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## Poverty Law: Brains Without Money: Poverty as Disabling

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**Poverty Law***Brains Without Money: Poverty as Disabling*Emily R.D. Murphy<sup>1</sup>*Introduction*

The United States has long treated poverty and disability as separate legal and social categories. Disabled individuals generally are not thought to be morally responsible for their disadvantage, whereas poor individuals are assumed to be at fault for their poverty and are therefore less deserving of aid.<sup>2</sup> But advances in brain and behavioral science undermine those assumptions. Poverty inhibits brain development in children. In adults, poverty adversely affects cognitive capacities that are key to decisionmaking and long-term planning. The science is complex and ongoing, but its most basic finding is quickly approaching consensus: poverty's effects in the brain can be disabling.

Understanding poverty as disabling has significant implications for policy and law. It supports proposals such as universal basic income, negative income tax, child grants, and simplified benefits determinations. It also supports insertion of social welfare into the dominant civil-rights framework for disability policy and could resolve longstanding tensions among disjointed federal disability laws. Finally, brain and behavioral science may support litigation strategies to compel accessibility to existing systems and potentially help promote a new public understanding of the causes of poverty. This Chapter explores the scientific evidence for, and legal and policy implications of, poverty as disabling.

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<sup>1</sup> Excerpted and adapted from Emily R.D. Murphy, *Brains Without Money: Poverty as Disabling*, 54 CONN. L. REV. 699 (2022).

<sup>2</sup> See, e.g., Wendy Bach, *Federalism, Entitlement, and Punishment Across the US Social Welfare State*, in HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 21, 21–22 (Ezra Rosser ed. 2019).

*Disability and Poverty as Distinct Legal Categories*

Both U.S. law and U.S. society treat persons with disabilities differently from persons who are poor. Disability law often sounds in the register of civil rights and aspires to incorporate both positive and negative rights.<sup>3</sup> In contrast, the law grants poverty few positive or negative rights: a Sixth Amendment right to counsel when accused of a crime,<sup>4</sup> and some minimal procedural due process rights when losing established welfare benefits.<sup>5</sup> These distinctions play out in cash-assistance programs, which have different eligibility requirements and levels of support based on whether the individual is poor because of disability or “merely” poor.<sup>6</sup> Similarly, persons with disabilities are entitled to antidiscrimination and other legal protections that “merely” poor people are not: accommodations for access to voting,<sup>7</sup> ineligibility for the death penalty,<sup>8</sup> accommodations in employment,<sup>9</sup> antidiscrimination protections in employment and access to public services,<sup>10</sup> and access to special education,<sup>11</sup> to name a few. Further, disability advocates considered and deliberately rejected the notion that poverty should be considered a disability. They understood the political importance of distinguishing their project from a welfare system for the “merely” poor. As a result, the original implementing regulations of the Americans with

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<sup>3</sup> Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 4–8 (2004).

<sup>4</sup> *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

<sup>5</sup> William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001).

<sup>6</sup> Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 373–74 (1996).

<sup>7</sup> E.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355; Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678; Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666.

<sup>8</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>9</sup> 42 U.S.C. §§ 12111–17.

<sup>10</sup> *Id.*; *id.* §§ 12131–65.

<sup>11</sup> 20 U.S.C. § 1401(30)(C)).

Disabilities Act (“ADA”) and the Rehabilitation Act exclude poverty from their definitions of disability or impairment.<sup>12</sup>

These legal distinctions reflect divergent assumptions about the causes of disability and poverty. Disabled persons deserve social insurance because their disadvantage is not their (moral) fault.<sup>13</sup> Destitute persons, by contrast, are marked as “the ‘undeserving poor,’”<sup>14</sup> whose status is their own fault. Poor people experience, on average, worse employment outcomes and lower academic achievement.<sup>15</sup> Fundamentalist market assumptions<sup>16</sup> about these correlations put poverty as the result, rather than the cause: people are poor *because* they don’t work hard enough or aren’t smart enough.

#### *The Brain Science and Behavioral Science of Poverty*

The brain and behavioral science of poverty and low socioeconomic status (“SES”) suggests that these assumptions are wrong. To date, the weight of the evidence suggests that poverty is a significant contributing cause of cognitive deficits in adults and of detriments to brain development in children. In other words, the evidence suggests that the causal arrow can go the other way: that some poor people experience academic and employment disadvantages *because* they are poor.

The degree to which poverty causes cognitive problems is not fully understood, nor are the specific mechanisms through which poverty impairs cognition. Further, the causal story is neither

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<sup>12</sup> Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694, 35,698, 35,699 (July 26, 1991); Equal Employment Opportunity for Individuals With Disabilities, 56 Fed. Reg. 35,726, 35,741 (July 26, 1991).

<sup>13</sup> Diller, *supra* note 6, at 385–94.

<sup>14</sup> *Id.* See also Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 L. & SOC’Y REV. 1 (2019).

<sup>15</sup> Daniel A. Hackman, Martha J. Farah & Michael J. Meaney, *Socioeconomic Status and the Brain: Mechanistic Insights from Human and Animal Research*, 11 NATURE REV. NEUROSCIENCE 651, 651 (2010).

<sup>16</sup> See Lucy A. Jewel, *The Biology of Inequality*, 95 DENV. L. REV. 609, 643–54 (2018).

simple nor clean;<sup>17</sup> the complexity of socioeconomic status demands care and caution in scientific conclusions.<sup>18</sup> But even with these qualifications in mind, scientists are nearing consensus that poverty causes some meaningful degree of problems in brain development and cognitive functioning.

#### A. Childhood Brain and Cognitive Development

Poor children are at far greater risk for negative outcomes in mental-health, academic, and behavioral functions of the brain. Cognitive neuroscience and structural brain imaging consistently indicate that low childhood SES, and many of its attendant conditions (e.g., trauma, environmental toxins, nutrition, family stress) are negatively associated with brain development and cognition.<sup>19</sup> One recent study found that children from homes with incomes below 200% of the federal poverty line had significantly less gray matter (neuronal cells that process information) overall and, specifically, less gray matter in the frontal and parietal areas of the brain, which are critical for mediating executive and language functions.<sup>20</sup> These differences persisted and, in fact, widened over growth trajectories.<sup>21</sup> Even controlling for a variety of potential factors, including birth weight, early health, and infant head size at birth, children with low SES “began their lives with similar gray matter volumes but had lower total gray matter compared with those from middle and high-income households by toddlerhood.”<sup>22</sup> A follow-up study found that the trend continues as children grow older, with effects of markedly lower test scores

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<sup>17</sup> E.g., Martha J. Farah, *Socioeconomic Status and the Brain: Prospects for Neuroscience-Informed Policy*, 19 NATURE REV. NEUROSCIENCE 428 (2018).

<sup>18</sup> Martha J. Farah, *The Neuroscience of Socioeconomic Status: Correlates, Causes, and Consequences*, 96 NEURON 56, 62 (2017).

<sup>19</sup> See Greg J. Duncan, Katherine Magnuson & Elizabeth Votruba-Drzal, *Moving Beyond Correlations in Assessing the Consequences of Poverty*, 68 ANN. REV. PSYCH. 10.1–.2 (2017).

<sup>20</sup> Jaime L. Hanson, Nicole Hair, Dinggang G. Shen, Feng Shi, John H. Gilmore, Barbara L. Wolfe & Seth D. Pollak, *Family Poverty Affects the Rate of Human Infant Brain Growth*, 8 PLOS ONE 1, 5 (2013).

<sup>21</sup> *Id.* at 6–7.

<sup>22</sup> *Id.* at 5.

and educational attainment.<sup>23</sup> These results are convergent with other rigorous and high-profile studies.<sup>24</sup>

These studies demonstrate correlation but not causation. Randomized controlled trials (“RCT”) are the best experimental design for identifying causal relationships, and one major RCT is currently underway. The Baby’s First Years Study is the “first study in the United States to assess the impact of poverty reduction on family life and infant and toddlers’ cognitive, emotional, and brain development.”<sup>25</sup> Across four different cities, over one thousand low-income mothers (with average household incomes just over \$20,000 per year) were recruited upon their child’s birth to receive an unconditional monthly cash gift of either \$333 or \$20 for the first fifty-two months of their child’s life.<sup>26</sup> The first set of data are now published and reveal that, at approximately one year of age, infants in the high-cash gift group showed different patterns of brain activity—patterns “linked to subsequent higher cognitive skills”—than infants in the low-cash gift group.<sup>27</sup> The important implication from the study is that the differences in brain activity were likely caused by the different levels of cash gifts. This RCT study, coupled with the correlation studies,

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<sup>23</sup> Nicole L. Hair, Jaime L. Hanson, Barbara L. Wolfe & Seth D. Pollak, *Association of Child Poverty, Brain Development, and Academic Achievement*, 169 JAMA PEDIATRICS 822, 822 (2015).

<sup>24</sup> Kimberly G. Noble, Suzanne M. Houston, Natalie H. Brito, Hauke Bartsch, Eric Kan, Joshua M. Kuperman, Natacha Akshoomoff, David G. Amaral, Cinnamon S. Bloss, Ondrej Libiger, Nicholas J. Schork, Sarah S. Murray, B.J. Casey, Linda Chang, Thomas M. Ernst, Jean A. Frazier, Jeffrey R. Gruen, David N. Kennedy, Peter Van Zijl, Stewart Mostofsky, Waler E. Kaufmann, Tal Kenet, Anders M. Dale, Terry L. Jernigan & Elizabeth R. Sowell, *Family Income, Parental Education and Brain Structure in Children and Adolescents*, 18 NATURE NEUROSCIENCE 773, 773 (2015). *See also Research: Pediatric Imaging, Neurocognition, and Genetics (PING) Study*, U.C. SAN DIEGO: CTR. FOR HUM. DEV., <https://chd.ucsd.edu/research/ping.html> (last visited Mar. 16, 2022).

<sup>25</sup> *See* BABY’S FIRST YEARS, <https://www.babysfirstyears.com> (last visited Mar. 16, 2022).

<sup>26</sup> *Id.*

<sup>27</sup> Sonya V. Troller-Renfree, Molly A. Costanzo, Greg J. Duncan & Kimberly G. Noble, *The Impact of a Poverty Reduction Intervention on Infant Brain Activity*, 119 PROC. NAT’L ACAD. SCIS., Jan. 25, 2022, at 1, 1.

strongly suggests that childhood SES affects brain structure and activity.

#### B. Decisionmaking by Poor Adults

Poor adults underuse formal banking institutions and overuse high interest check-cashing and payday loan services. They also play lotteries, undersave, and borrow at high interest rates. Health-related behaviors include high rates of consumption of tobacco products and fast food.

One explanation for these behaviors is grounded in scarcity theory: scarcity focuses attention on immediate surroundings, reduced inhibitory control, and preference for near-term rewards over long-term goals.<sup>28</sup> Additionally, paying attention to one thing can lead to attentional neglect of other things.<sup>29</sup> Current science of the “psychology of poverty” supports the theory that poor persons’ more limited options affect behavior<sup>30</sup> and cognitive decisionmaking,<sup>31</sup> with significant causal weight attributable to the contextual factors of low SES.<sup>32</sup> Today’s grocery cart, for

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<sup>28</sup> See SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013); Anuj K. Shah, Sendhil Mullainathan & Eldar Shafir, *Some Consequences of Having Too Little*, 338 SCI. 682, 682 (2012).

<sup>29</sup> See generally William A. Johnston & Veronica J. Dark, *Selective Attention*, 37 ANN. REV. PSYCH. 43–75 (1986).

<sup>30</sup> Esther Duflo, *Poor But Rational?*, in UNDERSTANDING POVERTY 367, 367 (Abhijit Vinayak Banerjee, Roland Bénabou & Dilip Mookherjee eds., 2006).

<sup>31</sup> Junhua Dang, Shanshan Xiao & Siegfried Dewitte, *Commentary: “Poverty Impedes Cognitive Function” and “The Poor’s Poor Mental Power”*, 6 FRONTIERS PSYCH. 1, 2 (2015); Gillian V. Pepper & Daniel Nettle, *The Behavioural Constellation of Deprivation: Causes and Consequences*, 40 BEHAV. & BRAIN SCIS. 314 (2017).

<sup>32</sup> Jennifer Sheehy-Skeffington, *The Effects of Low Socioeconomic Status on Decision-Making Processes*, 33 CURRENT OP. PSYCH. 183, 183 (2020). The science comes with significant caveats and limitations. Poverty’s multi-faceted and relational nature presents empirical challenges. See Matthew A. Diemer et al., *Best Practices in Conceptualizing and Measuring Social Class in Psychological Research*, 13 ANALYSES SOC. ISSUES & PUB. POL’Y 77, 78 (2013). Also, impairment in one aspect of cognitive functioning may be offset by

example, obscures consideration of next month's utility payment. For poor people, scarcity constantly affects essential aspects of daily life.<sup>33</sup> The science thus supports the claim that poverty can contribute to the kind of decisionmaking observed in poor adults.

*Poverty as Disability: Concept and Reform*

The claim that poverty is disabling is a descriptive and conceptual claim about legal and social categories. It soothes the tension between competing models of disability because poverty's effects on brain and cognition fit both the impairment-focused, medicalized model and the social model of disability. And because everyone is at some risk of poverty-inducing events, my claim supports "universalism" as a model for disability theory.<sup>34</sup> Poverty as disability also helps shine a light on the oft-neglected category of "invisible" brain-based disabilities, which include learning disabilities, mental illnesses, and cognitive, intellectual, and developmental disabilities.<sup>35</sup>

Poverty as disability also suggests avenues for law and policy reform. Some avenues may be very broad, by extending to persons in poverty the range of positive and negative rights afforded to persons with disabilities.<sup>36</sup> Others are narrower, by shifting

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improvements in another. Finally, evidence of causation is probabilistic, not determinative. See Duncan et al., *supra* note 19, at 10.4.

<sup>33</sup> In some contexts, financial adversity may improve certain cognitive capacities, such as procedural learning, executive functions in uncertain environments, and aspects of rational decisionmaking. See Willem E. Frankenhuis & Daniel Nettle, *The Strengths of People in Poverty*, 29 CURRENT DIRECTIONS PSYCH. SCI. 16, 17–19 (2020).

<sup>34</sup> See, e.g., Jerome E. Bickenbach et al., *Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps*, 48 SOC. SCI. & MED. 1173, 1190 (1999); Irving Kenneth Zola, *Toward the Necessary Universalizing of a Disability Policy*, 67 MILBANK Q. 401, 420 (1989), reprinted in 83 MILBANK Q. 1, 20 (2005).

<sup>35</sup> Ariana Cernius, *Enforcing the Americans with Disabilities Act for the "Invisibly Disabled": Not a Handout, Just a Hand*, 25 GEO. J. POVERTY L. & POL'Y 35, 56 (2017).

<sup>36</sup> See generally Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 426 (2001).



disability rights toward universalism and focusing on institutional design and social policy benefitting all and accommodating difference where needed.<sup>37</sup>

Program design, for example, offers both broad and narrow opportunities for reform. Broadly, welfare programs aimed at alleviating poverty *as disability* may need to increase wealth transfer dramatically, such as through universal basic income, negative income tax, and child grants. More narrowly, administrative programs designed to help alleviate poverty—which often require complex application burdens and continuous entitlement proof—should be simplified to avoid imposing significant cognitive demands on those already cognitively burdened.<sup>38</sup> Additionally, making it easier for people to navigate administrative bureaucracy may free up attentional cognitive resources that they can use for caregiving, job-seeking, and other activities of self-determination.<sup>39</sup> My claim exposes the way welfare systems overlook—and even exacerbate—invisible disabilities caused by the very situation they are meant to address.

Poverty as disability also helps reconceptualize social-welfare interventions.<sup>40</sup> Cash and opportunity allowances should be framed as an acknowledgment of the collective responsibility for disability<sup>41</sup> and an investment in individual capacity.<sup>42</sup> As one illustration, when disabled persons are entitled to rights and accommodations, such as in schools or employment, poor persons should be screened for cognitive and neurological disabilities that would entitle them to the same support. My claim also invigorates consideration of poverty as a quasi-protected class<sup>43</sup> and of

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<sup>37</sup> See Ari Ne'eman, *What If Disability Rights Were for Everyone?*, N.Y. TIMES (Oct. 1, 2021).

<sup>38</sup> Julian Christensen, Lene Aarøe, Martin Baekgaard, Pamela Herd & Donald P. Moynihan, *Human Capital and Administrative Burden: The Role of Cognitive Resources in Citizen-State Interactions*, 80 PUB. ADMIN. REV. 127, 127 (2020).

<sup>39</sup> See, e.g., *id.* at 131–33; Emily R.D. Murphy, *Collective Cognitive Capital*, 63 WM. & MARY L. REV. 1347, 1390 (2022).

<sup>40</sup> See Bagenstos, *supra* note 3, at 4–8; Weber, *supra* note 6, at 577.

<sup>41</sup> Sagit Mor, *Disability and the Persistence of Poverty: Reconstructing Disability Allowances*, 6 NW. J.L. & SOC. POL'Y 178, 184 (2011).

<sup>42</sup> Murphy, *supra* note 39, at 1390–91.

<sup>43</sup> See Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401 (1995) (recounting the failure of the effort to use litigation

recognizing a right to healthy brain development. Finally, broad understanding of the widespread experience of invisible brain-based disability should shift policymakers' attention towards prevention rather than remediation. The brain and behavioral science offer not only a window to visualizing these implications but also some pathways toward their implementation.

### *Litigation Strategies*

Private civil litigation is an important tool for social change. Litigation for structural changes to policies affecting people in poverty, however, has had limited success, and, since the 1970s, courts have limited legal rights and protections for people in poverty.<sup>44</sup> Understanding poverty as disability may offer new litigation options for poor people to assert rights and obtain remedies. Bringing such suits as experimentalist interventions can contribute to broader legislative and social change.<sup>45</sup>

For example, poverty as disability aligns poverty with the growing phenomenon of raising student claims of “medical civil rights”<sup>46</sup> under the ADA and Rehabilitation Act and seeking structural accommodations—not individualized plans—in schools.<sup>47</sup> In the case of means-tested benefits systems—like

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to establish any right to welfare); Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527 (2014); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

<sup>44</sup> See generally MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–73* (1993); *THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES* (Marie A. Failing & Ezra Rosser eds. 2016).

<sup>45</sup> See generally Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).

<sup>46</sup> Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1173 (2020).

<sup>47</sup> See, e.g., *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1104–06 (C.D. Cal. 2015). In the order denying defendants' motion to dismiss, the court recognized that trauma and its effects were cognizable as a “physical or mental impairment” within the meaning of Section 504 and the ADA. *Id.* at 1109–11. See also *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004-PCT, 2018 WL 1871457, at \*3–4 (D. Ariz. Mar. 29, 2018). The *Stephen C.* case settled these claims in 2020.

TANF, SNAP, Medicaid programs, or General Assistance statutes—the cognitively burdensome processes and procedures required to establish and maintain benefits can be challenged as a form of discrimination on the basis of a disability that causes “bureaucratic disempowerment,”<sup>48</sup> which can be cast as a deprivation of procedural due process.<sup>49</sup>

The issue for the courts is one of structural equality and the accommodation of difference, rather than formal equality via equal treatment of individuals. The ADA requires persons with a “disability” be given meaningful access to state-provided services.<sup>50</sup> Because the legal definition of disability is based on functional impairments, rather than their etiological cause, someone whose poverty causes cognitive deficits in attentional focus and executive function that substantially affect their ability to learn, think, concentrate, communicate, or work is arguably disabled within the meaning of the ADA.

The causal relationship between poverty and cognitive or neurological deficits plays at least two roles in legal proceedings. First, articulating the causal relationship may facilitate the factual identification and acceptance of disabling cognitive impairments that are often subtle, invisible, and overlooked, particularly in the context of persistent sociopolitical assumptions that poverty is the result of individual failure or cultural pathology. Second, identifying poverty as a cause of disabling cognitive deficits may facilitate obtaining structural injunctive relief, consistent with both the ADA’s theory of structural equality and its purpose as an antidiscrimination law, through class certification.<sup>51</sup> Class-wide relief is also consistent with the ADA’s focus on providing “meaningful access.” Poverty as disability thus has wide-ranging

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Appellants’ Opening Brief at \*11 n.6, *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-CV-08004-SPL, 2021 WL 2672928 (9th Cir. June 25, 2021).

<sup>48</sup> Michael Lipsky, *Bureaucratic Disempowerment in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 3 (1984).

<sup>49</sup> *Perdue v. Murphy*, 938 N.E.2d 766, 773, 775 (Ind. Ct. App. 2010), *vacated sub nom.* *Perdue v. Gargano*, 962 N.E.2d 640 (Ind. 2011), *vacated sub nom.* *Perdue v. Gargano*, 964 N.E.2d 825 (Ind. 2012).

<sup>50</sup> *Id.* (citing *Alexander v. Choate*, 469 U.S. 287, 301 (1985)).

<sup>51</sup> Linda Hamilton Krieger, *Introduction: Backlash Against the ADA*, in *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 1* (Linda Hamilton Krieger ed. 2003).

implications for civil litigation seeking benefits and remediation for impoverished persons.

### *Conclusion*

To the extent that brain and behavioral science explain human behavior in a way that is different than previously assumed, they hold the potential to change policy by changing minds. Here, evidence from brain science may prove sufficiently disruptive to permit reexamination of the factual underpinnings of the causes of behavior in poverty.

That reexamination does present the risk of misinterpreting the science and the risk of blurring the boundaries between the descriptive and the normative. Science can provide a better understanding of how and why humans behave the way they do, but it cannot answer how—or whether—to incorporate that understanding into better law and policy. Brain and behavioral science, like all science, must be thoughtfully deployed in society with ethical, social, and legal guardrails in mind, with careful attention to the limits of scientific knowledge and advancement, and alongside societal norms of justice and welfare.

But even with those caveats, brain and behavioral science are revealing strong evidence that poverty causes problems in development and cognition. These problems are invisible, subtle, and hard to detect, but may cause significant impairment in attention, decisionmaking, planning, and judgment that add to the challenges of life in poverty. For some poor people, the impairments may be disabling. Understanding poverty as disability challenges the legal and social categories of both “poverty” and “disability” and has implications for both law and policy.

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