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ARTICLE

JUSTICE FOR CRIMES VICTIMS WITH DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM: AN EXAMINATION OF BARRIERS AND IMPETUS FOR CHANGE

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INTRODUCTION¹

Access to justice is a broad concept, encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice. Persons with disabilities have often been denied access to fair and equal treatment before the courts, tribunals, law enforcement officials, prison systems, and other bodies that make up the justice systems in their country because they have faced barriers.²

"As long as persons with disabilities face barriers to their participation in the justice system, they will be unable to assume

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1. This paper is based upon a response to a lecture by Professor Samuel Bagenstos, Professor of Law, University of Michigan Law School, delivered at the 2015-16 Annual Law Journal Lecture at the University of St. Thomas School of Law. The focus of the lecture was "The ADA at 25: The Continued Inequality of Americans with Disabilities." The basis for Professor Bagenstos's lecture was the seminal writing of Jacobus tenBroek. Professor tenBroek was an influential scholar of disability law and a disability rights activist. This paper is influenced by Professor tenBroek's writings on custodialism vs. integrationism and the medical vs. social model of disability. See generally Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966); Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Tort*, 54 CAL. L. REV. 841 (1966).

2. Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities, and the Legal System*, 17 INT'L L. STUDENTS ASS'N J. COMP. L. 281, 282 (2011).

their full responsibilities as members of society or vindicate their rights.”³

This paper focuses on the problem of crimes perpetrated against persons with disabilities and the barriers to justice in the United States in the 21st century. The remedy, ensuring that persons with disabilities are granted equal access to justice within the criminal justice system is grounded in the promise of the Americans with Disabilities Act,⁴ prohibiting discrimination and guaranteeing that people with disabilities have the same opportunities as everyone else to participate in the mainstream of life. Title II of the ADA pertains to state and local government programs and services. In order for people with disabilities to participate in the mainstream of life when they are victims of crime, they must have equal access to and fair treatment within the criminal justice system—before law enforcement officials, the courts, victim services, and any other bodies that make up the system of justice. Further efforts to move from “custodialism” to “integrationism”⁵ for persons with disabilities was secured in the United States Supreme Court decision in *Olmstead v. L.C. ex rel. Zimring*,⁶ a ruling that requires states to eliminate unnecessary segregation of persons with disabilities and to ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs—known as the integration mandate of Title II of the ADA. In 2009, on the tenth anniversary of the Supreme Court decision in *Olmstead*, President Obama launched “The Year of Community Living” and directed federal agencies, including the Department of Justice, to vigorously enforce the civil rights of Americans with disabilities.⁷ As more people with disabilities, particularly mental disabilities,⁸ move from large state institutions and other segregated settings to homes in the community, and as more people move from sheltered work environments to supported and integrated employment in the community, the criminal justice system must be prepared to represent the needs and interests of all people with disabilities as members of mainstream society.

While the focus of this paper is on the United States, given that the problem of crime victimization of persons with disabilities is a global problem, as recently documented by the World Health Organization,⁹ a broader scope is warranted. The literature examining the problem and barriers to

3. *Id.* at 286.

4. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101–12213 (2016).

5. tenBroek & Matson, *supra* note 1, at 815–16.

6. 527 U.S. 581 (1999).

7. Civil Rights Division, *Statement of the Department of Justice on the Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, U.S. DEP’T OF JUSTICE (Jun. 22, 2011), http://www.ada.gov/olmstead/q&a_olmstead.htm.

8. Defined for this paper’s purposes as “people with intellectual, developmental, or mental-health related disabilities resulting in cognitive impairment affecting comprehension, communication, or learning.”

9. *Global Status Report on Violence Prevention 2014*, WORLD HEALTH ORG., http://apps.who.int/iris/bitstream/10665/145086/1/9789241564793_eng.pdf.

justice from other countries, in particular Canada, Australia, and the countries that make up the United Kingdom, is instructive in addressing the problem in the United States, especially in light of the establishment of the first international instrument by which persons with disabilities can enforce their human rights.¹⁰ Much of the more recent literature coming out of Canada, Australia, and the United Kingdom are grounded in the rights articulated in the Convention on the Rights of Persons with Disabilities (“CRPD”). The Preamble of the CRPD provides a compelling examination of the wide array of conditions, concerns, and areas of importance to and for people with disabilities across the world—many of which are directly or indirectly related to crime victimization and equal protection under the law.¹¹ Four of the fifty Articles are most directly relevant to the focus of this paper:

- *Article 5: Equality and non-discrimination* stipulates, among other provisions “that all persons are equal before and under the law and entitled without any discrimination to the equal protection and equal benefit of the law” and “shall take all appropriate steps to ensure that reasonable accommodation is provided.”¹²
- *Article 12: Equal recognition before the law* stipulates, among other provisions “that persons with disabilities enjoy legal capacity on an equal basis with other[s] in all aspects of life” and “state parties shall take appropriate measures to provide access by person[s] with disabilities to the support they may require in exercising their legal capacity.”¹³
- *Article 13: Access to Justice* stipulates, among other provisions, that policymakers “ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings.”¹⁴
- *Article 16: Freedom from exploitation, violence and abuse* stipulates, among other provisions, that policymakers “put in place effective legislation and policies . . . to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated, and where appropriate, prosecuted.”¹⁵

10. G.A. Res. 61/106 (Jan. 24, 2007).

11. *Id.* at 2.

12. *Id.* at 6–7.

13. *Id.* at 9.

14. *Id.* at 10.

15. *Id.*

On July 30, 2009, President Obama signed the treaty proclaiming the rights of persons with disabilities.¹⁶ However, the United States has yet to ratify the treaty that has already been ratified by 162 countries throughout the world.¹⁷

Three main theses are explored: (1) Crimes, most notably interpersonal violence, perpetrated against people with disabilities is a serious, persistent, and pervasive problem; (2) Vulnerability to interpersonal violence and other forms of crime victimization is universally, yet erroneously, conceptualized as an inherent attribute of disability. And, it is this individualized notion of vulnerability, which ignores “the context” or the “situation” of the “vulnerable individual,” which enhances vulnerability and increases risk; (3) The failure for crime victims with disabilities, in particular people with mental disabilities, to be recognized and responded to as constituents within the criminal justice system are deeply entrenched in long-standing system-based barriers. The paper is divided into the following six parts with a conclusion.

Part I. Defining “Disability”. Grounds “disability” in the World Health Organization (WHO) bio-psycho-social-model of disability. Examines the medical model and social model of disability and the evolving understanding of “disability” and disability terminology. Discusses the definition of disability in the United States based upon purpose: nondiscrimination laws, eligibility for Social Security benefits, and for collecting and measuring population-based demographic data.

Part II. Crime Victimization—Magnitude of the Problem. Provides compelling evidence that crime victimization perpetrated against people with disabilities is a serious, persistent, and pervasive problem. Examines contemporary understanding of the problem of crime victimization of people with disabilities. Provides an overview of the definitional and methodological limitations of the body of research. Examines the methods in the U. S. for collecting crime victim statistics, with an emphasis on the National Crime Victimization Survey (NCVS). Explains changes to the NCVS emanating from the Crime Victims with Disabilities Awareness Act. Presents the findings from the most recent Crimes Against People with Disabilities report, along with additional select research findings of crime victimization by type of disability.

Part III. Impact of Interpersonal Violence on Physical Health and Psychosocial Functioning. Puts the problem of interpersonal violence into a global context. Examines the debilitating physical health and mental health effects of interpersonal violence on adults in the general population, with some delineation by gender. Presents recent research findings on trauma

16. United Nations Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3 (Dec. 13, 2006), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15&chapter=4&lang=en.

17. *Id.*

and the impact of interpersonal violence on people with disabilities by four broad types of disability (physical, intellectual, severe mental illness, and deafness). Advocates for an understanding of the impact of interpersonal violence on functioning—not applied in a fixed, rigid, and proscriptive way—as part of a victim-centered, trauma-informed response.

Part IV. Understanding Vulnerability and Risk. Examines and challenges the presumptive individualized notion of vulnerability of people with disabilities to interpersonal violence. Presents an alternative understanding of vulnerability from a multifactorial model—an “in situation” approach to understanding vulnerability to crime victimization. Examines the complex interplay between the individual—in relationship with people within their immediate social networks—within the larger environmental context—within the larger society and culture.

Part V. Adult Protective Services Response to Victimization of People with Disabilities. Provides an overview of the origins and evolution of APS to demonstrate how the system was neither created, nor designed to represent the needs and interests of adults with disabilities. Presents a critique of the Adult Protective Services system to support the assertion that APS is an inferior substitute for responding to interpersonal violence and other forms of crime victimization perpetrated against people with disabilities.

Part VI. Barriers to Justice in the Criminal Justice System. Examines barriers to justice in the criminal justice system for people with disabilities, in particular people with mental disabilities. Provides an overview of systemic and personal barriers to put the criminal justice system-related barriers into a larger context of barriers. Examines the “failure to represent the ideal victim” as one of the reasons people with disabilities who are victims of crime are disadvantaged in the criminal justice system. Presents the research on barriers to reporting crimes and response from the police, along with administrative policy and procedural-based barriers and police officer practice barriers. Provides a critique of the barriers within the legal system, rooted in ableism, that systematically deny people with disabilities, most notably people with mental disabilities, access to justice.

Conclusion. Crimes—most notably interpersonal violence—perpetrated against people with disabilities is a serious, persistent, and pervasive problem. And, for people with mental disabilities, the problem is particularly egregious. The consequences of such crime victimization, has serious, debilitating, short- and long-term consequences to the physical health and psychosocial functioning of such victims—with some evidence that people with disabilities experience more trauma-related incidents, and when detected, more trauma-related disorders, with some differences in symptom manifestation. Vulnerability to interpersonal violence and other forms of crime victimization is universally, yet erroneously, conceptualized as an inherent attribute of disability. Vulnerability examined within “the context” or the “situation” of the “vulnerable individual” reframes the problem from

an individualized notion of vulnerability to a failure of societal institutions that fail to protect, represent the interest of, or fail to provide access or accommodation to people with disabilities. The failure of crime victims with disabilities, in particular people with mental disabilities, to be recognized and responded to as constituents within the criminal justice system are deeply entrenched in long-standing system-based barriers. With, attitudinal barriers, rooted in ableism, forming the bedrock for all other barriers. Equality in participation and benefits under the ADA, provides for “equality of opportunity, but does not guarantee equality of results” in accordance with “the principle that individuals with disabilities must be provided an equally effective opportunity to participate in or benefit from a public entity’s aids, benefits, and services.”¹⁸ Yet, the right to effective opportunity is lacking within the criminal justice system.

The solutions to remedy the barriers to justice are grounded in the Convention on the Rights of Persons with Disabilities (CRPD) vision for access to justice and equal protection under the law. In the promise and provisions of Title II of the Americans with Disabilities Act, in the U.S. Supreme Court *Olmstead* decision, and in President Obama’s directive to the U.S. Department of Justice to vigorously enforce the civil rights of Americans with disabilities. All should serve as impetus for stakeholders from *within* the criminal justice system, in collaboration with disability rights advocates and allies, to re-imagine the criminal justice system to include the needs and interests of all persons with disabilities.

PART I: DEFINING “DISABILITY”

As tenBroek wrote in the article *The Disabled and the Law of Welfare*¹⁹ it is important to examine the concept of “disability.” There is no uniform definition of “disability.” With the advent of modern medicine and the use of a process of diagnostic assessment, people with a physiological (mind and body) condition are categorized and are ascribed labels and subjected to corrective interventions—also known as the medical or rehabilitation model of disability.²⁰ The medical model of disability focuses on “individual deviations of body and mind from socially recognized norms.”²¹ It is a deficit-based model with the aim of ameliorating the deficiency through medical treatment or therapy for the restoration of normal

18. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., THE AMERICANS WITH DISABILITIES ACT: TITLE II, TECHNICAL ASSISTANCE MANUAL: COVERING STATE GOVERNMENT PROGRAMS AND SERVICES, § II-3.300 (1993) <http://www.ada.gov/taman2.html#II-3.3000>.

19. tenBroek & Matson, *supra* note 1, at 811.

20. ROMEL W. MACKELPRANG & RICHARD O. SALSGIVER, DISABILITY: A DIVERSITY MODEL APPROACH IN HUMAN SERVICE PRACTICE 83–86 (2009); Carol Thomas, *Disability Theory: Key Ideas, Issues and Thinkers*, in DISABILITY STUDIES TODAY 38, 43–45 (Colin Barnes, Mike Oliver & Len Barton eds., 2002).

21. Thomas, *supra* note 20, at 40.

functioning.²² The medical or scientific orientation to disability reinforces and perpetuates “custodialism.” tenBroek and Matson posit that the “custodial attitude is expressed in policies of segregation and shelter, of special treatment and separate institutions.”²³ Disability rights advocates and allies, past and present, challenge an overreliance on the view of disability from the medical model, contending that disability and the disadvantages experienced by people with disabilities must be understood in the broader societal and cultural context.²⁴

The social model of disability reformulates the problem of disability as one of social oppression in which “disability is the disadvantage or restriction of activity caused by contemporary social organization which takes no or little account of people. . . who have impairments and thus excludes them from the mainstream of social activity.”²⁵ Before Michael Oliver and other disability rights leaders and scholars transformed thinking about disability from the medical model to the social model in the 1970s,²⁶ tenBroek challenged contemporary understanding of disability writing “[f]or the most part it is the cultural definition of disability, rather than the scientific or medical definition, which is instrumental in the ascription of capacities and incapacities, roles and rights, status and security.”²⁷ Furthermore, tenBroek distinguished the difference between “disability” and “handicap” (a term viewed unfavorably within the disability rights community). “A handicap is the cumulative results of the obstacles which disability interposes between the individual and his [or her] maximum functional level.”²⁸ In plain language, the disadvantage or “handicap” of disability is less about the differences in how the brain or body works. Rather, it is societal barriers, whether physical, programmatic, or attitudinal, that can be most debilitating for people with disabilities. tenBroek’s conceptualization of disability is reflected in the view of disability under the United Nations CRPD, which categorically affirms the social model of disability:

“Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”²⁹

The World Health Organization (WHO) uses a “bio-psycho-social model” view of disability.³⁰ “Disability is the umbrella term for impair-

22. *Id.* at 40–41.

23. tenBroek & Matson, *supra* note 1, at 816.

24. *See generally* Mackelprang & Salsgiver, *supra* note 20; Thomas, *supra* note 20.

25. Thomas, *supra* note 20, at 39.

26. *Id.*

27. tenBroek & Matson, *supra* note 1, at 814.

28. *Id.*

29. G.A. Res. 61/106, *supra* note 10, at 2.

30. WORLD HEALTH ORG. & THE WORLD BANK, WORLD REPORT ON DISABILITY 4 (2011), http://www.who.int/disabilities/world_report/2011/report.pdf.

ments, activity limitations, and participation restrictions” that result from the interaction between an individual (with a health condition) and that individual’s contextual factors (environmental and personal factors).³¹

In the United States, the definition of “disability” varies depending upon the purpose for which it is being used. For purposes of nondiscrimination laws³² that take the broadest definition of disability, a person with a disability is generally defined as “someone who (1) has a physical or mental impairment that substantially limits one or more ‘major life activities,’ (2) has a record of such an impairment, or (3) is regarded as having such an impairment.”³³ For purposes of determining eligibility for federal Social Security benefits (Supplemental Security Income [SSI] and Social Security Disability Insurance [SSDI]), individuals must have a severe disability (or combination of disabilities) that “has lasted, or is expected to last, at least twelve months or result in death, and which prevents working at a ‘substantial gainful activity’ level.”³⁴

The Census Bureau is the leading source of population-based data about people and the economy in the United States.³⁵ The definition of disability used to collect population-based demographic data about persons with disabilities varies based upon the survey instrument used.³⁶ The American Community Survey (ACS) asks questions about six different types of difficulty: Hearing, vision, cognitive, ambulatory, self-care, and independent living. Using the ACS 2014 one-year estimates, 39.5 million, or 12.6 percent of, non-institutionalized persons have a disability, and 20.5 million, or 10.5 percent of, non-institutionalized working age adults (21–64) have a disability.³⁷ The Survey of Income and Program Participation (SIPP) uses a broader definition of disability, asking six questions about limitations in functional activity (i.e. seeing, hearing, speaking, walking, using stairs, grasping, lifting and carrying, limitations in activities of daily living (ADLs) and instrumental activities of daily living (IADLs), use of assistive aides, presence of mental conditions, difficulty working at a job, and disa-

31. *Id.*

32. Examples of U.S. nondiscrimination laws include the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and Section 188 of the Workforce Investment Act.

33. *Frequently Asked Questions*, U.S. DEP’T OF LABOR, OFFICE OF DISABILITY EMP’T POLICY, <http://www.dol.gov/odep/faqs/general.htm#3> (last visited April 27, 2016).

34. *Id.*

35. *About the Census Bureau*, U.S. CENSUS BUREAU (Feb. 11, 2016), <http://www.census.gov/about/what.html>.

36. The four main sources are the Annual Census, the American Community Survey (ACS), The Survey of Income and Program Participation, and the CPS Annual Social and Economic Supplement (CPS ASES). In addition to the U. S. Census Bureau, Disability statistics can be accessed at: 1) Disability Statistics, Cornell University, <https://www.disabilitystatistics.org/> and 2) Disability Statistics and Demographics, Rehabilitation and Research Training Center, University of New Hampshire, <http://www.researchondisability.org/statsrtc>

37. LEWIS KRAUS, 2015 DISABILITY STATISTICS ANNUAL REPORT 3, 6 (2015), http://www.disabilitycompendium.org/docs/default-source/2015-compendium/annualreport_2015_final.pdf.

bility status of all children. Using the SIPP 2010, it is estimated that 56.7 million people, or 18.7 percent of the population (one in five people), have a disability, with more than half of them reporting the disability was severe.³⁸ Among non-institutionalized working aged adults, 28.5 million, or 16.6 percent, of persons have a disability.³⁹

Despite efforts to understand “disability” from a “bio-psycho-social model,” it is the medical model that seems to permeate popular and professional thought. The very act of classifying and labeling contributes to significant disadvantages for people with disabilities. The phenomenon of diagnostic overshadowing, coming out of more recent critiques of the medical orientation to disability, focuses on how in the health context there is a tendency to attribute health problems to a person’s disability. This tendency of focusing solely or primarily through the lens of a person’s impairment finds resonance in the criminal justice system, where the victims’ disability overshadows the crime that has been committed.⁴⁰ This process of classifying, ascribing labels, and diagnostic overshadowing are especially dangerous in segregated, inaccessible, and non-inclusive societies, communities, and the systems within communities—work, education, recreation, and worship. Without opportunities for engagement with people with disabilities to counter and challenge what are most often deficit-based belief systems, diagnostic labels and classifying take on a life of their own in the minds of others.

PART II: CRIME VICTIMIZATION: MAGNITUDE OF THE PROBLEM

Prior to 1990 there was limited research into crime victimization of people with disabilities. Over the last two and a half decades, the body of research examining the magnitude and nature of the problem has grown, leaving little doubt that the crime victimization of people with disabilities is a serious, persistent, and pervasive problem. This is despite the fact that most of the literature is qualitative or quantitative research based upon small samples of convenience, with limitations in generalizability to the larger population of people with disabilities.

Two early efforts to understand the problem lay the foundation for subsequent inquiry. The first, a book by Dick Sobsey, conducted the first comprehensive examination of victimization of people with disabilities and

38. Matthew W. Brault, *Americans With Disabilities: 2010: Household Economic Studies*, U.S. CENSUS BUREAU, 4 (Jul. 2012), <http://www.census.gov/prod/2012pubs/p70-131.pdf>.

39. *Id.* The non-institutionalized population excludes persons residing in institutions such as nursing homes, mental hospitals, prisons and jails, and juvenile correctional facilities. For information about disability statistics, including defining, measuring, and collecting disability data go to the U. S. Census Bureau Disability website: <http://www.census.gov/people/disability/>.

40. Chih Hoong Sin et al., *Disabled Victims of Targeted Violence, Harassment and Abuse: Barriers to Reporting and Redress*, 8 SAFER COMMUNITIES 27 (2009).

continues to be an excellent scholarly source for examining the problem.⁴¹ Second, one of the provisions of the federal Crime Victims with Disabilities Awareness Act⁴² authorized the Attorney General of the United States to contract with the National Academy of Sciences (NAS) to conduct a study to increase knowledge about crimes against people with developmental disabilities. Given the dearth of information on criminal victimization of people with disabilities, the National Research Council (an operating agency of the NAS) opted to convene a Workshop on Crime Victims with Developmental Disabilities resulting in a publication with recommendations to improve policy, research, and evaluation of crime prevention, intervention, and access to justice.⁴³

The Literature and Measurement Issues

Definitional, methodological, and data issues have made it difficult to know the incidence and prevalence of violent and non-violent crimes with any certainty in the United States, let alone within a particular demographic population group. The literature varies in the inclusion of types of disability, terminology, classification of disability, and focus of the research. For example, early research would have used the term “mentally challenged” or “mental retardation.” Later, these terms would be replaced by “intellectual disability” or “developmental disability,” with the latter two terms erroneously used interchangeably.⁴⁴ In the U.K. “learning difficulty” or “learning disability” has replaced the early terminology. “Mental disability” is used to refer to people with a mental illness or an intellectual disability.

Upon review of the literature, it appears that offenses, both violent and non-violent, are named, defined, and classified differently based upon jurisdiction, system (e.g., criminal justice, adult protection, child protection, victim advocate), and entity generating statistical data. Much of the literature, in particular the early literature, examining the crime victimization of people with disabilities does not characterize the offenses in the language of violence⁴⁵ or criminal offenses. Rather, the literature characterizes the offenses using the language of social services, such as “abuse,” “maltreat-

41. See generally DICK SOBSEY, *VIOLENCE AND ABUSE IN THE LIVES OF PEOPLE WITH DISABILITIES: THE END OF SILENT ACCEPTANCE?* (1994).

42. Crime Victims with Disabilities Awareness Act, Pub. L. No. 105-301, 112 Stat. 2838.

43. NAT'L RESEARCH COUNCIL, *CRIME VICTIMS WITH DEVELOPMENTAL DISABILITIES: REPORT OF A WORKSHOP* (Joan Petersilia, Joseph Foote & Nancy A. Crowell eds., 2001).

44. Disability definitions and terminology, including intellectual disability and developmental disability, vary by state and authorizing federal and/or state legislation. A comprehensive examination of the definitional evolution of intellectual disability is provided by the Minnesota Governor's Council on Developmental Disabilities website. *Parallels in Time, A History of Developmental Disabilities*, THE MINNESOTA GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES (2016), <http://mn.gov/mnddc/parallels2/index.htm>.

45. Andrea Hollomotz, *Disability and the Continuum of Violence*, in *DISABILITY, HATE CRIME, AND VIOLENCE* 53 (Alan Roulstone & Hannah Mason-Bish, eds., 2013) [hereinafter Hollomotz I].

ment,” and “mistreatment.⁴⁶ The WHO uses the broad term “interpersonal violence” that comes closest to encapsulating the array of offenses.⁴⁷ Violence is defined as “the intentional use of physical force or power, threatened or actual, against oneself, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.”⁴⁸ The WHO distinguishes interpersonal violence from self-directed and collective violence, defining interpersonal violence as “violence that occurs between family members, intimate partners, friends, acquaintances and strangers, and includes child maltreatment, youth violence (including that associated with gangs), violence against women (for example, intimate partner violence and sexual violence) and elder abuse.”⁴⁹

Violence operates on a continuum with differential and derogatory treatment part of the continuum of violence.⁵⁰

The notion of a continuum seeks to draw attention to the fact that boundaries between incidents of mundane intrusion, derogatory treatment and violence are blurred, which can make it difficult for an individual to distinguish that which is seen to be ‘acceptable’ as part of the everyday from that which is seen, even by others and the law, as an act of violence.⁵¹

Such treatment has been conceptualized as care- and disability-related forms of violence that are specific to people with disabilities.⁵² These forms of victimization perpetrated against people with disabilities may not be recognized as abusive or considered crimes under state statutes. Care- and disability-related abuse documented in the literature include the following: (a) accusing a person of faking or exaggerating the condition contributing to disability; (b) anger because a person is not appropriately grateful for care; (c) depriving a person of opportunity and independence; (d) refusing to provide care in a preferred, dignified, or safe manner; (e) threatening to withhold or actually withholding care; (f) threatening to remove, destroy or actually removing or destroying assistive devices; and (g) overmedicating or withholding medication to exert control or obtain compliance.⁵³ The dis-

46. This assertion is based upon the author’s extensive review of the literature.

47. WORLD HEALTH ORG., *supra* note 9, at 2.

48. *Id.*

49. *Id.*

50. Hollomotz I, *supra* note 45, at 53–55.

51. *Id.* at 54–55.

52. Dena Hassouneh-Phillips, *Understanding Abuse of Women with Physical Disabilities: An Overview of the Abuse Pathway Model*, 28 *ADVANCES IN NURSING SCI.* 70, 74 (2005).

53. Elizabeth P. Cramer, Stephen F. Gilson & Elizabeth Depoy, *Women with Disabilities and Experience of Abuse*, 7 *J. HUM. BEHAV. & SOC. ENV’T* 183, 192–95 (2003); Hassouneh-Phillips, *supra* note 52, at 74; NANCY FITZSIMONS, *COMBATING VIOLENCE AND ABUSE OF PEOPLE WITH DISABILITIES: A CALL TO ACTION* 55–56 (2001) (citing Marsha Saxton et al., *Bring My Scooter so I Can Leave You: A Study of Disabled Women Handling Abuse by Personal Assistance Providers*, 7 *VIOLENCE AGAINST WOMEN* 393, 401 (2001) [hereinafter Saxton I]; Marsha Saxton et al., *We’re*

empowering and debilitating care- and disability-related forms of violence inflicted upon people with disabilities form the basis for the Abuse of People with Disabilities Caregiver Power and Control Model (also referred to as the Disability Abuse Model).⁵⁴

Collecting Crime Victim Data

In the United States, the federal government has two primary methods for collecting national crime statistics: The Uniform Crime Report (UCR) and the National Crime Victimization Survey (NCVS). The U.S. Federal Bureau of Investigation (FBI) administers the UCR Program. The FBI is responsible for collecting, analyzing and publishing crime statistics collected from more than 18,000 city, university and college, state, tribal, and federal law enforcement agencies across the United States. Disability-status information is not collected by law enforcement agencies. Therefore, the UCR is not helpful in determining rates of crimes perpetrated against people with disabilities, except with one notable exception: hate crimes. In 1994, Congress amended the Hate Crimes Statistics Act⁵⁵ to require the FBI to collect and report on hate crimes perpetrated against people with disabilities. The most recent hate crimes statistics report found that 1.4 percent of single-bias hate crime incidents were targeted because of bias against disability.⁵⁶ Of the ninety-nine victims of a hate crime, seventy-five were targets of anti-mental disability bias, and twenty-four were victims of anti-physical disability bias.⁵⁷ Between 1997 and 2012, a total of 835 incidents of hate crimes against persons with disabilities were reported to the FBI, representing the smallest number of total hate crime victims compared with other categories—race, religion, sexuality, and ethnicity.⁵⁸ Among the many reasons why it is believed that hate crimes are under-reported and under-recorded is that such offenses are mislabeled as abuse, maltreatment, or bullying, and never directed from the social services and educational systems to the criminal justice system.⁵⁹

The second source of national crime victim data is the National Crime Victimization Survey (NCVS), the primary source of statistical data on crime victimization in the United States. The NCVS is a self-report survey

All Little John Waynes: A Study of Disabled Men's Experience of Abuse by Personal Assistants, 72 J. REHABILITATION 3, 6 (2006) [hereinafter Saxton II].

54. FITZSIMONS, *supra* note 53, at 20–26. “Wheels” adapted from the Power and Control Wheel Model can be accessed at the National Center on Domestic and Sexual Violence website: http://www.ncdsv.org/publications_wheel.html.

55. Violent Crime Control and Law Enforcement Act, 28 U.S.C. § 534 (2016).

56. *Uniform Crime Report: Hate Crime Statistics, 2013, Victims*, FED. BUREAU OF INVESTIGATION 1 (2014), <https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013>.

57. *Id.* at 3–4.

58. Ryan Thorneycroft & Nicole L. Asquith, *The Dark Figure of Disablist Violence*, 54 HOW. J. CRIM. JUSTICE 489, 492 (2015).

59. *Id.* at 494; Sin et al., *supra* note 40, at 11.

in which interviewed persons are asked about the number and characteristics of victimizations experienced during the prior six months.⁶⁰ The NCVS collects information on nonfatal personal crimes (rape or sexual assault, robbery, aggravated and simple assault, and personal larceny) and household property crimes (burglary, motor vehicle theft, and other theft), both those reported and not reported to police. Up until 2009, rates of crime victimization were not available for people with disabilities.

With the passage of the Crime Victims with Disabilities Awareness Act,⁶¹ Congress elevated the problem of interpersonal violence against people with disabilities to a higher level of national importance. In addition to conducting a study of the problem referenced early in the paper, the Crime Victims with Disabilities Awareness Act also mandated that the NCVS include statistics on crimes against individuals with developmental disabilities and the specific characteristics of the victims of those crimes.⁶² Rather than focusing narrowly on developmental disability, as proscribed in the law, the Bureau of Justice Statistics (BJS) took a more expansive approach, with the most current definition of disability, using the social model orientation, being:

[T]he product of interactions among individuals' bodies; their physical, emotional, and mental health; and the physical and social environment in which they live, work, or play. Disability exists where this interaction results in limitations of activities and restrictions to full participation at school, at work, at home, or in the community. Disabilities are classified into six limitations: hearing, vision, cognitive, ambulatory, self-care, and independent living.⁶³

The six limitations are defined as follows:

- *Hearing limitation* entails deafness or serious difficulty hearing.⁶⁴
- *Vision limitation* is blindness or serious difficulty seeing, even when wearing glasses.⁶⁵

60. *Data collection: National Crime Victimization Survey*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=DCdetail&iid=245> (last visited Apr. 10, 2016). Data are collected from a nationally representative sample of about ninety thousand households representing nearly one hundred sixty thousand men and women aged twelve and older (excluding those persons living in an institutional setting) on an annual basis with each household interviewed twice a year.

61. Crime Victims with Disabilities Awareness Act, Pub. L. No. 105-301, 112 Stat. 2838 (1998).

62. *Id.* at § 2.

63. ERIKA HARRELL, U.S. DEP'T OF JUSTICE, CRIME AGAINST PERSONS WITH DISABILITIES, 2009–2013 - STATISTICAL TABLES 12–13 (2015).

64. *Id.* at 12.

65. *Id.*

- *Cognitive limitation* includes serious difficulty in concentrating, remembering, or making decisions because of a physical, mental, or emotional condition.⁶⁶
- *Ambulatory limitation* is difficulty walking or climbing stairs.⁶⁷
- *Self-care limitation* is a condition that causes difficulty dressing or bathing.⁶⁸
- *Independent living limitation* is a physical, mental, or emotional condition that impedes doing errands alone, such as visiting a doctor or shopping.⁶⁹

NCVS and the Crimes Against People with Disabilities Series

The first BJS Crimes Against Persons with Disabilities Report was issued in 2009 presenting 2007 crime victim data. Subsequent reports provide annual rates and trends by disability status, disability type and number, age, gender, race, type of crime, victim-offender relationship, police reporting, and assistance from victim services.⁷⁰

The NCVS findings corroborate the growing body of research that crime victimization is a serious, persistent, and pervasive problem for people with disabilities. The most recent Crimes Against Persons with Disabilities Report (2009–2013) estimated that the rate of violent victimization against persons with disabilities (36 per 1,000) was more than twice the age-adjusted rate⁷¹ for persons without disabilities (14 per 1,000).⁷² Violent victimization refers to serious violent crimes (i.e., rape, sexual assault, robbery, and aggravated assault) and simple assault. Serious violence accounted for about 39 percent of violent crime against persons with disabilities, significantly higher than the 29 percent found for persons without disabilities.⁷³ For all but one age group measured (persons sixty-five or older), the rate of violent victimization against persons with disabilities was

66. *Id.*

67. *Id.* at 13.

68. *Id.*

69. HARRELL, *supra* note 63, at 13.

70. See generally *Publications and Products: Crimes Against People with Disabilities*, BUREAU OF JUSTICE STATISTICS <http://www.bjs.gov/index.cfm?ty=pbse&sid=65> (last visited Apr. 10, 2016).

71. The differences in age distribution between the two populations must be taken into account when making direct comparisons of the violent victimization rate between persons with and without disabilities. The age distribution of persons with disabilities differs considerably from that of persons without disabilities, and violent crime victimization rates vary significantly with age. The age adjustment standardizes the rate of violence to show what the rate would be if persons without disabilities had the same age distribution as persons with disabilities. For this paper's purposes, when comparisons are made between people with and without disabilities, age-adjusted rates for people with disabilities are used. HARRELL, *supra* note 63, at 4 for a complete explanation of the use of age-adjusted rates.

72. HARRELL, *supra* note 63, at 5.

73. *Id.*

at least double the rate for people without disabilities.⁷⁴ Persons with disabilities of two or more races had the highest violent victimization rate (76.4 per 1,000), significantly higher than persons of two or more races without disabilities (21.3 per 1,000).⁷⁵

Children with disabilities under age twelve are not included in the NCVS. One of the earliest population-based epidemiological studies focusing on maltreatment of persons with disabilities, examined abuse and neglect of children with disabilities, and found that children with disabilities were 3.4 times more likely to experience maltreatment than their peers without disabilities.⁷⁶ In a recent meta-analysis of findings from studies of victimization of people with disabilities, children with disabilities were at a 4.3 times greater risk of all forms of violence (physical violence, sexual violence, and emotional abuse) than children without disabilities.⁷⁷ Children with disabilities were 2.9 times more likely than children without disabilities to be sexually abused, with children with intellectual and mental health disabilities 4.6 times more likely to be sexually abused than their peers without disabilities.⁷⁸

Violent crime victimization is as significant a problem for men with disabilities as it is for women with disabilities. The results of the most recent NCVS indicate that men with disabilities (37.1 per 1,000 age-adjusted) reported higher rates of violent victimization than *both* women without disabilities (11.9 per 1,000) and men without disabilities (15.8 per 1,000).⁷⁹ Little research has focused specifically on interpersonal violence against men with disabilities—limiting our understanding of the problem. One study of a nationally representative sample of U.S. adults, completing the Behavioral Risk Factor Surveillance System (BRFSS) survey administered by the Center for Disease Control and Prevention,⁸⁰ found that men who reported attempted and completed rape were also more likely to report activity limitations, indicative of the presence of a disability.⁸¹ People with disabilities, in particular boys and men with developmental disabilities and mental illness, were identified in the National Prison Rape Elimination

74. *Id.* at 4.

75. *Id.* at 6.

76. Patricia M. Sullivan & John F. Knutson, *Maltreatment and disabilities: A population-based epidemiological study*, 24 CHILD ABUSE & NEGLECT 1257, 1268 (2000).

77. Lisa Jones et al., *Prevalence and Risk of Violence Against Children with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies*, 380 THE LANCET (N. AM. EDITION) 899, 904 (2012).

78. *Id.*; *Statistics on Abuse and Neglect of Children with Disabilities*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <https://www.childwelfare.gov/topics/systemwide/statistics/can/stat-disabilities/> (last visited Apr. 10, 2016).

79. HARRELL, *supra* note 63, at 6.

80. A total of 59,511 male respondents participated in the optional sexual violence module.

81. Ekta Choudhary, Jeffrey Coben, & Robert M. Bossarte, *Adverse health outcomes, perpetrator characteristics, and sexual violence victimization among U.S. adult males*, 25 J. INTERPERSONAL VIOLENCE 1523, 1529 (2010).

Commission Report as at increased risk of sexual assault in correctional facilities.⁸²

The literature examining interpersonal violence against women with disabilities is expansive—although not necessarily rigorous in methodology. An important earlier study, a retrospective longitudinal study of 6,273 non-institutionalized women participating in the National Violence Against Women survey examined the association between the level of disability impairment and physical and sexual assault. The study found that women with severe disabilities were four times more likely to be sexually assaulted than women with no reported disability.⁸³ And, while not quite so significant a finding, women with moderate or severe disabilities were at greater risk of physical-only assault than women without a disability.⁸⁴ The results of the most recent NCVS found that women with disabilities (35 per 1,000 age-adjusted) experience violent crime at higher rates than women without disabilities (11.9 per 1,000).⁸⁵

Finally, the examination of crime victimization by type of disability indicates that persons with cognitive disabilities have the highest rates of violent victimizations (67 per 1,000), serious violent victimization (25.1 per 1,000), and simple assault (41.6 per 1,000).⁸⁶ Both men (64.6 per 1,000) and women (68.9 per 1,000) with cognitive disabilities had *equally high rates* of violent victimization. These results support the body of research examining interpersonal violence against people with intellectual disabilities.⁸⁷ It is this very population that is least likely to have access to and receive justice in the criminal justice system. Persons with a hearing disability had the lowest rates of both violent victimization (16.9 per 1,000) and serious violent victimization (8.4 per 1,000).⁸⁸ The limitations of the survey methodology, most notably communication barriers and the use of proxy respondents, may be a factor in the findings that persons with a hearing disability have lowest violent and serious violent victimization rates among the types of disability. The results of Barrow's dissertation research found that in her samples comparing hearing and Deaf and hard of hearing students, found that the Deaf were significantly more likely to be victimized

82. NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 70, 72–73 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

83. Carri Casteel et al., *National Study of Physical and Sexual Assault Among Women with Disabilities*, 14 INJ. PREVENTION 87, 89 (2008).

84. *Id.*

85. HARRELL, *supra* note 63, at 6.

86. *Id.* at 7. Age-adjusted rates were not generated by disability type due to differences and limitations with the data for the groups. Thus, the rates by type of disability cannot be compared with rates in the general population. *Id.*

87. See generally Willi Horner-Johnson and Charles E Drum, *Prevalence of Maltreatment of People with Intellectual Disabilities: A Review of Recently Published Research*, 12 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RES. REVS. 57–69 (2006).

88. HARRELL, *supra*, note 63, at 7.

sexually and violently than their hearing counterparts.⁸⁹ While not known with certainty, it can be assumed that people with serious mental illness are subsumed under the “cognitive” disability category as it is defined in the NCVS. Thus, the NCVS results support the body of research examining crime victimization of people with severe mental illness. An early seminal epidemiological study of crime victimization in adults with severe mental illness found more than one quarter of all persons with severe mental illness (SMI) have been victims of violent crime, a rate more than eleven times higher than the general population.⁹⁰ Depending upon the type of violent crime, gender, and race/ethnicity, prevalence was six to twenty-three times greater among persons with disabilities.⁹¹ A more recent systematic review of the literature of nine studies, representing 5,195 people with severe mental illness, found prevalence estimates of crime victimization ranging from 4.3 percent to 35.04 percent, with rates of victimization 2.3 to 140.4 times higher than people in the general population.⁹² People who are blind or visually impaired appear to get the least attention in the crime victim literature. For persons with a vision impairment, the estimated rates of violent victimization were 29.8 per 1,000 and of serious violent victimization were 11.9 per 1,000.⁹³

Limitations of the NCVS

As with the collection of any data, it is important to understand the limitations of the methodology. Limitations of the NCVS include the following: it (a) only surveys civilian non-institutionalized populations; (b) only includes those people with disabilities living among the general population in household settings; (c) the survey methodology may pose a barrier for people with limited verbal communication; and (d) greater reliance on the use of proxy interviews to obtain crime victimization information for people with disabilities.⁹⁴ The sampling protocol used means that people living in congregate care settings—those classified as institutions—are not represented. And while persons with disabilities living in group homes are included in the sampling protocol, the lead statistician at the BJS believes

89. Lauren M. Barrow, *Silent Victims: An Examination into Criminal Victimization of the Deaf* (2007) (unpublished PhD dissertation, City University of New York) (on file with The Graduate Center Library, City University of New York).

90. Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness*, 62 ARCHIVES OF GEN. PSYCHIATRY 911, 914 (2005).

91. *Id.* at 917.

92. R. Mangilio, *Severe Mental Illness and Criminal Victimization: A Systematic Review*, 119 ACTA PSYCHIATRICA SCANDINAVICA 180 (2008). The rate of 140.4 times higher was for personal theft.

93. HARRELL, *supra* note 63, at 7. See MICHELLE ARMSTRONG, *Violence and Crimes Against People with Disabilities* (2008); DICK SOBSEY ET AL., *Violence and Disability: An Annotated Bibliography* (1995), for an expansive review of the research focused on violence and crimes against people with disabilities.

94. HARRELL, *supra* note 63, at 13.

that people living in such settings are likely under-represented.⁹⁵ Given that we know paid caregivers are among the category of perpetrators of victimization against people with disabilities, it is highly probable that the rates of violent victimization are higher. Furthermore, the use of proxy respondents is problematic because they may omit crime incidents, may not know some details about reported crime incidents, or may be perpetrators of crimes; thus, the number of crimes against persons with disabilities is likely undercounted.⁹⁶

PART III: IMPACT OF INTERPERSONAL VIOLENCE ON PHYSICAL HEALTH AND PSYCHOSOCIAL FUNCTIONING

The WHO estimates that “more than 1.3 million people worldwide die each year as a result of violence in all of its forms (self-directed, interpersonal, and collective), accounting for 2.5% of global mortality.”⁹⁷ In addition, tens of thousands of people around the world are victims of non-fatal violence every day, including victims who sustain physical injuries requiring emergency care and people who suffer physical, sexual, or psychological abuse, but may not report such victimization to authorities.⁹⁸ Males, in particular young males, account for 82% of homicides worldwide, with estimated rates of homicide more than four times that of females.⁹⁹ Globally, women, children and the elderly bear the brunt of the non-fatal consequences of physical, sexual and psychological forms of violence.¹⁰⁰ Violence is the leading cause of mortality and morbidity, including acquired conditions or conditions contributing to disability, in the United States.¹⁰¹ In 2000, violence resulted in approximately 50,000 deaths and 2.2 million injuries requiring medical attention with a total lifetime cost of more than 70 billion dollars.¹⁰² The estimated incidence of interpersonal violence “equates to roughly nine interpersonal violence-related injuries per 1000 males and 7 per 1000 females.”¹⁰³

Victims of violence, regardless of the type of violence, experience a range of social, physical health, and psychological or mental health

95. Telephone Interview with Michael Rand, Statistician, Bur. Just. Statistics (2009).

96. See HARRELL, *supra* note 63, at 13, for further explanation of the limitations of the estimate.

97. WORLD HEALTH ORGANIZATION, *supra* note 9, at 2.

98. *Id.*

99. *Id.* at 9.

100. *Id.* at 13.

101. Phaedra S. Corso et al., *Medical Costs and Productivity Losses Due to Interpersonal and Self-Directed Violence in the United States*, 32 AM. J. PREVENTATIVE MED. 474 (2007).

102. *Id.* (indicating that the costs were estimated at \$64.4 billion (92%) for lost productivity and \$5.6 billion spent on medical care for 2.5 million injuries due to interpersonal and self-directed violence).

103. *Id.* at 476.

problems that can detrimentally impact short- and long-term functioning.¹⁰⁴ The WHO finds that “all types of violence have been strongly linked to negative health consequences across the lifespan, but violence against women and children contribute disproportionately to the health burden.”¹⁰⁵ According to the WHO, “physical injuries themselves are outweighed by the wide spectrum of negative behavioural, cognitive, mental health, sexual and reproductive health problems, chronic diseases and social effects that arise out of exposure to violence.”¹⁰⁶ Sexual violence, in particular, is described as “a life-altering event with ‘pernicious effects’ experienced long after the incident.”¹⁰⁷ Not only do victims of violence experience physical and emotional harm associated with the incident, they also experience physical and mental health issues associated with recovery.¹⁰⁸ Such issues stem from secondary victimization and negative social reactions from others, including criminal justice professionals, health care providers, family members, and friends.

Physical health problems can stem from injuries caused by interpersonal violence, result from the adoption of health-risk coping behaviors, and by chronic stressors associated with past, current, or fear of future victimization.¹⁰⁹ Physical injuries, potentially resulting in disability, include abdominal injuries, thoracic injuries, brain injuries, burns/scalds, fractures or sprains, and lacerations.¹¹⁰ Chronic health problems, believed to be adverse health outcomes stemming from interpersonal violence, include cardiovascular diseases (e.g., stroke, heart attack), circulatory disorders (e.g., hypertension), respiratory disorders (e.g., asthma), gastrointestinal conditions (e.g., stomach cramps), bone and muscle conditions (e.g., arthritis),

104. The information in this section about the impact on physical health and psychosocial functioning is drawn from the research-based literature examining the impact of interpersonal violence (including sexual violence and intimate partner violence) on male and female victims, with six sources focusing on both males and females, one source only males, and one source only females. See generally Tracie O. Afifi et al., *Mental Health Correlates of Intimate Partner Violence in Marital Relationships in a Nationally Representative Sample of Males and Females*, 24 J. INTERPERSONAL VIOLENCE 1398 (2009); MICHELE C. BLACK ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 REPORT (Nat'l Ctr. Disease Control 2011); Choudhary et al., *supra* note 81; Ann. L. Coker et al., *Physical and Mental Health Effects of Intimate Partner Violence for Men and Women*, 23 AM. J. PREVENTATIVE MED. 260 (2002); Corso et al., *supra* note 101; Gina Dillon et al., *Mental and Physical Health and Intimate Partner Violence Against Women: A Review of the Literature*, 2013 INT'L J. FAM. MED. 1 (2012); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUMATIC STRESS 119 (2003); WORLD HEALTH ORG., *supra* note 9.

105. WORLD HEALTH ORG., *supra* note 9, at 15. The WHO *Global State Report on Violence Prevention 2014* examines the problem of violence perpetrated against women, children, and the elderly, however, fails to address global violence against people with disabilities.

106. *Id.*

107. MARGARET C. HARRELL ET AL., A COMPENDIUM OF SEXUAL ASSAULT 1 (RAND Nat'l Def. Rsch. Inst. 2009).

108. *Id.*

109. BLACK ET AL., *supra* note 104, at 61.

110. WORLD HEALTH ORG., *supra* note 9, at 16.

diabetes, chronic headaches and pain, and sleep disorders.¹¹¹ Women experience adverse sexual and reproductive health outcomes, including unintended pregnancy, pregnancy complication, gynecological disorders, chronic pelvic pain, urinary tract infections, HIV, and other sexually transmitted diseases.¹¹² The health of victims may be further put at risk due to engagement in health-risk coping behaviors, such as alcohol and drug abuse, high-risk sexual behavior, smoking, and unhealthy diet-related behaviors.¹¹³

Interpersonal violence can lead to significant psychological or mental health problems. The term “crime-related mental illness” refers to mental health disorders that are a direct result of crime victimization.¹¹⁴ The mental health disorders most commonly associated with interpersonal violence are post-traumatic stress disorder (PTSD),¹¹⁵ depression, anxiety disorders (e.g., panic disorder, phobia), sleep disorders, and suicidality.¹¹⁶ Psychosocial-related problems associated with intimate partner violence (IPV) include, low self-esteem, fear of intimacy, difficulty re-learning trust, involuntary fear of others, strain or disruption on relationships, reluctance to enter into new relationships, avoidance of crowds, and voluntary social isolation.¹¹⁷ One study, drawn from the U. S. National Comorbidity Survey, found men and women experience the psychosocial effects of IPV differently, with males experiencing a more narrow range of poor mental health outcomes compared to women.¹¹⁸ Male victims were more likely to experience externalizing disorders, such as disruptive behavior disorders (e.g., hostility, anger, aggression) and substance use disorders, while women victims were more likely to experience internalizing disorders, such as anxiety and suicidal ideation.¹¹⁹

There is a small but growing body of research looking into trauma exposure, which includes trauma resulting from interpersonal violence and

111. Corso et al., *supra* note 101, at 480; Dillon et al., *supra* note 104, at 9; WORLD HEALTH ORG., *supra* note 9, at 16.

112. Dillon et al., *supra* note 104, at 9; WORLD HEALTH ORG., *supra*, note 9, at 16.

113. CORSO et al., *supra* note 101, at 480; Kilpatrick & Acierno, *supra* note 104, at 129–30; WORLD HEALTH ORG., *supra* note 9, at 16–17.

114. COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, VIOLENCE AGAINST WOMEN WITH MENTAL ILLNESS 3 (2007) [Hereinafter CSGJC].

115. See Kilpatrick & Acierno, *supra* note 104, for an examination of the epidemiological estimates of crime victimization, risk factors for crime victimization, and mental health outcomes of violence, with a comprehensive examination of PTSD and violent-crime related PTSD.

116. Dillon et al., *supra* note 104, at 4–8; Corso et al., *supra* note 101, at 480; Kilpatrick & Acierno, *supra* note 104, at 128–30; WORLD HEALTH ORG., *supra* note 9, at 16.

117. CTR. FOR DISEASE CONTROL, *Intimate Partner Violence: Consequences*, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> (last updated Mar. 3, 2015).

118. Afifi et al., *supra* note 104, at 1412.

119. *Id.*

crime victimization, experienced by persons with disabilities.¹²⁰ Trauma and PTSD are believed to be common among people with disabilities, but often go undetected due to a myriad of reasons, including the failure of health and mental health professionals to routinely screen for these problems when assessing treatment needs, failure of professionals to evaluate trauma history, lack of follow through on reports of traumatic events, and lack of appropriate treatment planning.¹²¹ The results of a national epidemiological study of mental health disorders found that persons with physical disabilities had an average of five different trauma events compared to three for persons without disabilities, and were 2.6 times more likely to meet the criteria for lifetime PTSD, had more severe PTSD symptoms, and had higher rates of co-occurring substance abuse disorder (SUD) than nondisabled individuals.¹²² The results of a comprehensive review of the research between 1980 and 2010 found that prevalence rates of interpersonal trauma and trauma-related disorders were significantly higher in persons with severe mental illness (SMI), 30 percent higher for PTSD (with a range of 20% to 47%), than for adults in the general population (7%).¹²³ People with an intellectual disability may be more predisposed to trauma-related symptoms due to previous trauma exposure and other vulnerabilities.¹²⁴ There is also some evidence that the effects of PTSD may manifest differently in the people with an intellectual disability.¹²⁵

That is, different kinds of problem behaviors can be considered symptoms of PTSD, such as aggression and anger outbursts, self-injurious behavior, non-compliance, social isolation, sleeping problems, and restlessness. Overshadowing, i.e. attributing problem behavior as part of ID itself, is a well-known feature in mental health care for people with ID.¹²⁶

Caution is warranted when attempting to generalize findings from mainstream American to “individuals from other cultures or distinct subcul-

120. See generally Melissa L. Anderson et al., *Posttraumatic Stress Disorder and Substance Use Disorder Comorbidity Among Individuals with Physical Disabilities: Findings from the National Comorbidity Survey Replication*, 27 J. TRAUMATIC STRESS, 182 (2014); Maria W. Mauritz et al., *Prevalence of Interpersonal Trauma Exposure and Trauma-Related Disorders in Severe Mental Illness*, 4 EUR. J. PSYCHOTRAUMATOLOGY 1 (2013); L. Mevissen & A. de Jongh, *PTSD and its Treatment in People with Intellectual Disabilities: A Review of the Literature*, 30 CLINICAL PSYCHOL. REV. 308 (2010); Kim T. Mueser & Weili Lu, *Traumatic Stress in Special Populations*, in THE OXFORD HANDBOOK OF TRAUMATIC STRESS 128–40 (J. Gayle Beck & Denise M. Sloan, eds., 2012); Sven Schild & Constance J. Dalenberg, *Trauma Exposure and Traumatic Symptoms in Deaf Adults*, 4 PSYCHOL. TRAUMA THEORY RES. PRAC. POL’Y 117 (2012); Heather Sequeira, *Implications for Practice: Research into the Effects of Sexual Abuse on Adults with Intellectual Disabilities*, 8 J. ADULT PROTECTION 25 (2006).

121. Mueser & Lu, *supra* note 120, at 132–33.

122. Anderson et al., *supra* note 120, at 185–86.

123. Mauritz et al., *supra* note 120, at 11.

124. Mevissen & A. de Jongh, *supra* note 120, at 314.

125. *Id.*

126. *Id.*

tures” — such as Deaf adults.¹²⁷ The findings of one small research study designed specifically to query trauma and traumatic symptoms in Deaf adults found “[a] high incidence rate. . . consistent with other reports of elevated rates of trauma among people with physical or mental disabilities or ethnic minority groups,”¹²⁸ with the symptoms of dissociation (i.e. detach or disconnect from oneself—thoughts, memories, feelings), more common among Deaf adults than adults in the general population.¹²⁹

An understanding of the impact of interpersonal violence on functioning—not applied in a fixed, rigid, and proscriptive way—is part of a victim-centered, trauma-informed¹³⁰ response. If all components of the criminal justice system adopts “a philosophy that places the victim as the principal focus of its operational concern then a seamless system of care and cooperation that restores the victim may be more easily achieved.”¹³¹ Assuming that there is a “right” or “real” way for a crime victim to respond to interpersonal violence poses a barrier to justice. For people with disabilities, such a response can impede equal access to, and fair treatment within, the criminal justice system.

PART IV: UNDERSTANDING VULNERABILITY AND RISK

The psychological and socio-economic hardships experienced by people with disabilities are largely a product of the [socio-] cultural definition—an assumptive framework of myths, stereotypes, aversive responses, and outright prejudices.¹³² Perhaps the most pervasive, destructive, and debilitating assumption is that which equates disability with *vulnerability* (i.e., susceptibility, defenselessness, helpless, liability).¹³³ Vulnerability implies weakness, dependency, or a need for protection—in essence a custodial familial and public response to disability. Being vulnerable to victimization is viewed as part and parcel with having an impairment, despite the fact that vulnerability to victimization is part of the human condition. “Vulnerability is—and should be understood to be—universal and constant, inherent in the human condition.”¹³⁴

Everyone is vulnerable, to varying degrees throughout their lifetime, to crime victimization. Failure to recognize vulnerability to victimization as

127. Schild & Dalenberg, *supra* note 120, at 117.

128. *Id.* at 122.

129. *Id.* at 124.

130. See generally *Trauma Training for Criminal Justice Professionals* Substance Abuse and Mental Health Services Administration, (Aug. 19, 2015), <http://www.samhsa.gov/gains-center/trauma-training-criminal-justice-professionals>.

131. Mary Clark, *The Human Right of the Disabled to Access Justice: An Imperative for Policing*, 85 POLICE J. 221, 231 (2012).

132. tenBroek, J & Matson, *supra* note 1, at 814.

133. Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 4 (2008).

134. *Id.* at 1.

part of the human experience reinforces the notion that the vulnerability for people with disabilities is universally different than the vulnerability of “able-bodied” people.¹³⁵ For people with disabilities, vulnerability is almost universally associated with *individual factors* that reside within the person—the impairment in cognitive, physical, sensory (hearing/vision), or mental functioning. Thus, for example, a person with an intellectual disability is viewed as vulnerable—and because of this vulnerability at increased risk—because he or she has cognitive impairment.¹³⁶

As a society, past and present, we tend to take an individualized notion of vulnerability due to impairment *and* incapacity, ignoring that vulnerability results from interactions with external risk factors. “Spatial analysts do not see ‘vulnerability’ as specific to particular sections of society but rather as a relationship that humans have with their social environments.”¹³⁷ People with disabilities are “vulnerable” because of the increased risk for interpersonal violence that exists within relationships, within social environments, and within the larger social, political, economic, and cultural context.¹³⁸

Understanding Vulnerability and Risk from a Multifactorial Model

In 1994, Dick Sobsey wrote what remains the seminal book on victimization of people with disabilities.¹³⁹ Sobsey proposed the Integrated Ecological Model of Abuse, which is a multifactorial model for understanding and preventing crime victimization of people with disabilities.¹⁴⁰ A similar model has been proposed to understand elder violence (commonly referred to as abuse)¹⁴¹ and to prevent violence.¹⁴² Additional ecological models examine the risk of sexual violence perpetrated against people with learning

135. Ryken Grattet & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference,”* 91 J. CRIM. L. & CRIMINOLOGY 697 (2001); ANDREA HOLLOMOTZ, *LEARNING DIFFICULTIES AND SEXUAL VULNERABILITY: A SOCIAL APPROACH* 36–37 (2011) [hereinafter Hollomotz II].

136. Cognitive impairment refers to deficits in the ability to learn and apply learning to novel situations, to comprehend information, to problem-solve, and to recognize and avoid potentially dangerous situations, places and people.

137. HOLLOMOTZ II, *supra* note 135, at 36.

138. One can infer from tenBroek’s treatises about the rights of people with disabilities that he was acutely aware of how the larger social, political, economic, and cultural context created disadvantage for people with disabilities.

139. SOBSEY, *supra* note 93.

140. *Id.* at 145–74.

141. Georgia J. Anetzberger, *Caregiving: Primary Cause of Elder Abuse*, 24 GENERATIONS 46 (2001).

142. CTR. FOR DISEASE CONTROL, *The Socio-Ecological Model: A Framework for Prevention*, <http://www.cdc.gov/ViolencePrevention/overview/social-ecologicalmodel.html> (last updated Mar. 25, 2015).

difficulties (i.e. intellectual disabilities).¹⁴³ These models all take an “in situation” approach to understanding vulnerability to crime victimization. Examining victim-related factors and offender-related factors, as well as the complex interplay between the individual—in relationship with people within their immediate social networks—within the larger environmental context where people live (neighborhood); where people learn, work, recreate, and worship (community); and within the larger society and culture (i.e., laws, societal norms, the media).¹⁴⁴

Multifactorial models, such as the Integrated Ecological Model of Abuse, factor in the direct effects of individual impairment as a salient factor to consider when examining the vulnerability of people with disabilities to crime victimization. People with disabilities, to varying degrees based upon the type, age of onset, and severity of the disability, are less able to perceive externalized risk, less able to assess and avoid harm or danger, and less able to thwart an attack, due to individual impairment.¹⁴⁵ However, it is this author’s assertion that the unrecognized, ignored, and underappreciated disadvantage for people with disabilities is that individual vulnerability intersects with relational, economic, social, political, and attitudinal factors that disadvantage people with disabilities.¹⁴⁶ “Within individual” vulnerability is maximized and perpetuated by disempowering and debilitating practices of people, environments, and systems¹⁴⁷—all of which contribute to people with disabilities being perceived as “attractive victims.” Many of the individual characteristics that are believed to make people with disabilities more vulnerable, are not personal attributes or inherent traits of the person. Rather, they are socially mediated effects of disability.¹⁴⁸

For example, “helpless” is an attribute often associated with people with disabilities. Helplessness is learned. But too often our educational system and disability service system train children and adults with disabilities to be compliant. Learned helplessness, reinforced by compliance training, leads to learned compliance.¹⁴⁹ Additionally, skills needed to minimize the risk of interpersonal violence, such as personal safety skills, sexual competency, assertiveness, and self-defense,¹⁵⁰ are typically not afforded to people with disabilities, especially people with intellectual and developmental

143. Andrea Hollomotz, *Beyond ‘Vulnerability’: An Ecological Model Approach to Conceptualizing Risk of Sexual Violence Against People with Learning Difficulties*, 39 BRIT. J. SOC. WORK 99, 107–08 (2009) [hereinafter Hollomotz III]; HOLLOWOTZ II, *supra* note 135, at 138–39.

144. FITZSIMONS, *supra* note 53, at 26–27; NAT’L RESEARCH COUNCIL, *supra* note 43, at 22–31.

145. NAT’L RESEARCH COUNCIL, *supra* note 43, at 26.

146. *See also* Fineman, *supra* note 133, at 11 (asserting that vulnerability is “institutional as well as individual”).

147. SOBSEY, *supra* note 93, at 162–63.

148. NAT’L RESEARCH COUNCIL, *supra* note 43, at 27.

149. SOBSEY, *supra* note 93, at 164–66; FITZSIMONS, *supra* note 53, at 91–92.

150. SOBSEY, *supra* note 93, at 178.

disabilities.¹⁵¹ Such skills are shaped and developed through formal education, lived experience, and learning opportunities throughout one's lifetime.

Furthermore, persons with disabilities experience higher levels of disadvantage than persons without disabilities that contribute to vulnerability, including the following:

- Higher unemployment: 34.4 percent of civilian adults under sixty-five with disabilities employed in the community compared to 75.4 percent of adults under sixty-five without disabilities;¹⁵²
- Lower earnings: "Median earnings of civilians with disabilities ages [sixteen] and over in the U.S. was \$21,232, about two-thirds of the median earnings of people without disabilities, \$31,324";¹⁵³
- Increased poverty: In 2014 28.1 percent of people with disabilities lived in poverty compared to 13.3 percent of people without disabilities. "For US civilians ages 18-64 living in poverty in 2014, state rates ranged from 19.2 percent (Alaska) to 40.6 percent (District of Columbia). For those without disabilities of the same age group, the poverty rate was about half as high, ranging from 7.5 percent in New Hampshire to 18.8 percent in Arizona."¹⁵⁴

A focus on "the context," referred to as the "situation" of the vulnerable individual, should lead us "to redirect focus onto the societal institutions that are created in response to individual vulnerability"¹⁵⁵ that fail to protect, represent the interests of, or fail to provide access or accommodation to people with disabilities.

PART IV: ADULT PROTECTIVE SERVICES RESPONSE TO VICTIMIZATION OF PEOPLE WITH DISABILITIES

Past and present, the predominant response to crime victimization of people with disabilities is an administrative response or a social service response—not a criminal justice response. Neither system provides adequate protection or justice for people with disabilities. An administrative response refers to the fifty state systems that identify, investigate and resolve abuse or neglect of persons with disabilities, including the misuse of restraint and seclusion, within public or private sector providers of services to persons with disabilities using state and federal Medicare and Medicaid dollars.¹⁵⁶ The Health Care Finance Administration (HCFA) (now the Centers for Medicare and Medicaid [CMS]) has established conditions of participation that specifically require participating nursing homes, intermediate

151. Gina Di Giulio, *Sexuality and People Living with Physical or Developmental Disabilities: A Review of Key Issues*, 12 CAN. J. HUM. SEXUALITY 53, 59 (2003).

152. KRAUS, *supra* note 37, at 29.

153. *Id.* at 20.

154. *Id.* at 22.

155. Fineman, *supra* note 133, at 13.

156. OFFICE INSPECTOR GEN., REPORTING ABUSES OF PERSONS WITH DISABILITIES (2001).

care facilities, and psychiatric facilities to protect residents and patients from abuse.¹⁵⁷ States also fund residential and vocational services for person with disabilities that operate outside the purview of federal oversight, with each state developing its own laws, regulations, and system for identifying, investigating, and resolving reported incidents.¹⁵⁸ Each State's delegated licensing authority (ies) investigate service provider reported incidents. Such authorities follow either federal or state regulations pertaining to investigatory protocol (including referral to law enforcement) and guidelines for screening-in or screening-out reports for investigation and substantiation of findings, with penalties imposed upon provider agencies for "indicated" violations. Problems with the administrative response are documented in reports issued by the national network of Protection and Advocacy agencies¹⁵⁹ and in federal government agency investigatory reports.¹⁶⁰

An overview of the origins and evolution of APS is provided to demonstrate how the system was neither created, nor designed to represent the needs and interests of adults with disabilities. A critique of the Adult Protective Services system—a system that many more people with disabilities may be subjected to in accordance with states' vulnerable adult statutes—is presented to support the assertion that APS is an inferior substitute for responding to interpersonal violence and other forms of crime victimization perpetrated against people with disabilities.

Origins and Evolution of the Adult Protection System

Adults are considered vulnerable based upon age or inability. Legal definitions of "vulnerable adult" vary by state, but a "vulnerable adult" is globally defined as "a person who is either being mistreated or in danger of mistreatment and who, due to age and/or disability, is unable to protect himself or herself."¹⁶¹ APS is an outgrowth of the Child Protection System (CPS), largely created to deal with issues of "aging" and assess the social services and protection services needs of older adults;¹⁶² it seemingly

157. *Id.*

158. *Id.*

159. The mission of the National Disability Rights Network (NDRN) is to promote the integrity and capacity of the P&A and CAP national network and to advocate for the enactment and vigorous enforcement of laws protecting civil and human rights of people with disabilities. P&A agencies have the authority to provide legal representation and other advocacy services, under all federal and state laws, to all people with disabilities, including maintaining a presence in facilities that care for people with disabilities, where they monitor, investigate and attempt to remedy adverse conditions (<http://www.ndm.org/about.html>).

160. See U.S. GEN. ACCOUNTING OFFICE, *MEDICAID: OVERSIGHT OF INSTITUTIONS FOR THE MENTALLY RETARDED SHOULD BE STRENGTHENED* (1996), <http://www.gao.gov/assets/230/223310.pdf>; OFFICE INSPECTOR GEN., *supra* note 156.

161. PAMELA B. TEASTER ET AL., *THE 2004 SURVEY OF STATE ADULT PROTECTIVE SERVICES: ABUSE OF ADULTS 60 YEARS OF AGE AND OLDER* 10 (2004).

162. Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053, 1057 (2009).

morphed to include vulnerable adults eighteen to fifty-nine.¹⁶³ The first National Convention on Aging was held in 1950, followed by Congress' appropriation of funds in 1952 to fund social service programs for older adults—leading to the formation of protective service units.¹⁶⁴ Congress, under the 1962 amendments to the Social Security Act, “authorized payment to states for establishing protective services for persons with physical and/or mental limitations who were unable to manage their own affairs or who were neglected or exploited.”¹⁶⁵ In 1973, as part of efforts to extend the Developmental Disabilities Act and establish a Bill of Rights for people with [intellectual disabilities] in residential facilities, the United States Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare conducted a hearing into the care, treatment, habilitation, and protection of people in residential facilities.¹⁶⁶ Included was examination into the need for an independent protective services system, resulting in the creation of the nationwide state Protection and Advocacy system (P & S).¹⁶⁷ These efforts paved the way for Congress' passage in 1974 of Title XX of the Social Security Act¹⁶⁸ mandating states to use some of the money to address abuse, neglect, and exploitation of children and adults, thereby ensuring that all states create a system for addressing adult protection.¹⁶⁹ Adult protection gained prominence when the problem of elder mistreatment was framed as an “aging” issue.¹⁷⁰ This reframing of the problem seemingly led “policymakers to look at another, already existing, age-based protection regime in designing a response.”¹⁷¹ Policies aimed at protecting children from abuse and neglect became the frame of reference during the creation of the adult protective system.

This frame of reference had a profound effect on the design of elder protection laws. In some cases, laws designed to protect children were adopted in the elder mistreatment context with little more tailoring than substituting the word ‘elder’ for ‘child.’ For example, the concept of mandatory reporting, [. . .], was borrowed from mandatory child abuse reporting schemes largely

163. Paula M. Mixson, *Public Policy, Elder Abuse, and Adult Protective Services: The Struggle for Coherence*, 22 J. ELDER ABUSE NEGLECT 16, 18 (2010).

164. *Id.* at 18.

165. Pamela B. Teaster et al., *A Glass Half Full: The Dubious History of Elder Abuse Policy*, 22 J. ELDER ABUSE NEGLECT 6, 8 (2010).

166. *Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973: Hearing on S. 427 and S. 458 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare*, 93rd Cong. 418–21 (1973) (statement of Robert E. Cooke, M.D., Chairman of the Scientific Advisory Board, Joseph P. Kennedy, Jr. Foundation).

167. Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 94–103, 89 Stat. 486 (1975).

168. Social Security Act, 42 U.S.C. §§1397–1397j-1 (2010).

169. Kohn, *supra* note 162, at 1056–57.

170. *Id.* at 1057.

171. *Id.*

without consideration of whether it was appropriate for the senior population.¹⁷²

Or, appropriate for adults with disabilities.

In 1987, Title XX was converted to the Social Services Block Grant (SSBG), removing the requirement that states provide adult protection as a condition of receiving SSBG funds.¹⁷³ Adult protection competed for funds with an array of other public social welfare issues and stakeholders:

Among such competition, programs protecting vulnerable adults gained little traction, because the conversion of Title XX to a block grant effectively removed the requirement that states provide adult protection as a condition of federal financial participation. The wide discretion that the block grant allowed the states in allocating funds resulted in a disparate emphasis on adult protection and correspondingly varied laws, definitions, policies and data collection and reporting capacities among state programs.¹⁷⁴

To date, there is no federal government agency in the United States that has regulatory oversight or provides funding for adult protective services.¹⁷⁵ In 2010, the first comprehensive legislation to address elder abuse, the Elder Justice Act (EJA) was enacted into law.¹⁷⁶ Among its many provisions, the law authorizes \$100 million for state and local Adult Protective Services Programs—money that has yet to be appropriated by Congress.¹⁷⁷ Other legislation has been introduced that would advance the rights of victims of elder abuse, increase resources for investigation and prosecution of elder abuse, create in statute a National Adult Protection Services Resource Center, and expand the rights of people in long-term care facilities.¹⁷⁸ It is clear that both historically, and with the passage of the Elder Justice Act, the focus of adult protective services is to a great extent on older adults and the problem of “elder abuse.”

Limitations of Adult Protective Services and the System

The challenge of understanding and critiquing APS is that in the United States there are fifty different systems. And, depending upon how

172. *Id.*

173. Mixson, *supra* note 163, at 18–19.

174. *Id.* at 19.

175. NAT'L ADULT PROTECTIVE SERVICES ASS'N., ADULT PROTECTIVE SERVICES IN 2012: INCREASING VULNERABILITY, 2–3 (2012), <http://www.napsa-now.org/wp-content/uploads/2012/06/BaselineSurveyFinal.pdf> [hereinafter NAPSA I].

176. Elder Justice Act, Pub. L. No. 111-148, 124 Stat. 119.

177. *Id.* Additional provisions of the Elder Justice Act include allocating \$25 million for APA demonstration programs, additional support for the Long-Term Care Ombudsman Program, creating elder abuse forensic centers, authorizing an Elder Abuse Coordinating Council for federal agencies, authorizing an expert public Advisory Board on Elder Abuse, Neglect and Exploitation, and requiring the reporting of crime in long-term care facilities to law enforcement.

178. See NAT'L ADULT PROTECTIVE SERVICES ASS'N., *Policy & Advocacy*, <http://www.napsa-now.org/policy-advocacy/eja-implementation/> [hereinafter NAPSA II].

the system is structured in each state, there could be literally hundreds of “mini-systems.” In sixty-four percent of the states, the Adult Protective Services program is administered at the state level and fifteen percent at the county level, with the remaining administered in various other ways.¹⁷⁹ Furthermore, there is no national data reporting system;¹⁸⁰ therefore, states are not required to provide data to the national organizations that collect data on the APS system and disseminate such findings.¹⁸¹ The most current report documenting the challenges of APS in the United States, a system that lacks uniformity in an era of reduced state budgets, is ironically entitled “Adult Protective Services in 2012: Increasing Vulnerability.”¹⁸² The title rightfully implies that the system that is supposed to protect people who are vulnerable is not solving, and may be contributing to, the problem.¹⁸³

The focus of much of APS is responding to reports of self-neglect, caregiver abandonment or neglect, and other forms of “mistreatment,”¹⁸⁴ and then connecting individuals and their caregivers with resources. APS commonly uses a caregiver stress model¹⁸⁵ or dependency-stress model¹⁸⁶ to explain the victimization of “vulnerable adults.” The model views caregivers as over-burdened and in need of respite and supports. From this model, the sympathy often lies with the caregiver, perhaps an example of what Randall refers to as disappearing perpetrators—the perpetrator’s behavior is excused away as an outcome of caregiver burden or lack of resources.¹⁸⁷ Mainstream media reinforces this notion of burden by characterizing people with disabilities as *suffering* because of their condition.¹⁸⁸ If people with disabilities are suffering, then by proxy the people in their lives must be suffering as well, resulting in sympathy for the caregiver. Alleviate the “stress,” and victimization will cease.

APS is a custodial response to “maltreatment” or “mistreatment” of people with disabilities, grounded in the belief of their inherent vulnerabil-

179. NAPSA I, *supra* note 175, at 2.

180. NAPSA I, *supra* note 175, at 8.

181. What we know about the adult protection system in the United States comes largely from reports prepared for The National Center on Elder Abuse (within the U.S. DHHS Administration on Aging) by the National Association of Adult Protective Services Administrators (NAAPSA), The National Adult Protective Services Association (NAPSA), and the National Association of States United for Aging and Disabilities (or predecessor organization).

182. NAPSA I, *supra* note 175.

183. See generally NCEA Publications on elder Abuse, NAT’L CTR. ON ELDER ABUSE, <http://www.ncea.aoa.gov/Resources/Publication/index.aspx>.

184. Teaster et al., *supra* note 165, at 24–25.

185. Elizabeth P. Cramer & Shane Brady, *Competing Values in Serving Older and Vulnerable Adults: Adult Protective Services, Mandated Reporting, and Domestic Violence Programs*, 25 J. ELDER ABUSE NEGLECT 453, 456 (2013).

186. NAT’L RESEARCH COUNCIL, *supra* note 43, at 23.

187. Melanie Randall, *Sexual Assault Law, Credibility, and “Ideal Victims”*: Consent, Resistance, and Victim Blaming, 22 CANADIAN J. OF WOMEN AND THE L., 397, 423–25 (2010).

188. Claire Edwards, *Pathologising the Victim: Law and the Constructions of People with Disabilities as Victims of Crime in Ireland*, 29 DISABILITY & SOC’Y 685 (2014).

ity. This system reinforces cultural distinctions between “normal” and “special,” further disadvantaging people with disabilities. The system inherently takes away autonomy, choice, and the right to self-determination and has been criticized as a paternalistic response¹⁸⁹ to a socially constructed problem. The following examination of the paternalistic nature of the system for older adults has applicability to the paternalistic nature of the system for adults with disabilities classified as vulnerable under state statutes:

Although well-intentioned, many of these statutes take a paternalistic approach that has serious—and potentially unjustifiable—civil rights implications for the seniors they are designed to protect. For example, some limit older adults’ substantive due process rights by criminalizing certain forms of consensual sexual behaviors; others undermine older adults information privacy rights by requiring the doctors, attorneys, priests or other confidant to report suspected abuse or neglect to the state.¹⁹⁰

The practices of APS workers, operating in a paternalistic system, have been described as disempowering and thwarting autonomy.¹⁹¹ Assessment and risk management, measures taken to mitigate possible future bad outcomes,¹⁹² tend to be approached from the perspective that the professional knows best, justifying actions taken for the person’s own good (even if they go against the person’s wishes).¹⁹³

One of the most controversial special protections is “mandated reporting,”¹⁹⁴ with all but three states in the United States having mandated reporting laws.¹⁹⁵ Unannounced home visits by APS workers put people at even greater risk.¹⁹⁶ The person on whose behalf the report is made may not even know that a report has been made. If the person with a disability is dependent upon the alleged perpetrator for physical care or financial support, serious consequences can ensue. Visits from law enforcement are very different than from visits from social services workers.¹⁹⁷ A very different message is sent to both perpetrators and crime victims about the importance of and the seriousness of the offenses when the response is from a criminal justice professional. Even the language of APS minimizes the victimization—assault becomes physical abuse, terroristic threats become verbal abuse, criminal sexual assault becomes sexual abuse. Furthermore, “vulner-

189. Cramer & Brady, *supra* note 185, at 461–63; Edwards, *supra* note 188; Kohn, *supra* note 162, at 1055–58.

190. Kohn, *supra* note 162, at 1055.

191. Cramer & Brady, *supra* note 185, at 461–63.

192. Fiona Parley, *Could Planning for Safety be a Realistic Alternative to Risk Management for those Deemed Vulnerable?*, 13 J. OF ADULT PROTECTIONS 6, 8 (2011).

193. Cramer & Brady, *supra* note 185, at 460.

194. *See* Kohn, *supra* note 162.

195. NAPSA I, *supra* note 175, at 36–37.

196. Cramer & Brady, *supra* note 185, at 462.

197. *See generally* Cramer & Brady, *supra* note 185.

ability” of people who are already “predetermined to be vulnerable” by state statute, is determined by others’ assessment of risk and ability.¹⁹⁸

The “Adult Protective Services in 2012: Increasing Vulnerability” report provides ample evidence for concern regarding the system of APS workers making determinations about the lives of adults with disabilities. Most concerning are the:

(a) failure to uniformly require a college degree as a minimum educational requirement for training personnel, supervisors, investigators/caseworkers, and intake workers;

(b) failure to uniformly require a law degree to serve as APS legal staff, with 24 percent of states not requiring APA legal staff to have a law degree;

(c) limited pre-service and in-service training, with seventeen states requiring a week or less training of new workers and only twenty-three states requiring APS supervisors to attend a supervisory training;

(d) lack of training specific to disability;

(e) fact that APS is not the only focus of work for APS workers; and

(f) high caseloads, with caseworkers in ten states having fifty to one hundred cases.¹⁹⁹

APS is a complaint-based response system to “mistreatment” that has already occurred, primarily engaging in secondary prevention.²⁰⁰ There is no evidence that APS engages in primary prevention—strategies aimed at changing cultural norms, attitudes, and policies that contribute to, reinforce, and perpetuate victimization to keep “mistreatment” from occurring in the first place.²⁰¹ Furthermore, there is no evidence that APS engages in risk reduction efforts to help “vulnerable” adults learn skills that can reduce their risk of being a target, to teach skills to recognize and avoid higher risk situations and people, and to educate them about their rights and resources. The success & challenges experienced by the U.K. in transforming their system of adult protection to a system of safeguarding can be instrumental

198. *Id.*

199. *See* NAPSA I, *supra* note 175.

200. CTR. FOR DISEASE CONTROL, SEXUAL VIOLENCE PREVENTION: BEGINNING THE DIALOGUE (2004), <http://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf>.

201. *Id.* PRIMARY PREVENTION activities focus on removing the root cause BEFORE the social problem has occurred to prevent initial perpetration or victimization. Strategies are aimed at changing cultural norms, attitudes and policies that reinforce and perpetuate interpersonal violence. SECONDARY PREVENTION activities focus on the immediate responses *after* the social problem has occurred. Efforts aim to prevent re-victimization and to deal with the short-term consequences of interpersonal violence and to stop perpetrators from re-offending through early identification and intervention. TERTIARY PREVENTION focuses on the long-term responses to the social problem *after* it has occurred to deal with the lasting consequences of victimization, restore victims/survivors health and wellness, and prevent perpetrators from re-offending through treatment, incarceration, and other forms of monitoring and containment.

in re-conceptualizing and reforming the system in the United States.²⁰² The lack of effort to support the empowerment of people with disabilities within the APS is further evidence of the paternalistic nature of the system and lack of empowerment-based practices. One scholar asks, “Are we restricting liberty for the convenience of others? To appease the ‘fear of others.’ To ease the conscience of others who want to believe that as a society we are addressing this problem?”²⁰³

It is important to recognize that for people with disabilities, vulnerability and risk of crime victimization “has a source, namely the perpetrator, who is responsible for creating the risk and who ought to be held accountable.”²⁰⁴ One could argue that our adult protection system thwarts the ability for people with disabilities to be recognized and responded to as constituents of the criminal justice system. One legal scholar’s examination of “disappearing perpetrators” has applicability when APS is used as a substitute for pursuing “abuses” and “abusers” within the criminal justice system—de facto, disappearing perpetrators.²⁰⁵

In most states, APS programs are the first responders to crime victimization of people with disabilities because of their “vulnerable adult status” in our society. Eighteen states do not have a toll-free hotline to report abuse.²⁰⁶ Thirty-two do not have an intake line staffed twenty-four hours a day.²⁰⁷ Thirty-five of the states have up to twenty-four hours to initiate a case.²⁰⁸ Eighty-five percent of states have a specific time frame to complete investigations ranging from thirty days to ninety days.²⁰⁹ Very limited information is provided in APS system reports about the role and relationship of APS with law enforcement, perhaps indicative of part of the problem. One of the most egregious disadvantages experienced by people with disabilities in our society is that of victim of crime.²¹⁰ What does it say about the value of people with disabilities in our society when the publically sanctioned and publically funded response to crime victimization of people with disabilities is calling social services? This is hardly in accordance with tenBroek’s vision of integrationism.²¹¹

202. Andrew Reece, *Leading the Change from Adult Protection to Safeguarding Adults: More than just Semantics*, 12 J. OF ADULT PROTECTION 30 (2010).

203. Parley, *supra* note 192, at 9.

204. Janine Benedet & Isabel Grant, *A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law*, 43 OTTAWA L. REV. 447, 455 (2013) [hereinafter Benedet & Grant I].

205. Randall, *supra* note 187, at 424.

206. NAPSA I, *supra* note 175, at 24–25.

207. *Id.*

208. *Id.*

209. *Id.* at 26–27.

210. Paul Willner, *Assessment of Capacity to Participate in Court Proceedings: A Selective Critique and Some Recommendations*, 17 PSYCHOL., CRIME & L. 117, 117–18 (2011).

211. tenBroek & Matson, *supra* note 1.

PART VI: BARRIERS TO JUSTICE IN THE CRIMINAL JUSTICE SYSTEM

“Equality before the law is a fundamental human right enshrined in various United Nations documents on human rights.”²¹² Article 7 of the Universal Declaration of Human Rights, a milestone document in human rights, declares: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”²¹³ Article 15 of the Convention on the Elimination of all Forms of Discrimination Against Women, adopted by the General Assembly in 1979, declares: “States Parties shall accord to women equality with men before the law.”²¹⁴ “In criminal justice, this fundamental human right is heavily dependent upon legislation and process both in court and by the investigating agency. If one of these ‘legs’ is missing, then equality is denied and any human rights declaration is rendered effectively meaningless.”²¹⁵

This last part of the paper focuses on barriers to justice in the criminal justice system for people with disabilities, in particular people with mental disabilities. Such disabilities may be present from birth or acquired, such as through illness, disease process, accident, or as a consequence of crime victimization. It is the intent of the author to highlight some of the most salient barriers, as well as identify legal scholars who are critiquing systems of justice and proposing criminal justice system reform.

The Merriam-Webster dictionary defines “barrier” as:

- (1) “something (such as a fence or natural obstacle) that prevents or blocks movement from one place to another”;
- (2) “a law, rule, problem, etc., that makes something difficult or impossible”, or
- (3) “something that makes it difficult for people to understand each other.”²¹⁶

All three simple definitions are applicable to understanding barriers to justice for people with disabilities in the criminal justice system. Barriers may be classified into two broad groups: systemic and personal (or individual).²¹⁷ “Systemic barriers” (or external barriers) are patterns of behavior, policies or practices that are part of societal or administrative structures of an organization, and which create or perpetuate a position of disadvantage

212. Clark, *supra* note 131, at 221.

213. G.A. Res. 217A, at Art. 7 (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/index.html>.

214. G.A. Res. 34/180, at Art. 15 (1979), <http://www.un.org/womenwatch/daw/cedaw/text/econvention.html>.

215. Clark, *supra* note 131, at 221.

216. *Barrier*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/barrier>.

217. Fitzsimons, *supra* note 53.

for people with disabilities.²¹⁸ In the case of crime victimization they are the external barriers that make it difficult to prevent, stop, access services, and obtain redress from such victimization. Systemic barriers can be classified into five broad categories: physical, economic, communication, service system, and attitudinal.²¹⁹

“Personal barriers” (or individual barriers) are limitations as a result of individual impairment, compounded by a lack of knowledge, skills and resources, and the negative thoughts, feelings, beliefs, and fears, real or imagined, that operate within a person and result in disempowerment and disadvantage for people with disabilities.²²⁰ Personal barriers are enhanced, reinforced, and created by other persons, systems, and policies external to the individual. Personal barriers that are particularly detrimental to the empowerment and well-being of people with disabilities include: learned helplessness, learned compliance, low self-esteem, self-blame, denial, sense of responsibility to others, fear of retaliation, fear of the unknown, fear of losing custody of children, lack of knowledge, skills, and resources, and poverty.²²¹

Failure to Represent the “Ideal” Victim

Given evidence of increased rates of crime victimization, one might expect that prosecuting such crimes would be a priority within the criminal justice system. Furthermore, given the seemingly prevailing belief in the inherent vulnerability of people with disabilities, meaning that the vulnerability resides within the person as a result of his or her impairment, there would be even more impetus for people with disabilities being a priority within the criminal justice system. Why might this dichotomy exist? Attitudinal barriers may help to explain this lack of priority.

One of the barriers to access to justice within the criminal justice system for persons with disabilities may be the failure to represent the “ideal victim.” Persons with disabilities—the “victimological others”—do not make an ideal victim within our society or the criminal justice system.²²² The “victimological other” refers to “the person who does not readily fit into perceived norms about who or what the victim of crime should look like or behave.”²²³ There are two key traits of the ideal victim: he or she must be *both* vulnerable and not to blame for his or her victimization.²²⁴ The “vulnerability” of people with disabilities to crime victimization has

218. Adapted from the definition of “systemic barriers” in FITZSIMONS, *supra* note 53, at 64.

219. *Id.* Refer to Chapter 4 for an extensive examination of systemic barriers as they pertain to people with disabilities.

220. Adapted from the definitions of “personal barriers” in *id.* at 89.

221. *Id.* Refer to Chapter 5 for an extensive examination of personal barriers as they pertain to people with disabilities.

222. Edwards, *supra* note 188.

223. *Id.* at 686.

224. *Id.* at 688.

already been established. The second criteria, not blamed for his or her victimization, merits close examination in order to support the assertion that people with disabilities fail to represent the ideal victim.

One's initial assumption may be that people with disabilities are non-deserving victims. This thinking would fit with the belief system that people with disabilities are weak, frail, helpless, and innocent (and if so, not culpable for their own victimization). Yet, the history of treatment of people with disabilities tells a far different story: warehousing in institutions, segregation, forced sterilization, genocide, medical experimentation, and classified using an array of derogatory terms.²²⁵ People with disabilities, especially people with mental disabilities, are often viewed in society as deviant and dangerous²²⁶—a phenomenon noted by tenBroek in his reference to people with disabilities “collectively known as deviant” and “devious.”²²⁷

While the attitudes and treatment of people with disabilities no longer represents such egregious and widespread violation of basic human rights, the national network of Protection and Advocacy organizations from across the United States can attest to the many ways that people with disabilities are victimized.²²⁸ The inhumane treatment at METO (The Minnesota Extended Treatment Options in Cambridge, Minnesota) documented in the report *Just Plain Wrong: Excessive Use of Restraints and Law Enforcement Style Devises* clearly documents that professionals working at the facility saw the residents as deviant, deserving of, and ultimately responsible for their own victimization.²²⁹ The *Just Plain Wrong* report also documents the twelve systems in Minnesota, with specific roles “intended to be a check and balance system to prevent” the egregious victimization at METO.²³⁰ The system of checks and balances failed. The Ombudsman wrote “the question raised in this review is how specific roles within the system are required to provide checks and balances and a level of protection could have turned the other way while these vulnerable individuals were being

225. Mackelprang & Salsgiver, *supra* note 20, at 3–29.

226. *Id.*

227. tenBroek & Matson, *supra* note 1.

228. The mission of the National Disability Rights Network NDRN's mission is to promote the integrity and capacity of the P&A and CAP national network and to advocate for the enactment and vigorous enforcement of laws protecting civil and human rights of people with disabilities. P&A agencies have the authority to provide legal representation and other advocacy services, under all federal and state laws, to all people with disabilities, including maintaining a presence in facilities that care for people with disabilities, where they monitor, investigate and attempt to remedy adverse conditions. For more information about the Network go to: <http://www.ndrn.org/en/about.html>.

229. MINNESOTA OMBUDSMAN FOR MENTAL HEALTH & DEV. DISABILITY, *JUST PLAIN WRONG: EXCESSIVE USE OF RESTRAINT AND LAW ENFORCEMENT STYLE DEVISES* (2008), http://www.mn.gov/mnodd/meto_settlement/documents/just_pl.

230. *Id.* at 9.

routinely restrained.”²³¹ Furthermore, the widespread practice in child and adult disability service systems of labeling people with disabilities as having “behaviors” necessitating corrective action on the part of authority-figures²³² and the excessive use of seclusion and restraint of children receiving special education services often in segregated settings²³³ does not bode well for people with disabilities being seen as ideal victims.

Randall’s examination of *Sexual Assault Law, Credibility, and “Ideal Victims”* sheds additional light to why persons with disabilities fail to represent the ideal victim.²³⁴ Sexual assault is a serious, persistent, and pervasive problem for persons with disabilities, therefore Randall’s examination is particularly germane. Sexual assault victims are perhaps the most disadvantaged of all crime victims given the array of myths and stereotypes about what “real” assaults and the “ideal” victim look like, complexities surrounding the law of consent, and the tendency to assail the credibility of victims.²³⁵

The archetype of the ideal sexual assault victim, which has expanded somewhat over the years in response to increased social and legal awareness of violence against women, nevertheless still functions to disqualify many complainants’ accounts of their sexual assault experiences. To this extent, the ‘ideal victim’ myth continues to undermine the credibility of those women who are seen to deviate too far from stereotypical notions of “authentic” victims and from what are assumed to be “reasonable” victim responses.²³⁶

It is important to understand the concept of *intersectionality* as it applies to persons with disabilities as victims of sexual assault and other crimes, with disadvantages compounded for racial/ethnic minorities and LGBT. “Racialized and marginalized women, who are less valued and less credible in a society characterized by racism [and for persons with disabilities (ableism) and for persons who are LGBT (heterosexism)], are by definition, less readily identified as ‘ideal victims’ and more easily stigmatized as ‘bad’ or ‘undeserving’ victims (if their claims are heard at all).”²³⁷ Women

231. *Id.* at 10–11.

232. This assertion is based upon thirty years of experience working, researching, teaching, and consulting in the field of disability. The term “behaviors” is widely used in the field to refer to when a person in a subordinate position has engaged in a “behavior” that is deemed by a person in a position of power and authority as inappropriate, noncompliant, problematic – regardless of whether the “behavior” is justified or would be deemed perfectly appropriate by a person without a disability.

233. See U.S. Senate Health, Educ., Lab. & Pensions Comm., *Dangerous Use of Seclusions in Sch. Remains Widespread and Difficult to Remedy: A Rev. of Ten Cases*, <http://www.help.senate.gov/imo/media/doc/Seclusion%20and%20Restrains%20Final%20Report.pdf>.

234. Randall, *supra* note 187.

235. See *Id.*

236. *Id.* at 398.

237. *Id.* at 410.

and men with mental disabilities have been simultaneously treated as asexual and hypersexual,²³⁸ with the latter used to portray the victim as the true aggressor.²³⁹ Women with disabilities who do not conform to the conventional standard of physical beauty may be subjected to the belief that they should be lucky that a man displays sexual interest in them and that they ought to be grateful for the attention.²⁴⁰ The issues are particularly complicated for men with disabilities given the societal expectations of male masculinity, and the fear of being labeled as homosexual when the perpetrator is male.²⁴¹ Disclosure of abuse is very difficult for men with disabilities, with the “male ethic” of “not squealing or complaining” reported.²⁴² “The assumption that a non-consenting victim will show rigorous physical resistance may be stronger for male victims than for women.”²⁴³

In cases of sexual assault, the victim’s response, including resistance, timeliness of disclosure and display of emotional distress, is subjected to scrutiny to determine if the response fits with what is perceived of as the typical and “normal” trauma and coping responses.²⁴⁴ “Different psychological responses manifest different behavioral patterns or coping strategies for each survivor of sexual assault. In addition, external factors such as victim social support network, severity of the assault, or a victim’s relationship to the assailant may also have an impact on a victim’s psychological functioning after a sexual assault.”²⁴⁵ Persons with disabilities, in particular people with mental disabilities, are disadvantaged when professionals within the criminal justice system fail to understand the complexities of human psychology and human behavior within a multifactorial model (such as the Integrated Ecological Model presented in Part IV). A victim’s failure to resist or verbalize “no” is perceived differently when understood as a consequence of compliance training²⁴⁶ or as the result of a lack of awareness of information about sexual behaviors and sexual assault.²⁴⁷ A victim’s reluctance to report a crime committed by a family member is perceived

238. Janine Benedet & Isabel Grant, *Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases*, 50(1) OSGOODE HALL L.J. 1, 8 (2012) [hereinafter Benedet & Grant II]; FITZSIMONS, *supra* note 53, at 83–84; Di Giulio, *supra* note 151, at 53.

239. Benedet & Grant II, *supra* note 238, at 8.

240. Benedet & Grant II, *supra* note 238, at 7–8; FITZSIMONS, *supra* note 53, at 83–84, 93; Dena Hassouneh-Phillips & Elizabeth McNeff, “*I Thought I was Less Worthy*”: *Low Sexual and Body Esteem and Increased Vulnerability to Intimate Partner Abuse in Women with Physical Disabilities*, 23 SEXUALITY & DISABILITY 227, 227 (2005).

241. Michelle Davies, *Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Support Services*, 7 AGGRESSION & VIOLENT BEHAV. 203, 208 (2002); *See generally* Saxton II, *supra* note 53.

242. Saxton II, *supra* note 53, at 9.

243. Benedet & Grant II, *supra* note 238, at 9.

244. Randall, *supra* note 187, at 427.

245. *Id.* at 427.

246. Randall, *supra* note 187, at 150.

247. *Id.* at 152.

differently with an understanding of the significant financial barriers people with disabilities face limiting options.²⁴⁸

Furthermore, persons with disabilities, in particular persons with mental disabilities, cannot be “ideal” victims as long as players within the criminal justice system fail to view them as credible reporters and witnesses of sexual assault and of other crimes.²⁴⁹ “It is often assumed that they [people of both sexes with mental disabilities] cannot distinguish fact from fiction, that they are more likely to make up stories around sexual assault, or that they are more likely to lie because they do not appreciate the solemnity and consequences of judicial proceedings”²⁵⁰—despite empirical evidence to support such assertions.

Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar ‘equality’; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished.²⁵¹

In addition, the notion of the ideal victim “implies that there is an ideal offender, someone who more often than not is a stranger.”²⁵² Perpetration of crime victimization against people with disabilities is generally thought to be committed by someone in the person’s immediate social network: a parent, partner, sibling, friend of the family, or a paid care giver²⁵³—although this is an area where more epidemiological research is needed. The results of the most recent NCVS found 41 percent of violence against persons with disabilities was perpetrated by someone well known or by a casual acquaintance, compared to 35 percent of violence against persons without disabilities.²⁵⁴ Perpetration of violence against persons with disabili-

248. *Id.* at 156.

249. Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues*, 52 MCGILL L.J. 515, 546 (2007) [hereinafter Benedet & Grant III]; Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief*, 52 MCGILL L.J. 243, 257 (2007) [hereinafter Benedet & Grant IV]; Benedet & Grant I, *supra* note 204, at 2–9; Janine Benedet & Isabel Grant, *More Than an Empty Gesture: Enabling Women with Mental Disabilities to Testify on a Promise to Tell the Truth*, 25 CANADIAN J. OF WOMEN AND L. 31, 33–40 (2013) [hereinafter Benedet & Grant V]; Louise Ellison, *Responding to the Needs of Victims with Psychosocial Disabilities: Challenges to Equity of Access to Justice*, 1 CRIM. L. REV. 28, 40–41 (2015) [hereinafter Ellison I]; Louise Ellison et al., *Challenging Criminal Justice? Psychosocial Disability and Rape Victimization*, 15 CRIMINOLOGY & CRIM. JUST. 225, 230–234 (2015) [hereinafter Ellison II]; Voula Marinos et al., *Victims and Witnesses with Intellectual Disability in the Criminal Justice System*, 61 CRIM. L. Q. 517 (2014); Anthony L. Pillay, *The Rape Survivor with an Intellectual Disability vs. the Court*, 42 S. AFRICAN J. OF PSYCHOL. 312 (2012); SOBSEY, *supra* note 93; Julia L. Wacker, Susan L. Parish, & Rebecca J. Macy, *Sexual Assault and Women with Cognitive Disabilities: Codifying Discrimination in the United States*, 19 J. OF DISABILITY POL’Y STUD. 86 (2008).

250. Benedet & Grant II, *supra* note 238, at 9.

251. tenBroek & Matson, *supra* note 1, at 814.

252. *Id.* at 689.

253. See FITZSIMONS, *supra* note 53, at 40.

254. HARRELL, *supra* note 63, at 9.

ities by other relatives has been higher than for persons without disabilities for four of the five reporting years.²⁵⁵ The notion that a caregiver would *intentionally* harm a person with a disability challenges our view of the ideal perpetrator. This notion is in accordance with the caregiver-stress or dependency-stress model used to explain the victimization of vulnerable adults.²⁵⁶

People with disabilities fail to represent the “ideal” victim because of prejudicial attitudinal barriers—barriers that may be as entrenched today as when the Americans with Disabilities Act was passed more than twenty-five years ago.

Barriers: Reporting and Response from Police

For most people, police officers are the most visible criminal justice professionals and are likely the first point of contact to the criminal justice system. Given the importance of the police officers’ role in the criminal justice system for victims of crime, the experiences of people with disabilities with law enforcement is examined in order to identify barriers to justice requiring remedy.

Reporting Crimes

The numbers estimating the rates of crime victimization perpetrated against people with disabilities is believed to be an underestimate of the true prevalence, in part due to lack of reporting on the part of victims. The results of the most recent National Crime Victim Survey (NCVS) do not show significantly different rates of reporting to the police of violent crimes perpetrated against people with and without disabilities, despite the widespread belief that crimes perpetrated against people with disabilities are widely underreported.²⁵⁷ These results should be interpreted with an understanding of the limitations of the research.²⁵⁸ The percentage of violent crimes reported to police by persons with disabilities (47.5 percent) and without disabilities (44.2 percent) is comparable, with the victim being the most common reporter (with disabilities 57.8 percent and without disabilities 58.4 percent).²⁵⁹ Over the last five years, the percentage of violent crimes against persons with disabilities that was reported to police did not change significantly.²⁶⁰ In the five-year period studied, the majority of vio-

255. *Id.* 2009: 10.5% persons with disabilities vs. 5.9 percent persons without disabilities; 2011: 11.5 percent persons with disabilities vs. 7.3 percent persons 9.0 percent persons with disabilities vs. 5.6 percent persons without disabilities.

256. *See* Social Security Act, 42 U.S.C. §§1397–1397j-1 (2010).

257. BUREAU OF JUSTICE STATISTICS, *supra* note 60, at 10.

258. *See generally id.* at 13; HARRELL, *supra* note 63, at 11 for further explanations of the limitations of the estimates.

259. HARRELL, *supra* note 63, at 10.

260. *Id.*

lent crimes against persons with disabilities that was reported to the police were done so by the victim, similar to rates among violent crime victims without disabilities.²⁶¹ However, the trend of people with disabilities reporting their own victimization has been on the decline over the last few years, from 71.3 percent in 2009 to 57.8 percent in 2013, with a doubling of the category of “someone else” reporting crime victimization.²⁶²

The NCVS queries the reasons for not reporting crimes to the police. The reasons for not reporting are varied and fairly comparable by victim disability status. Persons with disabilities identified the following reasons for not reporting crimes to the police: (a) 43.6 percent responded “dealt with another way” (e.g., reported to another official and private or personal matter); (b) 38.4 percent responded “other reason” (e.g., did not want to get offender into trouble with the law, was advised not to report to police, afraid of reprisal, too inconvenient, did not know why it was not reported, and other reasons); (c) 21.1 percent responded “not important enough to respondent” (e.g., minor or unsuccessful crime, child offender, and not clear if a crime occurred); and (d) 19.5 percent responded “police would not help.”²⁶³ These reasons for not reporting crimes to the police corroborate many of the reasons identified in the larger body of literature: not knowing that a report should be made or how to make a report, access/accommodation barriers, fear of being discredited based upon disability, feelings of shame or embarrassment, fear of retaliation or other negative consequences (especially when the perpetrator is a family member or paid/unpaid caregiver), and negative past experiences.²⁶⁴ Notably, not being believed or viewed as a credible reporter contributes to a lack of faith in the system.

Victims with disabilities do not report crimes because society does not provide an adequate, supportive response. Reasons for not reporting appear to be connected to personal and systemic barriers, many of which are related to concerns about secondary victimization and other types of negative social reactions contributing to a crime victim’s decision *not* to disclose the

261. *Id.*

262. *See id.* at 10. “Someone else” is not defined, but does not include: other household member, someone official, or police who were at the scene.

263. *Id.* at 11. (explaining that respondents could check more than one reason category resulting in the percentage not adding up to 100%).

264. Beckie Child, Mary Oschwald, Mary Ann Curry, Rosemary B. Hughes, & Laurie E. Powers, *Understanding the Experience of Crime Victims With Disabilities and Deaf Victims*, 10 J. OF POL’Y PRAC. 247, 249 (2011) [hereinafter Child]; *see* CSGJC, *supra* note 114, at 3; Ellison I, *supra* note 249, at 31; Ellison II, *supra* note 249, at 230; FITZSIMONS, *supra* note 53, 407–09; Jennifer Keilty & Georgiana Connelly, *Making a Statement: An Exploratory Study of Barriers Facing Women With Intellectual Disability When Making a Statement About Sexual Assault to Police*, 16 DISABILITY & SOC’Y 273, 279 (2010); NAT’L RESEARCH COUNCIL, *supra* note 43, at 49–50; Ortoleva, *supra* note 2, at 312; Joan R. Petersilia, *Crime Victims With Developmental Disabilities*, 28 CRIM. JUST. AND BEHAV. 655, 661 (2001); Chih Hoong Sin, Annie Hedges, Chloe Cook, Nina Mguni, & Natasha Comber, *Adult Protection and Effective Action in Tackling Violence and Hostility Against Disabled People: Some Tensions and Challenges*, 2 J. OF ADULT PROTECTION 63, 67–68 (2011); SOBSEY, *supra* note 93.

victimization to another person or report to police.²⁶⁵ Negative social reactions include disbelief, blame, and general unsupportiveness. At the time of making a report, for persons with an invisible disability, a decision must be made about whether or not to disclose the disability.²⁶⁶ And when the “disability is disclosed” or is readily apparent, there are concerns about being treated fairly. Persons with disabilities have legitimate concerns that engagement with law enforcement will not be based upon him or her as an individual and upon his or her ability; rather, the relationship with law enforcement will be based upon the officer’s knowledge and perception of the disability or diagnostic label. One researcher’s review of the literature pertaining to sexual assault found that investigative and legal personnel are more likely to commit secondary victimization than medical or social service personnel.²⁶⁷ The concept of intersectionality applies to understanding the reporting of crimes. For example, persons with disabilities who are racial/ethnic minorities or who have other disadvantaged minority status in our society may not report crimes due to perceived or real barriers based upon their minority status.²⁶⁸

Response from Police

The police are the first point of contact in, and the gatekeepers to, the criminal justice system. The response from police once reports are made by persons with disabilities (or on behalf of persons with disabilities) is crucial to accessing all other services and protections the criminal justice system affords crime victims. Ortoleva frames the issue of access to justice as a human right, and the response from police is within the rights framework.²⁶⁹

The ability to access justice is of critical importance in the enjoyment of all other human rights and in the fair and effective administration of justice. For example, a person with a disability who feels that she or he has been denied the right to work may wish to turn to the justice system to seek a remedy. However, if the justice system fails to accommodate her or his physical, communication, or other disability-related needs, and/or expressly discriminates against her or him, then clearly denial of access to the justice system also results in denial of protection of the right to work. Similarly, a person with a disability who has been the victim of a crime may wish to report the crime to the police and

265. Child, *supra* note 264, at 250; Ellison II, *supra* note 249, at 230; Mary Oschwald, Mary Ann Curry, Rosemary B. Hughes, Anne Arthur, & Laurie E. Powers, *Law Enforcement’s Response to Crime Reporting by People With Disabilities*, 12 J. OF POL’Y PRAC. AND RES. 527, 528 (2011) [hereinafter Oschwald]; see CSGJC, *supra* note 114, at 3.

266. *Id.*

267. HARRELL et al., *supra* note 102, at 76.

268. Child, *supra* note 264, at 259.

269. Ortoleva, *supra* note 2.

press charges against the offender. However, if she or he is denied physical access to the police station, clear communication with the police, or access to information that is understandable, then that person may not be able to exercise her or his rights as a victim. These examples demonstrate that human rights are indivisible, interdependent, and interconnected.²⁷⁰

Congress has attempted to remedy these barriers and provide access to law enforcement for persons with disabilities. Title II of the Americans with Disabilities Act protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by state and local law enforcement departments and personnel through the provision of “reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services” to crime victims.²⁷¹

There are an array of barriers that fit into two-broad categories: (1) administrative policy and procedural-based barriers; and (2) police officer practice-based barriers. The two categories are interconnected. “Administrative policy and procedural-based barriers” pertains to the failure of police administrators to “formulate and implement a comprehensive policing strategy to meet the needs of people with disabilities” to ensure access to justice.²⁷² Administrative policy and procedural-based barriers include the following: (a) physical access barriers, such as police stations that are not physically accessible or located in areas readily accessible to people with disabilities who rely upon public transportation; and (b) programmatic access barriers, including inaccessible reporting systems, forms, procedures, and resources for accommodating people with differing communication needs and abilities (e.g., sign language interpreters, materials in alternative formats for crime victims who are blind, modification to protocols to accommodate interviewing victims and witnesses with mental disabilities).²⁷³

The findings from a survey of one hundred thirty-three law enforcement agencies in the United States are instrumental in understanding administrative policy and procedural barriers.²⁷⁴ In response to questions

270. *Id.* at 285–86.

271. 28 C.F.R. Part 35 (2011).

272. Clark, *supra* note 131, at 222.

273. Sources identifying administrative policy and procedural-based barriers: Andrew Bailey & Owen Barr, *Police Policies on the Investigation of Sexual Crimes Committed Against Adults Who Have a Learning Disability*, 4 J. OF INTELL. DISABILITIES 129, 134 (2000); Child, *supra* note 264, at 257–58; Rachel Davies, Ian Mansell, Ruth Northway, & Robert Jenkins, *Responding to the Abuse of People With Learning Disabilities: The Role of the Police*, 1 J. OF ADULT PROTECTION 11, 17 (2006); Ellison I, *supra* note 249, at 31; Ellison II, *supra* note 249 at 230; Oschwald, *supra* note 265, at 531–33; Ortoleva, *supra* note 2, at 305; Sin et al., *supra* note 41, at 53–56; *see* Barrow, *supra* note 89 (dissertation).

274. *See* Oschwald, *supra* note 265, at 534–38 for an explanation of their representative sampling method of four types of law enforcement departments: municipal police, county sheriffs, campus police, and tribal police, and information about survey construction and distribution.

about recording, asking about, and addressing crime victims' accommodation needs (such as need for an interpreter, accessible transportation, and extra time to talk to an officer), only 16 percent reported recording accommodation needs on the crime report.²⁷⁵ Additionally, only 14 percent had a protocol for asking about accommodation needs (some only when "disability" was apparent).²⁷⁶ Approximately 37 percent of agencies had protocols for providing accommodations, and 31 percent reported having successful and effective protocols for facilitating crime reporting with victims with disabilities.²⁷⁷ Lack of a multidisciplinary teamwork approach with formal cooperative agreements with community-based agencies²⁷⁸ to better respond to and support crime victims with disabilities was also identified as both administrative policy and procedural-based barriers in the literature. Finally, lack of pre-service and post-service training of police investigators relating to the needs of crime victims with disabilities is lacking. Of the law enforcement departments surveyed, 42 percent provided officers with disability awareness training, averaging 1.5 hours per year.²⁷⁹ Disability awareness training of other department personnel was even lower, with 14 percent of agencies training crime victim advocates, and 17 percent of agencies training other civilian personnel (also approximating 1.5 hours annually).

Conversely, "police officer practice-based barriers" pertain to barriers that occur at the point of contact and during the investigation process between crime victims with disabilities and police officers. The major issues that arise are associated with lack of knowledge to distinguish and accommodate different disabilities and negative stereotypes and prejudice, ultimately impacting perceptions of capabilities, credibility, and reliability.²⁸⁰ For example:

[P]olice use their assessment of credibility to determine the time and resources, if any, to be allocated to taking a statement and investigating a complaint. If complainant credibility is used to prioritize complaints, it is easy to see how complaints by people

275. *Id.* at 535.

276. *Id.*

277. *Id.* at 535–36.

278. For example, Centers for Independent Living and other disability advocacy organizations, domestic and sexual violence, APS, domestic violence shelters, and sexual violence crisis centers.

279. Oschwald, *supra* note 265, at 538.

280. Sources identifying police officer practice-based barriers: Bailey & Barr, *supra* note 273, at 131; Child, *supra* note 264, at 255–58; Ellison I, *supra* note 249, at 31; Ellison II, *supra* note 249, at 230; Keilty & Connelly, *supra* note 264, at 274; Scott J. Modell & Suzanna Mak, *A Preliminary Assessment of Police Officers' Knowledge and Perceptions of Persons With Disabilities*, 46 INTELL. AND DEVELOPMENTAL DISABILITIES 183, 187 (2008); Ortoleva, *supra* note 2, at 310–11; Sin et al., *supra* note 41, at 56; see CSGJC, *supra* note 114.

with [mental disabilities] will routinely fall to the bottom of the list.²⁸¹

An absence of clear policies and procedures for investigating crimes against people with disabilities, including accommodation of interview techniques that support a person making a statement, can lead to “individual attitudes and personal values of police officers and other staff”²⁸² arbitrarily determining outcomes for crime victims with disabilities that are not based upon the merits of the case.

Barriers Within the Justice System

To be fully included in society, persons with disabilities need access to justice. As long as persons with disabilities face barriers to their participation in the justice system, they will be unable to assume their full responsibilities as members of society or to vindicate their rights. For this reason, it is important that barriers be removed so that persons with disabilities can enjoy the equal opportunity to perform their duties as parties, witnesses, jurors, lawyers, prosecutors, judges, arbitrators, and other participants in the administration of justice.²⁸³

The origins of the U.S. criminal justice system date back to colonial times and the creation of the U.S. Constitution and the Bill of Rights. It took almost two hundred years to afford persons with disabilities civil rights protections with the enactment of the Americans with Disabilities Act in 1990. Legal scholars examining barriers to justice for persons with disabilities, in particular persons with mental disabilities, question some of the universal and accepted practices that inherently disadvantage persons with disabilities—a population that the system was never created to represent or accommodate—in the justice system.

The barriers are rooted in ableism. *Ableism* refers to “the belief that people with disabilities are inferior to nondisabled people because of their differences.”²⁸⁴

Ableism devalues people with disabilities and results in segregation, social isolation, and social policies that limit their opportunities for full participation. Just as with other isms, when ableism is operationalized into policy and practice, professionals [. . .] underestimate capabilities, limit self-determination, and behave oppressively toward the people subjected to ableism.²⁸⁵

This oppression is coupled with preferential treatment and advantage towards persons without disabilities who are temporarily able-bodied. The

281. Keilty & Connelly, *supra* note 264, at 281.

282. Bailey & Barr, *supra* note 273, at 129.

283. Ortoleva, *supra* note 2, at 286.

284. Mackelprang & Salsgiver, *supra* note 20, at 9.

285. *Id.*

hurdles that persons with disabilities must overcome to provide testimony to their own crime victimization or as witnesses to the victimization of others, is seemingly insurmountable. The proverbial deck is stacked against them.

Barriers to Testifying: Assessment of Capacity

The issue of capacity and consent was examined by a panel of leading experts in the field as part of the National Research Council's Workshop on Crime Victims with Developmental Disabilities and documented in the subsequent report of the proceedings (see Part I).²⁸⁶ The panel found:

Historically, society often assumed that people with disabilities—especially those with cognitive disabilities such as [intellectual disability]—were not competent to express their preferences or give consent. Many people with disabilities in fact may have the functional capacity to consent to various actions. But the lack of capacity often has less to do with a person's inherent limitations than with societal attitudes that limit opportunities to make choices and to receive guidance and training in making those choices.²⁸⁷

Furthermore,

[c]apacity is not an all-or-nothing proposition. Individuals, including those with disabilities can have capacity in some area and lack it in others. [. . .].

Nevertheless, as a matter of law, it has long been true that people with disabilities are presumed to be competent (or have capacity) unless proven otherwise. This presumption, which also applies to witness testimony in court cases, has important implications for people with disabilities and their meaningful participation in society. Among other things, it means that a person with disabilities is entitled to full participation on equal terms with others. A statute or practice that as a general matter prevents all people with [mental disabilities] from testifying in court, for example, would violate this principle of presumed capacity.²⁸⁸

Legal scholars have called into question the methods used to assess capacity, the de facto practice of subjecting people with mental disabilities to such forensic assessment of competency, and the need for such assessment.²⁸⁹ It is the aim of this author to highlight the most salient issues noted

286. NAT'L RESEARCH COUNCIL, *supra* note 43, at 42–47.

287. *Id.* at 42–43.

288. NAT'L RESEARCH COUNCIL, *supra* note 43, at 43; FED. R. EVID. 601 (discussing competency to testify in general: "Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision").

289. Benedet & Grant III, *supra* note 249, at 536; Benedet & Grant IV, *supra* note 249, at 286; Benedet & Grant I, *supra* note 204, at 25; Benedet & Grant V, *supra* note 249, at 47;

by legal scholars in order for the community of legal scholars and professionals to evaluate the merits of such claims. In particular, the merits as they pertain to creating undue barriers for people with disabilities to have their complaints heard in a court of law.

Capacity, misuse of intelligence testing, and infantilizing people with disabilities

Intelligence testing measures the capacity to make abstractions, to learn, to deal with novel situations.²⁹⁰ The inappropriate use of intelligence quotient (IQ) testing, resulting in a mental age (MA) or developmental age (DA) used to erroneously define a person with a disability, contributes to systematic bias in a number of ways.

Often intelligence tests are provided as a means to assess capacity. An intelligence test is standardized and individually administered by a qualified professional designed to predict academic [based upon an assessment of capacity to learn] success by comparing the number of questions the person could answer compared to others the same age. However, a low Intelligence Quotient (IQ) is not an indication of capacity to tell the truth. Similarly the intelligence test provides a Mental Age (MA) that is often interpreted to represent the functioning level of the individual with regard to all things. However, a Mental Age is nothing more than the age equivalence of others who generally answer that many questions. It should not be interpreted as predictive of the understanding of the individual on other life events or as a depiction of real life abilities.²⁹¹

This “misunderstanding that a person’s intellectual disability implies a lack of capacity to participate in the judicial system”²⁹² represents a barrier to justice for people with intellectual and other mental disabilities.

The reliance upon mental age infantilizes persons with disabilities, equating them with children.²⁹³ “A common tendency in the lives of adults with intellectual or development disabilities whenever they are ‘assessed’ by professionals is to equate their abilities with that of a child.”²⁹⁴ This practice tends to focus on what a person cannot do rather than on the abilities the person does have, defining the person in prejudicial terms of limita-

Marinos et al., *supra* note 249, at 523-24; Pillay, *supra* note 249, at 314–15; Willner, *supra* note 210, at 124.

290. *Intelligence Test Definition*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/science/intelligence-test> (last visited Apr. 25, 2016).

291. Marinos et al., *supra* note 249, at 523.

292. *Id.*

293. Benedet & Grant V, *supra* note 249, at 50; Wacker, Parish & Macy, *supra* note 249, at 89.

294. Benedet & Grant V, *supra* note 249, at 50.

tions in a manner that reduces credibility from the onset—a practice that has been characterized as “inherently prejudicial.”²⁹⁵

The young woman who has been labeled as having the mental age of a six year old is not the same person she was when she was six years old. Her years of experience with the world and her development through her life cycle contribute to the adult she has become, whatever her intellectual disabilities.²⁹⁶

Mental age may be useful to describe general ability in mathematics or reading. However, it does not describe a person globally or recognize the lived experience of the person.²⁹⁷

Capacity assessment: Memory and suggestibility

People with mental disabilities are subjected to challenges of credibility due to limitation in memory—effectively barring them giving testimony about their own crime victimization.²⁹⁸ The issue stems from a belief that people with mental disabilities have poor memories and can easily develop false memories through the process of suggestion before or during a trial.²⁹⁹

While research shows that people with [intellectual disability] typically recall fewer details of events than people without disabilities, [. . .] it does not suggest that they are more likely to fabricate false memories or distort what they do recall. In fact, people with [intellectual disability] are probably less likely to fabricate believable lies that stand up to cross-examination because this requires more sophisticated abstract reasoning skills.³⁰⁰

The type of memory recognition required to testify to events witnessed or experienced relies upon incidental or automatic memory to retrieve the information, a process that is believed to be no more difficult for people with cognitive impairment than it is for people without such impairment.³⁰¹

Most individuals can recall long-term events with the same accuracy as those without a disability, but recall will depend on how memory was stored or retrieved. Memory. . . depends on: the person’s prior knowledge of the type of event that was experienced, the stress associated with the event, and the significance of the event to the person’s life. However, the method of retrieval of stored memories can determine if individuals are able to provide the evidence they remember. Under extreme stress the individual. . . may begin to demonstrate greater weakness in cognitive

295. *Id.* at 51.

296. *Id.*

297. *Id.*

298. Marinos et al., *supra* note 249, at 524–27; SOBSEY, *supra* note 93, at 286; Wacker, Parish, & Macy, *supra* note 249, at 89.

299. SOBSEY, *supra* note 93, at 286.

300. *Id.*

301. Wacker, Parish & Macy, *supra* note 249, at 89 (citing Henry & Gudjonson, 1999).

abilities than he or she would in non-stress conditions. This is called cognitive disintegration. Under such conditions the person may fail to respond or may respond in a manner that is more immature and inconsistent with his or her normal functioning.³⁰²

Because “retrieval of stored information is under the control of the legal system,” appropriate strategies to maximize the retrieval of stored memories and efforts to acclimate persons with mental disabilities with the court process and expectations can compensate for testimonial challenges associated with memory.³⁰³

Assessing competency: Basic and truth-lie

Forensic assessment of competency to testify entails assessing basic competency (the ability to observe, remember and communicate what the witness saw, heard, or experienced).³⁰⁴ And, truth-lie competency—the ability to tell the truth.³⁰⁵ If, in fact, such competency assessment is warranted, a practice that some legal scholars have called into question,³⁰⁶ then it is imperative that the assessment of capacity to testify must be done “in a manner that is free from systematic sources of bias that create [aggravated] impression[s] of unreliability.”³⁰⁷

Two types of witness competency used in the context of children, basic competency and truth-lie competency, has applicability to adults with mental disabilities given the dearth of literature specific to this population³⁰⁸—with the caveat that in doing so *does not* mean to equate adults with mental disabilities as children. “Among the requirements for basic competency are the witness’ ability to observe, remember and communicate, and these are best assessed by simply allowing the witness to testify, because the proof is in the pudding.”³⁰⁹

The other type of competency, truth-lie competency, “refers to the ability to tell the truth.”³¹⁰ Legal scholars and researchers have examined the assessment of truth-telling inflicted upon persons with disabilities.³¹¹ Criticisms largely focus on what is perceived to be unequal treatment under the law whereby adults with mental disabilities, are presumed to be predis-

302. Marinos et al., *supra* note 249, at 524.

303. *Id.* at 527.

304. Pillay, *supra* note 249, at 316.

305. *Id.*

306. Benedet & Grant III, *supra* note 249, at 524; Benedet & Grant IV, *supra* note 249, at 264; Benedet & Grant I, *supra* note 204, at 3; Benedet & Grant V, *supra* note 249, at 41; Pillay, *supra* note 249, at 314–15.

307. Willner, *supra* note 210, at 118.

308. Pillay, *supra* note 249, at 316.

309. *Id.*

310. *Id.*

311. Benedet & Grant II, *supra* note 238, at 12-14; Benedet & Grant V, *supra* note 249, at 46–47; NAT’L RESEARCH COUNCIL, *supra* note 43, at 44; Pillay, *supra* note 249, at 316–17; Wacker, Parish & Macy, *supra* note 249, at 89.

posed to lying, subjected to defining abstract concepts of “truth” and “lie” and are asked to explain what an oath is and the penalties for perjury.³¹²

Non-mentally disabled adults taking the stand to testify are *presumed* to have the necessary competence to testify. This is in itself problematic since it appears discriminatory, especially since society and courts ought to be making legal and other procedures easier, rather than more difficult for complainants with mental disabilities. [. . .] [L]aws requiring more of one group than another in order to allow them to testify are erring in a significant way. [. . .] [A]dults (without mental disabilities) are not asked to define abstract concepts such as ‘truth’, ‘lie’, or ‘oath’ before being permitted to testify, despite the fact that a significant proportion of unimpaired adult witnesses are unable to adequately define these terms.³¹³

Furthermore, a “lie” is an “intentional false statement” provided with the “deliberate intent to deceive.”³¹⁴ There is research evidence that lying occurs more in individuals with higher, rather than lower, levels of intelligence given that lying involves higher order processes in the brain.³¹⁵

Considering the [. . .] vagueness in the definitions and understanding of ‘truth’ and ‘lies’ we have to question whether it is meaningful or even fair to ask intellectually disabled individuals about their understanding of these concepts, and evaluate their responses to decide whether they can testify in court cases in which they are complainants? Considering the great ‘thinkers’ and intellectuals of contemporary and bygone times have contemplated these concepts inconclusively, it makes little sense to ask cognitively impaired individuals such questions. The terms ‘truth’ and ‘lie’ are abstract concepts, very unlike the concrete concepts and pieces of information they are to be questioned about in relation to the event they have witnessed or in which they have been involved.³¹⁶

The entire notion of competency examination has been challenged as inherently discriminatory, resulting in insurmountable barriers to justice for people with mental disabilities.³¹⁷ “Could the determination of competency to testify not be made by simply letting her/him testify?”³¹⁸ “Are we setting the threshold too high?”³¹⁹ “The purpose of the inquiry is to exclude at the

312. Benedet & Grant V, *supra* note 249, at 38.

313. Pillay, *supra* note 249, at 316–17.

314. *Id.* at 317.

315. *Id.* (citing Fu, Evans, Wang, & Lee, 2008).

316. *Id.*

317. Benedet & Grant V, *supra* note 249, at 50; Pillay, *supra* note 249, at 317; Wacker, Parish, & Macy, *supra* note 249, at 89.

318. Pillay, *supra* note 249, at 314.

319. Benedet & Grant V, *supra* note 249, at 44.

outset worthless testimony.”³²⁰ It is the role of judge or jury to determine the facts. It may be that evidence from a witness with a mental disability will be found not to be credible, and thus the adjudicator rejects the evidence or weighs the evidence in the larger body of evidence.³²¹ “By refusing to allow a complainant to testify, we are saying that her [or his] testimony is ‘worthless’ and that we cannot allow the trier of fact even to hear the evidence and make an assessment about its weight.”³²² Rather than focusing effort to discredit and disqualify people with disabilities from giving testimony, every attempt should be made to find reasons why a person should be permitted to give evidence, with supports provided to maximize competency.

Barriers to Giving Testimony in Court

Should people with disabilities receive special provisions and accommodations to testify in court or should the entire system be re-examined? The answer is beyond the scope of this article and the expertise of this writer. However, the critiques of the justice system call for a re-examination and reform³²³ by the *powers* that maintain our system of criminal justice to the rules governing the system, including evidentiary and procedural rules governing cross-examination. Such re-examination and reform may be substantive, procedural, and/or symbolic—these are three distinct, yet interdependent components of justice:³²⁴

[S]ubstantive justice which concerns itself with an assessment of the rights claims that are available to those who seek a remedy; procedural aspects which focus on the opportunities and barriers to getting ones claim into court or other dispute resolution forum; and, symbolic components of access to justice which steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment.³²⁵

For adults with mental disabilities, a standard course of court proceedings has emerged that is inherently damaging to the credibility of such victims.³²⁶

First, a psychologist testifies about the generic aspect of the [crime] victim’s impairment, such as relevant [or what the examiner believes are relevant] medical, psychological, social, [and]

320. *Id.* at 46.

321. *Id.*

322. *Id.*

323. Benedet & Grant III, *supra* note 249, at 548; Benedet & Grant IV, *supra* note 249, at 287–88; Benedet & Grant II, *supra* note 238, at 27–42; Benedet & Grant V, *supra* note 249, at 47; Marinos et al., *supra* note 249, at 530; Ortoleva, *supra* note 2, at 314; Pillay, *supra* note 249, at 320.

324. Ortoleva, *supra* note 2, at 284.

325. *Id.*

326. Wacker, Parish, & Macy, *supra* note 249, at 89.

physical issues. Next, a professional qualified [or at least deemed by the court to be qualified]. . .presents testimony about the victim's mental age, language skills, and concrete thinking ability. Third, after [the] judge and jury are presented with this information about what life is like for the accuser and her [or his] purported credibility, most victims with mild or moderate cognitive impairments are asked to testify about their victimization.³²⁷

As was already noted, mental age is not particularly instructive in one's ability to provide testimony and is most likely quite prejudicial. Furthermore, the attention paid to the individual's impairment and abilities (or lack thereof) is inherently prejudicial—predisposing jurors and judges to view the crime victim's testimony through a discriminatory lens that would never be used to evaluate the testimony of nondisabled crime victims.³²⁸ This standard course of practice essentially skews the scales of justice towards the accused by institutionalizing the practice of putting crime victims' credibility on trial.

There are critiques of access to justice for witnesses with mental disabilities in sexual assault cases that have much broader applicability to crime victims with disabilities, challenging the notion that a rigorous and challenging cross-examination is always the best way to get at the truth.³²⁹ Adversarial cross-examination is fundamental to a fair trial, with this proposition generally accepted as true without adequate scrutiny.³³⁰ However, failure to scrutinize indoctrinated practices has likely contributed to the failure of the promise of Title II of the ADA to go beyond the removal of surface barriers and get at the heart of systemic barriers to justice:

[S]ubject[ing] a [person] with a mental disability to a rigorous cross-examination with repeated and leading questions, in a manner that is confrontational and often accusatory, is probably the worst way to get her [or his] story heard accurately in court. It is likely to unfairly undermine her [or his] credibility and to result in unjustified acquittals or in prosecutors deciding not to pursue a case.³³¹

The body of social science evidence calls into question reliance upon the traditional methods of cross-examination to get at the truth for complainants with mental disabilities.³³²

If we really are trying to get at the truth, we should be asking questions that facilitate that objective rather than interfere with it. The right to cross-examination surely does not extend to the right

327. *Id.* (citing Denno, 1997, and Rogers, 1999).

328. *Id.*

329. Benedet & Grant III, *supra* note 249, at 547; Benedet & Grant II, *supra* note 238, at 17; Benedet & Grant V, *supra* note 249, at 47.

330. *Id.*

331. Benedet & Grant II, *supra* note 238, at 1.

332. *Id.*

to take advantage of vulnerable witnesses' difficulties. The purpose of cross-examination should be to test and challenge the veracity of evidence, not to confuse and badger the witness into saying things that conflict with what he or she may have said in direct examination.³³³

Cross-examination can be conducted in a way that respects both the right of the accused to a fair trial and the complainant's right to equality in the justice system.³³⁴

To be protected by Title II, the individual must be a "qualified individual with a disability."³³⁵

To be qualified, the individual with a disability must meet the essential eligibility requirements for receipt of services or participation in a public entity's programs, activities, or services with or without—

- 1) Reasonable modifications to a public entity's rules, policies, or practices;
- 2) Removal of architectural, communication, or transportation barriers; or
- 3) Provision of auxiliary aids and services.

The "essential eligibility requirements" for participation in many activities of public entities may be minimal. For example, most public entities provide information about their programs, activities, and services upon request. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it. However, under other circumstances, the "essential eligibility requirements" imposed by a public entity may be quite stringent.³³⁶

The evidence presented in this paper supports the assertion that for persons with disabilities, in particular persons with mental disabilities, the "essential eligibility requirements" to participate in the justice system are quite stringent—overly stringent—and undermine equal treatment under the law.

CONCLUSION

The first of three theses examined in this paper is that crimes—most notably interpersonal violence—perpetrated against people with disabilities is a serious, persistent, and pervasive problem. And, for people with mental disabilities, the problem is particularly egregious. There is a growing body of research-based evidence, with the findings from the most rigorous quantitative research studies presented, to support the aforementioned assertion.

333. *Id.* at 17.

334. *Id.* at 5.

335. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *supra* note 18, at 10.

336. *Id.*

Furthermore, the consequences of such crime victimization, has serious, debilitating, short- and long-term consequences to the physical health and psychosocial functioning of such victims—with some evidence that people with disabilities experience more trauma-related incidents, and when detected, more trauma-related disorders, with some differences in symptom manifestation. In order to provide a victim-centered, trauma-informed response, an understanding of the impact of interpersonal violence on functioning—not applied in a fixed, rigid, or proscriptive way, is essential.

The second thesis is that vulnerability to interpersonal violence and other forms of crime victimization is universally, yet erroneously, conceptualized as an inherent attribute of disability. Furthermore, it is this individualized notion of vulnerability, which ignores or discounts that individual attributes of vulnerability are a by-product of and exist within interpersonal relationships, within social environment, and within the larger social, political, economic and cultural context—that enhances vulnerability and increases risk. It is this focus on “the context” or the “situation” of the “vulnerable individual” that reframes the problem from an individualized notion of vulnerability to a failure of societal institutions that fail to protect, represent the interest of, or fail to provide access or accommodation to people with disabilities. This conceptualization of vulnerability is in accordance with the social model of disability.

The third thesis postulates that the failure of crime victims with disabilities, in particular people with mental disabilities, to be recognized and responded to as constituents within the criminal justice system are deeply entrenched in long-standing system-based barriers. With, attitudinal barriers, rooted in ableism, forming the bedrock for all other barriers—physical access and programmatic accommodation. APS—a social service response—is indicative of one of the long-standing system-based barriers, which represents an inferior substitute for responding to interpersonal violence perpetrated against people with disabilities. Especially, when APS as it is promulgated, is the first responder to such victimization and, may in fact, thwart the ability for adults with disabilities to be recognized and responded to as constituents of the criminal justice system. Failure to represent the “ideal” victim, rooted in prejudicial attitudinal barriers, is a salient contributing factor to explain why adults with disabilities—as crime victims—lack standing in the criminal justice system. The police are the first point of contact in, and as such functions as the gatekeepers to, the criminal justice system; therefore barriers at this level are especially egregious. The small, but compelling research-based evidence supports the assertion that barriers permeate the system at both the administrative policy and procedural level and the police officer practice level. Last, but certainly not least, are the barriers within the justice system—with the barriers to being deemed competent to testify and to actually giving testimony in court, almost insurmountable for people with mental disabilities.

It has been fifty years since tenBroek advocated for transformation of both attitude and policies of segregation, special treatment, and separate institution from *custodialism* to *integrationism* and for the right of people with disabilities to *live in the world*. At the time of tenBroek's writings the disability rights movement was in its infancy, children with disabilities did not have the right to a "free appropriate public education," and institutional care was the accepted practice at the time. Attitudes and policies have changed. People with disabilities in the United States enjoy significantly greater participation in the life of the community than during the world of tenBroek's time. Yet, barriers to justice prevail. It took another twenty-four years for the Americans with Disabilities Act to be enacted, codifying in United States federal civil rights law tenBroek's vision for legal protections to aid in breaking down barriers, disadvantages, and inadequate protections. Title II should afford people with disabilities the opportunity to participate in the mainstream of life when they are victims of crime. However, as has been demonstrated, such equal access and fair treatment eludes people with disabilities—in particular people with mental disabilities. Equality in participation and benefits under the ADA, provides for "equality of opportunity, but does not guarantee equality of results" in accordance with "the principle that individuals with disabilities must be provided an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services."³³⁷ This raises the question as to whether "effective opportunity" is being afforded to persons with disabilities in the justice system.

The solutions to remedy the barriers to justice are within our reach. Very little was known about the problem of interpersonal violence perpetrated against people with disabilities when the Crime Victim's with Disabilities Awareness Act was passed in 1999. The "problem," grounded in empirical evidence, is no longer such a mystery. The Convention on the Rights of Persons with Disabilities provides the vision for access to justice and equal protection under the law. Furthermore, the work being done in other countries around the world to transform systems, in accordance with the CRPD, is instructive to addressing the barriers in the United States. The promise and provisions of Title II of the ADA, the U.S. Supreme Court *Olmstead* decision, and President Obama's directive to the U.S. Department of Justice to vigorously enforce the civil rights of Americans with disabilities, should all serve as impetus for stakeholders from *within* the criminal justice system, in collaboration with disability rights advocates and allies, to re-imagine the criminal justice system to include the needs and interests of all people with disabilities.³³⁸

337. *Id.* at 12.

338. Resources: U. S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, Crime Victims with Disabilities, <http://ovc.ncjrs.gov/topic.aspx?topicid=62>; *National Center on Criminal Justice & Disability* funded by the Bureau of Justice Assistance (BJA) and the U.S. Department of Justice to serve as a national clearinghouse for information and training on the

topic of people with intellectual and developmental disabilities as victims, witnesses and suspects or offenders of crime, <http://www.thearc.org/NCCJD>; *National Center for Victims of Crime*, Responding to Crime Victims with Disabilities, Resource Directory, <https://victimsofcrime.org/library/resource-directory-victims-with-disabilities> (last visited Apr. 25, 2016); U.S. Dep't of Justice, Office of Violence Against Women, TRAINING AND SERVS. TO END VIOLENCE AGAINST WOMEN WITH DISABILITIES GRANT PROGRAM, <https://www.justice.gov/ovw/grant-programs#tsev> (last updated Sept. 9, 2015).