

INTELLECTUAL DISABILITY, MITIGATION
AND PUNISHMENT

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Abstract: Individuals with intellectual disability in the criminal legal system experience objectively worse outcomes than others—more wrongful convictions, more pretrial detentions, worse plea deals, and longer sentences. None of these outcomes are justified under the prevailing theories of punishment. These disparate outcomes stem from initial failures to identify that a person has intellectual disability in combination with misunderstandings and biases about intellectual disability. This Article analyzes how the criminal legal system treats individuals with intellectual disability, the reasons for these inequitable and negative experiences, and the theories of punishment justifying their sentences. Drawing on this foundational analysis, this Article proposes that jurisdictions adopt a categorical rule that makes intellectual disability always mitigating and requires courts, in their sentencing orders, to articulate the degree to which they find it mitigating and why. This rule, however, is not the ultimate goal, but rather a tool for effectuating broader change in the criminal legal system.

This Article expands upon the analysis articulated in *Atkins v. Virginia*, in which the U.S. Supreme Court exempted individuals with intellectual disability from the death penalty after considering both the practical realities they face in the criminal legal system and the theories of punishment. By applying this same approach to non-death penalty cases involving individuals with intellectual disability, it becomes clear that a categorical rule is again necessary. After describing the proposed categorical rule, this Article describes how the rule is situated within broader conversations about disability justice and abolition, as well as the greater implications for change in the criminal legal system—including increased identification, greater understanding across system actors, and more appropriate sentences.

INTRODUCTION

Robert Sams, age twenty, is serving a five-year prison sentence for possession of a controlled substance.¹ He has a minimal, nonviolent prior record,

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and nothing about his offense was particularly egregious. Mr. Sams has mild intellectual disability and only made it through eighth grade.² In school, his deficits in adaptive behavior³ meant that he had trouble following multi-step directions, controlling impulses, and connecting with peers.⁴ Though he had an Individualized Education Program (IEP) to accommodate his intellectual disability,⁵ the schools he attended were all underfunded, and he never fully received the necessary supports.⁶ To compensate for and mask his disability, he would feign understanding of complex issues and adopt an air of bravado and confidence.⁷

Mr. Sams worked several minimum wage jobs throughout his teenage years,⁸ but when his girlfriend became pregnant, he felt pressure to earn more

¹ During my years as a public defender and clinical professor, I have seen the impact of intellectual disability on criminal cases in many complex ways. This representative account is an amalgamation of these experiences.

² A person with “[m]ild” intellectual disability generally has an IQ between 50 and 69, limitations in adaptive functioning, and experiences onset during the developmental period. See NAT’L ACADS. OF SCIS., ENG’G & MED., MENTAL DISORDERS AND DISABILITIES AMONG LOW-INCOME CHILDREN 171 tbl.9-1 (Thomas F. Boat & Joel T. Wu eds., 2015) [hereinafter MENTAL DISORDERS]; ROBERT L. SCHALOCK, RUTH LUCKASSON & MARC J. TASSÉ, AM. ASS’N ON INTELL. & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, DIAGNOSIS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 13–21 (12th ed. 2021). For a more complete explanation of intellectual disability, including mild intellectual disability, see *infra* Part I.A.

³ Adaptive behavior is the “collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.” SCHALOCK ET AL., *supra* note 2, at 117; see *infra* Part II.B.2 (discussing adaptive deficits).

⁴ See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 34–36 tbl.1 (5th ed. 2013) [hereinafter DSM-V] (describing adaptive functioning deficits in conceptual, social, and practical domains for persons with mild to profound intellectual disability).

⁵ See OFF. OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP’T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 1–4 (Lisa Küpper ed., 2000), <https://www2.ed.gov/parents/needs/spced/iepguide/iepguide.pdf> [<https://perma.cc/4Y5K-QUH8>].

⁶ See Yael Cannon, Michael Gregory & Julie Waterstone, *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403, 447–57 (2013) (discussing institutional failures in implementing the Individualized Education Program (IEP) process that interfere with student access to services); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 31 (2003) (“School personnel fail not only to identify students with disabilities, but also they fail, with surprising frequency, to diagnose and address disabilities correctly.”).

⁷ See Martha E. Snell et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 220, 225–26 (2009) (describing the lengths to which individuals go to conceal their intellectual disability). See generally ROBERT B. EDGERTON, *THE CLOAK OF COMPETENCE* (revised & updated ed. 1993) (describing various ways in which individuals with intellectual disability work to mask their disability and meld with the general public).

⁸ See Snell et al., *supra* note 7, at 223–24 (describing employment rates and commonly held jobs among individuals with intellectual disability, and noting “[a]lthough it is true that people with intel-

money and started selling cocaine. Shortly thereafter, police arrested him for possession with intent to distribute.⁹ Because he had a minimal prior record, the court released him with a mandatory curfew: he had to be in his house between 7:00 pm and 7:00 am. Mr. Sams, however, had deficits in his practical adaptive functioning, related to his intellectual disability, that made it difficult for him to adhere to this curfew.¹⁰ Within a week of his release, he was rearrested for violating curfew when he went to pick up dinner at a Chinese restaurant around the corner from his house at 7:20 pm. At the time of the arrest, officers recovered a small amount of marijuana. The judge revoked his release status and incarcerated Mr. Sams pending the resolution of his case.

Mr. Sams had a strong Fourth Amendment defense, but he hated being incarcerated, and if he pled guilty to a downgraded charge of possession of cocaine, the court would immediately release him on probation.¹¹ Litigating the case could have taken months if not years. So when presented a plea deal by his public defender, who had no idea of his intellectual disability, Mr. Sams expressed immediate interest.¹²

After Mr. Sams pled guilty, the court sentenced him to three years of supervised probation.¹³ At no point from the start of the case through sentencing

lectual disability with higher IQs are more likely to be employed than people with intellectual disability with lower IQs, their employment rate (27.6%) is far below the national average in the general community (75.1%) and more often consists of part-time work, in entry-level service jobs, with low wages and minimal benefits" (citing Kiyoshi Yamaki & Glenn T. Fujiura, *Employment and Income Status of Adults with Developmental Disabilities Living in the Community*, 40 MENTAL RETARDATION 132 (2002))).

⁹ Individuals with intellectual disability are more likely to be caught and arrested than the general population. Tammy Smith, Edward A. Polloway, James R. Patton & Julia F. Beyer, *Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning*, 43 EDUC. & TRAINING IN DEVELOPMENTAL DISABILITIES 421, 422 (2008).

¹⁰ See K. Schuchardt, M. Gebhardt & C. Mäehler, *Working Memory Functions in Children with Different Degrees of Intellectual Disability*, 54 J. INTELL. DISABILITY RSCH. 346, 346–48 (2010) (noting that young people with intellectual disability tend to have trouble across working memory).

¹¹ People who are incarcerated before trial, regardless of any intellectual disability, experience worse outcomes in their cases. LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 3–6 (2019), <https://safetyandjusticechallenge.org/wp-content/uploads/2021/06/Justice-Denied-Evidence-Brief.pdf> [<https://perma.cc/75QF-NF5J>] (noting that individuals who are detained pretrial are more likely to be convicted of an offense and receive harsher sentences than those released within three days of arrest).

¹² See Sheri Lynn Johnson, John H. Blume & Amelia Courtney Hritz, *Convictions of Innocent People with Intellectual Disability*, 82 ALB. L. REV. 1031, 1038–39 (2018) (noting that lawyers frequently struggle to identify that a client may have intellectual disability). One of the three domain areas of adaptive deficits is in conceptual skills, which includes difficulty in "choosing a good solution when confronted with a problem," "planning future life activities," and "anticipating the consequences of his or her behavior." SCHALOCK ET AL., *supra* note 2, at 30.

¹³ See Joan Petersilia, *Justice for All? Offenders with Mental Retardation and the California Corrections System*, 77 PRISON J. 358, 360–61 (1997) (noting that most individuals with intellectual disa-

was Mr. Sams' intellectual disability raised, and in fact, all parties, including the judge, prosecutor, defense attorney, police officers, and pretrial services and probation officers, were unaware of the disability.¹⁴

During probation, Mr. Sams encountered many of the same challenges as during pretrial release: he often missed appointments and mandatory programming, and he struggled to find and maintain employment. These issues, though none involved re-offending, made Mr. Sams "unsuitable for probation." After multiple probation violation hearings, the court revoked Mr. Sams' probation and sentenced him to five years in prison.¹⁵

Mr. Sams' prison experience is especially harsh because of his intellectual disability. He is a target for violence and abuse,¹⁶ and without a GED, he lacks access to rehabilitative programming.¹⁷ Worse yet, a dearth of educational supports prevents him from obtaining a GED while in prison.¹⁸ Consequently, Mr. Sams misses out on opportunities to earn early release and spends more time incarcerated than others.¹⁹

bility "confess to the crime, plead guilty to the original (not reduced) charge, and waive their right to a jury trial" (citation omitted).

¹⁴ Intellectual disability is often referred to as a "hidden disability." See *infra* Part I.A. Without particular training, identifying intellectual disability can be a substantial challenge. Johnson et al., *supra* note 12, at 1038–39.

¹⁵ See COUNCIL OF STATE GOV'TS JUST. CTR., *CONFINED AND COSTLY: HOW SUPERVISION VIOLATIONS ARE FILLING PRISONS AND BURDENING BUDGETS* 1 (2019), <https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf> [<https://perma.cc/UY5A-D8Q8>] (noting that 25% of all prison admissions are for technical violations of probation such as missing appointments).

¹⁶ See Katie Kronick, *Left Behind, Again: Intellectual Disability and the Resentencing Movement*, 101 N.C. L. REV. 959, 1010–11 (2023).

¹⁷ See, e.g., FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., *PSYCHOLOGY TREATMENT PROGRAMS*, CN 5330.11, ch. 2, at 6, 12 (2016), <https://www.bop.gov/policy/progstat/5330.11.pdf> [<https://perma.cc/7NFU-PZXB>] (noting that an eighth-grade education level is required for both the Bureau of Prisons' nonresidential and residential drug treatment programs).

¹⁸ Obtaining a GED is believed to be essential to rehabilitation, often leading a reduced risk of recidivism. See, e.g., John Nuttall, Linda Hollmen & E. Michele Staley, *The Effect of Earning a GED on Recidivism Rates*, 54 J. CORR. EDUC. 90, 92–94 (2003) (finding that attaining a GED while in custody substantially reduced the likelihood of recidivism). In addition, Mr. Sams is entitled to special education services until the age of 21 or 22, depending on the jurisdiction, which he would likely receive in the community but would face substantial barriers to accessing in prison. See Seth E. Packrone, *Educational Death Sentences: Addressing the Plight of Students with Disabilities in Adult Jails and Prisons*, 59 HARV. C.R.-C.L. L. REV. 103, 114–15 (2024).

¹⁹ See Jennifer C. Sarrett & Alexa Ucar, *Beliefs About and Perspectives of the Criminal Justice System of People with Intellectual and Developmental Disabilities: A Qualitative Study*, 3 SOC. SCIS. & HUMANS. OPEN, Feb. 6, 2021, at 1, 2, <https://perma.cc/5JK8-4XM8> (noting how "failure to quickly comply with orders, which may be related to difficulty processing information or anxiety in high stress situations, can lead to disciplinary reports, and can eventually result in solitary confinement or prolonged sentences"); Robert D. Dinerstein & Shira Wakschlag, *Using the ADA's "Integration Mandate" to Disrupt Mass Incarceration*, 96 DENV. L. REV. 917, 921 (2019) (describing many ways in which incarceration is particularly challenging and detrimental for individuals with intellectual and other disabilities); Petersilia, *supra* note 13, at 362 ("The offender with [intellectual disability] takes

Intellectual disability²⁰ is both ubiquitous and hidden in the criminal legal system.²¹ Individuals with intellectual disability are disproportionately involved with the system, but the degree of the inequity remains unclear due in part to identification failures.²² Furthermore, actors in the criminal legal system

up an inordinate amount of staff time, and many are eventually reclassified to a higher (and more expensive) security level and moved to maximum-security cells. Their poor institutional behavior and ‘overclassification’ also means that they fail to earn good-time or work-time credits, are unable to participate in institutional or early release programs, and in states with parole, fail to become eligible for parole because they have not finished the programs or procedures required for parole consideration.”).

²⁰ At the outset, I acknowledge that defining and diagnosing intellectual disability raises many complex issues related to race, poverty, and bias. See Robert M. Sanger, *IQ Intelligence Tests, “Ethnic Adjustments” and Atkins*, 65 AM. U. L. REV. 87, 118–21 (2015). In terms of testing, racial bias has been well-documented with Black individuals scoring lower on average than white individuals. *Id.* at 120. These differences, which have nothing to do with genetics as has been proven since the 1990s, likely “reflect the fact that children who grow up with limited resources are less likely to develop to their full genetic potential.” *Id.* This inequity has resulted in controversial assertions, such as prosecutors requesting that a Black person’s IQ score be adjusted upward so they are eligible for the death penalty. *Id.* at 108–16. In addition, some researchers have found that although Black children score lower on average, white children are more likely to receive special services and accommodations in school. Paul L. Morgan et al., *Are Black Children Disproportionately Overrepresented in Special Education? A Best-Evidence Synthesis*, 83 EXCEPTIONAL CHILD. 181, 192–93 (2017). Simply put, the combination of systemic racism, socioeconomic factors, and trauma makes the diagnosis of individuals with intellectual disability complicated, particularly among persons with multiple marginalized identities. See Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 928–30 (2021), https://www.yalelawjournal.org/pdf/HarrisEssay_a4tipb29.pdf [<https://perma.cc/CG3Y-FTNG>]. And these are the very individuals more likely to be pulled into the criminal legal system. See Smith et al., *supra* note 9, at 422.

²¹ See Ryan Thorneycroft & Nicole L. Asquith, *Crippling Criminology*, 25 THEORETICAL CRIMINOLOGY 187, 187 (2021) (“The position of disabled people within criminal justice frameworks and scholarship is one of ambivalence, which leaves disabled people in the simultaneous and contradictory position of centrality and marginality.”); Jessica Jones, *Persons with Intellectual Disabilities in the Criminal Justice System: Review of Issues*, 51 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 723, 727 (2007) (“Although police protocols and court-diversion schemes attempt to improve the identification of individuals with ID, research and prevalence studies continue to highlight that many individuals are still overlooked or misidentified.”).

²² See Smith et al., *supra* note 9, at 422 (discussing how individuals with intellectual disability are disproportionately represented in the criminal legal system). Although they constitute about 2% of the general population, common estimates are that individuals with intellectual disability make up between 4% and 10% of the population involved in the criminal legal system. *Id.* This disproportionate representation is not because individuals with intellectual disability are more likely to commit crimes, but rather because they are more likely to be caught and more likely to live in overpoliced neighborhoods. *Id.* (noting the overrepresentation of mild intellectual disability in impoverished, predominantly minority neighborhoods, which correlates with over-policing). Many also believe these estimates are low given the failure to identify individuals with intellectual disability involved in the system. See Johnson et al., *supra* note 12, at 1038–39. The woes that individuals with intellectual disability experience are similar to those experienced by individuals with mental illness—possibly signifying a broader, more systemic issue with the U.S. justice system. See Samuel R. Wiseman, *Bail and Mental Illness*, 64 B.C. L. REV. 1931, 1935 (2023) (“Mentally ill defendants, who tend to receive inadequate treatment in jail and upon release, now repeatedly cycle through pretrial detention or release and back into incarceration. Indeed, three U.S. prisons now serve as the largest ‘psychiatric facilities’ in the

rarely understand intellectual disability or its effect on a person's interaction with the criminal legal system.²³ As a result, intellectual disability is occasionally mitigating, sometimes aggravating, often deemed irrelevant, but mostly, it is not even discussed.²⁴

Yet a person's intellectual disability can impact every facet of a criminal case—why they entered the system in the first place;²⁵ how they are treated during the pretrial phase;²⁶ what happens during the trial or plea;²⁷ what is presented at sentencing and how that information is interpreted;²⁸ and their experience of incarceration.²⁹ Studies show that individuals with intellectual disability are less likely to be released pre-trial,³⁰ receive worse pleas and longer

nation for mentally ill individuals, housing more patients than any individual hospitals or dedicated community treatment centers.” (footnotes omitted)).

²³ Jones, *supra* note 21, at 723–24 (noting how intellectual disability is largely misunderstood); see also Sheri Lynn Johnson, John H. Blume, Emily Paavola & Lindsey S. Vann, *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 HOFSTRA L. REV. 1107, 1155 (2018) (noting the importance of educating the court on intellectual disability during death penalty litigation under *Atkins v. Virginia*).

²⁴ See *infra* Part I.B. The failure to understand intellectual disability and the treatment of individuals with intellectual disability as inferior reflects ableism within the criminal legal system. See Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 688 (2021); *infra* Part I.A.

²⁵ For example, students with disabilities are disproportionately involved in the school-to-prison pipeline. U.S. DEP'T OF EDUC. OFF. FOR C.R., CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 7 (2014), https://civilrightsdata.ed.gov/assets/downloads/2011-12_CRDC-School-Discipline-Snapshot.pdf [<https://perma.cc/6W9M-6S38>] (“Students with disabilities represent a quarter of the students who are referred to law enforcement or subjected to school related arrests, while representing just 12% of the student population.”).

²⁶ Smith et al., *supra* note 9, at 426–27 (noting that individuals with developmental disabilities had more difficulty seeking bail prior to trial and were therefore more likely to be incarcerated); Sarrett & Ucar, *supra* note 19, at 7 (discussing confusion reported by individuals with intellectual disability when interfacing with the criminal legal system).

²⁷ See Smith et al., *supra* note 9, at 427 (highlighting a study that concluded that “persons with developmental disabilities concede guilt more quickly than their peers who are non-disabled, provide more self-incriminating material than other defendants, and are unable to participate in plea bargaining as easily as others”).

²⁸ *Id.* (explaining that individuals with intellectual disabilities “run a greater risk at sentencing because many may have previously violated bail conditions or the communities in which they reside may lack the appropriate kinds of community options that can ensure subsequent success”).

²⁹ JENNIFER BRONSON, LAURA M. MARUSCHAK & MARCUS BERZOFKY, BUREAU OF JUST. STAT., NCJ 249151, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12, at 1 (2015), <https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf> [<https://perma.cc/8XWX-H2AL>] (“Compared to those without a disability, prisoners with a disability were about 4 times more likely and jail inmates with a disability were nearly 2.5 times more likely to report past 30-day serious psychological distress.”); Petersilia, *supra* note 13, at 361 (noting that less than 10% of incarcerated individuals with intellectual disability receive any specialized services and they are more likely to be abused or victimized while in jails or prisons).

³⁰ Smith et al., *supra* note 9, at 426–27.

sentences, and spend more time incarcerated than similarly situated peers.³¹ Intellectual disability is not merely *relevant* to the criminal system process or a fact to check-off when considering mitigating factors at sentencing—its mitigating effect should be considered at every stage and during almost every decision.³²

In 2002, in *Atkins v. Virginia*, the U.S. Supreme Court held that the Eighth Amendment forbids the execution of individuals with intellectual disability for two reasons.³³ First, the death penalty cannot be justified under any theory of punishment when the person being sentenced has intellectual disability.³⁴ Second, individuals with intellectual disability are more likely to be wrongfully executed than others and thus deserve special protection.³⁵ As the Court acknowledged, in practice, individuals with intellectual disability are more likely to falsely confess and have difficulty assisting counsel in their defense, and their demeanor might wrongly give the impression that they lack remorse.³⁶

The dual concerns articulated in *Atkins*—the lack of theoretical support and the practical risk of unjust outcomes—are just as likely to apply in non-death penalty cases.³⁷ But this analysis never trickled beyond the death penalty context.³⁸ And, of course, the vast majority of individuals with intellectual disability ensnared in the criminal legal system are not alleged to have committed crimes eligible for the death penalty.³⁹ When presented with evidence of intellectual disability in non-death penalty cases, courts take various approaches—

³¹ Sarrett & Ucar, *supra* note 19, at 2 (explaining that individuals with intellectual disability in the criminal legal system “often experience more complications and confusion, which can lead to them serving longer and harder sentences than those without these disabilities”); Smith et al., *supra* note 9, at 427 (noting that persons with intellectual disability may be at risk of receiving longer sentences due to factors such as past violations of bail conditions, a lack of access to appropriate community resources, and variability between attorneys’ abilities to provide competent representation).

³² See, e.g., Johnson et al., *supra* note 12, at 1041–42 (explaining how individuals with intellectual disability are uniquely vulnerable at each step of the criminal process).

³³ 536 U.S. 304, 318–21 (2002).

³⁴ *Id.* at 318–20.

³⁵ *Id.* at 320–21.

³⁶ *Id.*

³⁷ See *id.* at 318–21.

³⁸ See generally Paul Marcus, *Does Atkins Make a Difference in Non-Capital Cases? Should It?*, 23 WM. & MARY BILL RTS. J. 431, 457–58, 461 (2014) (noting the lack of reported judicial decisions favorable to “low intelligence” defendants, which is in part because “little judicial or legislative energy seems to have been expended in favor of intellectually disabled defendants in the sentencing context”). Often, when defense attorneys do cite to *Atkins* in non-capital cases, courts refuse to extend the ruling. *Id.* at 462–63 (providing a list and summaries of several cases failing to extend *Atkins* to non-capital cases).

³⁹ See Karen L. Salekin, J. Gregory Olley & Krystal A. Hedge, *Offenders with Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3 J. MENTAL HEALTH RSCH. INTELL. DISABILITIES 97, 98 (2010) (noting that only a “small proportion of people with intellectual disability . . . commit violent crimes”).

some nuanced and considered, others dismissive or antagonistic.⁴⁰ In addition, in cases involving lower-level offenses, defense attorneys have fewer incentives and resources to investigate whether a client has intellectual disability and its effect on the client's involvement in the criminal legal system.⁴¹ Thus, intellectual disability often remains hidden throughout litigation. In too many cases, a person's intellectual disability is given little mitigating weight or not exposed at all.⁴²

This Article contributes to the literature on the criminal legal system by extending the *Atkins* analysis beyond the death penalty context to all criminal cases: the theories of punishment and the practical risks of wrongful conviction and punishment necessitate a categorical rule that intellectual disability is always mitigating.⁴³ Further, to combat the way in which intellectual disability frequently hides in plain sight in the criminal legal system, this proposal requires judges in sentencing orders to state the degree to which they find intellectual disability mitigating and to explain their reasoning.

Much of this Article discusses theories of punishment and sentencing, but it is not just about sentencing advocacy and decisions. It is also about the need to consider the mitigating effect of intellectual disability at every stage of the criminal legal system. Other scholars have argued that we should expand the way we envisage disability law and ableism within the system,⁴⁴ and that we should take a new and more mitigation-focused approach to sentencing and theories of punishment.⁴⁵ This Article, in comparison, is the first to examine how intellectual disability is treated in sentencing decisions, why that approach must change, and the implications of making intellectual disability categorically mitigating.

Part I of this Article explains how intellectual disability is currently treated in the criminal legal system.⁴⁶ This Part defines and describes intellectual

⁴⁰ See *infra* Part I.B.

⁴¹ See Johnson et al., *supra* note 23, at 1140–41 (discussing the incentives that often drive defense counsel away from conducting “the kind of careful, exhaustive, intellectual disability focused investigation required for an accurate and reliable assessment of intellectual disability”).

⁴² See *infra* Part I.B.2.

⁴³ See *Atkins v. Virginia*, 536 U.S. 304, 318–21 (2002) (concluding that the Eighth Amendment prohibits the execution of individuals with mental disability). Although I am using the analytical framework from *Atkins*, I am not arguing that without this rule, sentences for individuals with intellectual disability violate the Eighth Amendment. See *id.* at 321. Whether such sentences violate the Eighth Amendment may be a subject of future research.

⁴⁴ See, e.g., Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1401–02 (2021); Harris, *supra* note 20, at 916; Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Dis/Ability, and Class Actions*, 47 FORDHAM URB. L.J. 293, 293–94 (2020).

⁴⁵ See, e.g., John B. Meixner Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395, 1395–96 (2022); Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 162 (2016); Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 107–08 (2013).

⁴⁶ See *infra* notes 49–150 and accompanying text.

disability and analyzes the legal context in which judges make sentencing decisions.

Part II examines the dual concerns of theory and practice as applied to the punishment of individuals with intellectual disability.⁴⁷ I first probe the relationship between intellectual disability and the theories of punishment, and then describe the practical realities and disparately negative consequences for individuals with intellectual disability in the criminal legal system.

In Part III, I propose that intellectual disability must be categorically mitigating and that judges, when sentencing a person with intellectual disability, must provide an explanation of the degree that they find intellectual disability mitigating.⁴⁸ This Part also addresses potential abolitionist and disability justice critiques regarding this proposal and concludes with the potential positive, broader implications of this proposal. Although this proposal is focused on sentencing, the goal is that making intellectual disability categorically mitigating will positively affect the treatment of individuals with intellectual disability throughout the criminal legal system—from their first appearance to the conclusion of their sentence.

I. INTELLECTUAL DISABILITY IN THE CRIMINAL LEGAL SYSTEM

This Part provides a high-level overview of intellectual disability in the criminal legal system.⁴⁹ Section A defines intellectual disability for the purposes of this Article.⁵⁰ Section B delves into how courts and the criminal legal system approach sentencing, and specifically, sentencing individuals with intellectual disability.⁵¹

A. Defining Intellectual Disability

The Supreme Court has relied on the American Association on Intellectual and Developmental Disabilities (AAIDD)⁵² for the definition of intellectual disability,⁵³ emphasizing that this professional community is best equipped to

⁴⁷ See *infra* notes 151–312 and accompanying text.

⁴⁸ See *infra* notes 313–383 and accompanying text.

⁴⁹ See *infra* notes 49–150 and accompanying text.

⁵⁰ See *infra* notes 52–80 and accompanying text.

⁵¹ See *infra* notes 81–150 and accompanying text. This Article focuses primarily on federal cases. Though a complete review of both federal and state cases would be a great benefit to the literature, that breadth of coverage is beyond the scope of this Article.

⁵² SCHALOCK ET AL., *supra* note 2, at xi (“Since its founding in 1876, the American Association on Intellectual and Developmental Disabilities (AAIDD) has led the field of intellectual disability (ID) in understanding, defining, and classifying the construct that is currently referred to as intellectual disability.”).

⁵³ See *Moore v. Texas*, 581 U.S. 1, 5–6 (2017); *Hall v. Florida*, 572 U.S. 701, 719–20 (2014); *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002).

establish this definition.⁵⁴ Thus, this Article similarly relies on the AAIDD definition that “[Intellectual Disability] is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22.”⁵⁵

Individuals with intellectual disability are diagnosed as having mild, moderate, severe, or profound disability.⁵⁶ Most people with intellectual disability are in the mild range (85%), followed by moderate (10%).⁵⁷ A small percentage of individuals with intellectual disability fit within the severe (3.5%) or profound (1.5%) ranges.⁵⁸ Though mild intellectual disability is the least debilitating of the diagnoses,⁵⁹ it is still significant—a person with mild intellectual disability will have substantial limitations in functioning.⁶⁰

Most individuals with intellectual disability involved in the criminal legal system fall into the mild intellectual disability range.⁶¹ Addressing the issues

⁵⁴ This definition of intellectual disability is not without controversy. For example, to diagnose the limitation in intellectual functioning, an IQ test is used. See Rebecca H. Shields et al., *Sensitivity of the NIH Toolbox to Detect Cognitive Change in Individuals with Intellectual and Developmental Disability*, 100 *NEUROLOGY* e778, e778–80 (2023). Though the development of the initial IQ test in the early 1900s was not connected with the eugenics movement, that movement quickly co-opted the test and used it to further its racist and biased agenda. See Ajitha Reddy, *The Eugenic Origins of IQ Testing: Implications for Post-Atkins Litigation*, 57 *DEPAUL L. REV.* 667, 670–71 (2008). Though the eugenics movement has largely dissipated, remnants from its characterizations of intelligence have persisted, including the beliefs that intelligence is static and “it is possible to design a testing instrument capable of peeling back layers of political and socioeconomic shrouding to reveal a true essence of intelligence.” *Id.* at 673. But addressing whether a different definition of intellectual disability would be more appropriate in the criminal legal system is outside the scope of this Article and an area for potential future research.

⁵⁵ SCHALOCK ET AL., *supra* note 2, at 13. Of note, at the time *Atkins* and its progeny were decided, the age of onset required for an intellectual disability diagnosis was eighteen. *Id.* at 19 tbl.2.2. According to AAIDD, the professional community has agreed that the age of onset must be during the developmental period, though there was disagreement as to the age at which the developmental period ends. *Id.* at 32. Because several agencies rely on age twenty-two as the point at which the developmental period ends, the age of onset was extended. *Id.* AAIDD, however, does not expect that this change will impact prevalence rates as “the vast majority of diagnoses of ID are, and will continue to be, made in early childhood.” *Id.* at 33.

⁵⁶ *MENTAL DISORDERS*, *supra* note 2, at 171 tbl.9-1; DSM-V, *supra* note 4, at 33–40.

⁵⁷ *MENTAL DISORDERS*, *supra* note 2, at 171 tbl.9-1.

⁵⁸ *Id.*

⁵⁹ A person with a mild intellectual disability has an IQ between 50 and 69. *Id.* A person with moderate intellectual disability has an IQ between 36 and 49. *Id.* A person with severe intellectual disability has an IQ of 20 to 35, and profound intellectual disability an IQ below 20. *Id.*

⁶⁰ See *infra* for a description of adaptive functioning limitations in this Section. A person with mild intellectual disability would also be ineligible for the death penalty under *Atkins*. 536 U.S. 304, 321 (2002).

⁶¹ See *MENTAL DISORDERS*, *supra* note 2, at 171 tbl.9-1; Johnson et al., *supra* note 12, at 1040. If individuals with moderate, severe, or profound intellectual disability do become involved in the crim-

these individuals face in the criminal legal system is complicated. Even though mild intellectual disability includes significant limitations in functioning, the disability is effectively hidden.⁶² Mild intellectual disability is hard to identify—especially in the context of criminal cases—because, almost always, nothing about the person’s physical appearance would indicate a disability.⁶³ Few actors in the criminal legal system—defense attorneys, pretrial or probation agents, judges, and prosecutors—are trained to identify signs that a person may have intellectual disability.⁶⁴ And the lack of resources in the majority of these offices means that even if people were adequately trained, few would have the time or resources to make such an identification.⁶⁵

The challenges caused by a disability’s hidden nature are compounded by the “[c]loak of competence.”⁶⁶ Many individuals with intellectual disability try to conceal their disability because they have come to believe—with good rea-

inal legal system, a court is more likely to find them incompetent to stand trial, and thus they may be institutionalized, but they would not appear in the prison system or serve a sentence. Johnson et al., *supra* note 12, at 1040 (“Criminal defendants are more likely to have mild intellectual disability than moderate or severe because persons who are more impaired are rarely subject to criminal proceeding: they are not likely to commit crimes due to the nature of their disability, and, if they do, they are more likely to be found not competent to stand trial, or to lack criminal responsibility.”).

⁶² Smith et al., *supra* note 9, at 424 (“[I]t is estimated that 75% of persons with disabilities who are arrested are not identified as having a disability. Further an estimated 10% of this population goes unidentified during a subsequent prison term.” (citation omitted)).

⁶³ *Id.* (explaining that persons with mild intellectual disability do not normally have a particular look or display childlike behavior); Johnson et al., *supra* note 23, at 1117 (“Mild intellectual disability is challenging to identify and diagnose because persons falling in this category almost always have significant relative strengths and abilities and greater masking skills that could lead inexperienced counsel to erroneously believe their client is not a person with intellectual disability.”).

⁶⁴ JOAN PETERSILIA, CAL. POL’Y RSCH. CTR., DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES 6 (2000), <https://files.eric.ed.gov/fulltext/ED465905.pdf> [<https://perma.cc/MQ9R-UWT6>] (“Most justice personnel are unfamiliar with how to recognize [intellectual disability]”); Snell et al., *supra* note 7, at 225 (noting the need to educate police, lawyers, and judges who work with persons with intellectual disability to ensure needed accommodations are provided); see also Johnson et al., *supra* note 12, at 1039 (“[L]imited resources and expertise lead lawyers—even experienced capital defense lawyers—to miss red flags of intellectual disability and thus fail to raise the issue at trial or in state and federal post-conviction appeals.”).

⁶⁵ Anthony C. Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 718 (2013) (discussing the public defense system’s “limited resources and excessive caseloads that compromise the defender’s ability to operate as an individual’s champion against the state”); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1579–89 (2018) (describing chronic underfunding of public defender offices across the United States, creating issues such as “[e]xcessive public defender caseloads, insufficient compensation for appointed and contract defense lawyers, limited access to attorneys,” and a “lack of ancillary resources critical to competent representation”).

⁶⁶ Smith et al., *supra* note 9, at 423 tbl.1 (explaining that the “[c]loak of competence” may lead persons with intellectual disabilities to expend significant energy to disown or conceal limitations, or take the blame for co-defendants in an effort to appear competent).

son—that a negative stigma is associated with it.⁶⁷ Thus, many individuals do not affirmatively disclose their disability *and* work to mask it.⁶⁸

Similarly, defense attorneys are often concerned that presenting a client's intellectual disability, although it may have some mitigating impact, may work as a double-edged sword⁶⁹ and result in a harsher sentence.⁷⁰ An additional concern is that if the person, if labeled as someone with an intellectual disability, is sentenced to prison, then their experience may make them a target for abuse.⁷¹ So, even if a defense attorney does learn that a client has intellectual disability, they may decline to raise it for strategic reasons.⁷² In essence, defense attorneys, even when providing client-centered representation, rarely uncover, disclose, or raise intellectual disability.

This bias within the criminal legal system is often termed ableism, which is “a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society.”⁷³ Within an ableist criminal legal system, people with intellec-

⁶⁷ Snell et al., *supra* note 7, at 222 (“[M]any individuals with intellectual disability with higher IQs attempt to hide their disability or attempt to pass as normal or try to appear intellectually capable and, thus, miss out on or even reject accommodations that might have been available if their disability had been declared or identified.”); EDGERTON, *supra* note 7, at 132 (“The label of [intellectually disabled] not only serves as a humiliating, frustrating, and discrediting stigma in the conduct of one’s life in the community, but it also serves to lower one’s self-esteem to such a nadir of worthlessness that the life of a person so labeled is scarcely worth living.”).

⁶⁸ See Snell et al., *supra* note 7, at 222.

⁶⁹ See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989) (“Penry’s [intellectual disability] and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.”), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

⁷⁰ Smith et al., *supra* note 9, at 424 (“[I]n the legal system, the [intellectual disability] label serves to excuse behavior in some cases and to limit options in other cases . . .”).

⁷¹ *Id.* (discussing that being labeled as intellectually disabled causes stigmatization within the prison population); Anna Scheyett, Jennie Vaughn, Melissa Taylor & Susan Parish, *Are We There Yet? Screening Processes for Intellectual and Developmental Disabilities in Jail Settings*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 13, 14 (2009) (explaining that persons with intellectual disabilities are vulnerable to victimization by other incarcerated individuals).

⁷² See Smith et al., *supra* note 9, at 424 (explaining that because persons with intellectual disabilities have trouble gaining access to treatment programs and may be stigmatized in prison settings, their attorneys may try to have the label removed to serve their clients more efficiently); Petersilia, *supra* note 13, at 368 (“[M]any defendants with [intellectual disability] are identified and then unidentified because it better serves their legal interests. . . . Sometimes, the [intellectual disability] label creates more difficulties and limits the available options more significantly than any lack of identification.”).

⁷³ Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 980 (2019); see also Chin, *supra* note 24, at 688 (“Ableism, at its base, ‘is oppression faced due to disability/impairment (perceived or lived), which not only signals disability as a form of difference but constructs it as inferior.’” (quoting LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 16 (2020))).

tual disability are often deemed inferior or viewed as “troublemakers.”⁷⁴ The notions that individuals with intellectual disability cannot rehabilitate⁷⁵ or that they are more likely to commit offenses⁷⁶ are ableist falsities and represent the types of challenges that individuals with intellectual disability face in the criminal legal system.

The AAIDD’s Manual on Intellectual Disability includes examples of significant limitations in adaptive functioning across the three domains (conceptual, social, and practical skills).⁷⁷ From an ableist perspective, they can view many expressions of these limitations as criminal or willful refusals to follow court orders or laziness. But these actions or behaviors would be better understood as directly connected to a person’s intellectual disability. The table below contains examples of actions that could result in worse outcomes in the criminal legal system, each coupled with an adaptive functioning limitation that often gives rise to that behavior.

History or Behavior Relevant to Criminal Legal System Involvement	Significant Limitation in Adaptive Functioning
Conceptual Skills	
Allan does not have enough money to buy dinner for his family, so he shop-lifts from the store.	Difficulty in choosing a good solution when confronted with a problem or situation.
Barb arrives at her probation officer’s office an hour after it closes and misses her probation meeting.	Difficulty effectively using ideas or symbols, such as time.
Charlie has aged out of foster care and is unemployed. He has been unable to identify job opportunities or apply to jobs.	Difficulty in self-direction and/or arranging or planning future life activities.
Della gets into a car she knows is stolen to joy ride with her friends.	Difficulty anticipating the consequences of their behavior.
Edward dropped out of school at fifteen and, while incarcerated, has been in over two-hundred hours of GED classes but still does not have a GED.	Difficulty with academics.
Fran is facing probation revocation for failing to pay restitution in a timely manner.	Difficulty with money/financial concepts.

⁷⁴ Morgan, *supra* note 73, at 981.

⁷⁵ See *infra* Part II.A.1.

⁷⁶ See *infra* Part II.A.3.

⁷⁷ SCHALOCK ET AL., *supra* note 2, at 30.

Social Skills	
At sentencing for a serious violent offense, when asked if he wants to speak, Greg merely says he is “sorry” and fails to make eye contact with the judge or complainant.	Impaired social/interpersonal skills and learning from experiences.
Helen’s boyfriend, who does not have intellectual disability and provides financially for her, asks Helen to drive a suitcase of cocaine to another drug distributor.	Increased vulnerability and victimization, especially concerning whom to trust, whom to follow, and what circumstances are safe.
During an interrogation about a serious assault, Ian smiles throughout the questioning.	Inadequate social responding and social judgment.
Throughout her criminal case, Jessica does not tell her attorney that she has a diagnosed intellectual disability and feigns understanding of issues in her case.	Tendency to deny or minimize the disability to their detriment.
Kurt accepts an unfavorable plea deal shortly after the judge indicated a preference that the case resolve quickly.	Strong desire to please authority figures based on limited understanding of the situation.
Practical Skills	
Liz appears in disheveled clothes and unclean for court, leading the judge to assume that she does not take court seriously.	Limitations in self-care.
Matt has never held a job for more than three months. His supervisors have stated that he refuses to follow directions and loses his temper at managers.	Limitations in work skills such as obtaining a steady job that covers expenses, meeting work competencies, getting along with coworkers and managers, handling job conflict appropriately, and maintaining high-quality work under pressure.
Nora faces charges for child endangerment because her home has mold, pest infestations, and rotting food.	Limitations in maintaining a safe environment for one’s self and one’s children.

When criminal legal system actors—including defense attorneys, prosecutors, judges, probation officers, and others—fail to appreciate that a person has intellectual disability and how that disability impacts them, negative consequences often follow. For example, a weak job history is harmful for obtain-

ing pretrial release;⁷⁸ lack of remorse can lead to longer sentences;⁷⁹ and failure to obtain a GED can prevent a person from gaining early release from incarceration.⁸⁰ In each of these instances, intellectual disability is mistaken for criminality on account of systemic ableism.

B. How the Criminal Legal System Punishes Individuals with Intellectual Disability

As illustrated above and throughout this Article, the perception of intellectual disability's negative stigma is not unfounded.⁸¹ When advocates ask courts to consider intellectual disability as mitigation in sentencing, the results are mixed: some treat it as mitigating, others as aggravating, and others give it no weight at all.⁸²

Subsection 1 of this Section describes some of the statutes and cases guiding sentencing decisions with respect to intellectual disability.⁸³ Subsection 2 then analyzes how judges interpret them.⁸⁴

1. The Law of Sentencing and Intellectual Disability

When it comes to criminal sentencing, the role of intellectual disability in sentencing law varies across states and the federal system, reflecting diversity in sentencing across jurisdictions. This Subsection starts with an overview of these general approaches, and then specifically discusses various approaches to intellectual disability in sentencing.

Statutes, rules and regulations, and case law proscribe and guide how judges may approach sentencing.⁸⁵ For criminal offenses, a statute generally

⁷⁸ See, e.g., 18 U.S.C. § 3142(g)(3)(A) (requiring federal judicial officers to consider the history and characteristics of an individual's employment to determine appropriate pretrial release conditions); MD. R. 4-216.1(f)(2)(C) (mandating that Maryland judicial officers consider an individual's "employment status and history" before making pretrial release recommendations).

⁷⁹ Meixner, *supra* note 45, at 1416, 1429 (identifying an individual's expression of remorse as a key mitigating factor at sentencing).

⁸⁰ Under the First Step Act, individuals serving sentences in federal prisons can earn sentence reductions through good conduct time (GCT) credits. First Step Act of 2018, Pub. L. No. 115-391, § 102(b)(1)(A), 132 Stat. 5194, 5210 (codified as amended at 18 U.S.C. § 3624(b)). When awarding GCT credits, "the [Prison] Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree." 18 U.S.C. § 3624(b)(1).

⁸¹ See *supra* notes 66–80 and accompanying text.

⁸² See *infra* Part I.B.2.

⁸³ See *infra* notes 85–113 and accompanying text.

⁸⁴ See *infra* notes 114–150 and accompanying text.

⁸⁵ See Bradley R. Hall, *Mandatory Sentencing Guidelines by Any Other Name: When "Indeterminate Structured Sentencing" Violates Blakely v. Washington*, 57 DRAKE L. REV. 643, 644–45 (2009).

dictates a particular range for the sentence.⁸⁶ For example, for misdemeanor possession of cocaine, the sentencing range may be up to 180 days incarceration and a fine of one thousand dollars.⁸⁷ Thus, the judge can sentence the person to anything from probation to fines up to a period of incarceration. Or, a sentence for aggravated robbery may range from ten to fifteen years incarceration without an option for probation.⁸⁸ Judges can only impose sentences within statutory ranges.⁸⁹

Just as these ranges can vary substantially across jurisdictions,⁹⁰ so can the degree to which legislatures provide judges with sentencing guidance.⁹¹ Such guidance is provided through statutes, regulations, and case law.⁹² For example, in the federal system, the U.S. Sentencing Guidelines provide specific considerations for judges and further narrow the range of potential sentences.⁹³ Although these Guidelines are discretionary, judges are encouraged to sentence within the Guidelines unless the circumstances are outside the “‘heartland’ of conduct.”⁹⁴

Even with the statutory ranges and other guidance, judges have substantial discretion in sentencing, and courts often rely on the theories of punish-

⁸⁶ See *id.* at 647–49. Though most criminal offenses are proscribed by statute, some jurisdictions still have common law. For example, murder remains a common law offense in Maryland. Act effective Oct. 1, 2002, ch. 26, 2002 Md. Laws 197, 214 (codified as amended at MD. CODE ANN., CRIM. LAW § 2-201 (West 2024)) (“Murder is one of the original felonies at common law. The statutory distinction between the degrees of murder is only for purposes of imposition of penalties, not for altering the elements of the crime of murder at common law.”).

⁸⁷ See TEX. HEALTH & SAFETY CODE ANN. § 481.115 (West 2023) (exemplifying a typical state sentencing guideline for cocaine possession).

⁸⁸ See TEX. PENAL CODE ANN. §§ 12.32, 29.03 (West 2023) (exemplifying a typical state sentencing guide for aggravated robbery, a first-degree felony in Texas).

⁸⁹ See Hall, *supra* note 85, at 644–45.

⁹⁰ Compare TEX. PENAL CODE ANN. §§ 12.33, 29.02 (mandating 2 to 20 years for robbery), and N.H. REV. STAT. ANN. §§ 636:1, 651:2 (2024) (requiring up to 7 years for robbery), with 18 U.S.C. § 2112 (imposing no more than 15 years imprisonment for robbery).

⁹¹ Following the U.S. Supreme Court’s decision in *United States v. Booker*, legislatures cannot require judges to follow sentencing guidelines—the guidelines can only be discretionary. 543 U.S. 220, 226–27 (2005) (majority opinion of Stevens, J.) (holding that the Sixth Amendment allows judges to deviate from sentencing guidelines).

⁹² Kimberly Kaiser & Cassia Spohn, *Why Do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing*, CRIMINOLOGY CRIM. JUST. L. & SOC’Y, Aug. 2018, at 44, 47 (analyzing statutes, case law, and sentencing guidelines manuals on which judges rely in sentencing decisions).

⁹³ See OFF. OF GEN. COUNS., U.S. SENT’G COMM’N, DEPARTURE AND VARIANCE PRIMER 1 (2014), https://www.ussc.gov/sites/default/files/pdf/training/primers/2014_Primer_Departure_Variance.pdf [<https://perma.cc/3C2M-46A2>] [hereinafter DEPARTURE AND VARIANCE].

⁹⁴ *Id.* at 5 (quoting U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A(1)(4)(b) (U.S. SENT’G COMM’N 2023), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2023/GLMFull.pdf> [<https://perma.cc/ZQ5S-E4UT>]).

ment.⁹⁵ But in determining how to apply these theories of punishment, courts weigh aggravating and mitigating factors. Aggravating factors are those that support a longer sentence.⁹⁶ For example, an extensive criminal history is a frequently cited aggravating factor—courts reason that if a person has a significant criminal history, they are more likely to recidivate and more in need of incapacitation or deterrence.⁹⁷ On the other hand, mitigating factors are those that support a lesser sentence.⁹⁸ For example, if a person struggles with substance use, a court may find it mitigating where the person is charged with stealing to support their drug addiction because they are less culpable for their actions (retribution)⁹⁹ and less likely to recidivate if provided appropriate services (rehabilitation).¹⁰⁰

The process of weighing these factors is highly discretionary and personal to each judge.¹⁰¹ A person may have only three applicable mitigating factors compared with six aggravating factors, yet still receive a sentence at the low end of the range if the mitigating factors are particularly significant.

Furthermore, judges can generally consider any facts they deem relevant without being encumbered by a mandatory standard of proof.¹⁰² Facts that judges routinely consider include conduct related to dismissed and unproven charges, conduct during the pendency of the charges, personal trauma histories, prior employment, remorse and acceptance of responsibility, and evidence of

⁹⁵ Kaiser & Spohn, *supra* note 92, at 49–50, 49 tbl.2 (finding that federal judges used theories of punishment to justify almost half of upward departures (49.20%) and more than half of downward departures (56.61%)). For a discussion of the various theories of punishment (rehabilitation, deterrence, incapacitation, and retribution), see *infra* Part II.A.

⁹⁶ Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1125 (2008).

⁹⁷ *Id.* at 1138, 1149 (explaining that a person's criminal history may indicate how likely they are to recidivate, justifying its use as an aggravating factor).

⁹⁸ *Id.* at 1125.

⁹⁹ Leslie E. Scott, *Drug Decriminalization, Addiction, and Mass Incarceration: A Theories of Punishment Framework for Ending the "War on Drugs,"* 48 N. KY. L. REV. 267, 296 (2021) ("[I]n the context of a non-drug possession offense, one federal judge concluded that addiction diminishes the addict's capacity to evaluate consequences and mitigates culpability, which is intrinsically tied to the retributive purpose for punishment." (citing *United States v. Hendrickson*, 25 F. Supp. 3d 1166, 1174 (N.D. Iowa 2014))).

¹⁰⁰ *Id.* at 285 (noting that incarceration may be inappropriate where rehabilitation will more likely occur in the community).

¹⁰¹ See Kaiser & Spohn, *supra* note 92, at 45 ("The federal guidelines, which until *Booker* were presumptive, are now advisory, and although judges must consider the guideline range in determining the appropriate sentence, they have discretion to sentence outside the range and are allowed to do so based on disagreement with the policies that undergird the guidelines.").

¹⁰² This was part of the problem the U.S. Supreme Court addressed in *United States v. Booker*, wherein persons were subject to mandatory upward departure based on facts not proven beyond a reasonable doubt. 543 U.S. 220, 226–29 (2005) (majority opinion of Stevens, J.).

good character, among a multitude of other considerations.¹⁰³ And, as this Article addresses, intellectual disability can be one of the factors that can land on both sides of the scale—mitigating for some judges but aggravating for others.¹⁰⁴

Though the U.S. Supreme Court has not explicitly held that intellectual disability is mitigating outside the death penalty context, some state appellate courts have. For example, New Jersey has a statutory list of mitigating and aggravating factors for courts to consider in sentencing, but mental defect, diminished capacity, and intellectual disability are not enumerated.¹⁰⁵ Nonetheless, in 1998, in *State v. Nataluk*, the Superior Court of New Jersey Appellate Division held that a sentencing judge's failure to consider a defendant's multiple traumatic brain injuries as a mitigating factor was erroneous.¹⁰⁶

In addition, although intellectual disability is a statutory mitigating factor in some jurisdictions, the sentencing court usually has discretion to decide whether it finds intellectual disability mitigating in a particular case.¹⁰⁷ For

¹⁰³ DEPARTURE AND VARIANCE, *supra* note 93, at 1, 24, 26–27, 33 (defining departure and instructing judges that they may depart based on evidence of acceptance of responsibility, a “record of prior good works,” “[d]ismissed and [u]ncharged conduct,” and prior employment); Meixner, *supra* note 45, at 1431–33 (explaining that family and social backgrounds, an expression of remorse, and mental health may be mitigating factors).

¹⁰⁴ See *infra* Part I.B.

¹⁰⁵ The fourth of New Jersey's mitigating factors considers whether “[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense.” N.J. STAT. ANN. § 2C:44-1(b)(4) (West 2024). Thus, often when discussing whether intellectual disability is relevant to sentencing, the courts reference this factor. See *State v. Nataluk*, 720 A.2d 401, 408 (N.J. Super. Ct. App. Div. 1998). The “excuse or justif[ication],” however, must be related to the defendant's conduct during the incident. See N.J. STAT. ANN. § 2C:44-1(b)(4).

¹⁰⁶ 720 A.2d at 406, 408 (holding that even where a jury rejected an insanity defense, the court should still consider the defendant's “mental defect” as a mitigating factor).

¹⁰⁷ See, e.g., ALASKA STAT. § 12.55.155 (2024) (providing that the court must consider certain mitigating factors, including if the defendant committed the offense while suffering from a mental disease or defect, such as intellectual and developmental disabilities, but has discretion as to lessening the sentence); ALA. CODE § 13A-5-51(6) (2024) (codifying substantial impairment of “[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law” as a mitigating factor); CAL. R. CT. 4.423(b)(2) (2024) (listing mitigating factors, including that “[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime”); 730 ILL. COMP. STAT. 5/5-5-3.1(a) (2024) (“The following grounds shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment . . . [t]he defendant was a person with an intellectual disability . . .”); N.C. GEN. STAT. § 15A-1340.16(e)(3)–(4) (2023) (including as mitigating factors that “[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense” and that “[t]he defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense”); MINN. SENT'G GUIDELINES AND COMMENTARY § 2.D.203(3)(a)(3) (MINN. SENT'G GUIDELINES COMM'N 2023), https://mn.gov/sentencing-guidelines/assets/1August2023MinnSentencingGuidelinesCommentary_tcm30-586295.pdf [<https://perma.cc/4R39-2BNA>] (listing “[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed” as a mitigating factor).

example, under the Federal Sentencing Guidelines, the United States Sentencing Commission (USSC) has approved downward departures if the person being sentenced has diminished capacity:

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.¹⁰⁸

Of note, the Guidelines require that for a downward departure, the disability must have “contributed substantially” to the person’s involvement with the offense.¹⁰⁹ As discussed below, there are many reasons intellectual disability may be mitigating outside its “substantial” connection with the underlying offense. This ability to downward depart is further limited—the court may not downward depart if the court finds a need to protect the community.¹¹⁰

In contrast, Illinois includes intellectual disability as a mandatory mitigating factor without statutory limitations.¹¹¹ A court “shall” find mitigation where “[t]he defendant was a person with an intellectual disability”¹¹² These statutes and regulations are the starting point for a sentencing decision—but the judge’s approach to theories of punishment, personal biases, and preferences dictate the ultimate decision.¹¹³

2. Courts’ Consideration of Punishment and Intellectual Disability

Judges largely agree that a “mental defect,” which can include intellectual disability, is mitigating.¹¹⁴ In response to a 2010 survey of judges, 80% stated that diminished capacity is relevant to a downward departure and 66% stated it

¹⁰⁸ U.S. SENT’G GUIDELINES MANUAL, *supra* note 94, § 5K2.13. The USSC goes on to clarify that a person with “[s]ignificantly reduced mental capacity . . . has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.” *Id.* cmt. 1.

¹⁰⁹ *Id.* § 5K2.13.

¹¹⁰ *Id.*

¹¹¹ 730 ILL. COMP. STAT. 5/5-5-3.1(a)(13).

¹¹² *Id.*

¹¹³ See *infra* Part II.A.

¹¹⁴ Hessick & Berman, *supra* note 45, at 195–96 (“Many states provide for mitigation whenever a defendant has reduced culpability. Some states limit mitigation to when a defendant is young or suffers from a physical or mental defect that affects culpability. Others frame this mitigating factor as a question of mens rea, such as whether the defendant did not plan, expect, or foresee the harm that occurred.”).

is relevant to sentencing determinations within the Guidelines.¹¹⁵ Determining what judges actually do when presented with “mental defect,” however, is less clear.

One scholar recently conducted an empirical study in which he looked at three hundred federal sentencing memoranda and compared the mitigation that the defense attorney raised with the judge’s sentencing determination to see what factors were most successful at reducing a sentence.¹¹⁶ He broke mitigation into two categories: offense mitigation¹¹⁷ and personal mitigation.¹¹⁸

The area of mitigation most likely to reduce a person’s sentence was a health issue supported by specific evidence.¹¹⁹ This was around three times more likely than any other mitigating factor to correlate with a decreased sentence.¹²⁰ This factor encompassed both mental health (mental illness, intellectual disability, and substance abuse, among others) and physical health (illness and physical disability, among others).¹²¹ The next two areas most likely to reduce a sentence were evidence of good character and the collateral consequences of incarceration.¹²²

Still, factors specific to intellectual disability may suggest that intellectual disability does not have the same mitigating effect as other ailments. Because individuals with intellectual disability are disproportionately likely to come from impoverished backgrounds, struggle to assist in their own defense, and be unreliable personal historians, providing the records to substantiate an intellectual disability diagnosis may not be possible.¹²³ Thus, intellectual disability may frequently fall into a different mitigation category that the empirical study

¹¹⁵ U.S. SENT’G COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at tbl.13 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf [<https://perma.cc/RRU2-DHTT>].

¹¹⁶ Meixner, *supra* note 45, at 1424–25.

¹¹⁷ *Id.* at 1426 tbl.1 (listing offense mitigation factors, such as relative seriousness, relative culpability, minimizing victim harm, acknowledging victim harm, and remorse).

¹¹⁸ *Id.* (listing personal mitigation factors, including historical trauma, character, general family and social background, collateral consequences, health, and age).

¹¹⁹ *Id.* at 1448 (“Supported health mitigation was, by far, the most associated with reduced sentences relative to the Guideline range . . .”).

¹²⁰ *Id.* at 1447–48.

¹²¹ Because of the manner in which this study was conducted, there is no way to identify which of these factors (mental illness versus physical disability versus intellectual disability) was more or less likely to correlate with a decreased sentence. *Id.* at 1467–68. Though intellectual disability was not separated out as a mitigating factor, many of the reasons for a decreased sentence would apply similarly across health issues, such as decreased culpability, more difficult experience of incarceration, decreased deterrent effect, and more. *See id.*

¹²² *Id.* at 1448.

¹²³ *See* Johnson et al., *supra* note 12, at 1138–45 (describing challenges associated with investigating intellectual disability in the context of criminal cases).

identified: “health—unsupported,” which had *no* impact on courts’ sentencing determinations.¹²⁴ In addition, individuals with intellectual disability, for these same reasons, may fail to provide sufficient information to their attorneys regarding good character and potential collateral consequence (other areas of persuasive mitigation) such that they do not benefit from the same quantity and quality of mitigation as other individuals.¹²⁵

The empirical analysis is revealing, but it does not describe how courts approach intellectual disability in individual cases. Answering that question is challenging for many reasons. First, judges rarely write opinions articulating their reasoning for a sentencing decision.¹²⁶ So it is often hard to assess why a court sentenced a person in a particular way. Second, how courts approach these decisions can vary widely based on the jurisdiction in which they sit,¹²⁷ the method through which they became judges (term appointments, lifetime appointments, elections, etc.),¹²⁸ and individual predilections.¹²⁹

I conducted a review of sixty-three federal cases in which a person raised intellectual disability during sentencing. This review revealed how disparate

¹²⁴ Meixner, *supra* note 45, at 1447 tbl.2, 1448.

¹²⁵ See Johnson et al., *supra* note 12, at 1047 (noting that deficiencies in working memory and communication may hinder the ability of a person with intellectual disability to assist counsel and provide information in a coherent manner).

¹²⁶ Though judges almost always write a sentencing order (often called a judgment of conviction order), that usually just includes the sentence (e.g., the length of incarceration or probation and related terms).

¹²⁷ Jeffery T. Ulmer & Brian D. Johnson, *Organizational Conformity and Punishment: Federal Court Communities and Judge-Initiated Guidelines Departures*, 107 J. CRIM. L. & CRIMINOLOGY 253, 255–56, 278 (2017) (finding that judges downward departed at rates similar to other judges within their jurisdiction, which varied significantly across jurisdictions).

¹²⁸ The method and duration of appointment is significant. Federal judges do not have to worry about the changing mores of the public—if the public wants more law and order, the judge can choose whether to follow that change or ignore it. Of course, the reverse is also true if public preferences lean more progressive than those of a judge.

¹²⁹ See Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1903 tbl.1, 1906 tbl.3 (2017) (highlighting that federal judges and state judges are both disproportionately white and male). A recent study of state court judges found that they are 80% white (compared with 62% of the general population) and 70% male (compared with 49% of the general population). *Id.* At the federal level, judges are roughly 67% white and 61% male. *Diversity of the Federal Bench: Current Statistics on the Gender and Racial Diversity of the Article III Courts*, AM. CONST. SOC’Y, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> [<https://perma.cc/LUB5-PGL3>]. Because tracking the demographics of state level judges is very challenging, little is known beyond race and gender. George & Yoon, *supra*, at 1893 (“Although state judges are public servants, little is known about them. Unlike their counterparts on the federal courts, much of the information on state judges is nonpublic and, in many instances, not even collected in a systematic way.”). The authors of *Measuring Justice* constructed their own dataset on state judges, but their analysis was limited to gender, racial, and ethnic composition of the courts. *Id.* at 1893–94. Though they collected and coded information on education, this data point was missing for a substantial number of the judges and, thus, was not included in the analysis. *Id.* at 1902.

the courts' approaches have been.¹³⁰ The reviewed cases fell into one of five categories:

- a) The court explicitly addressed intellectual disability and treated it as mitigating, resulting in a sentence at the low end of or below the Guidelines. Twelve cases fell into this category.
- b) The court mentioned intellectual disability in the sentencing decision but did not explicitly find it a mitigating factor, and the court sentenced the person at the low end of or below the Guidelines. Nine cases fell into this category.
- c) The court mentioned intellectual disability, found it was or was not explicitly a factor in sentencing, and the person was sentenced in the middle of their Guidelines range. Twenty-one cases fell into this category.
- d) The court mentioned intellectual disability, did not explicitly find it an aggravating factor, and sentenced the person at the high end of or above the Guidelines range. Fifteen cases fell into this category.
- e) The court explicitly addressed intellectual disability, treated it as aggravating, and sentenced the person within or above the Guidelines. Six cases fell into this category.

Thus, in one-third of the cases, intellectual disability appeared as or was explicitly mitigating. Twice as often, though, intellectual disability appeared as or was explicitly irrelevant or aggravating.

These sixty-three cases represent the breadth of judicial approaches to intellectual disability since the mid-2000s.¹³¹ Some took a remarkably nuanced, thoughtful, and historical perspective to sentencing individuals with intellectu-

¹³⁰ These cases were either federal appellate orders reviewing a sentencing decision or a sentencing judge's written sentencing order in which the person conviction had or was alleged to have intellectual disability. This review is limited by the nature of cases available. Most of the cases reviewed were appellate decisions (fifty-two of sixty-three). Appellate cases may reflect cases where the judge deviated either above or below the Sentencing Guidelines, rather than in which a person was sentenced within the Guidelines range. In addition, because these are federal cases, they may disproportionately involve child pornography (both possession and production), kidnapping, and firearm possession during drug trafficking when compared with state cases.

¹³¹ Though I did not include a date restriction in the search, the search terms included "intellectual disability," which became the official term of art in 2007, replacing "mental retardation." Joseph Shapiro, *Label Falls Short for Those with Mental Retardation*, NPR (Jan. 22, 2007), <https://www.npr.org/2007/01/22/6943699/label-falls-short-for-those-with-mental-retardation> [<https://perma.cc/9QA4-TCZW>]. For that reason, the orders are likely to be from around 2007 or later. This also ensured that the orders were post-*Atkins*, a 2002 decision.

al disability.¹³² In other cases, judges were dismissive or found the disability to necessitate a more significant custodial sentence.¹³³

For the cases in category (a), where intellectual disability was explicitly mitigating, six of those twelve cases came from a single judge in the U.S. Middle District of Alabama, Judge Myron Thompson.¹³⁴ Judge Thompson substantively considered the effect of intellectual disability in his sentencing decisions—not only finding it mitigating but crafting appropriate sentencing orders for the individual in light of their intellectual disability.

For example, in *United States v. Johnson*, Judge Thompson refused to revoke Mr. Johnson's probation for repeatedly testing positive for marijuana and spice.¹³⁵ Mr. Johnson had an IQ of seventy-two,¹³⁶ struggled to read and write, and was on probation for conspiracy to commit tax fraud stemming from a scheme in which his family took advantage of him.¹³⁷ In his order, Judge Thompson traced the history of how the United States has treated individuals with intellectual disability from institutionalization in deplorable conditions¹³⁸

¹³² See, e.g., *United States v. Robins*, No. 07CR00376, 2009 WL 1513408, at *3 (E.D. Ark. May 29, 2009) (imposing a time-served sentence for a man with intellectual disability convicted of attempted bank robbery, seventeen months below the Guidelines, in part because Mr. Robins' adoptive mother agreed to provide support and Mr. Robbins would be vulnerable to mistreatment if incarcerated).

¹³³ E.g., *United States v. Pedroza-Orengo*, 817 F.3d 829, 833, 837 (1st Cir. 2016) (affirming the district court's sentence of sixty months, a term above the Guidelines and twice the prosecutor's request of thirty months, for Mr. Pedroza-Ortega, a man with mild intellectual disability, and tacitly endorsing the district court's assertion that a person "'with that kind of situation has less acumen to make decisions, correct decisions regarding firearms and firearms use' and so poses 'a bigger danger than an individual who has an IQ of 125 with an illegal gun in his hand'" (quoting the district court's oral findings)).

¹³⁴ *United States v. Henderson*, 541 F. Supp. 3d 1312, 1313–15 (M.D. Ala. 2021); *United States v. Phaly*, No. 18cr21, 2019 WL 449205, at *1–2 (M.D. Ala. Feb. 5, 2019); *United States v. Johnson*, 122 F. Supp. 3d 1313, 1317–22 (M.D. Ala. 2015); *United States v. Piggott*, No. 14cr124, 2015 WL 1894319, at *1–4 (M.D. Ala. Apr. 27, 2015); *United States v. Ferguson*, 942 F. Supp. 2d 1186, 1194 (M.D. Ala. 2013); *United States v. McDade*, No. 07CR222, 2010 WL 670246, at *1–2 (M.D. Ala. Feb. 23), *aff'd*, 399 F. App'x 520 (11th Cir. 2010).

¹³⁵ *Johnson*, 122 F. Supp. 3d at 1321–22. Spice is a form of synthetic marijuana. *Spice/ K2, Synthetic Marijuana*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/factsheets/spice-k2-synthetic-marijuana> [<https://perma.cc/8R3H-KMPP>].

¹³⁶ With an IQ of 72, when considering the five-point potential standard error measurement, Mr. Johnson could either be in the range of mild intellectual disability or at the low end of normal intelligence. See *Hall v. Florida*, 572 U.S. 701, 712–14 (2014) (describing the standard error of measurement for IQ tests and noting that for an IQ of 71, a person's IQ could be between 66 (mild intellectual disability) and 76 (the low end of normal intelligence)).

¹³⁷ *Johnson*, 122 F. Supp. 3d at 1315.

¹³⁸ *Id.* at 1317–19 (describing the conditions in an Alabama facility "as a warehousing institution which, because of its atmosphere of psychological and physical deprivation, is wholly incapable of furnishing habilitation to the [intellectually disabled] and is conducive only to the deterioration and the debilitation of the residents" (quoting *Wyatt v. Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd in part, rev'd in part*, 503 F.2d 1305 (1st Cir. 1974))).

to deinstitutionalization¹³⁹ to the failure to provide services in the community, often leading to criminal legal system involvement.¹⁴⁰

In reaching his decision with regard to Mr. Johnson, Judge Thompson issued an order tailored to Mr. Johnson's specific needs for vocation rehabilitation, drug counseling appropriate for an individual with intellectual disability, and educational support services.¹⁴¹ Judge Thompson's thoughtfulness and sensitivity to the complexity surrounding the involvement of individuals with intellectual disability in the criminal legal system is exemplary.¹⁴² But just because one judge is attuned to the nuances of sentencing individuals with intellectual disability does not mean our current sentencing policy is adequate.

In 2021, in *United States v. Ayala-Lugo*, Mr. Ayala-Lugo presented expert evidence of intellectual disability.¹⁴³ The prosecutor argued that the court should not consider his intellectual disability because he had a partner of fifteen years, had worked as a barber for one year, and held a position of responsibility within a narcotics distribution operation.¹⁴⁴ The district court considered Mr. Ayala-Lugo's intellectual disability but nonetheless sentenced him to a term near the top of the Guidelines.¹⁴⁵ Then, in 2023, in *United States v. Butler-Jackson*, the district court sentenced Mr. Butler-Jackson to a term seventeen months above the Guidelines.¹⁴⁶ In doing so, the court heavily weighed the nineteen-year-old's prior criminal history against the mitigating evidence

¹³⁹ *Id.* at 1315, 1319.

¹⁴⁰ *Id.* at 1319–20. Judge Thomson noted four reasons that individuals with intellectual disability become involved with the criminal legal system: (1) some individuals generally become involved in the criminal legal system and that includes some with intellectual disability; (2) individuals with intellectual disability can be vulnerable to the negative influence of others; (3) the failure to provide services can lead to homelessness and substance abuse, which can lead to criminal legal system involvement; and (4) some providers struggle to effectively provide substance abuse and mental health treatment to individuals with intellectual disability. *Id.*

¹⁴¹ *Id.* at 1322 (“[T]he court determined that specialized treatment is more reasonable punishment than custody. Specifically, as the following order lays out, the court will require drug counseling, adult-education classes, and vocational rehabilitation. The drug counseling both will reinforce the need to avoid spice and will give Johnson someone to talk to, a desire that he emphasized at sentencing. The adult-education classes and vocational rehabilitation will help Johnson with reading, writing, arithmetic, and communication skills that will help him in his daily interactions and his work. Combined, these treatments, the court hopes, will help Johnson to be part of the community.”).

¹⁴² That Mr. Johnson, an eighteen-year-old with intellectual disability, was prosecuted for his involvement in a tax fraud scheme concocted by his family is also problematic and exemplifies the deep issues within the criminal legal system. See the discussion of abolition *infra* Part III.B.2. That said, individuals like Mr. Johnson continue to enter the system every day, and if judges treated them with the thoughtfulness of a Judge Thompson, the harm to the individuals and their communities would be greatly diminished. See *supra* note 141.

¹⁴³ 996 F.3d 51, 53–54 (1st Cir. 2021). This Article cites appellate cases when discussing unpublished district court sentencing decisions.

¹⁴⁴ *Id.* at 54.

¹⁴⁵ *Id.*

¹⁴⁶ No. 22-10694, 2023 WL 1102593, at *1 (11th Cir. Jan. 30, 2023) (per curiam).

of intellectual disability, childhood experiences of domestic violence, and mental health issues, among other mitigating factors.¹⁴⁷

In other cases, intellectual disability was explicitly aggravating. For example, in 2014, in *United States v. Black*, the district court sentenced Mr. Black to 183 months (seventy-two months above the Guidelines and around forty months more than his co-defendants) because the court believed Mr. Black's intellectual disability made it more likely that he would continue to engage in criminalized behavior.¹⁴⁸

Even in cases where intellectual disability did not result in an above-the-Guidelines departure, because of courts' complete lack of understanding of intellectual disability, individuals may have received a lighter sentence if they did not raise their intellectual disability. For example, in 2022, in *United States v. Edwards*, Mr. Edwards received a sentence within the Guidelines.¹⁴⁹ There, the court stated at sentencing that the "sad facts" of Mr. Edwards' background, including his intellectual disability, did not alter the court's assessment that Mr. Edwards "needs to be deterred from engaging in further criminal conduct and, frankly, incapacitated."¹⁵⁰

This review of federal cases demonstrates the significantly different ways judges approach intellectual disability. But what this review cannot show is what happens to individuals who do not raise their intellectual disability—how a sentencing court or prosecutor may perceive certain behaviors as aggravating rather than as manifestations of an intellectual disability. These *missing* cases similarly establish the need for a more consistent, transparent, and mitigating approach.

II. HOW THE THEORIES OF PUNISHMENT AND PRACTICAL REALITIES NECESSITATE TREATING INTELLECTUAL DISABILITY AS MITIGATING

Beyond these problematic inconsistencies, a comprehensive examination of the dual concerns raised in the Supreme Court's *Atkins v. Virginia* decision—the theories of punishment and practical realities—demonstrates that our current approach to intellectual disability in the criminal legal system is inequitable and unjust.¹⁵¹

This Part discusses each of these concerns in detail. Section A examines the modern approach to theories of punishment and specifically as applied to

¹⁴⁷ *Id.*

¹⁴⁸ 570 F. App'x 836, 841 (11th Cir. 2014) (per curiam).

¹⁴⁹ No. 21-1248, 2022 WL 1553455, at *1–2 (2d Cir. May 17, 2022).

¹⁵⁰ *Id.* at *1 (quoting the district court's oral findings).

¹⁵¹ See 536 U.S. 304, 321 (2002).

individuals with intellectual disability.¹⁵² Section B explores how intellectual disability practically affects a person and their experience in the criminal legal system—notably how our failure to identify and understand intellectual disability results in disproportionately negative outcomes.¹⁵³

A. Theories of Punishment and Intellectual Disability

Despite robust criticism of the criminal legal system and how it punishes,¹⁵⁴ the traditional theories of punishment¹⁵⁵ continue to dominate how judges sentence.¹⁵⁶ This is the case even though studies show many of these theories, including those intended to ensure public safety, fail in practice.¹⁵⁷ These theories of punishment are almost always used as tools of oppression—ways to

¹⁵² See *infra* notes 154–279 and accompanying text.

¹⁵³ See *infra* notes 280–312 and accompanying text.

¹⁵⁴ This includes critiques regarding racial discrimination, criminalization of poverty, draconian sentences, ableism (as discussed in this Article), failing to respond to the needs of victims and communities, among others. See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 412 (2018) (“Contemporary racial justice movements . . . are identifying policing, jail, and prison as the primary mode of governing Black, poor, and other communities of color in the United States, and pointing to law as the scaffolding.”); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 1 (2022) (“[T]he criminal courts . . . contribute their own unique forms of violence, social control, and exploitation.”); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1638 (2019) (“[C]riminal prosecution generally fails to address the needs of survivors of harm. It also degrades and brutalizes those subject to prosecution. All the while, the criminal legal system neglects the underlying causes of the problems at hand so that they are almost certain to occur again.” (footnotes omitted)). See generally Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (analyzing the intersection between criminal law and the welfare system to illustrate the law’s dedication to criminalizing poverty); Chin, *supra* note 24 (describing the Americans with Disabilities Act’s failure to meet the needs of disabled Black, Indigenous, and other people of color); Leigh Goodmark, *Gender-Based Violence, Law Reform, and the Criminalization of Survivors of Violence*, 10 INT’L J. FOR CRIME JUST. & SOC. DEMOCRACY, no. 4, 2021, at 13 (2021) (explaining how the current U.S. criminal system harms survivors of intimate violence, primarily women, by relying disproportionately on criminalization).

¹⁵⁵ The traditional theories of punishment are retribution and the three utilitarian theories (rehabilitation, deterrence, and incapacitation).

¹⁵⁶ See *infra* Part II.A.1–3.

¹⁵⁷ See, e.g., Christy Visser & John Eason, *Changing Prisons to Help People Change* (discussing how incarceration is not rehabilitative), in A BETTER PATH FORWARD FOR CRIMINAL JUSTICE: A REPORT BY THE BROOKINGS-AEI WORKING GROUP ON CRIMINAL JUSTICE REFORM 28 (Rashawn Ray & Brent Orrell eds., 2021) [hereinafter *Changing Prisons*]; Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) (asserting the ineffectiveness of general and specific deterrence); U.S. SENT’G COMM’N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 23 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf [<https://perma.cc/7FDU-QPWG>] [hereinafter EFFECTS OF AGING] (demonstrating that criminal activity decreases with age regardless of incarceration).

increase rather than decrease a sentence.¹⁵⁸ Alternatives have arisen—abolition¹⁵⁹ and restorative justice¹⁶⁰—but in courts across the country, judges routinely rely on the traditional theories of retribution, rehabilitation, deterrence, and incapacitation to determine an appropriate sentence.

Although these theories of punishment are most often used to further oppress individuals from marginalized backgrounds, they *can* increase equity. In fact, this currently might be the most effective way to decrease injustices faced by people with intellectual disability in the criminal legal system.

In this Section, Subsection 1 provides an overview of theories of punishment and mitigation.¹⁶¹ Subsections 2 through 5 then analyze the impact of intellectual disability under each theory of punishment.¹⁶²

1. Overview of Theories of Punishment

The two primary traditional theories of punishment are utilitarianism and retribution.¹⁶³ A utilitarian (sometimes referred to as “consequentialist”)¹⁶⁴ approach is one in which the sentence is justified because of the benefit that it will bring to society.¹⁶⁵ The utilitarian approach includes deterrence, rehabilita-

¹⁵⁸ See Hessick, *supra* note 96, at 1112 (“Nevertheless, there are strong reasons to believe our political systems over-identify aggravating sentencing factors and under-identify mitigating factors.”); Alice Ristroph, Essay, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1660–62 (2020) (discussing how the law school criminal law curriculum teaches students how to justify punishment rather than whether to punish).

¹⁵⁹ Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 162–63 (2021) (“Many abolitionists maintain that the prison system and its accompanying law enforcement processes, such as policing and court adjudication, not only fail to address the historical, social, and economic drivers of crime, but deepen them. Therefore, abolitionists advocate for doing away with prisons and policing and working to drive out the conditions that cause crime. Abolition focuses on finding new, restorative ways of addressing harm and ensuring safety.” (footnotes omitted)).

¹⁶⁰ *About Restorative Justice*, UNIV. OF WIS.-MADISON L. SCH., <https://law.wisc.edu/fjr/rjp/justice.html> [<https://perma.cc/9WT2-VKY6>] (“Restorative justice seeks to examine the harmful impact of a crime and then determines what can be done to repair that harm while holding the person who caused it accountable for his or her actions. Accountability for the offender means accepting responsibility and acting to repair the harm done.”).

¹⁶¹ See *infra* notes 163–195 and accompanying text.

¹⁶² See *infra* notes 196–279 and accompanying text.

¹⁶³ Hessick & Berman, *supra* note 45, at 177.

¹⁶⁴ See Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 699, 701 (2012) (characterizing utilitarianism as a “paradigmatic example” of consequentialism).

¹⁶⁵ *Id.* at 704–05 (describing utilitarian theory as fitting under the “umbrella category” of consequentialism, which “generally take[s] the view that punishment is justified insofar as it is an effective instrument to promote some future-looking social benefit”).

tion, and incapacitation.¹⁶⁶ Retribution, by contrast, focuses on whether the punishment fits the underlying offense, without particular regard for the benefit to society.¹⁶⁷ The United States has no clear guiding theory of punishment, meaning legislatures base sentences on disparate or even inconsistent rationales.¹⁶⁸

Rehabilitation was the dominant sentencing goal during the first half of the twentieth century, characterized by broad discretion and termed the “rehabilitative ideal.”¹⁶⁹ But, in the 1970s, lawmakers and judges moved away from that theory.¹⁷⁰ Legislatures rejected the rehabilitative ideal and started restricting judicial discretion.¹⁷¹ As time went on and the war on drugs and law and order became politically popular, sentences required longer and longer periods of incarceration.¹⁷² Mass incarceration has dramatically affected the United States, resulting in deleterious harm for many racialized communities and little, if any, benefit.¹⁷³

¹⁶⁶ Hessick & Berman, *supra* note 45, at 183 (explaining that the theories of deterrence, incapacitation, and rehabilitation are the “most widely discussed” of the theories seeking to accomplish the crime-reduction goal of utilitarianism); DeGirolami, *supra* note 164, at 705 (stating that the “social benefit” of consequentialist theories typically include deterrence, rehabilitation, and incapacitation).

¹⁶⁷ See Hessick & Berman, *supra* note 45, at 180 (“A retributivist distinguishes between offenders by evaluating the seriousness of a defendant’s crime. Punishment is then imposed proportionately based on offense seriousness. A retributivist does not merely rely on the crime of conviction when assessing offense seriousness. She also distinguishes between defendants convicted of the same crime by analyzing the relative gravity of the crime that each defendant committed. She analyzes the gravity of a crime by focusing on two considerations: (1) the loss or harm caused by the offense and (2) the blameworthiness of the individual defendant.” (footnotes omitted)).

¹⁶⁸ Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 1 (2006) (“Sentencing policy in the United States has fragmented. There is no overriding theory or model. There are no widely shared understandings about what sentencing can or should accomplish or about conceptions of justice it should incorporate or reflect.”).

¹⁶⁹ Initially supported in *Williams v. New York*, 337 U.S. 241 (1949), the U.S. Supreme Court continued to cite to this case and underlying sentencing approach favorably throughout the 1960s and 1970s as it provided more procedural protections to individuals charged with crimes. Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 4–6; see also *Chaffin v. Stynchcombe*, 412 U.S. 17, 21–25 (1973) (citing *Williams*); Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. & CRIMINOLOGY 226, 226 (1959) (describing the rise of the rehabilitative ideal in the first half of the twentieth century).

¹⁷⁰ Berman, *supra* note 169, at 8 n.41.

¹⁷¹ *Id.* at 11–13.

¹⁷² See Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 307 (2009) (“Beginning in the 1970s . . . state and federal governments tripled the percentage of convicted felons sentenced to confinement and doubled the length of their sentences.”); see also Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 190–91 (2017) (describing the move from a rehabilitative, utilitarian approach to a more retribution-focused approach to sentencing).

¹⁷³ The effects of mass incarceration have been well critiqued and analyzed in other literature. See, e.g., Clear & Austin, *supra* note 172, at 307–08 (describing a shift in the literature about the U.S. prison system “to emphasize deep concerns about the wisdom of our burgeoning prison population,” and noting that a “broad consensus has emerged that the prison population is too large”).

Since the fall of the rehabilitative ideal, both scholars and practitioners have struggled to identify a unifying theory of punishment.¹⁷⁴ Yet statutes and regulations guiding sentencing decisions have focused on the factors that would aggravate a sentence rather than mitigate it.¹⁷⁵ As such, many sentencing schemes include more approved aggravating factors than mitigating factors.¹⁷⁶ In the federal system, the USSC has outright discouraged the consideration of mitigating factors at times.¹⁷⁷

As scholars have grappled with the move away from a single, dominant theory of sentencing, some have embraced the idea that no one theory should dominate.¹⁷⁸ Some put forward a “hybrid” theoretical approach, “which blend[s] strands of retributivist and consequentialist theories in philosophically precise portions.”¹⁷⁹ “A typical hybrid approach holds that moral desert specifies a range of permissible penalties, and utilitarian considerations should drive the selection of the appropriate penalty within that range.”¹⁸⁰ This model, however, focuses specifically on whether the sentence should be *increased*.¹⁸¹

In contrast, two approaches have emerged to push for greater focus on mitigation—one broad, the other narrow. The “inclusive approach to punishment,” scholars have argued, would allow for the broad consideration of all theories of punishment without prioritizing one over another, with a greater

¹⁷⁴ Hessick & Berman, *supra* note 45, at 171 (“[M]uch to the chagrin of many commentators, through more than two decades of federal sentencing reform, neither Congress nor the U.S. Sentencing Commission has expressly defined or fully articulated the central purpose of federal sentencing.” (footnotes omitted)).

¹⁷⁵ *Id.* at 172–73 (explaining that the Federal Sentencing Guidelines restricted the role of mitigation at sentencing, and that a number of states with structured sentencing systems also permitted judges to mitigate sentences in only a small number of circumstances).

¹⁷⁶ Hessick, *supra* note 96, at 1128–29 (“[S]tate non-capital sentencing schemes tend to identify more aggravating sentencing factors than mitigating factors. Of the seventeen systems that identify both aggravating and mitigating factors, twelve states identify more aggravating than mitigating factors . . .”).

¹⁷⁷ See Hessick & Berman, *supra* note 45, at 172 (noting that the Sentencing Commission issued policy statements discouraging judges from mitigating sentences based on Sentencing Reform Act factors).

¹⁷⁸ DeGirolami, *supra* note 164, at 701 (discussing hybrid theories of punishment). *Contra generally* Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003) (arguing for a single theory of punishment to guide decision-makers).

¹⁷⁹ DeGirolami, *supra* note 164, at 701; see also Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005) (arguing that “[t]he best solution . . . is not to adopt a narrow punishment theory (e.g., one based solely on retributive or risk-management goals), but rather to design a hybrid sentencing system that gives appropriate scope to all legitimate sentencing purposes”).

¹⁸⁰ Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 621 (2009).

¹⁸¹ See Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 28 (1987).

focus on mitigation.¹⁸² “Under this approach, judges should reduce sentences whenever *any* of the punishment theories would support treating a fact or circumstance as mitigating.”¹⁸³ The inclusive theory of punishment is also consistent with the often under-relied-upon principle of parsimony that “calls for the imposition of the least punitive or burdensome punishment that will achieve valid social purposes.”¹⁸⁴

Similarly, judges are more likely to consider the various theories—rarely do they apply a single theory or particular order of theories.¹⁸⁵ As discussed:

Although criminal law theorists sometimes speak about punishment in terms of only a single theory, that is not how non-academics think about criminal punishment. Most people believe that we impose criminal sentences on defendants *both* to punish them for their crimes *and* to prevent future crimes from occurring. In other words, members of the general public are simultaneously retributivists and utilitarians.¹⁸⁶

Although some scholars argue for this broad approach to mitigation, others look at a specific mitigating factor—youthfulness—and argue that it should always mitigate. One scholar asserts that the sentence length for individuals who commit their crimes as children should lead to a reduction in sentence length in proportion to their age.¹⁸⁷ In doing so, the scholar notes, “[t]he Court’s jurisprudence of youth recognizes that juveniles who produce the same harms as adults are not their moral equals and do not deserve the same consequences for their immature decisions.”¹⁸⁸

Using the Supreme Court’s rationale from its trilogy of juvenile cases,¹⁸⁹ it is argued that because judges are making normative decisions about criminal responsibility and because we are not very good at determining the culpability of an individual youth as compared to an adult, a categorical mitigation rule is the only way to ensure more just sentencing.¹⁹⁰ “A Youth Discount recognizes that same-length sentences exact a greater penal bite from younger offenders

¹⁸² Hessick & Berman, *supra* note 45, at 211 (explaining that the inclusive approach to punishment is “not simply another hybrid theory” because it does not exclude consideration of certain factors in sentencing and does not prioritize certain theories above others).

¹⁸³ *Id.* at 204.

¹⁸⁴ Berman, *supra* note 169, at 49.

¹⁸⁵ Hessick & Berman, *supra* note 45, at 209 (stating that modern sentencing does not adhere to a single punishment theory).

¹⁸⁶ *Id.* at 210 (footnotes omitted).

¹⁸⁷ Feld, *supra* note 45, at 108.

¹⁸⁸ *Id.* at 137.

¹⁸⁹ *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁹⁰ Feld, *supra* note 45, at 138–41.

than older ones.”¹⁹¹ Though youth and individuals with intellectual disability are distinguishable, the justification for a categorical rule applies with equal force for individuals with intellectual disability.¹⁹²

This proposal sits at the intersection between the two above approaches.¹⁹³ Building off the suggested use of youthfulness as a specific mitigating factor, and similarly concerned with courts unfairly evaluating individuals’ culpability, this proposal mandates a categorical rule.¹⁹⁴ At the same time, however, the degree of mitigation would be discretionary—in line with parsimony—and factor the theories of punishment, the nature of the offense, and characteristics of the individual, as articulated by scholars in their broad inclusive theory of mitigation.¹⁹⁵

2. Intellectual Disability and Rehabilitation Theory

Under a rehabilitation theory of punishment, the goal is that upon completion of the sentence, the person will no longer present a danger to the community because they have changed for the better.¹⁹⁶ Sentences that aim for rehabilitation will often include conditions such as obtaining a high school diploma or GED, substance abuse treatment, mental health treatment, vocational training, and more.¹⁹⁷ These punishments and their attendant services can happen in either the community (generally through probation) or in a carceral setting.¹⁹⁸

¹⁹¹ *Id.* at 142.

¹⁹² As Professor Feld describes, one of the reasons for creating a Youth Discount is to ensure that children convicted of serious crimes, who still have great capacity for change and growth, will have an opportunity to have some life in the community after incarceration. *Id.* at 147. Although individuals with intellectual disability have the capacity for growth and change, it is not to the same degree as children or adolescents. See *infra* Part II.A.3.

¹⁹³ See *infra* Part III.A.

¹⁹⁴ See Feld, *supra* note 45, at 147.

¹⁹⁵ Hessick & Berman, *supra* note 45, at 209–11.

¹⁹⁶ Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 347–48 (2001) (“[T]he basic concept of the penitentiary or prison has remained unchanged since its conception. Convicted felons are separated from their former life, confined in a secure facility, and subjected to some regimen that will change their attitudes and enable them to be productive, law-abiding citizens once they are released.”); Allen, *supra* note 169, at 226 (noting that an essential part of the rehabilitative ideal is the idea that “measures employed to treat the convicted offender should serve a therapeutic function, that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions and in the interest of social defense”); Berman, *supra* note 169, at 4.

¹⁹⁷ Rubin, *supra* note 196, at 369 (providing examples of prison rehabilitation programming, including literacy efforts, high school diplomas and college degrees, mental health treatment, drug and alcohol use counseling, and trainings on a wide variety of vocational skills such as restaurant management, masonry, medical technology, and horticulture).

¹⁹⁸ *Id.* at 366 (noting that “[v]irtually all large prisons offer vocational and academic training of some sort,” and citing to vocational and academic supports such as day treatment programs, work release, and boot camps as part of the rehabilitative model).

Scholars and advocates have made strong and often persuasive arguments that carceral sentences are never directly rehabilitative—that people rehabilitate in prison despite the conditions, not because of them.¹⁹⁹ The likelihood of a person with intellectual disability receiving rehabilitative services while incarcerated is even lower.²⁰⁰

Though the criminal legal system is no longer primarily focused on making prisons rehabilitative (leading to decreased funding for such programs),²⁰¹ judges still often sentence individuals with the expectation that they will have opportunities for rehabilitation while incarcerated. In fact, in recent years, we have seen an increased interest in promoting rehabilitation during incarceration²⁰²—the 2018 First Step Act put into place new systems for encouraging

¹⁹⁹ See, e.g., *Changing Prisons*, *supra* note 157, at 29 (“Being sentenced to incarceration can be traumatic, leading to mental health disorders and difficulty rejoining society. Incarcerated individuals must adjust to the deprivation of liberty, separation from family and social supports, and a loss of personal control over all aspects of one’s life. In prison, individuals face a loss of self-worth, loneliness, high levels of uncertainty and fear, and idleness for long periods of time. Imprisonment disrupts the routines of daily life and has been described as ‘disorienting’ and a ‘shock to the system.’” (citation omitted)).

²⁰⁰ Miranda Hutchison, Don Hummer & Alese Wooditch, *A Survey of Existing Program Strategies for Offenders with Intellectual and Developmental Disabilities Under Correctional Supervision in Pennsylvania*, 60 PROB. J. 56, 58 (2013) (“Many correctional facilities do not have suitable programming for those with special needs . . .”).

²⁰¹ Allen, *supra* note 169, at 226 (describing the rise of rehabilitation during the first half of the twentieth century); Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 385 (2015) (noting that “rehabilitation was, as early as the 1970s, being abandoned as a primary justification for punishment” (citing FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 5–7 (1981))); Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC’Y REV. 33, 38 (2011) (explaining the shift from the rehabilitative ideal to a focus on law-and-order rhetoric that made it harder to fund prison programs).

²⁰² The focus in this Subsection is on the Federal Bureau of Prisons (FBOP). Though some of the discussion is relevant to and reflective of what happens in both federal and state prisons, some, particularly with regard to programming and priorities, is primarily reflective of the FBOP. The FBOP is not necessarily representative of the incarceration experience of most individuals in carceral settings (the number of individuals in state prisons is over one million, whereas the number in FBOP is around two hundred thousand). Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [<https://perma.cc/68R4-5GX2>]. Given the diversity of state corrections and prison systems, the FBOP is simply an example of rehabilitative programming. Also, in many cases, the FBOP has more funding and resources than state systems. See Annual Determination of Average Cost of Incarceration Fee (COIF), 88 Fed. Reg. 65405, 65406 (Sept. 22, 2023) (estimating that the FBOP paid an average of \$42,672 per incarcerated individual in a Bureau or non-Bureau facility in 2022); 2021 National Averages, NAT’L INST. OF CORR., <https://nicic.gov/resources/nic-library/state-statistics/2021> [<https://perma.cc/3JZQ-W9CY>] (estimating that state corrections divisions paid an average of \$31,580 for each individual incarcerated in a state facility in 2021); CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015*, at 7 (Erika Turner ed., 2017), <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf> [<https://perma.cc/ZD7C-9WF8>] (using statistics from 2015 to demonstrate state “cost per inmate”

individuals to participate in programming likely to decrease recidivism.²⁰³ The Federal Bureau of Prisons (FBOP) also touts its Evidence-based Recidivism Reduction (EBRR) programs that are designed with rehabilitation in mind.²⁰⁴ Furthermore, incarcerated individuals in federal custody are required to participate in GED programming if they do not have a GED or high school diploma, which studies demonstrate decreases the likelihood of recidivism.²⁰⁵

Despite these changes, individuals with intellectual disability still have decreased opportunities for rehabilitation while incarcerated, often leaving meaningful rehabilitation out of reach.²⁰⁶ For example, most individuals with intellectual disability require special education services to attain educational progress.²⁰⁷ But GED programs in prison provide less, not more, support.²⁰⁸ Thus, a person with intellectual disability in prison may spend hours in GED classes without any specialized support and leave empty-handed. Furthermore, a GED is not only valuable in and of itself, but it often unlocks additional reha-

varies widely, from a low of \$14,780 in Alabama to \$69,355 in New York). Thus, if the FBOP is unable to provide rehabilitative programming to individuals with intellectual disability, it is much less likely that states will provide such services.

²⁰³ 18 U.S.C. § 3634; *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/EJR5-G3NM>].

²⁰⁴ See OFF. OF THE ATT'Y GEN., U.S. DEPT. OF JUST., FIRST STEP ACT ANNUAL REPORT 11–14 (2023), <https://www.ojp.gov/first-step-act-annual-report-april-2023> [<https://perma.cc/X9WS-R885>] (describing the program's needs assessment system, which identifies the needs of each inmate and assigns individualized, evidence-based programs and activities to reduce the likelihood of recidivism). See generally FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., EVIDENCE-BASED RECIDIVISM REDUCTION (EBRR) PROGRAMS AND PRODUCTIVE ACTIVITIES (PA), https://www.bop.gov/inmates/fsa/docs/evidence_based_recidivism_reduction_programs.pdf [<https://perma.cc/N2PP-RHTY>] (providing details about EBRR programs).

²⁰⁵ See, e.g., John Nuttall, Linda Hollmen & E. Michele Staley, *The Effect of Earning a GED on Recidivism Rates*, 54 J. CORR. EDUC. 90, 92–95 (2003) (concluding that attaining a GED while in custody substantially reduces the likelihood of recidivism).

²⁰⁶ Scheyett et al., *supra* note 71, at 14 (“Once incarcerated, individuals with intellectual and developmental disabilities seldom receive specialized services.”). Whether a judge believes a person needs rehabilitation is separate, though connected in some cases, from the belief that a person needs incapacitation. In some cases, a judge could reasonably think that a person would benefit from rehabilitative services, but that incapacitation is unnecessary (such as in Mr. Sams’ case). See *supra* notes 1–19 and accompanying text. In other cases, a judge might believe that a person must be incapacitated until they are rehabilitated, such as where a judge believes that a personal mental illness led to their commission of serious violent offenses. Issues related to incapacitation are discussed *infra* Part II.A.3.

²⁰⁷ Cannon et al., *supra* note 6, at 415 (“[L]ack of achievement both in school and in the early years of young adulthood is often associated with a failure to identify students for appropriate special education services early. This problem greatly increases the risk that appropriate services will be less effective if offered at a later time.”).

²⁰⁸ See generally, e.g., Letter from Anne S. Raish, Acting Chief of the Disability Rts. Section, U.S. Dep’t of Just., C.R. Div., to Paul Schnell, Comm’r, Minn. Dep’t of Corr. (Sept. 30, 2022), <https://www.justice.gov/opa/press-release/file/1540226/download> [<https://perma.cc/7QTB-97GZ>] (finding that the Minnesota Department of Corrections violated the Americans with Disabilities Act by failing to provide supports and accommodations to incarcerated students with intellectual disabilities).

bilitative programing.²⁰⁹ In the federal system, having a GED means that a person can receive better work assignments and engage in additional programing.²¹⁰

Also, many incarcerated individuals with intellectual disability struggle with literacy.²¹¹ Not only are individuals with intellectual disability unlikely to learn to read or write while incarcerated, but their illiteracy may also keep them from engaging in programming.²¹² For example, some substance abuse programs will not admit individuals without an eighth-grade reading level.²¹³

Recognizing that individuals with intellectual disability have unique needs, the FBOP has one program specifically designed for such individuals: the Skills Program.²¹⁴ In the Skills Program, individuals with intellectual disability and cognitive impairments are housed separately from the general population and engage in daily programming specifically designed to meet their

²⁰⁹ See generally FED. BUREAU OF PRISONS, DIRECTORY OF NATIONAL PROGRAMS (2017) [hereinafter NATIONAL PROGRAMS], https://www.bop.gov/inmates/custody_and_care/docs/20170518_BOPNationalProgramCatalog.pdf [<https://perma.cc/8GPG-YXCJ>] (noting that a GED or high school diploma is required for some FBOP programs, including the Life Connections Program and Occupational Educational Programs).

²¹⁰ *UNICOR: Program Details*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [<https://perma.cc/37WX-SJNS>] (“A high school diploma or General Educational Development (GED) certificate is required for all work assignments above entry level (lowest pay level).”).

²¹¹ See ELIZABETH GREENBERG, ERIC DUNLEAVY & MARK KUTNER, U.S. DEP’T OF EDUC., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 29 fig.3-2 (2007). The 2003 National Assessment of Adult Literacy Survey reported that 56% of adults in prison have only basic or below basic levels of prose literacy skills, 50% have basic or below basic levels of document literacy skills, and 78% have basic or below basic quantitative literacy skills. See *id.* The assessment authors define basic literacy as “skills necessary to perform simple and everyday literacy activities,” such as reading and understanding information in simple documents. *Id.* at iv. The survey does not distinguish between literacy rates for individuals with and without intellectual disability. See *id.* at 28 tbl.3-1, 29 fig.3-2 (noting whether any given study participant had been diagnosed with a learning disability, but abandoning the distinction when studying literacy rates). Though individuals with mild and moderate intellectual disability can learn to read, it often takes intensive and consistent instruction that has only recently been developed. See generally Jill H. Allor et al., *Is Scientifically Based Reading Instruction Effective for Students with Below-Average IQs?*, 80 EXCEPTIONAL CHILD. 287 (2014) (detailing a study that supports the efficacy of scientifically based reading instruction for low-IQ students).

²¹² Prisons offer fewer, not more, educational supports for individuals with intellectual disability. See Hutchison et al., *supra* note 200, at 58 (“Many correctional facilities do not have suitable programming for those with special needs”); Packrone, *supra* note 18, at 115 (“As of 2005, only 37% of adult jails and prisons operating under state or federal authority provided any special education services to students.” (citing JAMES J. STEPHAN, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 6 (2008), <https://bjs.ojp.gov/content/pub/pdf/csf05.pdf> [<https://perma.cc/4M6S-TBUC>])).

²¹³ PSYCHOLOGY TREATMENT PROGRAMS, *supra* note 17 (explaining that an eighth-grade education level is required for both the FBOP nonresidential and residential drug treatment programs).

²¹⁴ NATIONAL PROGRAMS, *supra* note 209, at 20.

needs, help with the transition to prison, and provide them with skills that will support their success upon release.²¹⁵

Still, this specialized program exists in only two of the FBOP's 122 prisons.²¹⁶ Additionally, it is only in low- and medium-security facilities, meaning that individuals at high-security facilities have no access to this programming.²¹⁷ As discussed below, this is particularly troubling given that individuals with intellectual disability might be in higher-security facilities because manifestations of their disability are sometimes the bases of disciplinary infractions.²¹⁸ The FBOP recognizes that individuals with intellectual disability have special needs when incarcerated, hence its creation of the Skills Program; yet with such a limited provision of this specialty programming, many, if not most, individuals with intellectual disability do not receive these specialized services.²¹⁹

In contrast to the dearth of services in prisons, communities have the flexibility and diversity of services that better suit the needs of individuals with intellectual disability. For community supervision sentences, though, courts must ensure that they are requiring only the appropriate and meaningful services that will facilitate rehabilitation.²²⁰ Carceral sentences, though, do not further rehabilitation goals for a person with intellectual disability.

3. Intellectual Disability and the Theory of Deterrence

Deterrence has two separate components: specific deterrence and general deterrence,²²¹ the former being the ability to deter a particular individual from committing future offenses,²²² the latter being the ability to deter the wider population from committing a similar offense.²²³ Generally, deterrence puts weight only on the aggravating side of the scale (if there is a need for deter-

²¹⁵ *Id.* (explaining that the Skills Program is a twelve- to eighteen-month residential treatment program for persons with intellectual disabilities, involving cognitive-behavioral treatments, cognitive rehabilitation, and skills training intended to improve institutional adjustment and promote successful reentry into the community after incarceration).

²¹⁶ *Id.* (explaining that the Skills Program is available at the medium-security Coleman, Florida facility and the low-security Danbury, Connecticut facility).

²¹⁷ *See id.*

²¹⁸ PETERSILIA, *supra* note 64, at 6 (explaining that persons with intellectual disability may be reclassified to higher-security levels because of behaviors related to their disabilities); *see also infra* Part II.A.4.

²¹⁹ *See* NATIONAL PROGRAMS, *supra* note 209, at 20 (providing an overview of the Skills Program).

²²⁰ *See infra* Part III.C.3.

²²¹ Athula Pathinayake, *Contextualizing Specific Deterrence in an Era of Mass Incarceration*, 18 CONN. PUB. INT. L.J. 357, 359 (2019).

²²² *Id.* at 362.

²²³ *Id.* at 365.

rence, then the sentence should be longer).²²⁴ For purposes of this Article, the question is whether treating intellectual disability as categorically mitigating will decrease the sentence's deterrent effect on the general population or on the individual with intellectual disability before the court.²²⁵ This Subsection will first discuss general deterrence and then specific deterrence.

Changing the way in which individuals with intellectual disability are sentenced is unlikely to have an impact on general deterrence.²²⁶ Individuals without intellectual disability would not benefit from this mitigation and would face the same potential sentences.²²⁷ As the Court noted in *Atkins*, this is also unlikely to impact individuals with intellectual disability in the general public.²²⁸

With regard to specific deterrence, this can be effective only when a person premeditates their conduct, which individuals with intellectual disability are unlikely to do.²²⁹ For specific deterrence to work, a person must understand that conduct A led to punishment X and that to avoid a similar punishment in the future, they should refrain from engaging in a variety of conduct.²³⁰ This requires extrapolation; short-, medium-, and long-term thinking; appreciation

²²⁴ As an initial note, studies question the efficacy of general deterrence as a sentencing principle—the certainty that a person will be punished is what deters people from committing offenses, but the potential severity of the punishment does not generally deter. See Nagin, *supra* note 157, at 199 (arguing that “certainty of apprehension, not the severity of the ensuing legal consequence, is the more effective deterrent”). Regardless, general deterrence remains a primary feature of many sentencing schemes. See, e.g., U.S. SENT’G GUIDELINES MANUAL, *supra* note 94, ch. 1 pt. A (“The Sentencing Reform Act of 1984 . . . provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence . . .”); N.J. STAT. ANN. § 2C:44-1(a)(9) (West 2024) (permitting the court to consider “[t]he need for deterring the defendant and others from violating the law”). Judges and prosecutors still rely on this theory of punishment because, of course, deterring future crime is a worthy goal. When I practiced as a public defender in New Jersey, where deterrence, both specific and general, is a statutory aggravating factor, judges would routinely find that the aggravating factor of general deterrence applied because, as some would say, “there is always a need to deter crime.”

²²⁵ Deterrence is analyzed slightly differently from the other theories of punishment because it focuses on the impact of the sentence itself—how long or harsh the sentence is—on the general population or an individual. It is not necessarily about the experience of the punishment, but rather the fact that the person was punished and what the punishment was. Thus, this discussion of intellectual disability and deterrence focuses on the impact of a rule categorically treating intellectual disability as mitigating. This is similar to how the U.S. Supreme Court in *Atkins* analyzed exempting individuals with intellectual disability from the death penalty. See 536 U.S. 304, 319–21 (2002).

²²⁶ See *id.* at 320.

²²⁷ See *id.*

²²⁸ See *id.* at 319–20 (“[I]t is the same cognitive and behavioral impairments that make [individuals with intellectual disability] less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”); see also *infra* Part II.B.2.

²²⁹ See *Atkins*, 536 U.S. at 320.

²³⁰ Pathinayake, *supra* note 221, at 373.

for the consequences of actions; and planning—skills that many individuals with intellectual disability struggle to accomplish.²³¹

Because categorically treating intellectual disability as mitigating will not decrease the general deterrent effect of a sentence, and deterrence is often not effectuated in the sentences of individuals with intellectual disability, deterrence should never lead to an increase in a sentence and may, in fact, prove mitigating.

4. Intellectual Disability and the Theory of Incapacitation

A person focused on incapacitation primarily considers how long a person should be removed from the community to ensure the community's safety.²³² Of course, this is with the hope that upon release, the person being sentenced will be less dangerous. If a court or prosecutor believes that a person is more likely to commit future and possibly serious offenses, their sentence will be longer.²³³

As with all utilitarian approaches to sentencing, though, the ultimate goal is decreasing recidivism—making communities safer. Yet, for a person with intellectual disability, incarceration is likely to *increase* the long-term risk of recidivism, rather than reduce it.²³⁴ Though incarceration might decrease opportunities for re-offense in the short-term, because of the lack of programming and increased risk of trauma for individuals with intellectual disability, incarceration may increase the long-term likelihood of recidivism. Thus, on balance (weighing short-term incapacitation against long-term increased recidivism), the overarching goals for a person focused on incapacitation are not met.

In addition, there are two common misconceptions about intellectual disability and incapacitation that must be dispelled to understand the implications under this theory of punishment: (a) that individuals with intellectual disability are more likely to recidivate than the general public; and (b) individuals with intellectual disability are often convicted and sentenced for the most serious

²³¹ See *infra* Part II.B.2.

²³² Hessick & Berman, *supra* note 45, at 183.

²³³ *Id.*

²³⁴ Evidence shows that the utility of incapacitation is generally mixed. Shawn D. Bushway, *Incapacitation* (describing the range of study results on the effectiveness of incapacitation), in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 37, 39–48 (Erik Luna ed., 2017). Of course, if someone is incapacitated in prison, they are less likely to commit an offense during the period of incarceration—intellectual disability or not. But incapacitation is overinclusive—many people who likely would *not* recidivate in the community are incarcerated, which can damage individuals and communities, rendering both less safe. For example, for individuals aged 30 to 34, their rate of recidivism after release from federal prison is only 36%. EFFECTS OF AGING, *supra* note 157, at 23 fig.4. So, 74% of individuals between 30 and 34 are unlikely to commit future offenses, yet thousands remain incarcerated. See *id.* Thus, the utility of this theory of punishment under many circumstances is questionable.

offenses. These false beliefs affect how courts punish individuals with intellectual disability, and they must be corrected.²³⁵

Prison can be a more traumatic experience for individuals with intellectual disability than for the general population.²³⁶ This means that with each additional day a person spends incarcerated, they suffer more trauma, which can result in a person leaving prison less equipped to handle the regular stressors of life and potentially more likely to recidivate.²³⁷ As discussed, individuals with intellectual disability are more likely than the general public to experience abuse from both corrections officers and other incarcerated individuals.²³⁸ They are also more likely to find themselves in solitary confinement,²³⁹ which can have substantial negative mental health consequences.²⁴⁰ These factors increase the likelihood that individuals with intellectual disability return to the community needing more services and having a higher likelihood to recidivate than when they entered the carceral setting.²⁴¹

Despite this manufactured trauma, evidence indicates that individuals with intellectual disability generally recidivate at the same rate as other similarly situated individuals, with respect to age, gender, race, and other social

²³⁵ See, e.g., *United States v. Gibbs*, 237 F. App'x 550, 558 (11th Cir. 2007) (per curiam).

²³⁶ See Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 258–61 (2013) (summarizing literature and studies supporting that prison is traumatizing). Many studies have demonstrated that prison is traumatic for most people regardless of disability. On balance, though, it is even more traumatic and less rehabilitative for individuals with intellectual disability. See *id.*

²³⁷ Scheyett et al., *supra* note 71, at 14 (explaining that “[w]hen released, [individuals with intellectual disability] receive little in the way of services and have high rates of recidivism”); PETERSILIA, *supra* note 64, at 19 (“Given the much higher rate of victimization of people with [intellectual disability] in prison, and the relatively longer sentences that inmates with these impairments serve, an argument can be made that imprisonment itself is a disproportionately harsh punishment . . .”).

²³⁸ PETERSILIA, *supra* note 64, at 8–20 (explaining that persons with intellectual disability are vulnerable to victimization by other incarcerated individuals, which may include theft of belongings, sexual assault, or being used to break prison rules, for example, by hiding contraband); Jones, *supra* note 21, at 730.

²³⁹ Sarrett & Ucar, *supra* note 19, at 2 (“While incarcerated, failure to quickly comply with orders, which may be related to difficulty processing information or anxiety in high stress situations, can lead to disciplinary reports, and can eventually result in solitary confinement . . .”); MARGO SCHLANGER, AM. CONST. SOC’Y FOR L. & POL’Y, HOW THE ADA REGULATES AND RESTRICTS SOLITARY CONFINEMENT FOR PEOPLE WITH MENTAL DISABILITIES 5–6 (2016), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1123&context=other> [<https://perma.cc/MG9Q-XJNM>] (discussing the disparate treatment and impact of individuals with mental and intellectual disabilities in solitary confinement).

²⁴⁰ Michelle H. Walton, *Barriers to Justice: Inaccessibility of New York’s Criminal Justice System for Individuals with Intellectual and Developmental Disabilities*, 14 ALB. GOV’T L. REV. 71, 94 (2021) (discussing the effects of solitary confinement on individuals with intellectual disability, including mental health related problems).

²⁴¹ Jane Dullum, *Sentencing Offenders with Disabilities*, 17 SCANDINAVIAN J. DISABILITY RSCH. 60, 60 (2015) (noting that the hindering effects of stigmatization as well as a lack of rehabilitative facilities in prisons seemingly contribute to dehabilitation in prisons).

factors.²⁴² Nevertheless, some judges express the belief that individuals with intellectual disability are *more* likely to recidivate because they believe intellectual disability is related to the criminal conduct itself and unlikely to change.²⁴³ That belief is simply false.

In part, the ability of a person with intellectual disability to grow and develop is misunderstood because we know much less about their cognitive growth.²⁴⁴ But a recent study exploring the efficacy of a new cognitive test revealed that, just like individuals in the general population, those with intellectual disability continue to develop attention and impulse control, among other things, into early adulthood.²⁴⁵

Not only do people with intellectual disability demonstrate growth over time, but with specific interventions and supports, a person with intellectual disability can advance further, such that concerns about incapacitation likely lessen.²⁴⁶ In recent years, the supports paradigm has emerged, which “has had a transformative effect on policies and practices in the field of [intellectual disability].”²⁴⁷ Advancements in the field of intellectual disability have made it

²⁴² Dynamic factors are more influential on rates of recidivism than static factors, such as intellectual disability. Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works?*, 34 CRIMINOLOGY 575, 584 (1996); see also Suzanne Fitzgerald, Nicola S. Gray, John Taylor & Robert J. Snowden, *Risk Factors for Recidivism in Offenders with Intellectual Disabilities*, 17 PSYCH. CRIME & L. 43, 50 (2011) (“The finding that criminal history and deviant lifestyle variables are associated with general recidivism in offenders with [intellectual disability] replicates the research literature in general offenders”); Billy C. Fogden, Stuart D.M. Thomas, Michael Daffern & James R.P. Ogloff, *Crime and Victimization in People with Intellectual Disability: A Case Linkage Study*, BMC PSYCHIATRY, May 28, 2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4884349/> [<https://perma.cc/HXN6-423T>] (“In this study, the overall rate of offending did not differ between the intellectual [sic] disabled and the community groups”).

²⁴³ See, e.g., *United States v. Black*, 570 F. App’x 836, 841 (11th Cir. 2014) (per curiam) (“Although Black argues that his mental and intellectual impairments warranted leniency, the court properly rejected this argument, finding that these problems exacerbated Black’s condition by making it more likely that he would continue his behavior, which was supported by his second psychological evaluation.”).

²⁴⁴ Shields et al., *supra* note 54, at e778 (“Sensitive measurement of cognitive change in this population is a critical need for clinical trials and other intervention studies, but well-validated outcome measures are scarce.”); Marianne Russ Sharp, *Finding Better Ways to Measure Cognitive Change in People with Intellectual Disability*, UC DAVIS HEALTH (Dec. 2, 2022), <https://health.ucdavis.edu/news/headlines/finding-better-ways-to-measure-cognitive-change-in-people-with-intellectual-disability/2022/12> [<https://perma.cc/XH7R-EGLT>] (“People with lower developmental abilities are often excluded from research studies and clinical trials That means the results of those studies do not apply to everyone, and this entire group is left out from having the potential benefit of a treatment.” (quoting David Hessel, Professor at UC Davis)).

²⁴⁵ Shields et al., *supra* note 54, at e785–86.

²⁴⁶ *FAQs on Intellectual Disability*, AM. ASS’N ON INTELL. & DEVELOPMENTAL DISABILITIES, <https://www.aaid.org/intellectual-disability/faqs-on-intellectual-disability> [<https://perma.cc/Z5R3-HYPW>] (“The overarching goal of these supports is to enhance the functioning of people with ID within their own environment in order to lead a more successful and satisfying life.”).

²⁴⁷ SCHALOCK ET AL., *supra* note 2, at 64.

possible to design supports that make it possible to improve the “life functioning of the person with [intellectual disability].”²⁴⁸ Decision-making, problem solving, and other behavioral skills are explicit parts of this paradigm.²⁴⁹ This belief that individuals with intellectual disability cannot change and develop is incorrect, given their growth that naturally occurs over time and what they can accomplish through the provision of proper support.

Finally, when we talk about mitigation and sentencing, often the first objection comes from people concerned about individuals who have committed the worst-of-the-worst offenses and the need to keep those individuals incapacitated.²⁵⁰ Those are real and legitimate concerns. But those offenses also represent a small fraction of the overall crimes committed²⁵¹ and the crimes committed by individuals with intellectual disability.²⁵² Although we do not know the exact numbers, studies on the types of crimes that individuals with intellectual disability commit indicate a pattern similar to the general population—more property crimes than violent crimes.²⁵³ Despite some studies finding that individuals with intellectual disability are more likely than the general population to commit some of the more serious offenses, other studies have found the exact opposite.²⁵⁴

²⁴⁸ *Id.* at 65. The supports paradigm has four characteristics that make it effective: it is “person centered, comprehensive, coordinated, and outcome-oriented.” *Id.* at 65–66.

²⁴⁹ *Id.* at 79–81.

²⁵⁰ See M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENV. L. REV. 151, 153–54 (2019) (discussing how most sentencing reforms are focused on “nonviolent, nonserious, and nonsexual offenders” (quoting MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 165 (2015))).

²⁵¹ John Gramlich, *What the Data Says (and Doesn’t Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/short-reads/2020/11/20/facts-about-crime-in-the-u-s/> [<https://perma.cc/BBJ4-DJUN>] (“In 2019, the FBI reported a total of 2,109.9 property crimes per 100,000 people, compared with 379.4 violent crimes per 100,000 people.”).

²⁵² See *id.*; Jones, *supra* note 21, at 726 (concluding that “the types of offences committed by individuals with [intellectual disability] seem to be similar to those of individuals without [intellectual disability]”).

²⁵³ Gabriel Martí-Agustí et al., *Intellectual Disability: Criminality, Assessment and Forensic Issues*, 45 SPANISH J. LEGAL MED. 155, 157 (2019). Authors of this study reviewed eighty articles in Spanish and English that discussed the experience of individuals with intellectual disability in criminal legal systems around the world. *Id.* at 156.

²⁵⁴ *Id.* at 157; see also LEIGH ANN DAVIS, THE ARC, PEOPLE WITH INTELLECTUAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEMS: VICTIMS & SUSPECTS 2 (2009), <https://thearc.org/wp-content/uploads/forchapters/Criminal%20Justice%20System.pdf> [<https://perma.cc/JQ5R-SQZL>] (“Research from the mid-80s to the 1990s found that the types of crime [individuals with intellectual disability] committed range from property crimes, like theft or robbery, to physical and sexual assault.”). Furthermore, comparing the rate at which individuals with intellectual disability commit offenses with other individuals may be misleading because individuals with intellectual disability are more likely to be caught for committing criminal offenses, thus, potentially inflating the relevant statistics. See *supra* note 22 and accompanying text.

What is clear is that individuals with intellectual disability do not commit violent offenses at rates significantly higher than the general population.²⁵⁵ Though some individuals with intellectual disability commit serious, violent offenses, those cases are not the norm. How judges sentence in those rare cases should not dictate sentencing in the vast majority of non-serious, non-violent offenses—cases like Mr. Sams', where incapacitation should not drive the theory of punishment.²⁵⁶

Finally, regarding the most serious offenses, because of the risk of unjust outcomes, intellectual disability should still mitigate even in these worst-of-the-worst cases.²⁵⁷ Individuals with intellectual disability are more likely to not only be wrongfully convicted, but also wrongfully punished.

5. Intellectual Disability and Retribution Theory

Unlike utilitarian theories of punishment in which the punishment is intended to effectuate some other goal, with retribution, the punishment is the end unto itself.²⁵⁸ A person is punished because they “deserve[] it.”²⁵⁹ In determining whether to punish and how to punish, a retributionist would generally look to two things: (a) the damage or injury caused by the offense, and (b) the defendant's blameworthiness.²⁶⁰ In *Atkins*, the U.S. Supreme Court held that individuals with intellectual disability are less blameworthy than other similarly situated individuals:

[Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than lead-

²⁵⁵ See Martí-Agustí et al., *supra* note 253, at 158. One of the limitations noted in the study is that much of the research surrounding individuals with intellectual disability and crime focuses on violent offenses, skewing the results. *Id.*

²⁵⁶ See Ristorph, *supra* note 158, at 1664–71 (discussing how law schools' focus on the most serious interpersonal offenses such as homicide and rape obscures a nuanced analysis of the vast majority of crimes charged).

²⁵⁷ See *infra* Part II.B.

²⁵⁸ Hessick & Berman, *supra* note 45, at 179.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 180.

ers. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.²⁶¹

Given the language in *Atkins*, when examining the sentencing of a person with intellectual disability, intellectual disability should always mitigate from a retributionist perspective.²⁶²

The *Atkins* approach to intellectual disability and retribution is not an aberration.²⁶³ Retributionists generally agree that a person with diminished capacity should receive a lesser sentence.²⁶⁴ But the way some judges view and the way the law conceives “diminished capacity” in criminal cases is too narrow. Many believe that the relevance of diminished capacity should be limited to instances when intellectual disability is directly and substantially connected with the commission of the offense—indeed, the Federal Sentencing Guidelines require it.²⁶⁵ For example, it would be relevant where a co-defendant manipulated a person with intellectual disability into committing the offense, but not necessarily in Mr. Sams’ case.²⁶⁶

If intellectual disability is not just a box to check but a lens through which to view a person’s actions, then the connection between an offense and intellectual disability will almost always be inextricable. For example, Mr. Sams’ decision to sell drugs had everything to do with systemic failures, difficulty finding and maintaining employment, and deficits with problem solving. Thus, even though it may be difficult to demonstrate that his intellectual disability “contributed substantially to the commission of the offense,” it makes his involvement in criminalized behavior less culpable.²⁶⁷

²⁶¹ 536 U.S. 304, 318 (2002) (footnotes omitted).

²⁶² See *id.* at 314–18. The Supreme Court’s argument about lesser culpability is not without controversy. As I have previously described, some disability rights advocates argue that people should view individuals with intellectual disability as having the same decision-making capabilities as others and that to say they have lesser culpability denigrates this view. Kronick, *supra* note 16, at 966. Other advocates, however, believe individuals with intellectual disability are capable of making daily decisions while having lesser culpability. *Id.* at 966–67.

²⁶³ *Atkins*, 536 U.S. at 320–21.

²⁶⁴ Hessick & Berman, *supra* note 45, at 182 (“Retributivists agree that, all else being equal, defendants should receive less punishment if they are less blameworthy than other defendants. For this reason, retributivists say that diminished capacity should reduce a defendant’s sentence.”). A defendant who suffers from a mental or physical defect that impairs their ability to appreciate the consequences of their actions is less culpable than a defendant who commits the same crime, knowing full well that the conduct is likely to harm another.

²⁶⁵ See U.S. SENT’G GUIDELINES MANUAL, *supra* note 94, § 5K2.13; Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALB. L. REV. 771, 794–95 (2014) (detailing the requirements for a downward departure under the Federal Sentencing Guidelines).

²⁶⁶ See *supra* notes 1–19 and accompanying text (discussing Mr. Sams’ case).

²⁶⁷ See U.S. SENT’G GUIDELINES MANUAL, *supra* note 94, § 5K2.13.

In addition, a retributionist considers not just the length of punishment but also how the person experiences the punishment.²⁶⁸ Incarceration is hard, even cruel, for almost everyone, and that is intentional—the United States is notoriously callous about the treatment of incarcerated individuals.²⁶⁹ But that experience can be substantially worse for a person with intellectual disability.²⁷⁰

Not only is there diminished programming,²⁷¹ but because of adaptive deficits, individuals with intellectual disability are more likely to incur disciplinary infractions.²⁷² A person might receive a disciplinary infraction because they failed to follow a corrections officer's instructions, strayed from where they were supposed to be, or committed other infractions that relate to the orderliness of the prison.²⁷³ Even though these infractions may seem minor, they can result in loss of privileges or even solitary confinement.²⁷⁴ These infractions can also result in higher-security classifications that entail placing individuals in high-security facilities with less access to programming and services and fewer freedoms.²⁷⁵

Corrections officers and other incarcerated persons can also violently target individuals with intellectual disability.²⁷⁶ Not only does the increased experience of violence for individuals with intellectual disability make the sentence harsher, but it also increases the likelihood that they are placed in solitary confinement for their own “safety,”²⁷⁷ which has significant, long-term deleterious consequences.²⁷⁸

²⁶⁸ Adam J. Kolber, Essay, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 186 (2009) (arguing that a retributivist who fails to consider a person's experience fails to properly exact punishment).

²⁶⁹ Hanan, *supra* note 250, at 152–53 (describing the particular harshness of the U.S. criminal legal system, including mass incarceration and draconian collateral consequences).

²⁷⁰ Smith et al., *supra* note 9, at 424.

²⁷¹ See *supra* Part II.A.1 (discussing opportunities for rehabilitation during incarceration).

²⁷² PETERSILIA, *supra* note 64, at 31–32 (noting that even asking for assistance from corrections staff can be seen as “pestering” and result in infractions).

²⁷³ Sarrett & Ucar, *supra* note 19, at 2 (noting how failure to timely follow orders, a persistent issue for those with diminished capacity, can result in additional punishment).

²⁷⁴ See *id.*

²⁷⁵ PETERSILIA, *supra* note 64, at 45 (explaining that incarcerated persons with intellectual disabilities may be reclassified to higher-security status due to poor institutional behavior).

²⁷⁶ See, e.g., Scheyett et al., *supra* note 71, at 14 (“They are also vulnerable to victimization by other inmates and may have their personal belongings stolen, be sexually assaulted, or used by other inmates for acts that violate prison rules, such as hiding contraband.” (citation omitted)); PETERSILIA, *supra* note 64, at 31–32 (noting that prisoners with intellectual disability may be abused or victimized by others and that staff members may retaliate, ridicule, or discipline incarcerated persons who they view as “pestering” them); Jones, *supra* note at 21, at 730.

²⁷⁷ See SCHLANGER, *supra* note 239, at 16 (“A prison seeking to fend off a challenge to placement of prisoners with disabilities in solitary confinement or high-security mental health housing might argue that the housing assignment is needed in order to provide adequate services (e.g., safety)

Intellectual disability is mitigating from a retributionist perspective because individuals with intellectual disability are less culpable and because their experience of incarceration is more difficult and challenging than the experience for other individuals.

* * * *

As described throughout this Section, no theory of punishment supports giving a person a harsher sentence because of intellectual disability. Yet studies show that individuals with intellectual disability experience worse outcomes in the criminal legal system than similarly situated individuals.²⁷⁹ The following Section discusses why these disparate outcomes may occur.

B. Intellectual Disability and the Criminal Legal System in Practice

Individuals with intellectual disability in the criminal legal system suffer worse outcomes in a myriad of ways. Wrongful convictions. Longer sentences. Longer pretrial detentions. Worse plea deals. These disparate outcomes result not only from the system's failure to identify that a person has an intellectual disability, but also from a failure to understand how intellectual disability affects a person and their experience in the criminal legal system. As the Court in *Atkins* held, not only is the risk of an innocent person being executed problematic, but so too is the risk that a guilty person is punished more severely due to their intellectual disability.²⁸⁰

This Section addresses both of these concerns and explains how they came to be. Subsection 1 focuses on wrongful convictions.²⁸¹ Subsection 2 focuses on wrongful punishment.²⁸²

to those prisoners, and therefore authorized by the regulations. But if that were the case, one would expect conditions of confinement to be as therapeutic as possible.”).

²⁷⁸ Walton, *supra* note 240, at 93 (“The effects of solitary confinement or SHU placement on individuals with [intellectual disability] and dually diagnosed mental illness are devastating. Individuals can suffer severe psychological harm as well as anxiety, depression, sleep deprivation, sensory deprivation, psychiatric decompensation, hallucinations, panic attacks, irrational anger and rage, loss of impulse control, difficulties with memory and cognition, social withdrawal, and suicidal ideation.” (footnote omitted)). One study of New Yorkers in prison found that those subject to solitary confinement are 6.9 times more likely to engage in self-injurious behavior than those in general population. Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 445 (2014).

²⁷⁹ See Smith et al., *supra* note 9, at 422–27 (detailing the various ways in which individuals with intellectual disability are treated objectively worse than others throughout the criminal process).

²⁸⁰ 536 U.S. 304, 320–21 (2002).

²⁸¹ See *infra* notes 283–296 and accompanying text.

²⁸² See *infra* notes 297–312 and accompanying text.

1. Wrongful Conviction

Wrongful conviction is not just a concern in the death penalty context, but in all criminal cases.²⁸³ Though the finality of the death penalty does make it different, every extra day that an innocent person spends incarcerated has irrevocable effects.²⁸⁴ Missing a child grow up or a parent's death cannot be made up²⁸⁵—the prison experience is traumatic and life-altering.²⁸⁶ Thus, even though death penalty punishments are different, any carceral sentence has irreversible consequences that should be mitigated wherever possible.

Simply put, regardless of the type of case, individuals with intellectual disability are more susceptible to wrongful convictions than others.²⁸⁷ Legal scholars comprehensively explored the frequency of and reasons for wrongful convictions of individuals with intellectual disability.²⁸⁸ In addition to the 101 individuals with intellectual disability whom the National Registry of Exonerations identified as wrongfully convicted, they identified another 71 individuals with documented claims of intellectual disability and wrongful conviction.²⁸⁹ These 172 wrongful convictions, though significant, are likely a gross underestimate of the number of wrongfully convicted individuals with intellectual disability, given the difficulty of identifying individuals who mask their disability as someone with intellectual disability.²⁹⁰

²⁸³ A wrongful conviction occurs when a person is factually innocent of the offense for which they were convicted, or procedural errors violated the person's rights. *Wrongful Convictions*, NAT'L INST. OF JUST., <https://nij.ojp.gov/topics/justice-system-reform/wrongful-convictions> [<https://perma.cc/3X6D-ZBYW>].

²⁸⁴ See Leslie Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, 5 AM. U. CRIM. L. BRIEF, no. 2, 2012, at 10, 19 ("[S]ome of the psychological consequences of wrongful conviction are irreversible . . ."); Samantha K. Brooks & Neil Greenberg, *Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review*, 61 MED. SCI. & L. 44, 52 (2020) ("The psychological impact on those wrongfully accused appears to be vast, severe and long-lasting.").

²⁸⁵ See, e.g., Erin Cox, *Exoneree Awarded \$2.9 Million from Md. for Wrongful Murder Conviction*, WASH. POST, <https://www.washingtonpost.com/dc-md-va/2023/07/05/john-huffington-maryland-exoneree/> [<https://perma.cc/35L5-3KQB>] (July 5, 2023) (noting that an exoneree described missing his mother's funeral because of a wrongful conviction as "unforgivable" (quoting John Huffington)).

²⁸⁶ See, e.g., Spencer S. Hsu, *D.C. to Pay \$9.2 Million in Wrongful Conviction*, WASH. POST (Feb. 28, 2015), https://www.washingtonpost.com/local/crime/judge-orders-dc-to-pay-record-91-million-in-wrongful-conviction-case/2015/02/27/f54edaa6-beea-11e4-8668-4e7ba8439ca6_story.html [<https://perma.cc/T2W4-5JN6>] (highlighting that "Mr. Odom spent more than twenty-two years of what should have been the prime of his adult life behind bars for a crime he did not commit," and that Mr. Odom suffered from "profound" physical and psychological harm due to "prison rapes, his diagnosis with HIV[,] . . . suicide attempts, depression and family estrangement" (quoting Judge Neal E. Kravitz)).

²⁸⁷ Johnson et al., *supra* note 12, at 1034.

²⁸⁸ See generally *id.* (studying wrongful convictions of persons with intellectual disability). Professors Sheri Lynn Johnson and John H. Blume, and attorney Amelia Courtney Hritz led the study. *Id.*

²⁸⁹ *Id.* at 1035, 1038.

²⁹⁰ *Id.* at 1038–39.

Individuals with intellectual disability are often wrongfully convicted due to deficits in working memory, social skills, and managing stress.²⁹¹ But one of the most significant reasons for wrongful conviction is false confessions. “While only 12% of the entire sample of exonerees falsely confessed, 71% of the exonerees with intellectual disability confessed.”²⁹²

Other reasons for wrongful conviction include difficulties assisting counsel,²⁹³ inappropriate demeanor,²⁹⁴ and susceptibility to exploitation by co-defendants and jailhouse informants.²⁹⁵ Though we cannot know the true number of individuals with intellectual disability who have been wrongfully convicted, we know that far too many are and that they are uniquely susceptible, often spending decades in prison for crimes they did not commit.²⁹⁶

2. Wrongful Punishment

Even if technically guilty of some offense, individuals with intellectual disability have worse outcomes than similarly situated individuals, including worse plea deals, longer sentences, and more time spent incarcerated.²⁹⁷ This Subsection describes a variety of reasons why this is so, but the root cause is a failure to understand intellectual disability and how it interacts with a person’s life and

²⁹¹ See *id.* at 1041–42.

²⁹² *Id.* at 1043. Individuals with intellectual disability are both more likely to succumb to police interrogations and less likely to understand *Miranda* warnings. *Id.* They are more vulnerable to coercive interrogation but have fewer protections. *Id.* at 1043–44. “Individuals with deficits in managing stress and decreased social skills can be particularly susceptible to social pressure and more likely to acquiesce to interrogators’ demands, which produces statements that are consistent with the interrogators’ beliefs rather than the suspects’ memories.” *Id.* at 1044.

²⁹³ *Id.* at 1047–49 (detailing how individuals with intellectual disability often struggle with working memory such that they cannot provide accurate accounts of events).

²⁹⁴ *Id.* at 1049–51 (explaining how individuals with intellectual disability may not understand what is happening during a trial or may have deficits in social skills that might result in reactions to the trial that jurors or judges perceive as inappropriate).

²⁹⁵ *Id.* at 1051–54 (“The same vulnerability to suggestion and compliance with authority that makes persons with intellectual disability more likely to confess falsely to crimes they did not commit also makes many such persons more likely to overstate their role in crimes in which they had some part, particularly if a trusted ‘friend’ is urging such an account of the crime.”).

²⁹⁶ See generally *id.* (exploring, in a paper dedicated to Eddie Elmore, an individual with intellectual disability who served thirty-two years based on a wrongful conviction before dying shortly after his release, the heightened risk for individuals with intellectual disability to be wrongfully convicted because they are so uniquely susceptible to false confessions).

²⁹⁷ Sarrett & Ucar, *supra* note 19, at 2 (explaining that individuals with intellectual disability in the criminal legal system “often experience more complications and confusion, which can lead to them serving longer and harder sentences than those without these disabilities”); Smith et al., *supra* note 9, at 427 (noting that persons with intellectual disability may be at risk of receiving longer sentences from the court due to factors such as past violations of bail conditions, lack of access to appropriate community resources, and variation between attorneys’ abilities to provide competent representation to individuals with intellectual disability).

experiences before they encounter the criminal legal system and once they are in it. This can include how actors consider a person's personal history (for example, an inconsistent work history or failing to finish high school)²⁹⁸ and how the system responds to deficits (for example, a failure to comply with curfew).²⁹⁹

During sentencing, judges consider a range of personal factors, regardless of the theory (or theories) of punishment guiding their decisions. These factors generally fall into two categories: personal history³⁰⁰ and behavior after the offense.³⁰¹ A court could view a person with intellectual disability's adaptive deficits as aggravating if those deficits are not viewed as either directly connected with the disability or failures to accommodate the disability.³⁰² To have a chance at an equitable result, the defense attorney, court, and prosecutor must understand the effects of intellectual disability.³⁰³

To be clear, not every "negative" experience that a person with intellectual disability has in the criminal legal system is *because* of their intellectual disability. As the AAIDD details, individuals with intellectual disability have both adaptive deficits and strengths that coexist, and these can vary greatly between and among individuals with intellectual disability.³⁰⁴ The problem is that currently, we are rarely even inquiring into whether a person's intellectual disability affects their actions, resulting in disparate and inequitable outcomes.

Understanding how adaptive deficits can manifest is necessary for fashioning an appropriate result in a criminal case.³⁰⁵ For example, judges are

²⁹⁸ Sarrett & Ucar, *supra* note 19, at 2 ("There are several reasons why people with these disabilities are at risk for justice involvement. High rates of poverty, unemployment, substance abuse, and poor educational backgrounds are contributing factors." (citations omitted)).

²⁹⁹ Smith et al., *supra* note 9, at 427 (explaining that many persons with intellectual disability have violated bail conditions, which, in turn, make sentencing riskier for them).

³⁰⁰ Meixner, *supra* note 45, at 1426.

³⁰¹ See James G. Carr, *Why Pretrial Release Really Matters*, 29 FED. SENT'G REP. 217, 218 (2017) ("[A]ny defendant, regardless of charged crime, criminal history, or guideline range, who can show a court, often for the first time in his or her life, that he or she can be law-abiding offers the court the best of all possible records and reasons to consider leniency."); Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 743–47 (2012). In my practice, judges routinely relied on how well an individual behaved during the pendency of the case in determining the appropriate sentence.

³⁰² See chart in this Subsection, *infra*.

³⁰³ See, e.g., Sarrett & Ucar, *supra* note 19, at 8 (noting that without training, there is the risk that the experiences of the intellectually disabled community will be disregarded and overshadowed by people who are not disabled).

³⁰⁴ SCHALOCK ET AL., *supra* note 2, at 15.

³⁰⁵ See Jones, *supra* note 21, at 724 (indicating that studies do not focus on understanding *why* people with intellectual disability commit crimes and that the "[p]rosecution depends on the perceived intent and 'guilty state of mind' of the individual arrested"); Walton, *supra* note 240, at 88 ("Since many legal professionals are unaware of the impact [intellectual disability] has during criminal pro-

quick to assume that a person missed a probation meeting because they did not want to go, when, in reality, they may have trouble managing their time due to a deficit—an issue that, if understood, could be resolved with small changes to probation procedures rather than incarceration.³⁰⁶ A prosecutor might assume that a person does not have remorse for the crime because they are unable to articulate that emotion, but this lack of remorse is actually a reflection of deficits in interpersonal skills.³⁰⁷ In that case, a lack of remorse should be neutral, not aggravating.

For a person with intellectual disability, not only can difficulty assisting counsel exacerbate wrongful convictions, but it can lead to wrongful punishment.³⁰⁸ The more mitigating evidence a defense attorney can provide to a judge, the more likely a judge is to give a lesser sentence.³⁰⁹ For example, if a client has trouble with working memory such that they cannot provide an accurate and complete personal history, then the defense attorney may not be able to put together a strong mitigation argument, even though mitigation exists.³¹⁰

The manifestations of these deficits are likely why individuals with intellectual disability have worse outcomes in criminal cases—they can result in poor performance on pretrial release, lengthier criminal histories, poor employment and education histories, acquiescence to worse plea deals, and difficulty in assisting with sentencing mitigation.³¹¹ Much of this has nothing to do with their involvement in the underlying offense, but nevertheless causes worse outcomes.³¹²

ceedings, individuals suffer disproportionately negative outcomes, increasing the likelihood of conviction and a jail or prison sentence.”).

³⁰⁶ Fundamental attribution error is where persons “overattribute” personal characteristics and “underattribute” external factors when judging another’s behavior. Michelle A. Travis, *Perceived Disabilities, Social Cognition, and “Innocent Mistakes,”* 55 VAND. L. REV. 481, 519–20 (2002).

³⁰⁷ See Johnson et al., *supra* note 12, at 1049–51 (explaining how individuals with intellectual disability may not understand what is happening during a trial or may have deficits in social skills that might result in reactions to the trial that jurors or judges perceive as inappropriate).

³⁰⁸ See *id.* at 1051–52 (explaining that a prosecutor is more likely to offer a plea deal to a co-defendant of “normal intellectual ability” in exchange for their testimony, rather than a co-defendant with intellectual disability “because their testimony is likely to be more persuasive”); Smith et al., *supra* note 9, at 427 (concluding that persons with disabilities risk higher sentences).

³⁰⁹ See Meixner, *supra* note 45, at 1443 (finding a significant relationship between the overall volume of mitigating arguments and a reduced sentence).

³¹⁰ See Johnson et al., *supra* note 12, at 1042 (stating that a deficiency in working memory may hinder the ability of a person with intellectual disability to “assist counsel[] and testify in their own defense”).

³¹¹ See *id.* at 1047–49 (detailing how individuals with intellectual disability often struggle with working memory such that they cannot provide accurate accounts of events).

³¹² One of the issues with the current system is that some guidelines and statutes require that the disability substantially contribute to the person’s involvement in the underlying offense. See, e.g., U.S. SENT’G GUIDELINES MANUAL, *supra* note 94, § 5K2.13. This limitation means that, in many

III. ESTABLISHING INTELLECTUAL DISABILITY AS CATEGORICALLY MITIGATING AND THE IMPLICATIONS

For all the reasons articulated in this Article—the risks of unjust results, the hidden nature of the disability, courts’ inconsistent treatment, and dubious justification under the theories of punishment—I propose a categorical rule that requires courts to mitigate the sentence where defense attorneys present evidence of intellectual disability. In addition, courts must state the degree to which they found intellectual disability mitigating and their justification. Mandating that courts mitigate sentences for intellectual disability is not just the end, it is the means by which greater equity and justice can be achieved for individuals with intellectual disability.

Section A of this Part describes this proposed rule in more detail and its potential implications—including greater identification of intellectual disability, increased understanding of the effects of intellectual disability, and more appropriate sentences.³¹³ Section B addresses critiques and discusses the proposal in the context of modern movements.³¹⁴ Finally, Section C outlines positive effects that would potentially flow from a rule in which intellectual disability is categorically mitigating.³¹⁵

A. *The Proposal*

As described above, though some state courts and statutes, as well as the Federal Sentencing Guidelines, permit courts to consider intellectual disability in sentencing, only Illinois requires that a court mitigate the sentence when the person being sentenced has intellectual disability.³¹⁶ Building off the Illinois statute, I propose that when the person being sentenced can demonstrate intellectual disability, the sentencing court must mitigate the sentence and state how the court considered and applied the mitigation in that particular sentencing decision.

The Illinois statute states that “[t]he following grounds *shall* be accorded weight in favor of withholding or minimizing a sentence of imprisonment . . . [t]he defendant was a person with an intellectual disability”³¹⁷ I propose that state legislatures and the USSC insert this language into sentencing statutes and regulations, with the following addition: “Courts must state the degree

cases, the intellectual disability’s effect on a person’s involvement in the criminal legal system is not given the weight or consideration it deserves.

³¹³ See *infra* notes 316–336 and accompanying text.

³¹⁴ See *infra* notes 337–357 and accompanying text.

³¹⁵ See *infra* notes 358–383 and accompanying text.

³¹⁶ See *supra* Part I.B.1.

³¹⁷ 730 ILL. COMP. STAT. 5/5-5-3.1(a)(13) (2024) (emphasis added).

to which the sentence was decreased in connection with the defendant's intellectual disability and their reasons.”

Subsection 1 discusses the effect of making intellectual disability mitigating.³¹⁸ Subsection 2 details the requirement that judges explain their reasoning.³¹⁹ Lastly, Subsection 3 covers issues with implementation.³²⁰

1. The Effect of Making Intellectual Disability Mitigating

As previously described, when judges make sentencing decisions, they categorize the facts before them as mitigating, aggravating, neutral, or irrelevant according to theories of punishment, guiding statutes, regulations, and case law.³²¹ They give different weights to various facts and factors, balance the aggravating versus mitigating facts, and then arrive at a sentence.

If intellectual disability is categorically mitigating, then any time a court is presented with evidence that a person has intellectual disability, it should give weight to the mitigation side of the scale. This does not mean that a person will always have a sentence at the low end of the range, but it should mean that the person's sentence is less than it would have been but for the evidence of intellectual disability.

This Article is not proscribing a particular weight that courts should give to intellectual disability in terms of mitigating effect, though it should likely be considerable if not heavy. This Article does not provide such a prescription because, as discussed, individuals with intellectual disability have different deficits and strengths.³²² A person with an IQ of 58 might receive more mitigating weight than a person with an IQ of 69.³²³ A person with adaptive deficits, including acquiescence to authority figures, might receive more mitigating weight where their co-conspirator was their beloved uncle than a person whose deficits are not as closely connected with their criminal involvement.³²⁴ The degree of mitigation should depend on the individual, the facts of the case, and the ways intellectual disability has affected the person's lived experience, including their experience in the criminal legal system.

³¹⁸ See *infra* notes 321–324 and accompanying text.

³¹⁹ See *infra* notes 325–326 and accompanying text.

³²⁰ See *infra* notes 327–336 and accompanying text.

³²¹ See *supra* Part I.B.

³²² See *supra* Part II.B.2.

³²³ See *supra* Part I.A.

³²⁴ A court will likely consider the effect of intellectual disability on the commission of the offense, but this proposal is distinguishable from the Federal Sentencing Guidelines because it encourages a broader view and consideration of how intellectual disability affects a person's involvement in the criminal legal system.

2. Explanation to Make the Categorical Rule Meaningful

This proposal also requires courts to explain how it evaluated and weighed the mitigating effect of a person's intellectual disability.³²⁵ Requiring this explanation is necessary to ensure that courts consider how intellectual disability affected the person and their involvement in the criminal legal system. In part, because of the deference given to a court's sentencing decision, in many jurisdictions, if an advocate presents a fact, it is presumed to be considered by the court even if the court did not mention that fact in its sentencing decision.³²⁶ If the requirement that courts categorically mitigate intellectual disability is to have meaning, then judges must explain its mitigating effect. Otherwise, a court could disregard an attorney's presentation of intellectual disability, and a reviewing court would likely presume the sentencing court considered it mitigating merely because the evidence was presented. In that instance, the categorical mitigation would be rendered meaningless.

Moreover, this would motivate defense attorneys to understand the effect that intellectual disability has on their clients' lives and present such to the courts. If courts could not silently ignore the rule or treat intellectual disability as aggravating, defense attorneys and individuals with intellectual disability would worry less about the "double-edged sword." The court must treat intellectual disability as mitigating, *and* their decision must be transparent.

3. Issues of Implementation

This Subsection addresses several issues that may complicate the operationalization of this proposal, including the applicable standard of proof, the pressure this proposal may place on public defenders, and the general lack of resources. For this proposal to be effective, the barriers to implementation should be minimized as much as possible.

First, regarding the standard of proof, because this information is presented in the context of sentencing, the standard should be low, if specified at all.³²⁷ As previously discussed, the law does not generally require judges to

³²⁵ This part of the proposal may receive criticism as inconsistent with U.S. sentencing tradition. See *Jones v. Mississippi*, 593 U.S. 98, 117–18 (2021). But if these very real issues are to be addressed, changes to the "traditional" sentencing practices are necessary.

³²⁶ See *id.* (noting that in most jurisdictions, it is presumed that a court considered a fact presented during sentencing unless the record affirmatively indicates otherwise).

³²⁷ In the death penalty context, jurisdictions vary substantially on the burden of proof required for a person to be deemed ineligible for the death penalty. For example, in Georgia, the defense must prove intellectual disability by proof beyond a reasonable doubt. GA. CODE ANN. § 17-7-131(c)(3) (2024). In contrast, Nevada simply mandates a preponderance of the evidence standard. NEV. REV. STAT. § 174.098(5)(b) (2024). Though this proposal similarly requires that individuals with intellectual disability be treated differently at sentencing from other individuals, this proposal does not mandate

apply a particular standard of proof when making sentencing decisions,³²⁸ though the degree of proof may impact the weight that a court gives the evidence.³²⁹ Some judges choose to require a particular standard of proof, such as clear and convincing evidence, but this is generally where the prosecution is requesting a substantial above-the-Guidelines sentence such that the person's liberty and due process would be at stake.³³⁰

Because this proposal could only decrease a sentence, the due process concerns noted above are not applicable.³³¹ Judges could treat this evidence as they treat other mitigating evidence—without a specified standard of proof. In the alternative, given the categorical nature of this proposal, judges could require the defense to meet a specified standard of proof, but in no case should that standard exceed preponderance of the evidence.³³² Regardless, the more quality evidence the defense can put forward, the more weight a judge is likely to give.³³³

Second, this proposal will impose additional obligations on already overburdened public defenders. They would need to identify whether a client may have intellectual disability, investigate the intellectual disability (for example, obtaining school records, interviewing family, securing an expert evaluation),

that individuals with intellectual disability are ineligible for a particular sentence. Thus, any argument for the appropriateness of a higher standard of proof, such as in the death penalty context, is not directly applicable in this context.

³²⁸ The exception to this is anything that would result in an increased sentence beyond the statutory provisions, in which case the prosecutor must establish those facts beyond a reasonable doubt. See *United States v. Booker*, 543 US 220, 231 (2005) (majority opinion of Stevens, J.) (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002)); see also *supra* Part I.B.

³²⁹ Meixner, *supra* note 45, at 1450–53 (finding that mitigation arguments were more likely to reduce a sentence when the defense provided supporting evidence).

³³⁰ Anthony LoMonaco, Note, *Disproportionate Impact: An Impetus to Raise the Standard of Proof at Sentencing*, 92 N.Y.U. L. REV. 1225, 1235–37 (2017) (noting that some federal circuits require clear and convincing evidence where the prosecution seeks to increase the sentence).

³³¹ See U.S. SENT'G COMM'N, *FEDERAL SENTENCING: THE BASICS* 11 (2020) (noting that for resolving factual disputes at sentencing, a preponderance of the evidence standard is ordinarily used).

³³² Preponderance of the evidence is the lowest standard of proof used in litigation and generally means that the court should find in favor of the party where their position is more likely than not correct. See Timothy R. Saviello, *The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases: How High Is Too High?*, 20 BERKELEY J. CRIM. L. 163, 205 (2015). Determining the appropriate standard of proof is akin to assessing the degree of risk—where the risk of an erroneous decision is greater for a particular party, they should have a lesser burden. *Id.* at 204. Thus, when a person's liberty is at stake in a criminal trial, the defense has no burden and the prosecution must prove its case beyond a reasonable doubt—the highest standard. *Id.* at 205. In contrast, in civil cases where money or property is at stake, the standard is preponderance of the evidence that creates an almost equal degree of risk to both parties. *Id.*

³³³ See Meixner, *supra* note 45, at 1450–53. Either requiring a particular standard of proof or not specifying a standard of proof has benefits and costs. In implementing the rule, it is worth considering barriers to getting evidence before the court, the standard of review on appeal, and credibility and meaningfulness of the categorical rule, among others.

and raise these issues in a persuasive way to the court and prosecution. Though these burdens exist, ensuring that individuals with intellectual disability receive competent representation and equitable treatment is essential. This is not the first time an additional, but essential, burden has been placed on public defenders.³³⁴ Also, the burdens might not be as great as they initially appear—with proper training, identifying a possible intellectual disability should not be onerous, and the investigation should mirror those that defense attorneys regularly direct.

Finally, though this proposal may require additional resources in some areas of the criminal legal system, it would decrease the resources needed in other areas. For example, as has been extensively documented, incarceration is expensive.³³⁵ If judges sentence individuals with intellectual disability to shorter periods of incarceration or no incarceration, jails and prisons would need fewer resources. If probation is tailored to individuals with intellectual disability to impose fewer and more appropriate conditions, then fewer resources would be needed for those departments. Thus, the increase in resources for experts, appropriate services, and trainings for criminal legal system actors should not result in an overall increase in resources.³³⁶

B. The Proposal in the Context of the Movements

This proposal is likely to receive critiques for both oversimplifying individuals with intellectual disability in the criminal legal system and insufficiently addressing the deep issues in the criminal legal system. I will address how I view this proposal in the context of the disability rights, justice, and abolitionist movements.

Subsection 1 of this Section addresses the disability rights and disability justice movements.³³⁷ Subsection 2 places this proposal in the context of the abolition horizon.³³⁸

³³⁴ See *infra* Part III.C.1 (discussing changes that public defenders offices made after the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010)).

³³⁵ See, e.g., Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 89 (2019) ("Incarceration is expensive. As of 2010, total state correctional expenditures neared \$50 billion annually, with the vast majority of those expenditures going toward the construction and operation of correctional facilities.").

³³⁶ This sort of diversion of resources is consistent with the abolition movement's aims to divest the oppressive system of resources and divert them to communities. These issues are described in more detail *infra* Part III.B.2.

³³⁷ See *infra* notes 339–348 and accompanying text.

³³⁸ See *infra* notes 349–357 and accompanying text.

1. The Disability Rights and Disability Justice Movements

The disability rights and justice communities have genuine concerns about treating individuals with disabilities as a monolith.³³⁹ As many scholars have noted, individuals with disabilities are not defined by their disabilities—they have strengths, weaknesses, and depth just like every other person.³⁴⁰ To define them by their disability wrongly minimizes their individuality.³⁴¹ Furthermore, any rule or theory that minimizes the culpability of individuals with intellectual disability can also be viewed as denigrating their autonomy.³⁴²

Also problematic, though, is not recognizing the ways social structures and systems may pose barriers and challenges for individuals with intellectual disability as a group.³⁴³ The criminal legal system is rarely nuanced and too often used as a hammer to address complex societal issues. That includes the treatment of individuals with intellectual disability. As legal scholars note, a middle ground can exist between “the harmful essentialist analyses of large groups and requiring that every individual be defined with such specificity that no patterns can be discerned.”³⁴⁴ These scholars go on to describe their theory of intersectional cohorts as “evaluating whether a potential intersectional cohort includes people sharing similar experiences, self-identities, attributed identities, and identity performances making them a discrete and a cohesive group with respect to a particular context and on a specific issue.”³⁴⁵

³³⁹ The disability rights movement has been the historically dominant force advocating for individuals with disabilities, including the creation of the Americans with Disabilities Act. Chin, *supra* note 24, at 705. “The disability rights framework emphasizes individualism and self-sufficiency with the goal of assimilation through integration at its core.” *Id.* at 691. In the last few decades, though, the disability justice movement has emerged—criticizing the single-issue focus of the disability rights movement and advocating for a more intersectional approach to disability advocacy. SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE 13, 23 (2d ed. 2019).

³⁴⁰ Johnson et al., *supra* note 12, at 1041 (“A fundamental precept of the field of intellectual disability is that ‘[w]ithin an individual, limitations often coexist with strengths.’” (quoting the language of the AAIDD)).

³⁴¹ See Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. PA. L. REV. 1757, 1795 (2022) (“Disability is an interactive process between the individual, the impairment, the person’s bodymind, and the environment.”).

³⁴² See *supra* note 262 and accompanying text.

³⁴³ See Ruth Colker, *The Americans with Disabilities Act’s Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1813, 1814 (2022) (noting that by focusing on the individual, the Americans with Disabilities Act makes it very hard to establish systemic change).

³⁴⁴ McGinley & Cooper, *supra* note 44, at 303. Professors Ann McGinley and Frank Cooper go on to discuss intersectional cohorts, which builds off Patricia Hill Collins’ work “that there is a meso-level in between the micro-level of individuals and the macro-level of society-wide structures, in which discrete, cohesive social groups share similar qualities and experiences.” *Id.* at 331 (citing PATRICIA HILL COLLINS, *FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE* 226–27 (1998)).

³⁴⁵ *Id.* at 333. This theory builds upon Professor Kimberlé Crenshaw’s intersectionality theory. *Id.*

Given the discrimination that individuals with intellectual disability face both within and outside the criminal legal system, “it is necessary to consider how . . . mental impairments, perceived or real, combine with our environments to create barriers that the law can remedy.”³⁴⁶ Where the system routinely treats individuals with intellectual disability poorly, there must be some remedy to stifle the proliferation of harm.

Though the disability rights movement successfully fought for the right to reasonable accommodations for many, the newer disability justice movement³⁴⁷ has argued that the disability rights movement “failed to recognize people with disabilities living at the intersection of multiple historically marginalized identities. . . . ‘historically centered white experiences,’” and focused “almost exclusively on the needs and experiences of people with physical disabilities.”³⁴⁸

This Article seeks to address some of the issues facing those who were not featured prominently in the disability rights movement—individuals with intellectual disability involved in the criminal legal system. These individuals tend to be those who experience multiple forms of oppression based on perceived or actual racial identity, poverty, and mental illness. Furthermore, this Article does not argue that the criminal legal system must treat all individuals with intellectual disability the same. This Article simply argues that intellectual disability should always mitigate—the degree to which it mitigates, and why, may vary among system-involved individuals.

Ultimately, this proposal, like any proposal that seeks to address the harms impacting individuals with intellectual disability as a group, may be over-inclusive, may over-simplify the issues, and may discount some individuality. But the risk of that is necessary to overcome the mountain of objectively worse outcomes that people with intellectual disability experience in the criminal legal system.

2. This Proposal and the Abolition Horizon

The abolitionist movement distinguishes between reformist reforms—reforms that further legitimize the systems of oppression—and non-reformist reforms—reforms that create transformative change and divest the systems of

³⁴⁶ *Id.* at 325.

³⁴⁷ Patty Berne and Mia Mingus, “two queer disabled women of color,” originally conceived of the disability justice movement in 2005, and soon after, Leroy Moore, Stacey Milbern, Eli Clare, and Sebastian Margaret joined in their visioning. SINS INVALID, *supra* note 339, at 16; *see also* Robyn M. Powell, *Beyond Disability Rights: A Way Forward After the 2020 Election*, 15 ST. LOUIS U. J. HEALTH L. & POL’Y 391, 434 (2022).

³⁴⁸ Powell, *supra* note 347, at 435 (quoting SINS INVALID, *supra* note 339, at 13).

oppression to invest in strengthening communities.³⁴⁹ Some in the abolition movement may critique this proposal as reformist and only further entrenching the criminal legal system. They may assert that making sentences for individuals with intellectual disability more equitable creates the impression that the system is “fair.” Though this proposal strives to make sentences for individuals with intellectual disability more equitable, that does not mean that they will be either “just” or “fair.” Under this proposal, they will merely be as unfair and unjust as others in the system rather than significantly more unfair and unjust. Injustice in the criminal legal system is pervasive, only radical change for everyone is likely to remedy that. Yet people, and particularly individuals with intellectual disability as detailed in this Article, enter the system daily and experience grievous harm—efforts to reduce those harms are now essential.³⁵⁰

An abolitionist approach to the criminal legal system is not always about the total, immediate destruction of the system.³⁵¹ It can include efforts at reform that slowly dismantle the system, inching it closer to total abolition.³⁵² Yet, as Audre Lorde stated, the “master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.”³⁵³ “The challenge comes in marrying an abolitionist vision with available methods for engaging a system or institution. . . . [T]he path to transformative change is necessarily piecemeal. But the pace of change does not render it valueless.”³⁵⁴

³⁴⁹ See, e.g., Amna A. Akbar, Response, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020), <https://harvardlawreview.org/forum/vol-134/demands-for-a-democratic-political-economy/> [<https://perma.cc/6SUZ-NPHW>] (“Whereas reformist reforms aim to improve, ameliorate, legitimate, and even advance the underlying system, non-reformist reforms aim for political, economic, social transformation: for example, socialism or abolition democracy.” (footnote omitted)).

³⁵⁰ See Maneka Sinha, *Radically Reimagining Forensic Evidence*, 73 ALA. L. REV. 879, 949–50 (2022); Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court’s Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 688 (2022) (noting the importance of seeking “solutions now” for the millions of individuals presently involved in the criminal legal system).

³⁵¹ See, e.g., Sinha, *supra* note 350, at 886 (“Activists and scholars, drawing from abolitionist theory to rethink criminal justice reform, encourage pursuing ‘non-reformist reforms,’ or taking actions that shrink and delegitimize the carceral state.” (quoting Mark Engler & Paul Engler, *André Gorz’s Non-Reformist Reforms Show How We Can Transform the World Today*, JACOBIN, July 22, 2021, <https://jacobin.com/2021/07/andre-gorz-non-reformist-reforms-revolution-political-theory> [<https://perma.cc/9U65-N5C5>])).

³⁵² See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1787 (2020) (“The ‘horizon’ toward which this agenda focuses our aspirations is a society that does not depend on prisons, police, or other forms of penal control. The horizon metaphor grounds today’s efforts in our imaginations for the world we want to live in tomorrow.”).

³⁵³ Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 112 (Nancy K. Bereano ed., 2007) (1984).

³⁵⁴ Vincent M. Southerland, *The Master’s Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, 70 UCLA L. REV. 2, 12 (2023).

This Article argues to use the master's tools for liberation—that we should take the theories of punishment (what could be more clearly a tool of oppression than a theory of how to punish) and use them to explain why intellectual disability is mitigating. This proposal may not dismantle the house, but it will reduce the harm to individuals with intellectual disability entering the system. A sentencing process that is more nuanced and requires deeper inquiries into individuals' lived experiences gets us closer to the abolitionist horizon.

This proposal, however, is just part of what must be radical change in how we treat individuals with intellectual disability. From our failures to provide adequate education³⁵⁵ to justifying family separation because of a parent's intellectual disability,³⁵⁶ the injustices abound. This is but one step in a much larger conversation and movement. Abolitionist approaches to remedying the challenges that individuals with intellectual disability face in the criminal legal system should be the focus of future scholarship.³⁵⁷

C. The Cascading Positive Effects of Making Intellectual Disability Mitigating

This Section describes in greater detail the potential positive implications of this proposal for individuals with intellectual disability, including better identification,³⁵⁸ an increased understanding of intellectual disability,³⁵⁹ and more appropriate sentences.³⁶⁰

1. Better Identification

Making intellectual disability categorically mitigating will lead more defense attorneys to investigate whether their clients have intellectual disability and thus lead to higher rates of identification. Although most defense attorneys are not routinely trained on how to recognize intellectual disability, these trainings, along with adding routine questions to initial interviews, could go a long way toward improving identification.³⁶¹ For example, asking a client about

³⁵⁵ See generally, e.g., Packrone, *supra* note 18 (describing how schools fail to provide the services to which students are entitled under the Individuals with Disabilities Education Act, often resulting in referrals to the criminal legal system).

³⁵⁶ See, e.g., Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1320–21 (2022).

³⁵⁷ Some scholars are already engaging in this conversation, including around institutionalization, but abolition, intellectual disability, and the criminal legal system remain underexplored. See, e.g., BEN-MOSHE, *supra* note 73, at 16.

³⁵⁸ See *infra* notes 361–367 and accompanying text.

³⁵⁹ See *infra* notes 368–370 and accompanying text.

³⁶⁰ See *infra* notes 371–383 and accompanying text.

³⁶¹ Johnson et al., *supra* note 23, at 1114–18 (identifying steps that defense attorneys can take to uncover whether a client may be intellectually disabled).

their educational history and whether they ever had an IEP could spur further investigation and identification.

In addition, because intellectual disability would always mitigate, failing to investigate or disclose such information could be considered ineffective assistance of counsel. Thus, many public defender offices and jurisdictions would have an obligation to train their attorneys on these issues or provide specialized disability law counsel, not unlike the response to the U.S. Supreme Court's ruling in *Padilla v. Kentucky*.³⁶² Just as public defender offices quickly incorporated immigration counsel into their offices and provided immigration law trainings in response to *Padilla*, they could incorporate specialized disability attorneys, experts, and trainings.³⁶³

For a person with intellectual disability to receive the benefit of this proposal, they must understand that they have an intellectual disability,³⁶⁴ know that disclosing their disability would unlock mitigation, and believe that disclosure is worth any attendant risks.³⁶⁵ Defense attorneys may encounter clients who, knowing that they could receive this mitigation, still oppose disclosing this information to the court or prosecutor. Such decisions should be respected consistent with the client's autonomy and a client-centered approach to practice.³⁶⁶ Respecting the ability of an individual with intellectual disability to make decisions about their own life—whether their attorneys agree or not—is essential to ensuring equitable treatment. This does mean, however, that defense attorneys should endeavor to communicate

³⁶² 559 U.S. 356 (2010). In *Padilla*, the Court held that the defense counsel provided ineffective assistance of counsel for failing to inform Mr. Padilla of the immigration consequences of a guilty plea. *Id.* at 360. As a result of the Court's ruling, public defender offices across the country hired *Padilla* counsel—attorneys who specialize at the intersection of criminal and immigration law—to advise clients and defense counsel on the impacts of criminal cases on immigration status. See generally Ingrid Eagly, Tali Gires, Rebecca Kutlow & Eliana Navarro Gracian, *Restructuring Public Defense After Padilla*, 74 STAN. L. REV. 1 (2022) (describing the impact of *Padilla* on public defender offices, including an empirical study on the impact within California).

³⁶³ This is not to say that public defender offices are using immigration counsel perfectly, but for many offices, the provision of advice certainly improved post-*Padilla*.

³⁶⁴ Another possibility is that a defense attorney, or another criminal legal system actor, would recognize signs that the person may be intellectually disabled and do their own investigation. Consistent with client-centered representation, however, the defense attorney should pursue the issue only after raising it with their client and obtaining the client's consent.

³⁶⁵ Colker, *supra* note 343, at 1818 (“By making people claim disability status to receive an accommodation, we must assume they are aware of the disability itself, are willing to disclose that disability to others, and have the cultural, political, and economic capital to take advantage of this legal recourse.”).

³⁶⁶ Monroe H. Freedman, *Client-Centered Lawyering—What It Isn't*, 40 HOFSTRA L. REV. 349, 353 (2011) (“Client-centered lawyering is premised on respect for the dignity and autonomy of each member of society. Clients are therefore entitled to know their rights with respect to society and other individuals, and to decide whether to seek fulfillment of those rights through the due processes of law.”).

information to clients with intellectual disability such that the client fully understands the consequences of their decisions.³⁶⁷

2. Increased Understanding of Intellectual Disability

As described throughout this Article, the court system is rarely responsive to the nuanced ways that intellectual disability affects a person before encountering and once in the criminal legal system.³⁶⁸ This proposal will help to change that. As defense attorneys become more familiar with intellectual disability and the effects it can have on a person's life, they will in turn educate courts, prosecutors, and probation and pretrial officers. Just like we have seen changes to perceptions of substance abuse recovery and relapse³⁶⁹ or youth and brain development,³⁷⁰ the more actors in the criminal legal system are educated on the issues, the more likely changes to perceptions and treatment will occur.

An important part of this change is actors using intellectual disability as a frame to better understand a person's lived experience. This might include why some services were not successful. Why a person did not complete high school. Why they acted aggressively with the police. Judges and prosecutors often perceive these facts, when viewed outside the context of a person's intellectual disability, as reasons to give an increased sentence or less favorable plea deal. But, when viewed properly, these "problems" are merely manifestations of the disability and systemic failures. Thus, by treating intellectual disability as mitigating and understanding the implications, the criminal legal system experience for a person with intellectual disability could be radically different.

³⁶⁷ Nevertheless, other models for ensuring client understanding exist. For example, in the United Kingdom, defendants are entitled to independent intermediaries, or "communication specialists who work on behalf of [the U.K. court system] to support people participating in a court or tribunal hearing. They provide impartial recommendations to [the court] about a person's specific communication needs and outline the steps needed to achieve them." *HMCTS Intermediary Services*, HMCTS. & TRIBUNALS SERV., <https://www.gov.uk/guidance/hmcts-intermediary-services> [<https://perma.cc/9QK3-77QB>] (Sept. 28, 2022).

³⁶⁸ See *supra* Part I.B.

³⁶⁹ See, e.g., Nora D. Volkow, *What Does It Mean When We Call Addiction a Brain Disorder?*, SCI. AM. (Mar. 23, 2018) (describing how brain science changed our understanding of addiction), <https://blogs.scientificamerican.com/observations/what-does-it-mean-when-we-call-addiction-a-brain-disorder/> [<https://perma.cc/3GUS-PU9B>].

³⁷⁰ In *Roper v. Simmons*, the U.S. Supreme Court adopted the argument that children's brains are different and, therefore, children should not be eligible for the death penalty. 543 U.S. 551, 569–70 (2005) (noting that scientific and psychological studies support observations that juveniles are different from adults). Since then, the difference between the adult brain and those of a child and young adult has been widely accepted. See generally Peter J. Benekos & Alida V. Merlo, *A Decade of Change: Roper v. Simmons, Defending Childhood, and Juvenile Justice Policy*, 30 CRIM. JUST. POL'Y REV. 102 (2019) (overviewing the evolution of juvenile justice toward more compassionate means).

3. Decreased and More Appropriate Sentences

If judges always treat intellectual disability as mitigating, then people will receive less time in a carceral setting or on probation. This is an obvious consequence of the proposal, but nevertheless worth underscoring. Carceral sentences have substantial effects on the individuals serving those sentences, their families, and communities.³⁷¹

Non-carceral sentences also take a toll. Though remaining in the community on probation is often preferable to incarceration, spending years on probation can have long-term negative effects.³⁷² Frequently, probation includes numerous requirements such as weekly meetings with a probation officer, mental health and substance abuse treatment, obtaining and maintaining employment, educational programming, community service, and paying financial obligations.³⁷³ These requirements can be difficult for the most organized and high-functioning clients.³⁷⁴ In addition, probation can include electronic monitoring, which alone is a highly invasive form of community supervision.³⁷⁵

One of the most concerning features of community supervision, though, is that often it merely delays a carceral sentence. “Estimates suggest that half of the people admitted to U.S. jails, and more than one-third of those admitted to prison, arrive there as a result of revocation from community supervision.”³⁷⁶ Thus, although this proposal could positively impact the initial sentence, a concern is that more people would receive probationary sentences only to fail

³⁷¹ See, e.g., Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1712 (2006) (“Today more than 1.5 million children, or 2% of the nation’s minors, have a parent in prison.” (citing BRUCE WESTERN, MARY PATTILLO & DAVID WEIMAN, *Introduction to IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 1, 9 (2004))).

³⁷² Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1035 (2013) (“While often reasonable when considered individually, in the aggregate, the sheer number of requirements imposes a nearly impossible burden on many offenders.”).

³⁷³ *Id.* at 1032–35 (describing the range of probation conditions judges often impose).

³⁷⁴ *Id.* at 1035. Probation can interfere with employment, parenting obligations, and education aspirations. See HUM. RTS. WATCH, “SET UP TO FAIL”: THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR 46, 56, 58 (2018), https://www.hrw.org/sites/default/files/report_pdf/us_probation0218_web.pdf [<https://perma.cc/VHA8-AMBB>] (describing barriers that individuals on probation face in securing and maintaining employment); Rebecca J. Shlafer, Michelle S. Phelps, J’Mag Karbeah & Alyssa Scott, *Parents on Probation: Custody, Co-Residence, and Care of Minor Children During Community Supervision*, 62 J. OFFENDER REHAB. 391, 406 (2023) (“[T]rying to manage probation and parenthood produced immense stress . . .”); CTR. FOR CMTY. ALTS., *THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS: RECONSIDERED* 2–4, 17–19 (2010), <https://communityalternatives.org/wp-content/uploads/2020/02/use-of-criminal-history-records-reconsidered.pdf> [<https://perma.cc/S3PM-LWLD>] (describing multiple barriers that individuals on probation face when applying to colleges).

³⁷⁵ See Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 154–55, 159–60 (2022) (noting that thousands of individuals across the United States are on electronic monitoring as part of their community supervision, and explaining the punitive nature of this form of supervision).

³⁷⁶ Klingele, *supra* note 372, at 1019.

and receive a carceral sentence.³⁷⁷ But probation does not need to be an on-ramp to incarceration. As one legal scholar detailed, to decrease the likelihood of revocation, courts and other actors in the criminal legal system should consider whether probation is entirely inappropriate for some individuals³⁷⁸ and how to limit the conditions and terms of probation to only those necessary.³⁷⁹

For individuals with intellectual disability, courts should tailor probation to further the theories of punishment described above, or perhaps recognize that a conviction alone is sufficient punishment.³⁸⁰ Conditions that can reduce recidivism and be rehabilitative for the general population may not serve the same ends for individuals with intellectual disability. For example, attending weekly supervision meetings may pose particular challenges for individuals with intellectual disability, including the planning required for regular meetings, navigating public transportation, and exhibiting appropriate social behavior.

Right now, as Mr. Sams' example illustrates, individuals with intellectual disability are failing probation and finding themselves incarcerated. If Mr. Sams' attorney (a) knew he had an intellectual disability, (b) advocated for appropriate conditions, and (c) argued during a violation hearing that the court should not revoke probation because the violations are connected with his intellectual disability, then perhaps Mr. Sams would not be serving a carceral sentence.³⁸¹ A more appropriate sentence in Mr. Sams' case, given that his crime was related to an inability to provide for his family, may have been requiring vocational and

³⁷⁷ Studies show that revocation decisions can be discriminatory as well, with judges more likely to revoke the probation of Black individuals than Caucasian or Hispanic individuals. JESSE JANNETTA, JUSTIN BREAU, HELEN HO & JEREMY PORTER, URB. INST., EXAMINING RACIAL AND ETHNIC DISPARITIES IN PROBATION REVOCATION: SUMMARY FINDINGS AND IMPLICATIONS FROM A MULTI-SITE STUDY 3–4 (2014), <https://www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF> [<https://perma.cc/JTQ4-2V2D>]. Because Black individuals are more likely to receive intellectual disability diagnoses, it follows that these biases are more likely to impact individuals with intellectual disability as well.

³⁷⁸ Klingele, *supra* note 372, at 1055–59.

³⁷⁹ *Id.* at 1060–64 (arguing that both the conditions of probation and the length of probation should be limited as appropriate for the particular case and individual).

³⁸⁰ *See id.* at 1055–56. Another alternative is the use of unsupervised probation, through which the court suspends a period of incarceration without any conditions other than that the person cannot commit new offenses.

³⁸¹ An issue that will likely persist even under this proposal is that probation and pretrial services officers are similarly untrained on how to work with individuals with intellectual disability. Ways in which the broader criminal legal system could change to better address the needs of individuals with intellectual disability should be a focus of future scholarship.

future planning training to better equip Mr. Sams in addressing his adversity.³⁸² Also, meetings with Mr. Sams' probation officer could be as needed.³⁸³

This proposal is not suggesting that courts require individuals with intellectual disability to participate in *more* programming than they would normally impose, but rather that courts should sentence a person to *less* programming and *only* programming that will meaningfully further the goals of the sentence.

CONCLUSION

The routinely unjust and inequitable outcomes that individuals with intellectual disability endure in the criminal legal system, combined with the support from theories of punishment, make clear that intellectual disability should be categorically mitigating in all cases. Furthermore, when we look beyond the numbers to how judges address intellectual disability in sentencing decisions, we can see the lack of understanding and ableism that undergird these disproportionately negative outcomes.

Simply making intellectual disability a factor for courts to consider in sentencing is not enough. Actors in the criminal legal system need to understand the far-reaching effects of intellectual disability on a person's experience throughout their life and once they are ensnared in the criminal legal system. Some of the necessary long-term changes include greater understanding and identification by defense attorneys, but it cannot be solely a burden on defense attorneys to advocate for equitable and just treatment. Prosecutors and judges similarly need to challenge whether the theories of punishment justify their actions, given all that we know or whether diverting individuals with intellectual disability out of the criminal legal system and the carceral systems altogether would lead to a more *just* result.

Perhaps advocating for this degree of nuance is overly optimistic. Yet, courts are sentencing individuals with intellectual disability to inequitable periods of incarceration every day—some change is necessary now, in this moment, under this system. This proposal would result in immediate relief and also potentially cause those optimistic, more substantive long-term changes.

³⁸² See *Future Planning 101*, THE ARC, <https://futureplanning.thearc.org/pages/learn/future-planning-101> [<https://perma.cc/4KHT-DQB8>].

³⁸³ Regular meetings with a probation officer are sometimes required to ensure that a person remains drug-free and engaged with required services, but for a person with intellectual disability, such meetings could more likely detract from, rather than enhance, rehabilitation.

