet the problem continues.⁶ These hate crimes are a direct result of the dehumanization inherent in our communities which is sustained by the structural violence built into our criminal justice, housing, education, and employment systems. Thus, this group of people is at extremely high risk of abuse, neglect, and violence and unable to get justice for these crimes (Quarmby 2012). People with I/DDs become victims at the hands of their abusers and then victims again at the hands of our criminal justice system.

4.2 As the accused and incarcerated

Political scientist Bernard Harcourt created a graphic representation of the influence of deinstitutionalization on mass incarceration. This line graph shows the steep decline of adults living in institutionalized settings cross over the steep increase of people being incarcerated in the 1970s (Harcourt 2011). Harcourt is not suggesting that mass incarceration was driven by deinstitutionalization—the influences of structural racism embedded in the Wars on Crime, Poverty, and Drugs were primary factors (Hinton 2016). However, his work points to the phenomena of transinstitutionalization. He argues that in the wake of deinstitutionalization, people with psychiatric and intellectual disabilities “were not only transferred to nursing homes, but eventually became a much larger segment of the prison population” (Harcourt 2011, 87).

The argument is not that the same people who were residing in these large institutions ended up in prisons and jails. Rather, the larger social processes that fail people with I/DDs and psychiatric disabilities, not addressed during deinstitutionalization, created high risk for incarceration. The reduction of social programs and housing supports (Ben-Moshe 2017, 275), as well as the special education-to-prison pipeline, poverty, and under- and unemployment in this community, increases the risk of criminal justice involvement for people with I/DDs. There are also very real ways in which the criminal justice system constructs disability by determining who is ‘unreasonable,’ ‘unpredictable,’ or otherwise pathologized based on responses to criminal justice interactions (Rembis 2014).

As disability scholar Liat Ben-Moshe notes, “We need to contend with the reality that during the heyday of institutionalization—extreme variance in behavior, thought or mind was not seen or accommodated in public” (2017, 279). Partly because of this invisibilization, many members of the general public are unaccustomed to integrating people with I/DDs. This unfamiliarity, along with the negative and discriminatory assumptions of intellectual, developmental, and psychiatric disabilities that were part of the context within which our social institutions were being built, meant these systems were often created without considering that people with disabilities also interact with these institutions. In other words, current education, employment, and criminal justice systems came into their modern forms during a time when institutions were hiding and segregating people with I/DDs. Dismantling institutions required a radical shift in public perception and attitude towards people with these disabilities, but this shift did not fully extend beyond the walls of the institutions. Thus, the social systems that were designed for nondisabled communities were not simultaneously altered to accept the changing social landscape that now includes, or should include, people with ‘non-normative minds.’

In this way, deinstitutionalization is important to the phenomena of disproportionate levels of people with I/DDs in incarcerated settings. While the exact prevalence is unknown, most estimates put the incarceration rates of people with I/DDs at significantly higher than that of the general population (Hayes 2007), which is about 1% for intellectual disability (Maulik et al. 2011) and up to 15% for the range of disorders considered to

⁶ For example, a June 9, 2019 article in *The New York Times* titled, “Residents Cowered While Workers at a Group Home Smacked and Pushed Them,” a June 12, 2019 *CNN* article titled, “Nursing Home Abuse Frequently Goes Unreported, Government Agency Finds,” or the March 2, 2019 *Washington Post* article, “A Caregiver Raped Two Intellectually Disabled Women, Police Say. Both Gave Birth To Children.”



be a developmental disability (CDC 2018). Meanwhile, among incarcerated populations, rates range from 7% for intellectual disability (Herrington 2009; Søndena et al. 2008) to 70-80% for developmental, intellectual, and learning disabilities combined (McCarthy et al. 2016; Søndena et al. 2008; Hayes et al. 2007). These numbers may also underreport as there is no standard practice of identifying people with I/DDs. Even forensic mental health professionals use a wide variety of tools to assess someone for I/DD, which is part of the reason why getting good reliable prevalence rates is so difficult (Sarrett 2017).

People with I/DDs come in contact with the criminal justice system as the accused for a range of reasons unrelated to engaging in criminal activity. High rates of poverty, substance abuse, susceptibility to coercion, and misunderstandings of criminal processes or what constitutes a crime (van Dooren et al. 2015; Søndena et al. 2008; Dowse et al. 2014) are important to consider. These factors all contribute to a high risk of contact with the criminal justice system and are deeply related to how disability is constructed and responded to within other social institutions, such as education and employment as described above. Sometimes, the expression of disability is a risk factor. For example, demonstrating unusual behaviors in public, such as self-regulatory stimming behaviors or simply wandering around, particularly if one is a person of color, may attract police attention. These interactions can easily escalate and lead to arrests or violence. This is what I call the criminalization of non-normative behavior, wherein behaviors outside of those deemed socially appropriate become a risk factor of police attention, incarceration, and even death.

Regardless of what brings people in this community into contact with police and prisons, their experience differs from that of nondisabled adults, leaving people with I/DDs at high risk for harm throughout the criminal justice system. People with I/DDs may have difficulty understanding the situation or the instructions given by a police officer, particularly if these instructions are stated quickly, have multiple steps, and/or are said loudly. A white autistic man in his 20s I interviewed described this kind of confusion when he was arrested.

I'm going towards the front of [my] house at that time, and all of a sudden I hear the [police car] doors opening, and, a few moments later, their guns being cocked and pointed at me, and saying, "Freeze. Don't move," which is kind of redundant because if you tell someone to freeze, they're not going to move. [Then] they tell me to get on my knees, and, in my mind, I'm telling myself, "But they just told me not to move."

Confusion such as this is predictable and can lead people to pause or fail to follow directions. When that happens (and it is interpreted as obstinacy by officers), it can quickly escalate the situation to a dangerous level. A Ruderman Family Foundation report found that up to half of the people reported in the media to have been killed by police have some sort of psychiatric or cognitive disability (Perry and Carter-Long 2016). Many of these instances may include moments like this, in which the victim requires more time to process instructions or is entirely thrown off by the stress and sensory confusion of these encounters.

Confusion at proceedings is inherent in almost every step of arrest, court, and incarceration. I spoke to people with a range of disabilities who reported not understanding what was happening through criminal justice procedures. One participant told me when he was in front of the judge "[s]ome of the words and things that they was saying, I didn't understand what them meant [...] So I'm like [...] What does that mean?' Because I didn't want to say the wrong thing and end up it being worse than what it was." Another informant recounted when he didn't understand the questions the judge was asking him, "she sentenced me to three months in [county jail] because I didn't understand." The judge said it was for "disorderly conduct."

In addition to not understanding the language of the courts, my informants reported not being able to read forms they were given to sign and lawyers and judges who did not ask about or accommodate their disabilities. This confusion can lead to people with disabilities waiving their rights unknowingly; looking disconnected and, thus, guilty in front of juries; or even providing false confessions (Carey 2009, 186; Brodsky and Bennett 2005). Disability scholar Robert Perske started what is now known as Perske's list, which compiles cases of people with I/DDs who have been exonerated after falsely confessing to serious crimes. Perske first published this list in 2008 and updated it in 2011, at which time he had identified 75 cases of false confession. Of these, six people were executed⁷ before their exoneration occurred (Perske

⁷ They were Joe Arridy, Jerome Bowden, Walter Correl, Girvies Davis, Barry Lee Fairchild, and Cornelius Singleton.



2011; Perske 2008). Since Perske's death in 2016, people have continued to update Perske's list. There are now 114 names on the list.⁸

The high rate of false confessions by people with I/DDs reflects the legacy of connections between I/DDs (as well as, in many of these cases, race), crime, a lifelong requirement for compliance, and the testimonial injustice encountered when asserting innocence. In some of these cases, ableist assumptions that people with non-normative minds are unable to control their behavior and are prone to criminal behavior lead people to assume their guilt. Alternately, people with I/DDs are convinced to confess in order to please caretakers, friends, or the police. Again, people with I/DDs are often taught from childhood to do what people—especially authority figures—tell them to do, even if that means confessing to something they did not do. And when people with I/DDs who are assumed guilty state their innocence, they are disregarded because of their intellect and, often, their race and gender (Ben-Moshe 2017). Again, testimonial injustice is at the center of these assumptions.

Even for people who are guilty, incarceration can be longer and harder for those with this type of disabilities. As noted above, difficulty following orders by an officer can be seen as disruptive behavior and result in disciplinary action. In an interview with an informant about his time in prison, he described to me the consequences of not understanding officer instructions. Often, they would “lock you in a room and they'll make you sit in there for the rest of the day or something like that. Or they'll not give you dinner or lunch or something, with everyone else.”

Disciplinary actions can also result in more time added to a sentence or being sent to solitary confinement (Gardner, Graeber, and Machkovitz 1998; Scheyette et al. 2009). It is well established that solitary confinement has extremely detrimental effects on one's mental and physical health (Kupers 2017). This is particularly true for someone with an I/DD who may have difficulty understanding why they are put there and struggle with managing anxiety, depression, and energy.

While incarcerated, people with these disabilities are targets for victimization by those they are incarcerated with as well as by officers and staff (Riches et al. 2006; Robertson and McGillivray 2015). The same injustices experienced in the free world are replicated in prisons and jails. One man reported to me that while he was in jail at the age of 17 the men were “constantly grabbing [him], pulling [him], and trying to put [him] in the shower and do all this stuff.” It was days before an officer helped him.

Fear of victimization by staff often leads people to hide their disability from prison and jail officials (Hayes 2007). One of my informants summed this attitude up by stating:

A lot of police officers, and a lot of judges, and a lot of people up in higher standards, they look down on people with disabilities like we're the dumbest things in the world and there is no way on God's green Earth you should be this old and not know how to do this, that, and the other [...] But if you're picking on me for this one little thing, then that shows how ignorant you are.

The fear of stigma, discrimination, and violence based on disability is a direct effect of wider public sentiments about disability traced through social institutions and to the foundations of the philosophies behind them.

For people with I/DDs, failing to disclose their disability means they will not be able to access accommodations, which can prevent participation in early release programs, such as therapies, educational courses, or vocational training programs. People may also choose not to participate in these programs because of a preference for isolation, which is sometimes disability-related but can also be a result of chronic victimization (Hayes 2007; Robertson and McGillivray 2015). Further, it is likely that these programs are not adapted for people with I/DDs (Wood et al. 2019), making it difficult for them to follow the information and meet the requirements for completion. Not being able to participate in these programs lowers one's chances of parole and, thus, leads to longer sentences.

⁸ This includes people who have been executed who were suspected or known to have an I/DD before *Atkins v. Virginia*. While the list was obtainable at the time of writing, at the time of publication the list was no longer available online. It is unclear what happened to the list.



The criminal justice system, as a social institution, was not designed with the consideration of engaging with people with a range of cognitive and psychiatric profiles. It is based on uniformity rather than flexibility and context. In this way, it fails to be a just system. People with I/DDs are yet another disenfranchised group who are often failed and harmed by this system.

5. Conclusion

This paper has traced the lineages of ableist assumptions about intellectual and developmental disability through our education, employment, and criminal justice systems to demonstrate the ways these systems work together to dehumanize and eugenically segregate this population from the general public. A wealth of scholarship demonstrates how American education systems and employment opportunities harm people with I/DDs, but focuses less on criminal justice. Here, I presented an overview of these harms to show the ways structural violence within the system disenfranchises people with non-normative minds.

I have argued that a long history of ableism maintains deep roots in our criminal justice system and described how testimonial injustice disregards the victimization of people with I/DDs. In doing so, stigma against this population is perpetuated and further victimizes these victims. I have also argued that disability itself is criminalized and punished through unnecessary police attention, heightened police response, disparate treatment throughout the system, and overly punitive incarceration experiences. These outcomes are built into our criminal justice system and are maintained by the ableism built into related social institutions, such as education and employment. As our modern social institutions were being created, they were done so with marginal and dehumanizing considerations of disability. These are the ways in which our criminal justice system constructs intellectual and developmental disabilities.

There is still much to learn about the ways the criminal justice system responds to, treats, and constitutes intellectual and developmental disabilities. And this work should start by answering the basic questions: What is the prevalence of these disabilities in incarcerated settings? How often do police interact with people with I/DDs as the accused and as victims? What are common demographic and criminal features of people with I/DDs who offend? What features sustain and generate abusive situations for people with I/DDs and how can future harms be averted? How can justice be ensured for this community after instances of victimization? What modifications of existing training programs are needed to ensure people with these disabilities are listened to, respected, and diverted from poor outcomes?

More work needs to be done to better understand how people with I/DDs experience the criminal justice system. Their perspectives and experiences must be centralized in efforts to reform structures that lead to criminal justice harm. Phenomenological and ontological information from people with I/DDs are likely to expose features of the criminal justice system that need reform, but remain unidentified because testimonial injustice ensures this perspective is not included in the conversation.

In this paper, I have argued that people with I/DDs are set up to fail and experience abuse because of the structural violence inherent in our social institutions. The system that is designed to address these impairments and bring justice is, in many ways, perpetuating the harm. Looking at the failures of deinstitutionalization, it is clear that without addressing structural violence and systematic ableism in related social institutions, reform efforts will simply lead to different problems. People with these disabilities need better representation in media, more reliable and affordable transportation, and affordable and accessible health care. To truly reform the criminal justice system in ways that ensure more justice for people with I/DDs, reform efforts cannot just focus on moments of criminal activity, but must include reforms to the surrounding contexts that lead to encounters with criminal justice professionals and settings. The criminal justice system cannot be changed without also changing our other social institutions and the underlying attitudes on which they are founded.

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