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## ARTICLE

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### CONTESTING THE CARCERAL STATE WITH DISABILITY FRAMES: CHALLENGES AND POSSIBILITIES

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#### INTRODUCTION

Within the last decade there has been an uptick in legal scholarship addressing the various forms of discrimination and physical, mental, and emotional harms experienced by disabled people in prisons and jails.<sup>1</sup> This

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<sup>1</sup> See generally Jasmine E. Harris, *Disability Law on the Frontlines*, CORNELL L. REV. ONLINE (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3705552](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3705552) [<https://perma.cc/PH4R-LKR7>] (arguing that the “integration mandate” central to disability law may lessen the effects of COVID-19 in various spaces); Mary Crossley, *Prisons, Nursing Homes, and Medicaid: A Covid-19 Case Study in Health Injustice*, 30 ANNALS HEALTH L. & LIFE SCI. 101, 109 (2021) (discussing how discrimination against Black and disabled people during the COVID-19 pandemic has resulted in disproportionate suffering in these groups); Benjamin C. Hattem, *Carceral*

recent literature is situated among a larger and more well-known critique of mass incarceration that has, until recently, focused primarily on race and class disparities, as well as various stages in the criminal legal process sites for racial and class subordination.<sup>2</sup>

Expanding extant critiques by addressing disability and disablement within the ongoing social dilemma of mass incarceration is timely and important for two main reasons: first, disabled people are overrepresented in prisons and jails and second, confinement in prison and jails poses specific physical, psychological, emotional, and habilitative harms to disabled people in particular.

First, as to the disparities: people with disabilities are overrepresented in prisons and jails. The most recent national study by the U.S. Department of Justice's Bureau of Justice Statistics found that approximately 3 in 10 incarcerated people have a disability.<sup>3</sup> More specifically, approximately 10% of survey respondents reported a mobility impairment; over 6% reported that they are deaf or low-hearing; and over 7% reported that they are blind or low-vision, defined as serious difficulty seeing even with glasses.<sup>4</sup> In another survey of incarcerated individuals, approximately 4% to 10% of respondents

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*Trauma and Disability Law*, 72 STAN. L. REV. 995, 998 (2020) (arguing that trauma is a central part of the carceral experience); Jamelia N. Morgan, *The Paradox of Inclusion: Applying Olmstead's Integration Mandate in Prisons*, 27 GEO. J. POVERTY L. & POL'Y 307-12 (2020) (discussing novel applications of legal strategies to apply in the prison context); Robert D. Dinerstein & Shira Wakschlag, *Using the ADA's "Integration Mandate" to Disrupt Mass Incarceration*, 96 DENVER L. REV. 917, 925 (2019) (discussing use of the *Olmstead* precedent in cases involving disabled incarcerated litigants); Jamelia N. Morgan, *Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 87 (2018) (documenting the stories of currently and formerly incarcerated people with disabilities and disability rights advocates); Margo Schlanger, *Prisoners with Disabilities in REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE* 297 (E. Luna, ed. 2017) ("[C]hoices relating to disability are central to the operation of U.S. incarcerative facilities . . ."); Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 1, 6 (2016) (discussing *Olmstead* principles in the context of diversion programs); Michael L. Perlin, "For the Misdemeanor Outlaw": *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 232-33 (2000) (discussing the impact of the *Olmstead* doctrine on placement of disabled incarcerated individuals in less restrictive settings). For an extensive critique of prison reform litigation from an abolitionist, critical race, and critical disability perspective, see LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 253-68 (2020).

<sup>2</sup> See generally, e.g., JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

<sup>3</sup> JENNIFER BRONSON, LAURA M. MARUSCHAK & MARCUS BERZOFSKY, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., SPECIAL REPORT NO. NCJ249151, *DISABILITIES AMONG PRISON AND JAIL INMATES*, 2011-12, at 1 (2015).

<sup>4</sup> *Id.* at 1-3.

reported having an intellectual disability.<sup>5</sup> Over half of all incarcerated individuals reported symptoms that meet the criteria for various mental illnesses.<sup>6</sup> Mania and depression predominated, but 15% of state prisoners had symptoms of psychotic disorders, such as delusions or hallucinations.<sup>7</sup> Finally, 51% of people incarcerated in prisons had some kind of chronic medical condition such as diabetes, cancer, heart disease, or high blood pressure.<sup>8</sup>

Gender and disability intersect in prisons and jails to render women with disabilities uniquely vulnerable while incarcerated. As many as 80% of incarcerated women meet the criteria for having at least one psychiatric disability.<sup>9</sup> Incarcerated women have higher rates of disability than the general population: 12% of women in the general population have symptoms of a mental disorder, or psychiatric disabilities, compared to 73% of women in state prison, 61% in federal prison, and 75% in local jails.<sup>10</sup>

Second, disabled people are particularly vulnerable to violence, physical and psychological harms in prisons and jails. Prisons and jails are violent and dangerous places that produce severe harms to physical, mental, and emotional health and well-being. All people incarcerated in prison and detained in jail are vulnerable to these risks. As a 2007 World Health Organization report noted, “[p]risons are bad for mental health”<sup>11</sup> due to “overcrowding; violence; solitary confinement; lack of privacy; separation from family and friends; lack of meaningful activity; and uncertain futures in terms of housing, work, and relationship.”<sup>12</sup> At the same time, these carceral

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<sup>5</sup> LEIGH ANN DAVIS, THE ARC, PEOPLE WITH INTELLECTUAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEMS: VICTIMS & SUSPECTS 1 (Aug. 2009), available at <https://thearc.org/wp-content/uploads/forchapters/Criminal%20Justice%20System.pdf> [<https://perma.cc/TT8T-AWMM>].

<sup>6</sup> DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS, SPECIAL REP. NO. NCJ213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006) [hereinafter JAMES & GLAZE].

<sup>7</sup> *Id.*

<sup>8</sup> LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., SPECIAL REPORT NO. NCJ252644, MEDICAL PROBLEMS REPORTED BY PRISONERS 4 (2021).

<sup>9</sup> Barbara E. Bloom & Stephanie S. Covington, *Addressing the Mental Health Needs of Women Offenders*, in WOMEN’S MENTAL HEALTH ISSUES ACROSS THE CRIMINAL JUSTICE SYSTEM 1 (Gido & Dalley eds., 2008), [https://www.nationaljailacademy.org/\\_documents/resources/female/addressing-women-mental-health.pdf](https://www.nationaljailacademy.org/_documents/resources/female/addressing-women-mental-health.pdf). [<https://perma.cc/MW6C-4U9Y>].

<sup>10</sup> JAMES & GLAZE, *supra* note 6, at 1-4.

<sup>11</sup> World Health Org. [WHO] & Int’l Comm. of the Red Cross, *Information Sheet: Mental Health and Prisons*, at 1 (2005), [https://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0007/98989/WHO\\_ICRC\\_InfoSht\\_MNH\\_Prisonns.pdf](https://www.euro.who.int/__data/assets/pdf_file/0007/98989/WHO_ICRC_InfoSht_MNH_Prisonns.pdf) [<https://perma.cc/ZK3N-6X6Y>].

<sup>12</sup> Syrus Ware, Joan Ruzsa & Giselle Dias, *It Can’t Be Fixed Because It’s Not Broken: Racism and Disability in the Prison Industrial Complex*, in DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA 170 (Liat Ben-Moshe et al. eds., 2014).

spaces produce unique harms and injuries for disabled people, who face a heightened risk of violence, deprivation, and discrimination.<sup>13</sup> Incarcerated people with disabilities are at a greater risk of encountering violence while in prison and suffering injuries from violent encounters.<sup>14</sup> Additionally, prisoners with disabilities face an increased risk of being denied access to appropriate mental health and medical services, along with therapeutic supports, putting them at greater risk of declining health outcomes.<sup>15</sup> Discrimination experienced by disabled people takes many forms—ranging from denials of access to medical services, educational, and rehabilitative programs, to segregation in solitary confinement which includes isolation in cells in conditions amounting to extreme deprivations of social and environmental stimuli.<sup>16</sup>

In light of these harms, it is perhaps not surprising that advocates have framed these carceral conditions—low-quality mental and medical health care, pervasive violence within prisons and jails, poor nutrition, and other harsh conditions—as “disabling”<sup>17</sup> in that the conditions of confinement have produced, or risk producing, physical and mental disabilities.<sup>18</sup> These advocates have relied on “disability frames,” in part, in order to capture the debilitating nature of injuries and scope of the harms and to seek legal relief

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13 See Peter Blanck, *Disability in Prison*, 26 S. CAL. INTERDISC. L.J. 309, 314 (2017) (“Research shows that prisoners with disabilities are at an increased risk for inadequate rehabilitation and safety while incarcerated. Inmates with disabilities have higher rates of injuries from violence and unintentional causes as compared to the general population of inmates without disabilities. Inmates with comorbid mental health conditions, and psychosocial and cognitive impairments (who are overrepresented in prisons) are at a higher risk of being victims of violence and displaying more violent behaviors relative to inmates without such disabilities. Incarceration is also generally associated with greater and deteriorating health conditions.”). People with disabilities also face disproportionate exposure to violence in the free world. According to a 2017 DOJ study, the rate of violent victimization for people with disabilities was 2.5 times that of people without disabilities, adjusting for the age distributions for individuals who have disabilities and those who do not. See ERIKA HARRELL, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., SPECIAL REPORT NO. NCJ250632, CRIMES AGAINST PERSONS WITH DISABILITIES, 2009-2015 - STATISTICAL TABLES 1 (2017).

14 Peter Blanck, *Disability in Prison*, *supra* note 1313, at 314.

15 *Id.* at 14.

16 Jamelia N. Morgan, *Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 87 (2018).

17 Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 978 (2019); see also Beth Ribet, *Naming Prison Rape As Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL’Y & L. 281, 291 (2010) (“My intervention here is to assert that it is meaningful to understand incarceration, and prison rape specifically, as experiences which are not just unhealthy, but disabling.”).

18 See, e.g., Nicholas Freudenberg, *Adverse Effects of US Jail and Prison Policies on the Health and Well-Being of Women of Color*, 92 AM. J. PUB. HEALTH 1895, 1897 (2002) (“Incarceration itself can increase the risk of infection, sexual assault, and improper medical care or contribute to posttraumatic stress disorder.”).

for their clients. As the term is used here to apply to conditions of confinement litigation, a disability frame is the use of disability and disability rights discourse to describe prisons conditions; disablement; the physical, psychological, and emotional harms stemming from deprivations or denials; or other forms of discrimination.<sup>19</sup> Advocates have relied on disability frames, in part, to allege legal injuries (namely, violations of statutory and constitutional rights) stemming from the physical and psychological harms, violence, and deprivation that disabled people experience in prisons and jails across the country.<sup>20</sup>

Since the passage of the ADA, disability frames are fairly common in prison reform litigation.<sup>21</sup> As I discuss below, though the disability frame serves some productive purposes, not all uses of the disability frame are beneficial given the long-standing goals of disability rights and disability justice movements. Indeed, both in prison reform litigation and beyond, stigmatizing tropes of disability may be present, even amidst legal victories.<sup>22</sup> That is to say, the reliance on stigmatizing tropes of disability may harm broader movement goals even if, in the individual case, the plaintiff prevails. The legal strategy of characterizing disability as an injury deserving of damages produces real tensions for advocates who aim to further the rights of prisoners and detainees without stigmatizing those within that group who are people with disabilities. For prison reform advocates, what is the appropriate use of the disability frame, if any? Which disability frames are stigmatizing? What are some of the challenges of deploying disability frames in conditions of confinement litigation and what are some of the possibilities? More specifically, what disability frames are productive in terms of promoting the separate goals of prison reform, decarceration, or abolition?

Part I discusses some of the uses of disability frames in conditions of confinement litigation, including what I term *stigmatizing disability frames* and *productive disability frames*. Part II outlines the goals of disability rights and disability justice movements and how those goals connect to movements for prison reform, decarceration, and abolition. Finally, Part III argues that, despite the risks, productive disability frames can serve to improve conditions of confinement for all incarcerated people, whether disabled or not.

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<sup>19</sup> For the purposes of this Article, to count as a disability frame, plaintiffs do not have to specifically allege claims under the Americans with Disabilities Act or the Rehabilitative Act of 1973. It is sufficient that disability frame is used to identify physical and mental impairments that result from, or are exacerbated by, incarceration.

<sup>20</sup> See *infra* notes 23–24 and accompanying text.

<sup>21</sup> See BEN-MOSHE, *DECARCERATING DISABILITY*, *supra* note 1, at 257 (“[D]isability became a major trope in prisoners’ rights litigation, but not necessarily from a critical or intersectional position.”).

<sup>22</sup> See, e.g., *id.* at 262.

## I. DISABILITY FRAMES IN CONDITIONS OF CONFINEMENT LITIGATION

In this Part, I examine the disability frame in conditions of confinement litigation in prisons and jails. Specifically, I discuss how advocates and courts are framing violations of constitutional law and federal disability laws as “disabling.”

Plaintiffs have deployed disability frames to allege that prison and jail conditions are disabling or debilitating. There are two primary versions of the disability frame argument. First, plaintiffs argue that confinement in the harsh conditions of prison and jail poses a risk to the incarcerated person’s health or safety by making it likely that their physical and mental health will (or will further) deteriorate while incarcerated. The risk of (or actual) deterioration is due in part to the alleged failures of prisons and jails to meet the medical and mental health needs of incarcerated plaintiffs with disabilities, or the alleged failures of prisons and jails to protect the incarcerated plaintiffs from harm, like violent assaults. Where disability frames are deployed here, disability is used to frame the nature of the alleged injury, constitutional deprivation, or denial of access; by acknowledging disability, advocates can more accurately describe the actual injuries alleged—risks of, or physical and/or psychological harms.<sup>23</sup>

In the second type of disability frame, prisons and jails are framed as disabling because they impede the ability of incarcerated people to rehabilitate—that is, to access rehabilitative, religious, or vocational

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<sup>23</sup> See, e.g., *Black v. Decker*, No. 20-CV-3055, 2020 WL 4260994, at \*6 (S.D.N.Y. July 23, 2020) (“Petitioner argues that he has received ‘inadequate care’ and faces ‘near certain death or serious debilitating complications in a jail environment.’ Petitioner specifically points to the fact that the OCJ medical team has been ‘unable to locate [Petitioner’s] medical issue,’ has not performed other types of examinations, ‘including an echocardiogram or consistent heart monitoring,’ and has not provided Petitioner with ‘off-site treatment’ or ‘hospitalization’ as is required by ICE guidelines.”); *Watson v. Searls*, No. 20-CV-517, 2020 WL 2572747, at \*1 (W.D.N.Y. May 21, 2020) (“[Watson] claims that his continued detention during the COVID-19 pandemic violates his right to Due Process under the Fifth Amendment . . . . More specifically, Watson—who claims that he ‘suffers from diabetes, obesity, and hypertension’—has been diagnosed with COVID-19, and he argues that the respondents are ‘unable to protect [him] from near certain death or debilitating complications in a jail environment.’”) (citations omitted); *United States v. Hernandez*, 89 F. Supp. 2d 612, 616-17 (E.D. Pa. 2000) (“Mr. Hernandez has not submitted any medical documentation regarding his condition, and there is no indication that his diabetes, asthma, and high blood pressure are so debilitating that the Bureau of Prisons will not be able to care for him adequately or that his condition is otherwise so extraordinary that it warrants a departure.”); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1280 (S.D. W. Va. 1981) (“The conditions existing at the jail serve to punish the pre-trial detainees and severely deprive the inmates, subjecting them to the specter of physical and emotional damage by their experiences in the substandard, debilitating, environment of the jail.”).



programs.<sup>24</sup> Here, disability frames have been deployed to frame denials of access (often, denials of reasonable accommodations) to rehabilitative programs, or appropriate medical and mental health treatment, as disability discrimination. When deployed in this way, the disability frame emphasizes not just the disability-based discrimination based on denials of reasonable accommodations, but also how such denials can impede rehabilitative opportunities by thwarting access to programs that permit incarcerated people to develop educational, rehabilitative, and educational skills.<sup>25</sup> Denying access to educational, rehabilitative, and vocational programs by failing to accommodate qualified individuals with disabilities functions as a type of disabling prison condition that prevents qualified individuals with disabilities from acquiring these skills.<sup>26</sup> Disabling prison conditions may also prevent qualified incarcerated people with disabilities from maintaining educational and vocational skills that may be acquired when they enter prison

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<sup>24</sup> See, e.g., *Andrews v. Davis*, 944 F.3d 1092, 1103 (9th Cir. 2019) (“According to the testimony of a former physician at one facility, the ‘conditions at the overcrowded and rat-infested prisons [were] ‘so debilitating’ that they deprived inmates of ‘any opportunity to rehabilitate themselves or even to maintain the skills already possessed.’” (quoting *In re Andrews*, 124 Cal. Rptr. 2d 473, 52 P.3d 656, 678 (Cal. 2002) (Kennard, J., dissenting))); *Weir v. Nix*, 890 F. Supp. 769, 779-80 (S.D. Iowa 1995), *aff’d*, *appeal dismissed in part*, 114 F.3d 817 (8th Cir. 1997) (“Weir professes an interest in in-depth religious scholarship and the twenty-five book limit plus the resources of the chapel library give him only a limited ability to pursue this interest. It is not surprising in a prison setting that the research tools available are less than ideal. Weir’s interest in religious scholarship stems from a personal avocation and desire to escape the debilitating atmosphere of prison life.”); *Madyun v. Thompson*, 657 F.2d 868, 874 (7th Cir. 1981) (“Paragraph 12L alleges that prisoners at Pontiac possess insufficient opportunities for vocational and educational training.”); *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976) (“The evidence in these cases also establishes that prison conditions are so debilitating that they necessarily deprive inmates of any opportunity to rehabilitate themselves, or even to maintain skills already possessed. While courts have thus far declined to elevate a positive rehabilitation program to the level of a constitutional right, it is clear that a penal system cannot be operated in such a manner that it impedes an inmate’s ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration.”), *aff’d and remanded sub nom.*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part, judgment rev’d in part sub nom.*, *Alabama v. Pugh*, 438 U.S. 781 (1978) (remanding for dismissal an order for injunctive relief requiring Alabama to eradicate cruel and unusual punishment from its prison system because such an order violated the Eleventh Amendment).

<sup>25</sup> With respect to educational and vocational skills, these arguments likely have more traction in the prison setting where sentences are longer, as compared to the jail setting where detainees may enter for short stays, or cycle in and out. See *Frequently Asked Questions*, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., [https://bjs.ojp.gov/frequently-asked-questions?combine=&sort\\_by=changed&sort\\_order=DESC&page=1#faq-what-is-the-difference-between-jails-and-prisons](https://bjs.ojp.gov/frequently-asked-questions?combine=&sort_by=changed&sort_order=DESC&page=1#faq-what-is-the-difference-between-jails-and-prisons) [https://perma.cc/4AL4-L9LR] (click third page of Frequently Asked Questions, then expand “What is the difference between jails and prisons?”) (“Jails are locally operated short-term facilities that hold inmates awaiting trial or sentencing or both, and inmates sentenced to a term of less than one year, typically misdemeanants. Prisons are longer-term facilities run by the state or the federal government that typically holds felons and persons with sentences of more than one year. Definitions may vary by state.”).

<sup>26</sup> See *supra* note 24 and accompanying text.

or jail.<sup>27</sup> For example, disabling prison conditions may include preventing incarcerated people from accessing materials that permit one to maintain one's level of study in a particular religious practice.<sup>28</sup> Here, disabling prison conditions need not be focused specifically on physical barriers to accessing programs; disabling prison conditions could include things like overcrowded facilities that limit opportunities to safe educational and rehabilitative programs simply because resources are stretched too thin to accommodate all incarcerated people.

Prisoner rights advocates deploy disability frames strategically in pleadings, motions, and briefs for a variety of reasons. Complaints that allege disability discrimination most clearly align with, and are an obvious site for, disability frames. In addition, complaints alleging constitutional violations may also draw on disability frames to capture the nature and scope of the harms (i.e., physical and mental impairments, or the risks of these impairments) that the complainants allege. Though the utility of disability frames may be obvious, how do we evaluate whether these frames are productive or stigmatizing? The next Section explores this question and offers a template for distinguishing between stigmatizing and productive uses.

### A. Stigmatizing Disability Frames

Disability law scholars have long argued that societal stigmas about disability reinforce societal discrimination, isolation, segregation, and the subordinated status of disabled people as a group in society.<sup>29</sup> Given the

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<sup>27</sup> See, e.g., *Pugh*, 406 F. Supp. at 326 (“Inmates are denied any meaningful opportunity to participate in vocational, educational or work activities. As a result, most inmates must spend substantially all of their time crowded in dormitories in absolute idleness. Such unbroken inactivity increases boredom, tension and frustration, which in turn promote incidents of violence. The evidence reflects that idleness of this magnitude destroys any job skills and work habits inmates may have, and contributes to their mental and physical degeneration.”); see also *infra* note 28 and accompanying text.

<sup>28</sup> See, e.g., *Weir*, 890 F. Supp. at 779-80 (describing the effect of a prison library's limited resources on an inmate's religious practice).

<sup>29</sup> See, e.g., Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 233-34 (2016) (“Special-treatment stigma occurs when employers are unwilling to hire or promote employees who need special benefits or accommodations in the workplace because of the real or perceived costs of providing such accommodations. Because most caregivers are women, any suggested reforms that help caregivers may have the perverse effect of causing employers to hire or promote fewer women. Special-treatment stigma also manifests itself in the resentment of other employees over the perceived special treatment given to caregivers.”); Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 480 (2015) (“[W]hile the ADA has generated greater integration of people with disabilities (and as a positive byproduct, greater social visibility) in some respects, it has not generated greater opportunities for people with disabilities to meaningfully interact with nondisabled people in public settings so as to challenge existing stigma.”); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 633 (1999) (noting that individuals with a record of impairment “are included in the definition because



prevalence of societal stigma against people with disabilities, advocates committed to working against disability-based subordination should be mindful of the ways that disability frames are deployed in litigation (and policy advocacy, more broadly) in order to avoid reinforcing stigma or using disability tropes that are stigmatizing.<sup>30</sup>

If the disability frame is a tool that can either maintain, entrench, or alleviate disability stigma and subordination, then the question becomes, what disability frames are stigmatizing for disabled people, both incarcerated and not? Of course, distinguishing which frames further disability stigma and which undermine it is a difficult task. Yet, the ongoing use of disability frames makes distinguishing stigmatizing from productive frames an urgent one. So, in the paragraphs below, I offer a few provisional principles for distinguishing the frames that are stigmatizing from those that are not, though this is by no means an exhaustive list.

First, stigmatizing disability frames use language that reinforce ableist notions of disability. Ableist language remains pervasive in society, and it is one of the mediums through which stigmatizing meanings of disability—meanings linking disability to deviance, dependency, deficiency, or criminality—are widely disseminated.<sup>31</sup> Ableist language, albeit likely

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Congress recognized the potential stigma that attaches once an individual is labeled as handicapped and the detrimental effects of that stigma on an individual's opportunities for employment and services.”); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 471 (2000) (“[The ADA] guarantee[d] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities . . . .”); see also Kaaryn Gustafson, *Disability, Fluidity, and Measuring Without Baselines*, 75 MISS. L.J. 1007, 1032 (2006) (“But disability is not only an external construct, it is also a self-chosen attribute, an axis of identity that, while at times has borne stigma, at other times has empowered individuals and generated community.”).

30 A similar discussion occurs in the realm of civil rights law and antidiscrimination law. See Jasmine Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 934 (2021) (“[L]egal scholars outside of disability law have increasingly reached for disability remedies in the absence of viable curative pathways in the existing civil-rights canon. These limitations are clear, yet selective deployment of disability law creates a tension between short term gains (receipt of benefits) and the negative effects of long-term framing (disability is an individual deficit and tragedy.”); see also *id.* (“Rabia Belt and Doron Dorfman have argued that the ‘medicalization of civil rights’ while perhaps fruitful for individuals seeking income supports through access to welfare benefits, may, in the long-term, undermine broader normative gains of the disability movements (disability rights, disability justice) to move away from biological frames of disability.”).

31 See, e.g., James L. Cherney, *The Rhetoric of Ableism*, 31 DISABILITY STUD. Q., no. 3, 2011, <https://dsq-sds.org/article/view/1665/1606> [<https://perma.cc/6AEE-ZH49>] (“‘Our minds, as linguistic products, are composed of concepts (verbally molded) which select certain relationships as meaningful.’ In other words, meaning exists primarily as a function of language rather than a natural or necessary consequent of material objects or bodies. Our comprehension of reality itself arises from our perspective, so ‘different frameworks of interpretation will lead to different conclusions as to what reality is.’” (quoting KENNETH BURKE, PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE 35 (3d ed. 1984))); Lydia X.Z. Brown, *Ableism/Language*, AUTISTIC HOYA, <https://www.autisticchoya.com/p/ableist-words-and-terms-to-avoid.html> (last updated Nov. 16, 2021) [<https://perma.cc/3DAM-TPM60>] (listing several ableist terms common in everyday language).

unintentionally, does creep into prisons conditions of confinement litigation that deploys disability frames to advocate on behalf of incarcerated people with disabilities. Lydia X.Z. Brown provides a list of common terms that reinforce ableism—terms that I refer to here as *ableist meanings of disability*.<sup>32</sup> Phrases in pleadings that describe disabled people as “suffering from” disabilities are the most common use of stigmatizing disability frames that reinforce ableist understandings of disability. As Brown explains, such language is “[o]ften ableist because it assumes that being disabled always means suffering, when that is frequently not true.”<sup>33</sup> Of course, if driven by the clients own description, as Brown notes, such language is not ableist, and, furthermore, “if it is describing a specific universally unwanted and painful experience (like having seizures),” it is likely not ableist either.<sup>34</sup> These distinctions in language matter for prisoners rights’ advocates seeking to avoid stigmatizing uses of disability frames through their language.

Second, stigmatizing disability frames, such as ableist meanings of disability, may reinforce long-standing stereotypes that link people with psychiatric disabilities to danger, violence, and criminality. In court opinions and briefs challenging harmful practices like solitary confinement, stereotypes that link disability with criminality can show up in advocacy on behalf of incarcerated clients with disabilities. For example, imagine a plaintiff who has a psychiatric disability—often termed a *mental illness* or *disorder*. These frames may be stigmatizing even when they are deployed to challenge assertions made by prison officials that individuals with so-called “serious mental illness” must be placed in isolation because they are dangerous, uncontrollable, and volatile. That is because, even while emphasizing that the particular client with a disability is being held in solitary confinement in violation of constitutional or statutory law, the narrative used to describe their conduct reinforces stereotypes that link disability, criminality, and dangerousness.

The following hypothetical allegation from a complaint exemplifies how stigmatizing disability frames may reinforce entrenched stereotypes that link psychiatric disabilities with danger, violence, and criminality:

*Jack was not able to maintain good behavior while in prison. Jack suffers from schizophrenia, among other mental illnesses. Jack's mental illness showed up in prison and Jack decompensated in prison. The illness causes Jack to act irrationally and to break prison rules, including rules against self-harm and staff assaults. Jack received*

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<sup>32</sup> Brown, *Ableism/Language*, *supra* note 31.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Instead of writing that an individual “suffers from” a particular disability, Brown recommends simply stating that an individual “has a disability.” *Id.*

*disciplinary tickets for these rule violations. As a result of these violations, Jack lost good time credits.*

The above account starts with deficiency framing (i.e., Jack is not able to maintain good behavior) and disability is the implied cause for such deficiencies. What is expressly stated is that Jack's disability causes him to act irrationally and violently. Yet, a person may read this account and determine that Jack's disability is exacerbated by the prison's failures to provide him with adequate mental health treatment or by the harsh conditions of imprisonment itself. A reframed paragraph to avoid stigmatizing frames would look as follows:

*Prison officials sanctioned Jack for not maintaining good behavior while in prison. Jack has schizophrenia, among other psychiatric disabilities. Jack's psychiatric disabilities showed up in prison, and due to prison officials' failure to provide Jack with access to adequate and constitutional mental health treatment, Jack decompensated in prison. Due to the lack of mental health treatment, Jack continued to act irrationally and break prison rules, including rules against self-harm and staff assaults. Jack received disciplinary tickets for these rule violations. As a result of these violations, Jack lost good time credits.*

In addition to modifications to ableist language, the reframed paragraph still deploys a disability frame—e.g., prison contributed to Jack's mental decompensation—but it shifts the focus of the problem from Jack's psychiatric disability to the prison's failure to provide Jack with mental treatment.

Third, disability frames that further what Doron Dorfman refers to as *special rights discourses* and Nicole Porter refers to as *special treatment stigma* may also promote stigma against disabled people.<sup>35</sup> Special rights discourses maintain that "minority groups gain an unfair advantage by 'disguising' their demands as striving to achieve 'equal rights' and an 'even playing field' when they are actually seeking *extra* benefits."<sup>36</sup> Special treatment stigma "occurs when employers are unwilling to hire or promote employees who need special

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<sup>35</sup> Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV., no. 4, at 1, 10 (2019); Porter, *Special Treatment Stigma*, *supra* note 29, at 233-34; see also Harris, *Processing Disability*, *supra* note 29, at 480 ("[W]hile the ADA has generated greater integration of people with disabilities (and as a positive byproduct, greater social visibility) in some respects, it has not generated greater opportunities for people with disabilities to meaningfully interact with nondisabled people in public settings so as to challenge existing stigma."); Crossley, *Disability Kaleidoscope*, *supra* note 29, at 633 (noting that individuals with a record of impairment "are included in the definition because Congress recognized the potential stigma that attaches once an individual is labeled as handicapped and the detrimental effects of that stigma on an individual's opportunities for employment and services.").

<sup>36</sup> Dorfman, *Fear of the Disability Con*, *supra* note 35, at 10.

benefits or accommodations in the workplace because of the real or perceived costs of providing such accommodations.”<sup>37</sup> Disability frames may further “special rights discourses” and “special treatment stigma,” in cases where advocates frame plaintiffs’ requests for relief as “special needs.” Here again, these cases often frame plaintiffs’ legal injuries as the result of individual (often physiological) deficiencies rather than structural ones.<sup>38</sup>

### B. Productive Disability Frames

Productive disability frames surface incarceration as a site for examining the material consequences of disability-based subordination. It does so in three ways. First, the disability frame provides for an individual and structural critique of carceral conditions and the impact on the individual (or individuals) with disabilities. The disability frame permits a focus on the individual harms to the body and mind, as well as, how prison conditions within the local jail or the prison system as a whole contribute to disablement.<sup>39</sup> The frame facilitates an examination of the conditions in the prison or jail and how such conditions are the “origin or cause of disability,”<sup>40</sup> and, further, how prison conditions are, in large part, produced by policies and practices that dictate how prisons will be managed. In this way, by focusing on disabling conditions, advocates can work to identify and

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<sup>37</sup> Porter, *Special Treatment Stigma*, *supra* note 29, at 233-34.

<sup>38</sup> See, e.g., Second Amended Complaint at 36, *Estate of Nunez v. Cnty. of San Diego*, No. 16-CV-1412, 2017 WL 3188321 (S.D. Cal. July 13, 2017) (“ADA creates an affirmative duty in some circumstances to provide special, preferred treatment, or ‘reasonable accommodation’ . . . . Discrimination includes a defendant’s failure to make reasonable accommodations to the needs of a disabled person based on his mental health. These accommodations include specialized training of jail staff, heightened level of medical care, and diligent surveillance.”); Plaintiff’s First Amended Complaint at 69, *Longoria v. Zapata*, No. 20-CV-00263, 2021 WL 2887991 (S.D. Tex. Mar. 5, 2021) (“[Plaintiff] had a mental health condition, schizoaffective disorder, depressive type, and . . . needed special treatment for that condition.”)

<sup>39</sup> In this Article, I rely on Beth Ribet’s definition of disablement. Ribet, *Naming Prison Rape as Disablement*, *supra* note 17, at 284-85. Ribet’s account is similar to what Bradley Areheart refers to as the *disablement/impairment binary*, which is a framing used by disability rights advocates and scholars to challenge medicalized definitions of disability and emphasize that disability is a social construction. Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL’Y REV. 347, 348 (2011) (“To challenge the idea that disability is essentially medical and to emphasize its social construction, disability scholars coined and advanced the disablement/impairment binary (‘disability binary’). Within this binary, disablement is said to represent the socially constructed features of disability, while impairment denotes a disabled physiology. Yet, by relying on a dichotomy between social disablement and physiological impairment, the disability binary underscores the notion that disability has a natural, biological essence. Such a notion may stymie disability rights by reinforcing older, biologically determinist ways of thinking about disability.”).

<sup>40</sup> Ribet, *Naming Prison Rape as Disablement*, *supra* note 17, at 284-85.

potentially remedy conditions that disproportionately affect disabled people or contribute to disablement.<sup>41</sup>

Second, the productive disability frame is more attuned to the physical, psychological, and emotional harms that incarcerated people experience than existing structural critiques that focus on race-based harms or gender-based harms alone. By bringing into sharper focus the effects of harsh conditions of prisons and jails on human bodies, disability frames provide advocates with a way to emphasize that system-wide prison policies and practices produce physical and mental impairments and decompensation—not simply deprivations. Deprivations are central to the constitutional analysis, and a denial of access may form the basis of a disparate treatment or failure to accommodate claims under the ADA. But, of course, not all deprivations are the same and the nature of the deprivation varies with respect to what is being denied—food, social interaction, environmental stimulation, access to prescription medications or therapy—and the effect of such denial. Disability frames provide a means for capturing the nature and scope of the material harms stemming from such denials.

Third, productive disability frames can serve to excavate and uncover oft-overlooked, unique harms produced by system-wide security policies rooted in a command-and-control, one-size-fits-all prison governance framework.<sup>42</sup> Universal strip search policies are one example. Many prisons and jails have policies that require strip searches when incarcerated people or detainees leave their cells or head to areas of the facility designated for visitation (e.g., with attorneys, family, counselors, etc.). These blanket strip searches apply 24/7 to all detainees within a prison or jail, including survivors of sexual abuse. Strip searches are invasive and can include physical and visual searches, or pat downs. For example, imagine that there are survivors of sexual abuse who have psychiatric disabilities—often stemming from trauma produced by such violence.<sup>43</sup> A disability frame would allow for a challenge to the uniform

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41 Ribet describes disablement as “not the presence of a disability (or at least not only) which results in negative consequence or ‘impairment,’ but the socio-cultural reaction to it . . . [as well as] the origin or cause of disability . . . [or] as the process by which some disabilities are socially produced, and more specifically are produced by violence, inequity and subordination.” *Id.*

42 Prisons and jails do engage in individualized security assessments for the purposes of determining housing and security classifications, but once classified, prisoners and detainees are subjected to the same rules and policies for all other people classified under the same security level.

43 Available data indicate that incarcerated women experience high rates of victimization, including physical and sexual abuse. JESSICA REICHERT, SHARYN ADAMS & LINDSAY BOSTWICK, *VICTIMIZATION AND HELP-SEEKING BEHAVIORS AMONG FEMALE PRISONERS IN ILLINOIS* 4 (2010),

[https://www.jrsa.org/awards/winners/10\\_Victimization\\_Help\\_Seeking\\_Behaviors\\_Female\\_Prisoner\\_s\\_Illinois.pdf](https://www.jrsa.org/awards/winners/10_Victimization_Help_Seeking_Behaviors_Female_Prisoner_s_Illinois.pdf) [<https://perma.cc/5YQQ-UWY5>]. Indeed, the Prison Rape Elimination Act of 2003 was enacted to respond to the prevalence of violence in prisons and protect prisoners from rape in prison. 42 U.S.C. § 15604. There is also the problem of sexual violence by prison guards against

strip-search policy as a failure to accommodate survivors of abuse who may be re-traumatized by pat downs and strip searches. In challenging these policies, disability frames can surface the unique harms to this specific subgroup that may not be apparent at first glance. Thus, disability frames provide an analysis that uncovers physical, psychological, and emotional harms that are more easily erased, or inadvertently ignored, under more traditional rights framing in conditions of confinement litigation.

Though individual legal strategies will inform the use of disability frames, not all disability frames are productive from the standpoint of the disability rights and Disability Justice movement.<sup>44</sup> What disability frames are productive in promoting the separate goals of prison reform, decarceration, or abolition? Specifically, in the next Part, I consider the following question: How can disability frames be deployed in prison conditions of confinement litigation to further the goals of the disability rights and Disability Justice movements?

## II. DISABILITY RIGHTS AND DISABILITY JUSTICE MOVEMENTS: FROM PRISON REFORM TO ABOLITION

How can disability frames be utilized in prison conditions of confinement litigation to further the goals of the disability rights and disability justice movements? The first step in answering this question is to recognize that the goals of the movements for disability rights and disability justice are different. Examining disability frames alongside the goals of prison reform and abolitionist movements provides a way to evaluate the extent to which disability frames maintain or further social stigmas about disability.

### A. *From Disability Rights to Disability Justice*

Spurred by disability rights organizations and activists, Congress enacted the ADA after “conclud[ing] that there was a ‘compelling need’ for a ‘clear and comprehensive national mandate’ to both eliminate discrimination *and* to integrate disabled individuals into the social mainstream of American life.”<sup>45</sup> Disability rights movements seek access and inclusion not only through enforcing antidiscrimination norms, but also include affirmative

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women. See generally Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45 (2007).

<sup>44</sup> This Article does not consider the question of how disability frames should inform legal strategy and the ethical questions the use of these frames may pose. It does, however, offer a way to think through the relationship between the use of disability frames and the goals of disability rights and disability justice movements.

<sup>45</sup> Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494, 505-06 (4th Cir. 2016) (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 674-75 (2001)).



obligations that employers, public services, and places of public accommodations remove barriers to employment, education, transportation, housing, voting, among other areas, and provide reasonable accommodations to disabled people. Beyond the requirements of equal access and inclusion, the ADA's accommodation mandate, as disability scholars have argued, also reflects an anti-subordination approach to remedying the institutional and social practices that reinforce the historical oppression of disabled people as group.<sup>46</sup> Disability Justice shifts the focus of advocacy efforts from that of equal access to wholeness, and from individual rights to collective organizing, which shifts power to historically marginalized groups.<sup>47</sup> As noted Disability Justice, abolitionist-organizer, and attorney Talila Lewis described how unlike movements focused on disability rights, "disability justice movements move *beyond* law and policy: It seeks to radically transform social conditions and norms in order to affirm and support all people's inherent right to live and thrive."<sup>48</sup> In *Sins Invalid*, Patty Berne defines *Disability Justice* as a "framework [which] understands that all bodies are unique and essential, that all bodies have strengths and needs that must be met . . . . We understand that all bodies are caught in these bindings of ability, race, gender, sexuality, class, nation state and imperialism, and that we cannot separate them."<sup>49</sup> Disability Justice provides a framework for developing multidimensional consciousness. A Disability Justice approach recognizes that "able-bodied supremacy has been formed in relation to intersecting systems of domination and exploitation," and that it is impossible to "comprehend ableism without

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<sup>46</sup> See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 452 (2000) (explaining how the ADA only extends to specific members of a socially subordinated group). See also *id.* at 401 ("Disability" is a condition in which people—because of present, past, or perceived 'impairments'—are viewed as somehow outside of the 'norm' for which society's institutions are designed and therefore are likely to have systematically less opportunity to participate in important areas of public and private life."); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (articulating how anti-subordination argues that it is inappropriate for groups to be subordinated in society and rejects even facially neutral policies that forwards historical subordination of groups).

<sup>47</sup> See, e.g., Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. REV. 1826, 1832 (2021) ("It is this tension between systemic change and liberalism's individuated approach to civil rights that disability activists increasingly critique as they conceive of disability justice as robust, with particular attention to co-constructed social identities, including race."); Mia Mingus, *Changing the Framework: Disability Justice*, LEAVING EVIDENCE (Feb. 12, 2011), <https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice/> [<https://perma.cc/9YT8-3GZJ>] (arguing for a shift away from "individualized and independence-framed notions" of disability access towards more "collective and interdependent" ones).

<sup>48</sup> Talila Lewis, *Disability Justice Is an Essential Part of Abolishing Police and Prisons*, LEVEL (Oct. 6, 2021), <https://level.medium.com/disability-justice-is-an-essential-part-of-abolishing-police-and-prisons-2b4a019b5730> [<https://perma.cc/YF3W-G6J9>].

<sup>49</sup> Patty Berne, *Disability Justice – A Working Draft*, SINS INVALID (June 9, 2015), <https://www.sinsinvalid.org/blog/disability-justice-a-working-draft-by-patty-berne> [<https://perma.cc/73QC-P3RF>].

grasping its interrelations with heteropatriarchy, white supremacy, colonialism and capitalism, each system co-creating an ideal bodymind built upon the exclusion and elimination of a subjugated ‘other . . .’<sup>50</sup>

Disability frames will serve different purposes given the separate goals of the movements for prison reform, decarceration, or abolition. Each movement and its goals will be addressed in turn to determine the utility of disability frames in each sphere.

### B. *Disability Rights, Prison Reform, and Decarceration*

Prison reformers have several goals, including alleviating or ending harsh conditions of confinement, reducing the number of people in prison and jails, and increasing access to high-quality mental and medical treatment, as well as rehabilitative, vocational, and educational programs.<sup>51</sup> For prison reformers, the disability frame has several potentially useful purposes—both in terms of emergency relief and long-term goals. With respect to emergency relief from the harsh and dangerous conditions of confinement. For example, disability frames that have been productive in litigation have focused specifically on decarceration, as the groundswell of litigation aimed at getting people out of prisons and jails during the ongoing COVID-19 pandemic has demonstrated.<sup>52</sup> These disability frames arguably helped ‘make the case’ for emergency relief in the form of release in response to the lethal COVID-19 virus. With respect to long-term goals, it allows plaintiffs to illuminate the physical and psychological harms of incarceration, while attuned to the physical, psychological, and emotional harms that incarcerated people experience. It can also serve to challenge (if not undermine) the legitimacy of blanket policies that fail to take into consideration the unique needs of incarcerated people with disabilities. Each of these purposes provide compelling illustrations, which can help educate (and persuade) courts as to material harms of incarceration and give teeth to the constitutional inquiry as to whether, for example, the deprivation was “sufficiently serious,”<sup>53</sup> or as

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., *ACLU Policy Priorities for Prison Reform*, ACLU, <https://www.aclu.org/other/aclu-policy-priorities-prison-reform> (last visited Mar. 28, 2022) [<https://perma.cc/XC28-DTU8>]; *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, U.S. DEP’T OF JUST. ARCHIVES, <https://www.justice.gov/archives/prison-reform> (last updated Mar. 6, 2017) [<https://perma.cc/4ERP-EX8Q>]; *Case for Reform, RIGHT ON CRIME*, <https://rightoncrime.com/about/case-for-reform> (last visited Mar. 28, 2022) [<https://perma.cc/F6TA-GR4H>].

<sup>52</sup> For an example of the efforts to obtain release of inmates during the COVID-19 pandemic, see *supra* note 23 and accompanying text.

<sup>53</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (“[T]he deprivation alleged must be, objectively, ‘sufficiently serious,’ . . . a prison official’s act or omission must result in the denial of ‘the minimal civilized measure of life’s necessities’ . . . . For a claim (like the one here) based on a failure to

to the consequences, including physical and psychological harms, which may result when prisons and jails discriminate against disabled people by failing to accommodate them as required under the ADA, or subjecting them to unjustified segregation in violation of *Olmstead*'s integration mandate.<sup>54</sup> Such compelling illustrations may serve to support prison reform goals of improving conditions of confinement, permitting factfinders to find constitutional or federal disability law violations, or persuading prison or jail officials to settle lawsuits and negotiate remedies for such violations. In this way, the disability frame may support the goals of prison reform movements.

At the same time, disability frames that maintain or entrench societal stigma about disability, or further ableism, could also further the goals of prison reform movements. Portraying incarcerated people as damaged, in part through disablement, demonstrates what prison rights advocates are so often required to prove to prevail in constitutional claims: serious harm, deprivation of the minimal civilized measure of life's necessities, or significant risk of serious harm.<sup>55</sup> It goes to the heart of what prison reform advocates are trying to convince the public of—namely, that incarceration is a social problem, rooted in racial, class, and disability discrimination and subordination, worthy of adequate policy responses and solutions. This makes the use of the disability frame particularly risky—and it is why prisoners' rights advocates should be mindful of potentially stigmatizing uses of the disability frame and avoid those uses.

### C. Disability Justice and Abolition

Movements for abolition—namely, the strand of abolitionist organizing that is focused on abolishing the prison industrial complex—seek to end all forms of punitive surveillance, policing, and punishment.<sup>56</sup> Abolition of the prison industrial complex (“PIC”) “is a positive project that focuses, in part, on building a society where it is possible to address harm without relying on

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prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.”).

<sup>54</sup> See, e.g., Jamelia N. Morgan, *The Paradox of Inclusion: Applying Olmstead's Integration Mandate in Prisons*, 27 GEO. J. POVERTY L. & POL'Y 305, 315-16 (2020) (discussing *Olmstead* and its possibilities for reimagining the carceral state); Dinerstein & Wakschlag, *supra* note 1, at 931-50 (applying *Olmstead*'s integration mandate to mass incarceration).

<sup>55</sup> See *Farmer*, 511 U.S. 825, 834 (1994) (“For a claim . . . based on a failure to prevent harm [to succeed], the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.”).

<sup>56</sup> See MARIAME KABA, *A People's History of Prisons in the United States*, in *WE DO THIS “TIL WE FREE US* (Tamara K. Kopper ed., 2021) (“Abolition . . . is a long-term project and a practice around creating the conditions that would allow for the dismantling of prisons, policing, and surveillance.”).

structural forms of oppression or the violent systems that increase it.”<sup>57</sup> According to abolitionists, oppressive structures and systems are pervasive in society.<sup>58</sup> One of the bedrocks of the abolitionist analysis is an understanding of the historical antecedents of the PIC: chattel slavery; racial capitalism; settler colonialism; the dispossession of Native lands; the eugenics policies that promoted the forcible sterilization of individuals with physical, developmental, and intellectual disabilities; and the forced segregation of disabled people into large state-run mental hospitals.<sup>59</sup> In line with these insights, Disability Justice advocates have identified abolition as a cornerstone of their work to end violence against, and the subordination of, disabled people.<sup>60</sup> With respect to the carceral state, activists within Disability Justice movements seek abolition of the PIC,<sup>61</sup> and call for the “decoupling of social responses to harm and conflict from the criminal legal system and building nonpunitive and noncarceral systems of accountability and care.”<sup>62</sup>

For abolitionists, disability frames also have several potentially productive purposes. Disability frames, as with prisoner rights movements, can serve to center the material consequences of incarceration—again, the physical, psychological, and emotional harms. Beyond this, for abolitionists, disability frames inform structural critiques often used by abolitionists to explain the overrepresentation of disabled people in prisons and jails. For instance, abolitionist organizer and attorney Talila Lewis maintains that “disabled

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<sup>57</sup> *Id.*

<sup>58</sup> As influential abolitionist scholar and activist Angela Y. Davis explained, the PIC must be understood as part of a social, political, and economic context that both shapes its contours and explains its expansive growth over the past several decades. See ANGELA Y. DAVIS, *The Prison Industrial Complex, in ARE PRISONS OBSOLETE?* 84, 84-104 (2003).

<sup>59</sup> See, e.g., BEN-MOSHE, *DECARCERATING DISABILITY*, *supra* note 1, at 28; KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* 36 (2017) (describing laws passed by the newly formed California state legislature targeting Native populations); Rachel Kushner, *Is Prison Necessary?* *Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAGAZINE (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/Q34G-XM5C>] (“‘Abolition’ . . . is an intentional echo of the movement to abolish slavery.”).

<sup>60</sup> See Lewis, *Disability Justice*, *supra* note 48 (“The past and present connections between disability and all forms of carceral violence are overt and overwhelming.”).

<sup>61</sup> See, e.g., *id.* (“[D]isability and abolitionists’ struggles . . . are one and the same.”); Katie Tastrom, *Disability Justice and Abolition*, NAT’L LAWYERS GUILD (Jun. 27, 2020), <https://www.nlg.org/disability-justice-and-abolition> [<https://perma.cc/3JHW-9ERA>] (“Disability justice requires the abolition of police and prisons.”).

<sup>62</sup> Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1203 (2022); see also Lewis, *Disability Justice*, *supra* note 48 (noting that disabled people comprise a “significant number of those incarcerated in medicalized carceral spaces like nursing facilities, group facilities, and civil commitment, ‘treatment’ facilities, and ‘hospitals’” and that “[w]hether under the pretense of ‘care’ or ‘corrections,’ disabled people are highly represented in *all* carceral populations”).

people (and those labeled disabled) have always been primary among the carceral machine's intended targets," and also "have the most frequent and catastrophic encounters with carceral systems."<sup>63</sup> Drawing from history, Lewis argues that the U.S. "government and corporations have always used constructed ideas around disability and criminality alongside constructed ideas about class and race to classify, criminalize, cage, and disappear its 'undesirables.'"<sup>64</sup> Because abolitionists identify these functions as core to the purpose of policing and incarceration, they have rejected the end goals of prison reform and called for abolition. Centering disability frames—or, more specifically, disablement due to pervasive societal ableism—permits abolitionists a more fulsome account of not just the harms stemming from incarceration, but also incarceration's root causes and social functions vis-à-vis disabled people.

Unlike prison reform and decarceration, stigmatizing disability frames will not further the goals of abolition. As Disability Justice has emphasized, ableism, or disability-based stigma and subordination, is pervasive and deeply entrenched in the criminal legal system.<sup>65</sup> Thus, undoing the vast reaches of the PIC, a goal of abolitionists, will not occur without addressing and undoing ableism and disability-based stigma and subordination. Indeed, Disability Justice activists challenge the marginalization of disabled people by contesting stigma and reclaiming stigmatized identities. Liat Ben-Moshe critiques prison reform litigation and provides reasons to avoid uncritical use of the disability (or disablement) frame.<sup>66</sup> Ben-Moshe posits:

[W]ill cases reliant on disablement lead to a rethinking of mass incarceration, or will they instead lead to incarceration by means that comply with the courts' vision of 'humane' incarceration, for example, the opening of more jails and prisons so they are less overcrowded or provide more psychopharmaceuticals (the most common 'treatment' of mental crisis in prisons), what Kilgore referred to as carceral humanism?<sup>67</sup>

As the excerpt from Ben-Moshe suggests, the uncritical use of the disability frame can lead to more human prisons, which, though consistent with the goals of prison reformers, are not the long-term goals of

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<sup>63</sup> Lewis, *Disability Justice*, *supra* note 48.

<sup>64</sup> *Id.*

<sup>65</sup> See Talila A. Lewis & Dustin Gibson, *The Prison Strike Challenges Ableism and Defends Disability Rights*, TRUTHOUT (Sept. 5, 2018), <https://truthout.org/articles/the-prison-strike-is-a-disability-rights-issue> [<https://perma.cc/HRF2-ELT5>] ("[A]bleism, sanism and audism . . . are deeply rooted throughout the entire criminal legal system.").

<sup>66</sup> See BEN-MOSHE, *DECARCERATING DISABILITY*, *supra* note 1, at 261.

<sup>67</sup> *Id.* at 261, 263 ("[T]he same logic that prepares people to be captured by systems of incarceration cannot be the framework that will set us free.").

abolitionists. That said, abolitionist movements at times may engage in practices that are not consistent with abolitionist praxis in that they reinforce societal subordination of disabled people through reinforcing stigmatizing tropes and discourse about disability. But the point here is that such failures to grapple with ableism will seriously undermine the goals of the abolitionist movement. As Talila Lewis wrote, “Abolitionist movements must contend with how disability and ableism interact with carceral systems, and be committed to abolishing all spaces to which marginalized people are disappeared.”<sup>68</sup> Movements for abolition should interrogate ableism in the systems they seek to abolish and avoid the use of stigmatizing disability frames, such as the ones outlined above, in their advocacy.

### III. LEANING INTO THE TENSIONS

In prison conditions litigation, the disability frame provides more than just a way to seek improved conditions, access, and equal treatment for disabled people. Both individual and structural reform litigation pose possibilities for systems-wide change for disabled *and* non-disabled people, with disabled people as litigants at the helm. Disability rights claiming by incarcerated people offers possibilities for system-wide change that benefits all incarcerated people in the specific facility, or state system, even if they are not part of the individual lawsuit or are not covered in the class of disabled incarcerated people. Such litigation allows for “integrating accommodations”<sup>69</sup> and “accommodating every body,”<sup>70</sup> while at the same time challenging the legitimacy of the institutions.

In this way, the promise of the disability frame in producing more precise ways to frame legal injuries and shape remedies is somewhat ironic. While the disability frame offers the opportunity to surface oft-marginalized more inclusive and diverse understandings of disability, it is deployed in precisely the location—prisons and jails—where the risk for ableist notions of disability to flourish is heightened. Long-standing associations between disability and criminality make it necessary to deploy the disability frame with caution so as to avoid stigmatizing use.

Claiming disability may be challenging for incarcerated clients. One’s racial or gender identity and sexuality may influence the decision to identify publicly as disabled or a person with a disability.<sup>71</sup> Disability may be perceived

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<sup>68</sup> Lewis, *Disability Justice*, *supra* note 48.

<sup>69</sup> Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 842 (2008).

<sup>70</sup> Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 693 (2014).

<sup>71</sup> Cf. Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 568 (2021) (discussing the varying significance of identity to those who claim a disability identity).



by some as a sign of weakness or vulnerability. And, as discussed above, despite tremendous gains by the disability rights and Disability Justice movements, harmful stereotypes about disability remain prevalent in society.<sup>72</sup> In some facilities, pervasive violence or social norms and practices that facilitate toxic masculinity may discourage incarcerated people from acknowledging any form of vulnerability. At the same time, productive uses of disability frames may facilitate “claiming disability” among clients in litigation against prisons and jails—sites where systemic violence and heteropatriarchy may ordinarily stifle such claiming.<sup>73</sup> Litigation and related advocacy may encourage not only rights claiming, but perhaps even the claiming of disability as a political identity for incarcerated plaintiffs.<sup>74</sup>

### CONCLUSION

Advocates who deploy the disability rights frame on behalf of their clients or at the insistence of their clients should consider the meaning of that frame beyond the individual case.

This is not to say that advocates should shy away from deploying the disability frame. Rather, advocates should be careful when deploying disability frames and be mindful of stigmatizing versus productive disability framing. By leaning into the tensions among disability claiming, empowerment, and rights rhetoric within litigation and advocacy on behalf of incarcerated people, advocates can push for more inclusive and diverse understandings of disability, disability subordination, and the purpose of disability rights protections both in and outside of prison walls.

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<sup>72</sup> See, e.g., Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1285-1289 (2001) (discussing the harm wrought by stereotypes on disabled people).

<sup>73</sup> See, e.g., SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* (1998); Eyer, *Claiming Disability*, *supra* note 71, at 586 (“[G]reater claiming of disability identity holds the potential to have a truly radical impact on disability rights . . . by dramatically expanding the pool of potential constituents of the movement for disability rights.”).

<sup>74</sup> See BEN-MOSHE, *DECARCERATING DISABILITY*, *supra* note 1, at 267 (“It is clear that litigation reform resulted in increased politicization of those incarcerated (prisoners’ rights movements, self-advocacy) and the legal notion that these are populations deserving of rights at all.”).

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