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FALLING AWAY INTO DISEASE: DISABILITY-DEVIANCE NARRATIVES IN AMERICAN CRIME CONTROL

MATT SALEH[†]

INTRODUCTION

Who in society is predisposed to crime? Many of us are familiar with cultural narratives that trace criminal behavior to some cognitive defect in the perpetrator.¹ For instance, we might recall the persistent media allusions to Adam Lanza's Asperger Syndrome after the mass shooting at Sandy Hook Elementary School,² despite evidence that individuals on the autism spectrum are, on average, not more likely, and are quite possibly less likely, to commit serious crime in their lifetime.³ Similarly, popular narratives about the relationship between "mental illness" and violence are pervasive, despite the broad meaning of the terminology and a deeply-misunderstood relationship between psychiatric disability and crime.⁴

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¹ See, e.g., Bernice A. Pescosolido et al., *Evolving Public Views on the Likelihood of Violence from People with Mental Illness: Stigma and Its Consequences*, 38 HEALTH AFFAIRS 1735, 1735 (2019).

² Compare Liza Long, *I am Adam Lanza's Mother: A Mom's Perspective on the Mental Illness Conversation in America*, HUFFPOST (Dec. 16, 2012), https://www.huffpost.com/entry/i-am-adam-lanzas-mother-mental-illness-conversation_n_2311009 [<https://perma.cc/2QX5-TQNQ>], with Alice Park, *Don't Blame Adam Lanza's Violence on Asperger's*, TIME MAG. (Mar. 11, 2014), <https://time.com/19957/adam-lanzas-violence-wasnt-typical-of-aspergers/> [<https://perma.cc/5NC5-WZKC>].

³ See, e.g., Claire King & Glynis H. Murphy, *A Systematic Review of People with Autism Spectrum Disorder and the Criminal Justice System*, 44 J. AUTISM & DEV. DISORD. 2717, 2717–18, 2730 (2014); Katie Maras et al., *Is Autism Linked to Criminality?* 19 AUTISM 515, 515–16 (2015); Anthony Holland, *Criminal Behaviour and Developmental Disability: An Epidemiological Perspective*, in OFFENDERS WITH DEVELOPMENTAL DISABILITIES 23, 25, 31 (William Lindsay et al. eds., 2004); Catherine A. Cheely et al., *The Prevalence of Youth with Autism Spectrum Disorders in the Criminal Justice System*, 42 J. AUTISM & DEV. DISORD. 1856, 1860 (2012).

⁴ See, e.g., Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 240–41 (2015); Yasmeen Abutaleb & William Wan, *After Trump Blames Mental Illness for Mass Shootings, Health Agencies Ordered to Hold All Posts on Issue*, WASH. POST (Aug. 20, 2019), <https://www.washingtonpost.com/health/after-trump-blames-mental-illness-for-mass-shootings-health-agencies-ordered-to-hold-all-posts-on-issue/2019/08>

From Batman⁵ to Bundy,⁶ narratives in popular culture that explain crime through allusions to developmental,⁷ intellectual,⁸ psychiatric,⁹ or psychosocial impairments¹⁰ are ubiquitous.¹¹ In one popular idiom, the disabled offender is “imbecilic” or “mad” to the point of lacking moral volition or free will.¹² In another, the disabled offender is “psychopathic,” antisocial and personality-disordered, but also competent, volitional, and accountable—sometimes terrifyingly so—to the point of evil genius or predation.¹³ Tellingly, within these stories and the idioms they

/20/c4030e4c-c370-11e9-b5e4-54aa56d5b7ce_story.html [https://perma.cc/D97P-S5V8] (quoting former president Donald Trump: “[m]ental illness and hatred pulls the trigger.”); *Mental Illness*, NAT'L INST. MENTAL HEALTH (2019), <https://bit.ly/2ZFH2XW> [https://perma.cc/42LP-7V8H] (noting that almost half of adolescents, 49.5%, will experience a mental illness during their lifetime); see also Tori DeAngelis, *Mental Illness and Violence: Debunking Myths, Addressing Realities*, 52 MONITOR PSYCH. 1, 1–2 (2021) (“While perpetrating violence is relatively uncommon among those with serious mental illness, when it does occur, in many cases it is intertwined with other . . . environmental factors.”); Jillian K. Peterson et al., *How Often and How Consistently do Symptoms Directly Precede Criminal Behavior Among Offenders With Mental Illness?*, 38 L. & HUM. BEHAV. 439 (2014); Rajeev Ramchand & Lynsay Ayer, *Is Mental Illness a Risk Factor for Gun Violence?*, RAND CORP. (Apr. 15, 2021), <https://www.rand.org/research/gun-policy/analysis/essays/mental-illness-risk-factor-for-gun-violence.html> [https://perma.cc/56HM-T5MX].

⁵ THE DARK KNIGHT (Warner Bros. Picture, et al. 2008) (Page 16 of the screenplay: “He’s a paranoid schizophrenic, a former patient at Arkham [Asylum]. The kind of mind the Joker attracts.”).

⁶ *Bundy v. Dugger*, 850 F.2d 1402, 1408 (11th Cir. 1988) (considering competence to stand trial in the case of Ted Bundy’s “bipolar mood disorder”).

⁷ See, e.g., US (Monkeypaw Productions & Perfect World Pictures 2019) (horror film in which actress Lupita Nyong'o's demonic doppelganger has the symptoms of spasmodic dysphonia).

⁸ See, e.g., JOHN STEINBECK, *OF MICE AND MEN* (1937).

⁹ See, e.g., THE INCREDIBLES (Pixar Animation Studios 2004) (primary villain named “Syndrome” is criminally insane and delusional).

¹⁰ See, e.g., WE NEED TO TALK ABOUT KEVIN (BBC Films 2012) (containing strong implication that the title character’s sociopathy, and shocking school violence, stems from a psychosocial mixture of extreme colic in infancy, and his mother’s coldness from post-partum depression).

¹¹ See Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1375 (2009) (“Not only is criminal madness an intrinsically powerful melodramatic plot device, it touches upon fundamental social and psychological issues central to cultural conceptions of justice, proper social organization, and the self.”).

¹² *Id.* at 1396–97 (“*Of Mice and Men* . . . explored what might be called, to use the language of *Buck v. Bell*, ‘imbecilic’ criminality . . . the linkage between crime and mental retardation is assumed . . . [asking readers] to make a moral assessment of the role of volition in criminal responsibility.”).

¹³ The volitional-but-pathological “evil genius” is particularly invoked in accounts of white-collar crime and racially-white serial murder. See generally Nick Bilton, “*She Absolutely Has Sociopathic Tendencies*”: *Elizabeth Holmes, Somehow, Is Trying to Start a New Company!*, VANITY FAIR (June 8, 2018),

render, childlike incompetence and psychopathic aptitude can be difficult to parse, leading to the befuddlement of law enforcement or the courts.¹⁴

Stories are inherently intrigued with cause-and-effect, and so is law.¹⁵ Existing scholarship has highlighted the important role that criminal law,¹⁶ and the carceral state more broadly, have played in constructing the modern understanding of cognitive disability in the West.¹⁷ In particular, tenuously-biomedical¹⁸ constructs of insanity as “disease of the mind,”¹⁹ incompetence,²⁰ and dangerous mental abnormality in civil confinement under state police power²¹ have themselves become cultural memes, helping to form societal understandings—and myths—about the interactions between neurodivergence, criminal predilection, and moral culpability.²²

<https://www.vanityfair.com/news/2018/06/elizabeth-holmes-is-trying-to-start-a-new-company> [https://perma.cc/835E-RSNG]; PHILIP JENKINS, USING MURDER: THE SOCIAL CONSTRUCTION OF SERIAL HOMICIDE (1994). Similar modalities describing urban or gang violence tend to instead invoke a racialized rhetoric of the godless brute. See generally John Dilulio, *The Coming of the Super-Predators*, WASH. EXAMINER (Nov. 27, 1995), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> [https://perma.cc/QD9V-MBDH].

¹⁴ See generally THE USUAL SUSPECTS (PolyGram Filmed Entm’t et al., 1995) (homicidal and sexually-violent sociopath fools law enforcement by using Cerebral Palsy as a literal disguise during an interrogation); PRIMAL FEAR (Rysher Entm’t 1996) (defendant in a murder trial fakes stutter and dissociative identity disorder to invoke the insanity defense).

¹⁵ See generally Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773 (1958); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Marcelo Ferrante, *Causation in Criminal Responsibility*, 11 NEW CRIM. L. REV. 470 (2008).

¹⁶ See generally Melinda Jones & Lee Ann Bassar Marks, *Law and the Social Construction of Disability*, in DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE 3 (Melinda Jones & Lee Ann Bassar Marks eds., 1999).

¹⁷ See generally Jean Stewart & Marta Russell, *Disablement, Prison, and Historical Segregation*, 53 MONTHLY REV. 61 (2001); Liat Ben-Moshe, *Disabling Incarceration: Connecting Disability to Divergent Confinements in the USA*, 39 CRITICAL SOCIO. 385, 386 (2011).

¹⁸ See, e.g., Hall v. Florida, 572 U.S. 701, 721 (2014) (“The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community’s diagnostic framework.”).

¹⁹ See M’Naghten’s Case (1843) 8 Eng. Rep. 718, 722 (HL).

²⁰ See, e.g., Dusky v. United States, 362 U.S. 402, 402 (1960).

²¹ See O’Connor v. Donaldson, 422 U.S. 563, 582–83 (1975) (describing that confinement to “protect society from the dangers of significant antisocial acts” falls under state police power).

²² With regard to disability and moral volition, see, e.g., Atkins v. Virginia, 536 U.S. 304, 306 (2002) (reasoning that mentally-retarded defendants “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct”); McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962) (defining

Law is a social institution that relies heavily on language to develop idiosyncratic models and constructs of reality, defined by consensus from within various legal communities about how a “closed linguistic system should best reflect the outside world.”²³ The title of this essay is attributable to Fiona Campbell’s observation that disability fictions in law—in collusion with biomedical discourses²⁴—often construct difference in liminal space where no literal referent exists, “deploy[ing] . . . a ‘compulsion towards terror’ . . . of ‘falling away’ and ‘crossing over’ into an uncertain void of dis-ease.”²⁵

Building off this, my observation is that in criminal law and policy, neurodivergent cognition *does not seem to actually exist* as a concept except in contraposition to the idealized sovereign subject of liberalism.²⁶ Over centuries, and in conversation with popular culture and public norms, law has constructed its own amalgams of the “imbecilic” or “mad” criminal (who is not morally accountable), as well as the compulsive predator or psychopath (who largely is).²⁷ Within these common, mostly unscientific, legal frameworks, we must take note of how neurodivergence is differentially asserted as both a causal mechanism of *negation*,²⁸

mental illness to include abnormality that “substantially affects mental or emotional processes and substantially impairs behavior controls”).

²³ Jeffrey M. Lipshaw, *Metaphors, Model, and Meaning in Contract Law*, 116 PENN. ST. L. REV. 987, 991 (2012); see also Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 L. & SOC’Y REV. 727, 727 (1989).

²⁴ See, e.g., Jed S. Rakoff, *Science and the Law: Uncomfortable Bedfellows*, 38 SETON HALL L. REV. 1379, 1385–86 (2008); Brief for the American Psychiatric Ass’n, American Psych. Ass’n, American Acad. of Psychiatry and L., et al. as Amici Curiae Supporting Petitioner at 2, *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) (No. 18-6135) (noting that the APA has filed 175 amicus curiae briefs addressing “the effect of mental illness and intellectual disability on criminal capacity.”).

²⁵ Fiona AK Campbell, *Inciting Legal Fictions: ‘Disability’s’ Date with Ontology and the Ableist Body of the Law*, 10 GRIFFITH L.R. 42, 44 (2001).

²⁶ Conversion of a proposition from “all A is B” to “all not-B is not-A.”

²⁷ For example, some states explicitly exclude personality disorders from the insanity defense, including ones that undeniably fall within the definition of mental illness under diagnostic frameworks. See OR. REV. STAT. § 161.295(2) (2018); CAL. PENAL CODE § 29.8 (West 2013); AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, 659 (5th ed. 2013) (defining “antisocial personality disorder” and linking it to “psychopathy”). For examples of state civil confinement or treatment statutes that define mental abnormality through a framework of *compulsive predation*, see KAN. STAT. ANN. § 59-29a01 et seq. (West 2015); 42 PA. STAT. AND CONS. STAT. § 9799.12 (2018); N.Y. MENTAL HYG. LAW § 10.03 (McKinney 2018).

²⁸ Wherein disability causes a *destruction* of volition, rationality, moral reasoning or understanding, choice, *M’Naghten*, 8 Eng. Rep. at 722 (requiring that, because of mental disease or defect, defendant did not know that their conduct was wrong or the

and of *compulsion*.²⁹ For the sufficiently imbecilic or mad criminal, all free agency is absent, and the disability tortures offender and victim alike.³⁰ For the psychopath, cognitive disability *hijacks* volition by a rhetorically-eroticized compulsion.³¹ At best, the former invokes a philosophically-controversial framework of disability as negative causation,³² while the latter is perhaps even more discursively damaging, attempting, perhaps paradoxically, to personify inhuman acts of deviance as a form of disability.

Definitional shortcomings like these continue to exist in American crime control, and disability-deviance narratives have

nature or quality of the act); *Parsons v. State*, 81 Ala. 577, 597 (Ala. Sup. Ct. 1887) (“[F]ree agency was at the time destroyed . . . [and] the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it so[]ely.”); *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954) (emphasis added) (“[A]ccused is not criminally responsible if his unlawful act was the *product of* mental disease or mental defect.”); Insanity Defense Reform Act, 18 U.S.C. § 17(a) (1984) (“[D]efendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.”).

²⁹ Wherein disability causes a behavioral *drive*, stimulus, or constraint.

³⁰ 4 WILLIAM BLACKSTONE COMMENTARIES *24-25, *395 (“[M]adness is its own punishment.”); see also *Ford v. Wainwright*, 477 U.S. 399, 407-08 (1986) (applying the same philosophy with regard to executing those with mental illness). The history here is one of equivocating the moral status of those with cognitive disabilities to non-human life forms, within a framework of Cartesian dualism. See *State v. Sikora*, 210 A.2d 193 (N.J. Sup. Ct. 1965) (“[C]riminal responsibility must be judged at the level of the conscious.”); *Rex v. Arnold*, 16 How. St. Tr. 695, 695 (1724) (accused’s responsibility depends on whether they were totally deprived of understanding and memory such that they were “no more than an infant, than a brute or a wild beast”); see also STANFORD ENCYCLOPEDIA OF PHILOSOPHY, COGNITIVE DISABILITY AND MORAL STATUS (2017).

³¹ And in doing so is almost phantasmic or Homerically godlike, acting upon a mostly-helpless vessel but also imbuing it with something like “evil.” See J.C. Oleson, *The Insanity of Genius: Criminal Culpability and Right-Tail Psychometrics*, 16 GEO. MASON L. REV. 587, 587 (2009) (quoting ARISTOTLE, NICOMACHEAN ETHICS: “As a brute has no vice or virtue, so neither has a god.”). See Covey, *supra* note 11, at 1421 (“[S]imilar to the sex fiend of the 1930s . . . [the predator] lacks sufficient volitional control . . . is sufficiently ‘mad’ for purposes of initiating civil detention . . . [but] bears no direct correlation to legal insanity, or even to clinically accepted definitions of mental illness.”). The psychotic compulsion is broadly sadistic. PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 29 (1998); Shane Anthony, *Is He a Sexual Predator, Mentally Ill or Both?*, ST. LOUIS POST-DISPATCH, Dec. 26, 2007, at 2; *State v. Belcher*, No. CR94100508, 2019 WL 7630751, at *4 (Conn. Super. Ct. Mar. 26, 2019) (“The sentencing court . . . [referred] to the ‘super-predator’ theory that was advanced by Dr. John Dilulio of Princeton University . . . [finding] that the petitioner had ‘no fears from your conduct of the pains of imprisonment, nor do you suffer from the pangs of conscience.’”).

³² See, e.g., David Lewis, *Causation*, 70 J. PHIL. 556 (1973); Jonathan Schaffer, *Causes Need Not Be Physically Connected to their Effects: The Case for Negative Causation*, in CONTEMPORARY DEBATES IN PHILOSOPHY OF SCIENCE 197 (Christopher Hitchcock ed., 2004).

retained a stubborn appeal as a potential “root cause” of crime.³³ Ultimately, I argue that cognitive disability—in its many forms—and publicly-endangering criminal behavior are not defensibly-overlapping conceptual domains to warrant their persistent invocation in law or policy. Because of law’s broader influence culturally, but also specifically in its nexus to public policy and administration, and because of an ongoing history of criminalizing disability, these definitional problems should not be overlooked.³⁴

I. DEVIANCE AS PATHOLOGY

If crime exists, then what is its cause? One of the preeminent historical functions of government has been the efficient deterrence of criminal endangerment to the mainstream populace.³⁵ In furtherance of this end, Western criminology has prioritized variants of “rational actor” theory, which posit, generally, that crime is a personal choice based on individual evaluations of its costs and benefits, meaning it is preventable through adequate incentivization frameworks.³⁶ Despite—or maybe because of—the centrality of choice within these diverse theories, experts and practitioners in law and criminology have gone to pains to model cognitive traits that inhibit normative “rationality.”³⁷

³³ See, e.g., James Q. Wilson, *The Future of Blame*, 46 NAT'L AFFS. 105, 113 (2010).

³⁴ See RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 3–4 (2000).

³⁵ See, e.g., Brandon C. Welsh & Rebecca D. Pfeffer, *Reclaiming Crime Prevention in an Age of Punishment: An American History*, 15 PUNISHMENT & SOC. 534, 538–39 (2013).

³⁶ See DAVID MATZA, DELINQUENCY AND DRIFT 9 (1964); JAMES Q. WILSON, THINKING ABOUT CRIME (1975); ANDREW VON HIRSCH, DOING JUSTICE (1976); Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activity Approach*, 44 AM. SOC. REV. 588 (1979); DEREK B. CORNISH & RONALD V. CLARKE, THE REASONING CRIMINAL: RATIONAL CHOICE PERSPECTIVES ON OFFENDING (1986). Also relevant here is the concept of “bounded or limited rationality,” which focuses on the ways that individuals and groups simplify a decision based on limited information or difficulty anticipating consequences of their actions. Generally, there are two “sources” of bounded rationality: cognitive limitation and extreme emotional arousal. See Bruce E. Kaufman, *Emotional Arousal as a Source of Bounded Rationality*, 38 J. ECON. BEH. & ORG. 135, 139 (1998); see generally JON ELSTER, RATIONAL CHOICE (1986).

³⁷ See Covey, *supra* note 11, at 1375 (“Criminal madness . . . has posed a hard problem for law, evidenced by the timeless controversy over the boundaries of criminal responsibility, the basic meaning of the insanity defense, and the broader problem of what to do with people whose mental, intellectual, or psychological attributes diminish their ability to abide by the law.”).

Culturally- and medically-formed notions of disability were often inserted as a framework for understanding “irrational” criminality.³⁸ For much of the nineteenth and twentieth centuries, a causal relationship between “feeble-mindedness” and criminality was seen as self-evident, both within law’s linguistic system³⁹ and in the biomedical and sociological sciences of criminology with which it frequently commingled.⁴⁰ Biological determinism provided the theoretical foundation for this conventional view: The expert and legal sentiment was that some individuals are simply *born to crime*.⁴¹

This conventional view—when not explicitly eugenic—manifested as a paternalistic rhetoric of “protectionism,”⁴² driven by the notion that some individuals with aberrant cognitions lacked free will⁴³ to participate in the social contract and benefit fully from its attendant liberties.⁴⁴ We can see this in the dual modern legacies of insanity and incompetence as a type of *mercy* in adjudication and sentencing,⁴⁵ as well as of prophylactic civil hospitalization of the mentally ill.⁴⁶ These policies and legal frameworks were informed by the cutting-edge biomedical and criminological sciences of the day, and often on the basis of causal

³⁸ See PETER CONRAD & JOSEPH W. SCHNEIDER, *DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS* 273 (1992).

³⁹ See, e.g., *Buck v. Bell*, 274 U.S. 200, 204 (1927) (“It is better for all the world, if instead of waiting to execute degenerate offspring for crime . . . society can prevent those who are manifestly unfit from continuing their kind.”).

⁴⁰ A framework known as “atavism” (reversion to the ancestral or bestial). See, e.g., CESARE LOMBROSO, *THE MAN OF GENIUS* (1889); see generally HENRY H. GODDARD, *THE KALLIKAK FAMILY: A STUDY IN THE HEREDITY OF FEEBLE-MINDEDNESS* (1913); CHARLES BUCKMAN GORING, *THE ENGLISH CONVICT: A STATISTICAL STUDY* (1913); EARNEST HOOTON, *CRIME AND THE MAN* (1939); William P. DeStephens, *Are Criminals Morons?*, 38 *J. SOC. PSYCH.* 187 (1953).

⁴¹ See generally MARY GIBSON, *BORN TO CRIME: CESARE LOMBROSO AND THE ORIGINS OF BIOLOGICAL CRIMINOLOGY* (2002).

⁴² See generally S.M. Rodriguez, Liat Ben-Moshe, & H. Rakes, *Carceral Protectionism and the Perpetually (In)Vulnerable*, 20 *CRIMINOLOGY & CRIM. JUST.* 537 (2020).

⁴³ See *Parsons v. State*, 81 Ala. 577, 597 (Ala. Sup. Ct. 1887).

⁴⁴ Ingunn Moser, *Against Normalisation: Subverting Norms of Ability and Disability*, 9 *SCI. CULTURE* 201, 207 (2000) (describing how people with disabilities during the late-modern period were often “inserted into positions of problematic social deviants that could and ought to be normali[z]ed”); see generally MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (1965).

⁴⁵ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 305 (2002).

⁴⁶ See *Addington v. Texas*, 441 U.S. 418, 418 (1979) (“The reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment.”).

stories that conflated social, cultural, and political alienation at structural levels with biologically-predetermined deviance, typically represented as “disability.”⁴⁷

Practically speaking, this politics of vulnerability⁴⁸ also resulted in the large-scale, systematic “removal of marked [disabled] bodies from public generative spaces.”⁴⁹ Throughout American history, removal on the basis of disability found legitimacy in many forms and on all levels of law, policy, and administration; in courts, in congress, and in federal, state, and local governance. Municipal statutes—collectively referred to as “Ugly Laws”—denied people with visible disabilities from public areas.⁵⁰ Civil confinement laws allowed involuntary hospitalization for a wide range of disability conditions⁵¹ (later updated to mostly encompass “endangering” psychiatric conditions).⁵² Immigration restrictions projected inferior genetic predisposition onto ethnic, racial, and cultural outsiders.⁵³ During the era of mass incarceration, the criminalization of vagrancy, homelessness, and other nonviolent offenses contributed to the “reinstitutionalization” of people with psychiatric disabilities in

⁴⁷ See GIBSON, *supra* note 41, at 2.

⁴⁸ See Sonja Feist-Price et al., *Disability, Race and Ex-Offender Status: The Tri-Vector Challenge to Employment*, 45 J. APPLIED REHAB. COUNSELING 25, 27, 29 (2014).

⁴⁹ Nirmala Erevelles, *Crippin’ Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline*, in *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA* 81, 81 (Liat Ben-Moshe et al. eds., 2014). Public policy during this period of American history often sought “to clarify and define who deserved, and who was deservedly excluded from, citizenship” through legitimizing narratives of the interplay between race, ethnicity, gender, and disability as genuine biological difference. Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE DISABILITY STUDIES READER* 17, 18 (Lennard J. Davis ed., 5th ed. 2017).

⁵⁰ See, e.g., CHI., ILL., MUN. CODE § 1612 (1881) (outlawing appearance in public of those who are “diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object”); cf. New Orleans, La., Ordinance 5046 (May, 1879) (criminalizing “wandering abroad and endeavoring by the exposure of . . . deformities to obtain or gather alms”); see generally SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* (2009).

⁵¹ See, e.g., Act of Sep. 14, 1965, 79 Stat. 685, 750–761 (hospitalization within the District of Columbia for persons with mental illness) (codified as amended at D.C. CODE §§ 21-501 to -591 (2021)); Kendra’s Law, Ch. 408, § 6, 1999 N.Y. Laws 1, 3 (McKinney) (codified as amended at N.Y. MENTAL HYG. LAW § 9.60 (Consol. 2021)) (involuntary outpatient commitment prior to known dangerousness).

⁵² See, e.g., *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) (holding that involuntary commitment is only permissible where “there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others”), *vacated*, 414 U.S. 473 (1974) (finding district court’s injunctive orders not specific enough to satisfy 65(d)); see also *Kansas v. Crane*, 534 U.S. 407, 415 (2002).

⁵³ Chinese Exclusion Act of 1882, Pub.L. 47–126.

carceral settings,⁵⁴ with particularly damaging results for Black and Brown people with disabilities.⁵⁵ Lawmaking and jurisprudence even legitimated the prior prevention of earthly existence through prior regimes of forced sterilization,⁵⁶ and civil restitution for “wrongful birth” and “wrongful life.”⁵⁷

II. DISABILITY, FREE WILL, AND THE (IR)RATIONAL ACTOR

Is disability a cause of criminogenic risk? Into present day, a consensus seems to have emerged that atavism has fallen out of favor in American crime control,⁵⁸ but I think this impression is overstated. Modern criminal justice policy in the West, and particularly in the United States during the growth of the carceral state during the 1970s, has been characterized as having an “obsession with identifying, assessing and managing” risk factors for crime commission and recidivism,⁵⁹ again situating the nexus

⁵⁴ See, e.g., Michael Rembis, *The New Asylums: Madness and Mass Incarceration in the Neoliberal Era*, in *DISABILITY INCARCERATED* 139 (Liat Ben-Moshe et al. eds., 2014).

⁵⁵ See generally Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, 107 *AM. J. PUB. HEALTH* 1977 (2017).

⁵⁶ See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“Three generations of imbeciles are enough.”); but see *Skinner v. Oklahoma*, 316 U.S. 535, 537, 542–44 (1942) (ruling that state law permitting the compulsory sterilization of the “habitual criminal” violated 14th Amendment equal protection); see also *id.* at 545 (Stone, J., concurring) (“Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend . . . either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable.”).

⁵⁷ See *Curlender v. Bio-Science Lab’s*, 165 Cal. Rptr. 477, 480–81 (Cal. Ct. App. 1980) (a “wrongful life” case involving a severely disabled child’s legal guardian suing a medical practitioner for damages related to their failure to prevent the child’s birth).

⁵⁸ See generally R. Barri Flowers, *Biological Perspectives on Delinquent Behavior*, in *KIDS WHO COMMIT ADULT CRIMES: SERIOUS CRIMINALITY BY JUVENILE OFFENDERS* (R. Barri Flowers ed., 2002); RONALD L. AKERS & CHRISTINE S. SELLERS, *CRIMINOLOGICAL THEORIES: INTRODUCTION, EVALUATION, APPLICATION* 37–38 (2013).

⁵⁹ John Muncie, *The Globalization of Crime Control—the Case of Youth and Juvenile Justice: Neo-Liberalism, Policy Convergence and International Conventions*, 9 *THEORETICAL CRIMINOLOGY* 35, 38 (2005); see also Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 *CRIMINOLOGY* 449, 450 (1992); David P. Farrington, *Explaining and Preventing Crime: The Globalization of Knowledge—The American Society of Criminology 1999 Presidential Address*, 38 *CRIMINOLOGY* 1 (2000); *The History of Risk Assessment*, BUREAU JUST. ASSISTANCE, <https://bja.ojp.gov/program/psrac/basics/>

where law and psychiatry meet as a locus of therapeutic intervention.⁶⁰ Concerningly, disability fictions, with roots in law, are increasingly being operationalized within administrative frameworks of crime *prediction*.⁶¹

A causal chain of neurodivergence-as-antecedent-to-crime still pervades lawmaking, most notably in statutes that invoke damaging stereotypes around the relationship between intellectual and developmental disabilities and sexual predation,⁶² and the relationship between “mental illness” and gun violence.⁶³ But in more banal and bureaucratic ways,⁶⁴ local justice-system practitioners—in prosecution, corrections, parole, and probation—now frequently use a wide range of validated and unvalidated risk assessment tools and checklists that ask them to predict future likelihood of criminal offending based on factors related to disability and psychosocial conditions.⁶⁵ Judges and juries in

history-risk-assessment [<https://perma.cc/QGE2-4SP7>] (last visited Nov. 14, 2021); John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCH. 489 (2015).

⁶⁰ One development has been the growth in “mental health courts” around the country, a form of diversion for individuals with mental health diagnoses, who are dramatically over-represented in low-level arrest and incarceration, centered on judicially-monitored assessment and community-based treatment. *See, e.g.*, Nancy Wolff et al., *Mental Health Courts and Their Selection Processes: Modeling Variation for Consistency*, 35 L. HUM. BEHAV. 402 (2011); MICHAEL SHADER, OFF. OF JUV. JUST. & DELINQ. PREVENTION, RISK FACTORS FOR DELINQUENCY: AN OVERVIEW 1 (2003) [hereinafter OJJDP RISK FACTORS FOR DELINQUENCY], <https://www.ojp.gov/pdffiles1/ojjdp/frd030127.pdf> [<https://perma.cc/8JSL-NC8G>] (comparing actuarial risk assessment by criminal justice agencies to a doctor’s role in identifying treatments for a heart attack).

⁶¹ This is perhaps unsurprising given the causal assumptions that have undergirded the law’s interest in disability. However, serious crime is profoundly difficult to predict. *See generally* BERNARD HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007). Assumptions about the link between disability and deviance have increasingly been made “actuarial.” *Id.* at 2.

⁶² *See, e.g.*, WASH. REV. CODE § 71A.12.200 (2006) (Community Protection Program).

⁶³ *See, e.g.*, 18 U.S.C. § 922(d)(4) (prohibiting sale of firearms to those who have been “adjudicated as a mental defective or has been committed to any mental institution”); FLA. STAT. § 790.06(10)(h) (2021) (suspending or revoking a license to carry a concealed firearm if the license holder is committed to a mental institution).

⁶⁴ *See generally* DAVID GARLAND, *THE CULTURE OF CONTROL* (2001) (broadly describing penological shift from harsh deterrence to internal “management” of surveilled groups).

⁶⁵ *See* Matt Saleh & LaWanda Cook, *Re-entry Services for Youth with Intellectual and Developmental Disabilities: A Qualitative Cost-Benefit Analysis* (unpublished manuscript) (on file with author) (discussing the use of both validated and unvalidated psychometric actuarial assessments of juvenile “risk” by local criminal-legal system practitioners); *see also* N.Y.S. DEP’T CORR. & CMTY SUPERVISION, Directive: COMPAS

criminal trials and civil commitment proceedings—similarly find themselves in regular dialogue with psychiatric experts about the interplay between disability and criminogenic risk, both in terms of mitigating factors and within a discourse of likelihood of future harm.⁶⁶

Even at the highest levels of crime-control policy and administration, “cognitive and neurological deficits”, “low IQ,” “learning disabilities,” “traumatic brain injury,” “medical-physical problems,” and even “special education enrollment” are presumptive indicators of criminogenic risk in individuals.⁶⁷ Federally-funded research on predictive risk assessment, developed for use in local criminal-legal settings, persistently aims to understand criminal offending through hybrid latent constructs related to mental health, learning disabilities, psychosocial functioning, antisocial attitudes, personality disorder, psychopathy, impulsivity, and other factors that either literally are disability traits, or that overlap heavily with disability traits.⁶⁸

ASSESSMENTS/CASE PLAN 1 (2019); *see also* State ex rel. D.D., 369 N.J. Super. 368, 372–73; 377–78 (2003) (describing local actuarial risk assessment and assessment of risk factors related to personality functioning and substance abuse for youth with learning disabilities and low-IQ whom the state was referring to adult adjudication); In re Shelton, 53 Cal. App. 5th 650, 664–65 (2020) (discussing parole board’s determination that an elderly plaintiff with Traumatic Brain Injury “continued to pose an unreasonable risk of danger to society,” based in part on disability characteristics related to inability to take moral accountability for prior crimes).

⁶⁶ *See, e.g.*, Cruz v. Shinn, No. CV-13-00389, 2021 WL 1222168, at *16–17 (D. Ariz. Mar. 31, 2021) (expert testimony discussing criminogenic risk resulting from “hereditary predisposition to psychological disorder, personality pathology, and alcohol and drug abuse and dependence, . . . neurodevelopmental issues including probable fetal substance exposure, learning problems in school, chronic stress in childhood, . . . head injuries,” and “[parental] psychological disorders,” and “teen onset of psychological disorders”); In re Commitment of Ausbie, No. 14-18-00167-CV, 2021 WL 1972407, at *7–*9 (Tex. Ct. App. May 18, 2021) (expert testimony of appellant’s dangerousness included “psychopathy checklist[s]” and findings of “schizoaffective disorder,” “borderline intellectual functioning” affecting “ability to control . . . and emotionally manage . . . behavior”); *see also* Washington v. United States, 390 F.2d 444, 455 (D.C. Cir. 1967) (prohibiting expert psychiatric testimony concerning whether crime was the “product” of mental illness, because this is a legal determination rather than a psychiatric one).

⁶⁷ *See, e.g.*, OFF. OF JUVENILE JUST. & DELINQUENCY PREVENTION, RISK FACTORS FOR DELINQUENCY, MODEL PROGRAMS GUIDE LITERATURE REVIEW 5 (2015) [hereinafter OJJDP MODEL PROGRAMS GUIDE], https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/risk_factors.pdf [<https://perma.cc/2472-XTZT>]; *see also* OJJDP RISK FACTORS FOR DELINQUENCY, *supra* note 60, at 5 (listing “low IQ,” “medical, physical problems,” and “hyperactivity” alongside “exposure to television violence”).

⁶⁸ *See, e.g.*, ROBERT D. HOGE ET AL., PREDICTION AND RISK/NEEDS ASSESSMENT, STUDY GROUP ON THE TRANSITIONS BETWEEN JUVENILE DELINQUENCY AND ADULT CRIME, GRANT REPORT TO THE U.S. DEPT. OF JUSTICE 10–13 (2013),

The result is a blended reliance on latent constructs, which run the gamut from “rebelliousness” to “antisocial personality” and “peer[s],”⁶⁹ with formal psychiatric-diagnostic categories, exemplifying implicitly causal theories of criminal disposition that invoke decision making infirmities in the mind’s “central command unit”⁷⁰ as a type of regulation deficit or lack that must be corrected through therapy.⁷¹ Much of the emphasis on the relationship, or correlation, between disability and crime derives from a parallel preoccupation in academic biological and sociological criminology, which has become significantly intertextual with courts through expert testimony and policymakers through grant-funded research and demonstration.⁷²

More modern criminological frameworks that marry rational choice with “environmental,” biological, neurological, and genetic determinants of criminal offending are gaining increased appeal, resulting in modernity’s “soft,” biologically- and socially-based form of determinism.⁷³ In current frameworks, individual-disability traits are now situated within an invidious

<https://www.ojp.gov/pdffiles1/nij/grants/242934.pdf> [https://perma.cc/5KN4-UX7G] (describing efficacy of mental health, disruptive behavior and disorders, Attention Deficit-Hyperactivity Disorder, psychosis, and personality variables in risk assessment); Kris R. Henning & Ryan M. Labrecque, Risk Assessment in Criminal Justice, Presentation at the Justice Reinvestment Summit (Feb. 2017), in *Criminology and Criminal Justice*; GINA VINCENT ET AL., OFF. JUVENILE JUST. & DELINQUENCY PROGRAMS, STUDYING DRIVERS OF RISK AND NEEDS ASSESSMENT INSTRUMENT IMPLEMENTATION IN JUVENILE JUSTICE, JUVENILE JUST. BULLETIN (Dec. 2018), <https://ojjdp.ojp.gov/library/publications/studying-drivers-risk-and-needs-assessment-instrument-implementation-juvenile> [https://perma.cc/4889-TZQW].

⁶⁹ See OJJDP MODEL PROGRAMS GUIDE, *supra* note 67, at 4.

⁷⁰ Ingunn Moser, *Against Normalisation: Subverting Norms of Ability and Disability*, 9 SCI. CULTURE 201, 205 (2000).

⁷¹ See *id.* See generally Jean Marie McGloin et al., *A Life-Course Analysis of the Criminogenic Effects of Maternal Cigarette Smoking During Pregnancy: A Research Note on the Mediating Impact of Neuropsychological Deficit*, 43 J. RES. CRIME & DELINQUENCY 412 (2006); see generally Pamela Lachman et al., *Assessing Youth Motivations for Joining a Peer Group as Risk Factors for Delinquent and Gang Behavior*, 11 YOUTH VIOLENCE & JUV. JUST. 212 (2013).

⁷² See, e.g., Frank Sirotych, *Correlates of Crime and Violence Among Persons with Mental Disorder: An Evidence-Based Review*, 8 BRIEF TREATMENT & CRISIS INTERVENTION 171, 176 (2008); see generally Matt DeLisi & Michael G. Vaughn, *Correlates of Crime*, in THE HANDBOOK OF CRIMINOLOGICAL THEORY (Alex R. Piquero ed., 2015); Michael T. Baglivio et al., *Violent Juveniles' Adverse Childhood Experiences: Differentiating Victim Groups*, 72 J. CRIM. JUST. 1, 5–7 (2021); see also *In re Det. of Muns*, No. 29920-1-III, 2013 WL 3148177 at *2, *5 (Wash. Ct. App., 3d Div. June 18, 2013) (citing Robert J. McGrath, Joy A. Livingston, & Gail Falk, *A Structured Method of Assessing Dynamic Risk Factors Among Sexual Abusers with Intellectual Disabilities*, 112 AM. J. MENTAL RETARDATION 221, 222 (2007)).

⁷³ See MATZA, *supra* note 36; Flowers, *supra* note 58.

“constellation” of community, family, and peer factors,⁷⁴ assessed “environmentally” to predict criminal functioning.⁷⁵ Within this new paradigm, developmental and psychosocial functioning have been awkwardly merged with a racialized-class rhetoric of moral and cultural poverty,⁷⁶ exemplifying a familiar motif of ascribing disability to groups who have been structurally oppressed and disproportionately surveilled.⁷⁷ Within rational actor frameworks new-and-old, disability still serves a key discursive function: it provides a source of individual-level “regulation deficits” thought to inhibit free will, resulting in a criminal predilection, or *risk*, that must be addressed through intervention—be it punitive or therapeutic. As before, disability in crime-control policy is barely more than a common foil for rationality.

⁷⁴ See, e.g., Henrik Soderstrom et al., *Adult Psychopathic Personality with Childhood-Onset Hyperactivity and Conduct Disorder: A Central Problem Constellation in Forensic Psychiatry*, 121 *PSYCH. RES.* 271, 271 (2004).

⁷⁵ See, e.g., Cohen & Felson, *supra* note 36, at 588–89. The most glaring problem with these newer ecological models of crime is that their community-level variables almost exclusively measure structural harm caused by *de jure* and *de facto* housing segregation, employment and healthcare inequality intergenerational poverty, and mass incarceration itself; all of which are associated with disability prevalence itself. See, e.g., OJJDP MODEL PROGRAMS GUIDE, *supra* note 67, at 5–9 (describing community-level risk factors such as living in a high-crime area, high-poverty conditions, and justice-involved family or peers); *but see generally* Lisa Bowleg, *Reframing Mass Incarceration as a Social-Structural Driver of Health Inequality*, 110 *AM. J. PUB. HEALTH* S11 (2020); April D. Fernandes, *How Far Up the River? Criminal Justice Contact and Health Outcomes*, 7 *SOC. CURRENTS* 29 (2019); Sebastian Daza et al., *The Consequences of Incarceration for Mortality in the United States*, 57 *DEMOGRAPHY* 577 (2020); JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015). Unfortunately, the criminal-legal system is one plausible antecedent (or “cause”) of the structural inequalities that make up the community-level indicators of criminogenic risk, which then get measured to predict involvement in the self-same system, and round and round. In meaningful, causal, ways the system is potentially measuring itself. See Seth J. Prins, *Criminogenic or Criminalized? Testing an Assumption for Expanding Criminogenic Risk Assessment*, 43 *L. & HUMAN BEHAV.* 477, 489–90 (2019) (empirical findings that onset of exposure to the criminal-legal system increases many of the indicators used to predict recidivism); *see also* Ulrike Hahn, *The Problem of Circularity in Evidence, Argument, and Explanation*, 6 *PERSPECTIVES ON PSYCH. SCI.* 172, 180 (2011).

⁷⁶ See *generally* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, *ATLANTIC MONTHLY*, Mar. 1992, at 1-12; WILLIAM J. BENNETT ET AL., *BODY COUNT: MORAL POVERTY—AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996); Interview by Randy Paige with Milton Friedman, Sr. Research Fellow at Hoover Inst. (1991) (commenting on the “crack baby” epidemic).

⁷⁷ See, e.g., Amanda L. Sullivan, *Wading Through Quicksand: Making Sense of Minority Disproportionality in Identification of Emotional Disturbance*, 43 *BEHAV. DISORDERS* 244, 245 (2017).

CONCLUSION: THE PERSONIFICATION OF INHUMANITY

What's wrong with people who commit crime? Medicalization describes a “process by which nonmedical problems become defined and treated as medical problems, usually in terms of illnesses or disorders.”⁷⁸ While some “correlates of crime” related to personality traits like “self-control”⁷⁹ and intellectual traits like IQ⁸⁰ have been empirically validated, theories of criminogenic risk often extend nebulous casual stories about cognition and crime to include developmental and intellectual disabilities; psychiatric conditions like schizophrenia and chronic depression; and psychosocial factors like trauma, neglect, antisocial peers, and substance abuse, where the actual relationship to crime is far from clear.⁸¹ Even the interpretation of disability within the criminal-legal system has been shown to be highly contingent on factors related to the unique intersectionality of the individual being arrested, adjudicated, convicted, sentenced, and so on.⁸²

This partly stems from what I think are faulty logical processes that don't quite know if they're inductive or deductive.⁸³ *If people who commit crime usually have lower-IQs, then people with intellectual and/or developmental disabilities must also have a higher propensity for crime. If people with lower self-control commit more crime, then people with disabilities that affect self-control must also have higher propensity for crime.* But criminal-legal system practitioners are usually working their way back from a crime, searching for a reason. The reality is that most of these theories about personality and intelligence are not validated for populations of people with disabilities, most clearly evidenced by the fact that the observed differences in IQ between offenders

⁷⁸ Peter Conrad, *Medicalization and Social Control*, 18 ANN. REV. SOC. 209, 209 (1992).

⁷⁹ See, e.g., Alexander T. Vazsony et al., *It's Time: A Meta-Analysis on the Self-Control-Deviance Link*, 48 J. CRIM. JUST. 48, 48–49 (2017).

⁸⁰ Travis Hirschi & Michael J. Hindelang, *Intelligence and Delinquency: A Revisionist Review*, 42 AM. SOC. REV. 571, 581 (1977) (finding that offenders have an average IQ score of about 92, or 8 points below the population average of 100).

⁸¹ See, e.g., Jacqueline Pei et al., *Fetal Alcohol Spectrum Disorder and the Criminal Justice System: A Research Summary*, 2 J. MENTAL HEALTH & CLIN. PSY. 48, 50–51 (2018) (warning against inappropriately associating fetal alcohol spectrum disorder, a developmental disability, with criminal behavior, instead of prioritizing structural determinants related to poverty, unstable housing and unemployment, racism, lack of access to services).

⁸² See, e.g., McCauley, *supra* note 55.

⁸³ See generally ELLIOTT SOBER, CORE QUESTIONS IN PHILOSOPHY: A TEXT WITH READINGS (6th ed. 2013).

and nonoffenders in the literature does not actually fall within, and is typically higher than, the common meaning of “intellectual disability.”⁸⁴

In essence, disability becomes a *heuristic* for expeditiously describing some of the known behavioral and cognitive aspects of criminal acting, but it does not follow that disability interjects as a cause in criminal offending. Empirically speaking, then, any *a priori* assumption—whether implicit⁸⁵ or explicit⁸⁶—that disability causes criminal offending likely commits the *post hoc ergo propter hoc* fallacy.⁸⁷

Another major problem is that crime data is notoriously difficult to interpret, in part because measurement limitations often result in statistics that capture who was *caught* committing crime, rather than a true, unbiased measure of criminal offending.⁸⁸ In short, what we more likely *know*, empirically speaking, is that people with certain cognitive disabilities are overrepresented in arrest and incarceration; we don’t know that they are disproportionately represented in the actual commission of crime compared to those without cognitive disabilities.⁸⁹ Acts of extreme violence, statistically speaking, are rare and difficult-to-predict events, but they also take up a disproportionate share of the public attention, fear, and imagination about crime.⁹⁰ Even the broader category of “violent crime” only makes up a small

⁸⁴ See, e.g., Anthony Holland, *Criminal Behaviour and Developmental Disability: An Epidemiological Perspective*, in OFFENDERS WITH DEVELOPMENTAL DISABILITIES 23 (William Lindsay et al. eds., 2004).

⁸⁵ See, e.g., C. S. Allely et al., *Violence is Rare in Autism: When it Does Occur, is it Sometimes Extreme?* 151 J. PSYCH. 49, 49–51 (2017) (small sample, *post hoc* coding of mass shooters for “potential [autism] features”).

⁸⁶ See, e.g., W. Huw Williams et al., *Traumatic Brain Injury: A Potential Cause of Violent Crime?*, 5 LANCET PSYCH. 836 (2018).

⁸⁷ Since event Y followed event X, event Y must have been caused by event X.

⁸⁸ See generally Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. 15 (2019).

⁸⁹ See, e.g., Anna Scheyett et al., *Are We There Yet? Screening Processes for Intellectual and Developmental Disabilities in Jail Settings*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 13 (2009); Jennifer Bronson et al., *Disabilities Among Prison and Jail Inmates, 2011-12*, BUREAU JUST. STAT. (2015); Aleksis P. Kincaid & Amanda L. Sullivan, *Double Jeopardy? Disproportionality in First Juvenile Court Involvement by Disability Status*, 85 EXCEPTIONAL CHILD. 453 (2019); Connie L. Kvarfordt et al., *Youth with Learning Disabilities in the Juvenile Justice System: A Training Needs Assessment of Detention and Court Services Personnel*, 34 CHILD & YOUTH CARE F. 27 (2005).

⁹⁰ See, e.g., Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 L. & HUM. BEHAV. 63, 68–69 (1994).

amount of arrests each year—less than 5%⁹¹—and the vast majority of violent crime is not committed by people with cognitive disabilities—who only make up about 5% of the U.S. population.⁹² In short, when we emphasize the role of cognitive disability in dangerous crime, *we are talking about a sliver of a sliver* of the actual threat that exists in our society. Our conceptions of “risk” are entirely out of proportion.⁹³

Deficit modeling of criminal behavior is self-legitimizing. The term “disability” “names thousands of human conditions and varieties of impairment, from the slight to the severe...[i]t is a category whose constituency is contingency itself.”⁹⁴ While the criminal-legal system has been slow to adopt non-medical models of disability, other areas of American public policy⁹⁵ now view disability within a “social model” that reframes disability’s causation account, defining disability “as disadvantage caused by the confluence of (1) personal impairment and (2) a social setting comprising architecture, economics, politics, culture, social norms, aesthetic values, and assumptions about ability.”⁹⁶ Somewhere in that list lie the stories that law tells. The overarching legal fictions of cognitive disability, in my reading, do not satisfy basic tests for logical inclusion in crime-control policy frameworks, and should not be continued.

⁹¹ See U.S. DEP’T OF JUST., FED. BUREAU OF INVESTIGATIONS, CRIME IN THE UNITED STATES, 2019 (2020), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested.pdf> [<https://perma.cc/XL4W-BSTP>].

⁹² WILLIAM ERICKSON ET AL., 2018 DISABILITY STATUS REPORT UNITED STATES 5, 10 (2018), https://www.disabilitystatistics.org/StatusReports/2018-PDF/2018-StatusReport_US.pdf [<https://perma.cc/KUF6-TD4H>]; see also DEANGELIS, *supra* note 4, at 21.

⁹³ See DEANGELIS, *supra* note 4, at 21.

⁹⁴ SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY (1998).

⁹⁵ See generally ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

⁹⁶ Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1257 (2007). See also MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH 22 (1990).