

Imprisonment of People with Intellectual Disability: Call for a Specialized Diversion Court

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Abstract

The overrepresentation of people with intellectual disability among the prison and jail populations is reviewed. Possible reasons for this overrepresentation are discussed. The development of a specialized intellectual disability/autism diversion court is suggested.

What is the problem?

People with intellectual disability are overrepresented among the prison population in the United States. Recent estimates (Spreat 2020) suggest that there may be seven times as many people with intellectual disability in jails and prisons than would be expected from their representation among the general population. Estimates of this overrepresentation range from 4 percent to 10 percent (Weiss 2013; Davis 2019; Veneziano & Veneziano 1996; Murphy, Chiu, Triantafyllopoulou, Barnoux, Blake, Cooke, Forrester-Jones, Gore & Beecham 2017). This phenomenon of overrepresentation has also been reported in Spain (Tort, Duenas, Vicens, Zabala, Martinez & Romero 2016), Wales (Hayes & McIlwain 1988), England (Hayes, Shokell, Matron & Lancaster 2007), Ireland (Gulati, Clarke, Delcellier, Meagher, Kennedy, Fistein, Boque & Dunne 2018), Norway (Sondenaa, Rasmussen, Palmstierna & Nottestaad 2005). If one accepts the estimate that 7 percent of the incarcerated population has intellectual disability, these individuals are overrepresented by at least 700 percent.

While it is clear that some individuals with intellectual disability do engage in criminal behavior, the reasons for the overrepresentation among the prison population are not equally clear. The suggestion that people with intellectual disability simply engage in more criminal behavior is rejected as a faulty supposition. There are a multitude of other reasons why individuals with Intellectual Disability may be incarcerated at a rate that far exceeds the rate of the general public. It has been suggested that some law breaking individuals with intellectual disability are essentially victims of others who encourage them to participate in criminal activity (Snell, et al. 2009; Davis undated). Naiveté and/or suggestibility may lead some individuals with intellectual disability to uncritically accept suggestions or commands given by a person they perceive as having power. Snell et al. (2009) suggest that common personality characteristics of individuals with intellectual disability and relatively high IQ scores (i.e., 60-70) may make them vulnerable to coercion into criminal activity.

In addition to coercion from others, one must consider systems factors that have an impact on individuals who have intellectual disability. ANCOR (2019) reported that the waiting list for intellectual disability services now approaches 400,000 across the United States. Savage (2015) suggests that this absence of necessary supports results in homelessness for some individuals. Some of these individuals turn to criminal behavior as a means to survive. Transgressions, even of a minor nature, can result in incarceration, with the root cause being the lack of needed supports and services.

Another explanation for criminal behavior is that the individual with intellectual disability may have learned the instrumental value of such behavior. This awareness may be compounded by personal characteristics such as impulsivity, low social skills, or difficulty reading social cues (Mallett et al. 2011). Ultimately, there are a multitude of reasons that individuals with intellectual disability may engage in criminal behaviors. Some are instrumental, some are situational, and some are simply a function of limited cognitive skills to understand and resist dangerous situations.

While it is clear that individuals with intellectual disability do commit criminal acts, it is not clear that they actually commit more crimes than members of the general public. However, it has been noted (Holland, Clare & Muiykhopadhyay 2002) that crimes attributed to people with intellectual disability, for the most part, are relatively minor. To the extent to which this observation is accurate, it suggests that there are some basic flaws in the system that lead to disparate outcomes for people with intellectual disability.

Perske (1991) noted that individuals who have intellectual disability do not always act in a self-protective manner when interviewed by the police. They may exhibit an overabundance of a desire to please authority figures, they may evidence an inability to participate in abstract thought, and they may fail to be able to observe the interviewer for cues regarding responses. Perske (1991) went on to note that people with intellectual disability may lack a basic understanding of their rights and of the court proceedings, or punishment. They may confess to crimes they did not commit. Weiss (2013) noted that once arrested, individuals with intellectual disability are more likely to be convicted and sentenced than other individuals.

The magnitude of this problem is startling. In 2016, there were 2,298,300 individuals incarcerated in prisons or jails in the United States (U.S. Bureau of Justice Statistics). The 7 percent prevalence rate suggested by Spreat (2020) would imply that as many as 160,881 individuals with intellectual disability were living in prisons or jails in the United States. Applying the one percent estimate of intellectual disability prevalence, one would expect that only 23,000 individuals with intellectual disability would be in prison or jail.

Jail is not a place to live for people with Intellectual Disability

It has been suggested (Ford, 2015) that prisons have come to replace the old state mental hospitals, with as much as one third of the prison population having significant mental health

challenges. The Americans with Disabilities Act has been applied to prison conditions, and it has been established that the act requires prisons to ensure equal access to offered supports and services for individuals who have disabilities (Weiss 2013). It is not clear, however, what those services are to be, and there is little to suggest that these services might include habilitative supports and instruction. Ultimately, prisons have a limited set of responsibilities towards individuals who have intellectual disability.

Prisons do not generally provide the level of supports and services needed by an individual who has intellectual disability. To place that individual in a setting that is devoid of such needed supports and habilitative services benefits neither the person nor society. In many cases, one might argue that it was the absence of these needed supports and services that were the root cause of the criminal behaviors that led to imprisonment.

An example is perhaps illustrative. Brian (fictitious name) is a 25-year-old man who has intellectual disability and a condition called Prader Willi Syndrome that is associated with life-threatening obesity. He lives in a group home in Southeastern Pennsylvania. In addition to intellectual disability and Prader-Willi Syndrome, Brian has impulse control and oppositional defiance disorders, and he can be quick to anger. He requires 24/7 direct support to function maximally within the community. Until the advent of the pandemic, he was living successfully in a group home and working in the community. His occasional angry outbursts could usually be de-escalated by staff. One day in April, however, something triggered him, and he threatened a group home staff member with a knife, and refused efforts to calm him. Group home staff called 911, and police officers were able to convince Brian to drop the knife, and he was taken to a hospital emergency room. After a psychiatric evaluation, he was sent to a specialty hospital for treatment. The group home wanted Brian to be discharged back to their care, confident that his problems could be addressed by staff he knew and trusted — and who didn't want to press charges against him. However, charges were filed anyway. He was sent to jail, but released within 24 hours on \$50,000 bail. Brian was clearly at risk of becoming one of those 160,881 individuals with intellectual disability who are in prison.

This case turned out differently. The Chester County Public Defender's Office and District Attorney worked together to get the bail requirement dropped. The group home leadership also contacted the Mental Health Court in Chester County and the Court's probation officer advocated on the resident's behalf. Still, even with so many people pulling for him, it took six months for the charges to be dropped. He has recently been able to return to work with a landscaping crew.

In addition to the support of his group home and the agency's parent company, this young man was fortunate to have several advocates in the court system and community members who took the time to understand his complex needs — and that jail was not the right setting for him. The existence of a specialized diversion court, the Mental Health Court, was also of great help in providing options besides jail. However, even this type of court is not typically equipped to handle the issues of people with intellectual disability and mental health challenges entering the criminal

justice system. The time is long overdue for new specialized courts to be established that would be tailored for people with intellectual disability and severe autism who become involved in the criminal justice system. These courts should be staffed similarly to mental health and other treatment courts through partnerships with providers and health systems which have the expertise and experience to deal with the particular and profound challenges that people with intellectual disability and autism encounter when they come in contact with the criminal justice system. As part of this new type of specialized court, services are needed to help people with these special needs to understand their rights, including access to accommodations, to understand alternatives to incarceration, to receive protection from self-incrimination and exploitation, and to receive access to victim services, when needed. The provision of such protection and support would seem to fall readily to the federally mandated disability rights organizations within each state. As in mental health and substance abuse treatment courts, those involved, including judges, prosecutors, defenders and law enforcement professionals, should receive training in order to understand the needs and complexities of this population.

What else can be done?

The provision of a specialized court is but one necessary step. It addresses the problem after the fact. Prevention is likely to be a more effective way of protecting individuals who have intellectual disability from becoming victims of the system. Among preventative factors to be considered are the following:

Eliminate Waiting Lists - For most individuals, intellectual disability is a chronic, life-long condition, and the impact of this condition is ameliorated by the provision of supports and services. The provision of supports and services as determined by the individual's treatment team (including the individual) will develop skills to resist solicitations to participate in criminal behavior, develop socially acceptable ways to meet wants and needs, and occupy time. The provision of supports and the elimination of waiting lists should reduce the number of people with intellectual disability in prison.

Ensure Meaningful Days - Society needs to ensure that people with intellectual disability are actively engaged in some sort of meaningful endeavor each day. Despite current efforts to close sheltered workshops, it must be recognized that workshops do provide meaningful day activity for individuals. Certainly alternatives to workshops exist, but it should be recognized that meaningful activity minimizes the opportunity for criminal activities.

Enhance Socialization - Gullibility is a defining characteristic of people with less significant forms of intellectual disability. Individuals must be taught suspicion and how to develop meaningful relationships with others. Such training might fall under the broader category of increased mental health supports for people with intellectual disability.

Community Is Not For Everyone - Over the past 50 years, America has made tremendous strides towards the integration of people who have intellectual disability. It must be recognized

that there are individuals whose behavior functions as a significant barrier to integration within the community. In the general population, these individuals are sent to jail. Among persons with intellectual disability, prison seems to be an inappropriate option because it doesn't provide needed supports and services. It may be that persons with intellectual disability who engage in criminal behavior are in need of a different form of supports and structure that is not offered in jail and generally not offered in the community. A special treatment program that focuses on the development of resilient skills that enable an individual to resist criminal opportunities must be considered.

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Bios

Tine Hansen-Turton is President and CEO of Woods Services, a Life Cycle Care Management organization serving 22,000 people across Pennsylvania and New Jersey, specializing in services for people with intellectual disability, autism, brain injury, and mental and behavioral health challenges. With more than 20 years of experience in health and human services senior management, executive leadership and consulting, she has founded and led several nationally recognized organizations and trade associations primarily focusing on nurse-led care. For the past two decades she has also been instrumental in globally positioning Nurse Practitioners as primary health care providers. Ms. Hansen-Turton still serves as the founding Executive Administrator for the Convenient Care Association (CCA), the national trade association of over 2,200 private-sector retail clinic industries, serving 25 million people with basic health care services across the country.

Elizabeth Hayden serves as Strategy Development Director for Woods Services, and is responsible for providing strategic guidance in program and resource development to Woods and its family of five affiliate organizations across New Jersey and Pennsylvania, identifying funding opportunities and writing grants, concept papers and policy papers. She brings over 25 years of project management, program development and management in public health and education to her role.

Lori Plunkett has over 30 years of experience working at Brian's House, helping individuals with intellectual disability live their lives to the fullest. Ms. Plunkett oversees residential, vocational and adult day programs, and is responsible for strategic growth for the organization. Ms. Plunkett earned her Master's Degree in Administration from West Chester University, and her Bachelor's in Special Education from Millersville University. She is an active member of Pennsylvania's major provider member organization, Pennsylvania Advocacy and Resources (PAR).

Scott Spreat is the Vice President of Research and Evaluation for Woods Services, and in this capacity, oversees program evaluation for Woods, and spearheads research and evaluation projects with external agencies. With the PAR provider association in PA, Dr. Spreat has directed four statewide surveys of Direct Support Professional compensation practices. Also with PAR, Dr. Spreat has participated in surveys on the impact of COVID-19 on consumer mortality and on provider agency operations. With the RCPA provider association in PA, Dr. Spreat is currently directing a survey on the use of telehealth during the pandemic, and worked with the New Jersey provider association NJACP, in which families, consumers, and staff were surveyed regarding receptivity to COVID-19 vaccination.