

REFLECTIONS ON REPRESENTING INCARCERATED PEOPLE  
WITH DISABILITIES:  
ABLEISM IN PRISON REFORM LITIGATION

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ABSTRACT

Over the last five decades, advocates have fought for and secured constitutional prohibitions challenging solitary confinement, including ending the placement and prolonged isolation of individuals with psychiatric disabilities in solitary confinement. Yet, despite the valiant efforts of this courageous movement to protect the rights of incarcerated people with disabilities through litigation, the legal regime protecting the rights of incarcerated people with disabilities reflects a troubling paradigm: ableism.

Ableism is a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society. In this Essay I argue that current Eighth Amendment jurisprudence in prison conditions of confinement cases in some ways requires lawyers to engage in ableism to protect their clients from harsh and inhumane treatment. The complexity of this arrangement—as between protecting and expanding the rights of people with disabilities and reinforcing practices that facilitate their exclusion and subordination—is both a cause and effect of ableism, particularly in the area of Eighth Amendment jurisprudence. Though entrenched in our legal institutions, the overrepresentation of people with disabilities in the criminal legal system calls for a new approach to the representation of these individuals.

Towards that end, this Essay proposes a series of interventions in both law and professional practice to reduce the reliance on, and effect of, ableism in representing people with disabilities in the prison reform litigation.

ABOUT THE AUTHOR

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INTRODUCTION

A few years ago, I met with a potential client in a supermax prison in western Pennsylvania. At the time, I was a staff attorney at the Abolitionist Law Center—a public interest law firm committed to ending race- and class-based mass incarceration—and primarily litigated conditions of

confinement cases, primarily those challenging solitary confinement. The visit was scheduled in response to his letter requesting legal representation, and I was visiting the prison on this particular day to see whether to take the case. This potential client had spent over twenty years in solitary confinement, which is to say that he spent approximately 22 hours per day inside a prison cell about the size of a regular parking space with limited human contact. Over the years, as he recounted, he had experienced limited, meaningful social interaction, save for superficial interactions with prison staff, no-contact “visits” with family behind an inch-thick glass partition, limited cell-side communications with medical and mental health staff, and strained conversations with other incarcerated people through vents, hallways, or metal doors. He spoke rapidly, yet comprehensively and clearly, as he shuffled through written notes and paperwork discussing the difficulties he experienced accessing qualified specialists, the hassle his family endured during planned visits, and of course—the symptoms of solitary—paranoia, lack of sleep, short-term memory problems, among other adverse effects, that manifest after days, months, and years in isolation.<sup>1</sup>

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<sup>1</sup> See, e.g., Stuart Grassian, Psychopathological Effects of Solitary Confinement, 140 AM. J. PSYCHIATRY 1450, 1451–53 (1983); Craig Haney, Mental Health Issues in Long-Term Solitary and “Supermax” Confinement, 49 CRIME & DELINQUENCY 124, 130 (2003); Richard Korn, The Effects of Confinement in the High Security Unit at Lexington, 15 Soc. JUST., Spring 1988, at 8, 14–16; Holly A. Miller & Glenn R. Young, Prison Segregation: Administrative Detention Remedy or Mental Health Problem?, 7 CRIM. BEHAV. & MENTAL HEALTH 85, 89–92 (1997).

I sat and listened, interrupting on occasion to seek additional details or clarification. He had clearly spent time preparing to make the case for why our firm should represent him. Allegations of the harms he described were supported with copious documentation, and the questions I posed were resolved with direct responses, more documentation, and even the offer of witnesses to corroborate his account of events. At the end of the more than hour-long presentation, the potential client sat back and frowned. I too stopped writing and inquired as to whether he had anything else to add. He shook his head and looked down at the files—the frayed papers and scraps of notes—before sliding down in his chair on the other side of the glass partition. He paused before sitting back up and glanced in my direction. “I know you won’t select me. I’m not disabled. I’m just not damaged enough,” he said finally, each sentence pushed out through a deep sigh. To diffuse the tension, I jumped in with words of reassurance, informing him that he would receive fair consideration just like anyone else. I told him our firm would look at the records he had sent us, the notes from my meeting, and follow-up with any questions. He nodded, but the forlorn look on his face suggested that my statement did not quite reassure him. And after the hour-long ride back to Pittsburgh, I realized that his statement reflected an insight that I had, up until that point, failed to fully appreciate.

As every prison litigator knows, the physical and psychological damage done to incarcerated people is profound. Yet, effective representation of incarcerated clients involves making difficult choices on who to represent and how to allocate resources. Deplorable prison conditions,<sup>2</sup>

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<sup>2</sup> See, e.g., Civil Rights Groups File Lawsuit Alleging Massive Civil

violence and abuse,<sup>3</sup> substandard medical and mental health care,<sup>4</sup> combined with the approximately 2.3 million people currently incarcerated

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Rights Violation at Mississippi Prison, ACLU (May 30, 2013), <https://www.aclu.org/news/civil-rights-groups-file-lawsuit-alleging-massive-human-rights-violations-mississippi-prison>.

<sup>3</sup> See, e.g., ROBERT A. BARTON & ROY W. WESLEY, OFFICE OF THE INSPECTOR GEN., STATE OF CAL., 2015 SPECIAL REVIEW: HIGH DESERT STATE PRISON, SUSANVILLE, CA 42 (2015), [https://www.oig.ca.gov/media/reports/Reports/Reviews/2015\\_Special\\_Review\\_-\\_High\\_Desert\\_State\\_Prison.pdf](https://www.oig.ca.gov/media/reports/Reports/Reviews/2015_Special_Review_-_High_Desert_State_Prison.pdf) (describing case involving a prisoner with mobility-related disabilities who was picked up from out of his wheelchair and thrown into his cell after he “resisted being placed in a cell”); Keri Blakinger, Disabled Prisoners Decry Unfair Treatment in New York’s Prison System, APPEAL (Jan. 8, 2019), <https://theappeal.org/disabled-prisoners-decry-unfair-treatment-in-new-yorks-prison-system>; Joe Coscarelli, 8 Appalling Stories of Inmate Abuse from Rikers Island’s Teen Jails, N.Y. MAG. (Aug. 1, 2014), <http://nymag.com/intelligencer/2014/08/8-appalling-stories-of-abuse-from-rikers-island.html>; David M. Reutter, Abuse and Assaults Continue at Pennsylvania Jail, PRISON LEGAL NEWS (Feb. 15, 2011), <https://www.prisonlegalnews.org/news/2011/feb/15/abuse-and-assaults-continue-at-pennsylvania-jail>; Benjamin Weiser & Michael Schwirtz, U.S. Inquiry Finds a ‘Culture of Violence’ Against Teenage Inmates at Rikers Island, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/nyregion/us-attorneys-of-fice-reveals-civil-rights-investigation-at-rikers-island.html>.

<sup>4</sup> See, e.g., Brian Joseph, Jailhouse Medicine—A Private Contractor

ated in American prisons, jails, immigration detention centers, and youth detention facilities,<sup>5</sup> taken together make the demand for competent advocates specializing in prison litigation especially high.<sup>6</sup> In part due to

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Flourishes Despite Controversy Over Prisoner Deaths, PRISON LEGAL NEWS (Apr. 1, 2016), <https://www.prisonlegalnews.org/news/2016/apr/1/jailhouse-medicine-private-contractor-flourishes-despite-controversy-over-prisoner-deaths>; Angie Leventis Lourgous, Accused of Preventable Inmate Deaths, State Agrees to Sweeping Health Care Reforms, Oversight at all Prisons, CHI. TRIB. (Jan. 4, 2019), <https://www.chicagotribune.com/news/local/breaking/ct-met-illinois-prison-health-lawsuit-20190103-story.html>; Eyal Press, Madness, NEW YORKER (May 2, 2016), <http://www.newyorker.com/magazine/2016/05/02/the-torturing-of-mentally-ill-prisoners>; Danny Robbins, Women’s Deaths Add to Concerns About Georgia Prison Doctor, AJC, <http://investigations.myajc.com/prison-medicine/womens-deaths-add-concerns> (last visited Apr. 22, 2019).

<sup>5</sup> Peter Wagner & Wendy Sawyer, Mass Incarceration: The Whole Pie 2018, PRISON POL’Y INITIATIVE (March 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> (“The American criminal justice system holds almost 2.3 million people in 1,719 state prisons, 102 federal prisons, 1,852 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.”).

<sup>6</sup> Michael W. Martin, Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis, 80 FORDHAM L. REV. 1219, 1226–27 (2011) (“[M]ost

the lack of competent counsel available to meet this demand, every year thousands of incarcerated people bring lawsuits pro se, where they face the daunting tasks of navigating the complexities of the legal process without guidance of counsel.<sup>7</sup> The high demand for representation and limited supply of lawyers necessitates a focus on the most serious cases, or cases where death or serious harm is imminent, basic human needs

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prisoners cannot afford to hire an attorney, and even if they could, many attorneys are ‘unwilling or unable to take on full representation of prisoner litigants.’”) (quoting Ira P. Robbins, Ghostwriting: Filling in the Gaps of Pro Se Prisoners’ Access to the Courts, 23 GEO. J. LEGAL ETHICS 271, 273 (2010)).

<sup>7</sup> See, e.g., Alec Karakatsanis, Policing, Mass Imprisonment, and the Failure of American Lawyers, 128 HARV. L. REV. F. 253, 267 (2015) (“Although lawyers have a moral and professional responsibility to address the policing and incarceration crisis, although they possess the training to engage in the intellectual and practical work that needs to be done, and although they possess a virtual monopoly on the ability to use the law to vindicate those rights, the distribution of legal labor is woefully inadequate to deal with this crisis.”). Former Seventh Circuit Judge Richard Posner mentioned his concern for the lack of legal representation for low-income litigants, including incarcerated litigants, as one of the reasons for his decision to retire after thirty-five years on the bench. Adam Liptak, An Exit Interview with Richard Posner, Judicial Provocateur, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>.

are denied, human suffering is ongoing, or constitutional rights are otherwise being ignored.<sup>8</sup> For prison litigators then, case selection becomes a way of triaging the most serious needs or, where the harms are prevalent across state systems, identifying cases that offer possibilities for the most sweeping legal interventions, whether through settlement agreements or consent decrees. One could argue that these choices communicate a message to potential clients—incarcerated people in need of representation—that their ability to fully vindicate their rights will depend not just on the seriousness of their allegations of harm, but as noted above, just how damaged they have become as a result.

In the first Section that follows, I will expand on the connections between disability and damage in the context of prison and prison litigation specifically. I will then introduce the idea of ableism and how Eighth Amendment jurisprudence and lawyers practicing in the area of prisoners' rights can—consciously or unconsciously—construct and reinforce ableism. The Article concludes with a few pathways forward to dismantling ableism in prison reform litigation.

## I. DISABILITY, DAMAGE, AND INCARCERATION

The connection between disability, damage, and incarceration and its impact on case selection reflects several key insights. To be damaged is to succumb to the disabling conditions of incarceration through death or disability, where disability includes physical and mental or psychiatric disabilities, traumas, substance use dependencies, and a range of other adverse effects. By not succumbing to the disabling conditions

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<sup>8</sup> See generally Karakatsanis, supra note 7, at 263–67.

of solitary, one perhaps is, in the words of the potential client, not “damaged enough” for the purposes of Eighth Amendment jurisprudence. Though damage is not always reflected in a disability, or a diagnosis of disability, often times a client’s diagnosed or manifested disability is how best to show harm or risk of harm in conditions of confinement cases. Selecting clients with diagnosed or manifested disabilities makes strategic sense. After all, placement of those individuals with “serious mental illness,” a common classification used by prisons systems, in solitary confinement has been found to violate the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>9</sup> To date, no court has found solitary confinement to be per se unconstitutional, though due process violations have been found for prolonged placements in solitary confinement without meaningful review.<sup>10</sup> Moreover, pleading manifested disability or physical injury is sound strategy in light of the Prison Litigation Reform Act’s physical injury requirement and its limit on damages.<sup>11</sup> Finally,

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<sup>9</sup>. See, e.g., *Austin v. Wilkinson*, No. 4:01-CV-071, at \*27 (N.D. Ohio Nov. 21, 2001); *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1107–08 (W.D. Wis. 2001); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 914–15 (S.D. Tex. 1999); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995).

<sup>10</sup>. *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 552 (3d Cir. 2017).

<sup>11</sup>. Though not without disagreement, circuit courts deciding the question to date have held that the Prison Litigation Reform Act’s physical injury requirement “limits damages and not actions.” JOHN BOSTON, LEGAL AID SOC’Y, PRISON LITIGATION REFORM ACT 271 (2014), <https://www.prisonlegalnews.org/media/publications/john%20boston-the%20plra-2007.pdf>; see

alleging disability also allows for claims under the Americans with Disabilities Act (ADA), a formidable tool in the prison litigators toolbox since the Supreme Court ruled the Act applied to prisons and jails in Pennsylvania Department of Corrections v. Yeskey.<sup>12</sup> Even though prisons are particularly dangerous and damaging for people with disabilities,<sup>13</sup> it is precisely

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also Jules Lobel, Prolonged Solitary Confinement and the Constitution, 11 U. PA. J. CONST. L. 115, 133–34 (2008).

<sup>12.</sup> 524 U.S. 206 (1998). The Supreme Court ruled in Yeskey that the “benefits” from “services, programs, or activities” included prisoners who rely on the state to meet their basic needs and provide them with rehabilitation. Id. at 210.

<sup>13.</sup> “This report adopts both ‘people-first’ language and ‘identity-first’ language when discussing people with disabilities . . . . ‘People first’ language [aims] to [avoid] perceived and subconscious dehumanization when discussing people with disabilities . . . .” JAMELIA MORGAN, ACLU, CAGED IN: SOLITARY CONFINEMENT’S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES 18 (2017) (quoting People First Language, NAT’L BLACK DISABILITY COALITION, <http://blackdisability.org/content/people-first-language-0> (last visited Apr. 22, 2019)). “The basic idea is to improve a sentence structure that names the person first and the condition second, i.e. ‘people with disabilities’ rather than ‘disabled people,’ in order to emphasize that they are people first.” Id. “Alternatively, the identity-first language rejects people-first language as an attempt to separate a person’s disability from that person’s identity.” Id. “Advocates for identity-first language contend that a person’s disability cannot be separated from that person’s

because of their disability that the law, where enforced, has the potential to protect people with disabilities to a far greater extent as compared to incarcerated people without diagnosed or recognized disabilities.<sup>14</sup>

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identity, and that ‘disability plays a role in who the person is, and reinforces disability as a positive cultural identifier.’” *Id.* (quoting Portrayal of People with Disabilities, ASS’N OF UNIV. CTR. ON DISABILITIES, [https://webcache.googleusercontent.com/search?q=cache:\\_2prCLodZQoJ:https://www.aucd.org/template/page.cfm%3Fid%3D605+&cd=1&hl=en&ct=clnk&gl=us](https://webcache.googleusercontent.com/search?q=cache:_2prCLodZQoJ:https://www.aucd.org/template/page.cfm%3Fid%3D605+&cd=1&hl=en&ct=clnk&gl=us) (last visited Apr. 22, 2019)). “According to experts in disability rights and culture, ‘[i]dentity-first language is generally preferred by self-advocates in the autistic, deaf, and blind communities.’” *Id.* (quoting Portrayal of People with Disabilities, ASS’N OF UNIV. CTR. ON DISABILITIES, [https://webcache.googleusercontent.com/search?q=cache:\\_2prCLodZQoJ:https://www.aucd.org/template/page.cfm%3Fid%3D605+&cd=1&hl=en&ct=clnk&gl=us](https://webcache.googleusercontent.com/search?q=cache:_2prCLodZQoJ:https://www.aucd.org/template/page.cfm%3Fid%3D605+&cd=1&hl=en&ct=clnk&gl=us) (last visited Apr. 22, 2019)). “Accordingly, identity-first language will be used when referring to deaf or blind people. Finally, the [article] is grounded in the perspectives of disability scholars who argue that ‘disabled people have redefined the problem of disability as the product of a disabling society rather than individual limitations or loss . . . .’” *Id.* (quoting JANE CAMPBELL & MIKE OLIVER, DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE 105 (1996)).

<sup>14</sup>. See generally, Margo Schlanger, Prisoners with Disabilities, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 295 (Erik Luna ed., 2017).

Of course, the offer of legal protection is meaningless without a legal regime committed to enforcement. What's more, legal protections that attempt to remedy legal injuries after the fact are ineffective in fully protecting incarcerated people with disabilities from harm in carceral spaces. Prisons are no place for people with disabilities. Prisons and jails are violent and dangerous places for any person, and even more so for people with disabilities<sup>15</sup> who face a heightened risk of violence and harassment.

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<sup>15</sup>. 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. ERIKA HARRELL, U.S. DEP'T OF JUSTICE, CRIMES AGAINST PERSONS WITH DISABILITIES, 2009–2015 - STATISTICAL TABLES, at 3 (July 2017), <https://www.bjs.gov/content/pub/pdf/capd0915st.pdf>. Approximately half of the people killed by police are people with disabilities. Samuel Lieberman, Half of People Killed at the Hands of Police Are Disabled, N.Y. MAG. (Mar. 15, 2016), <http://nymag.com/intelligencer/2016/03/half-of-people-killed-by-police-are-disabled.html> (citing DAVID M. PERRY & LAWRENCE CARTER-LONG, RUDERMAN FAMILY FOUNDATION, THE RUDERMAN WHITE-PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY (Mar. 2016), [https://rudermanfoundation.org/white\\_papers/media-coverage-of-law-enforcement-use-of-force-and-disability/](https://rudermanfoundation.org/white_papers/media-coverage-of-law-enforcement-use-of-force-and-disability/)). More recent data from the Washington Post indicate that in 2018 alone 21% of people killed by police had a “mental illness.” Fatal Force: 998 People Have Been Shot and Killed by Police in 2018, WASH. POST, <https://www.washingtonpost.com>.

<sup>16</sup> These carceral spaces are disabling in that the conditions of imprisonment result in chronic health conditions and other disabilities<sup>17</sup> due to low-quality health care, violence, and bad nutrition, among other stressors. As recent litigation shows, prisons routinely violate the rights of people with disabilities:<sup>18</sup> from denying them access to educational pro-

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com/graphics/2018/national/police-shootings-2018 (last visited Apr. 22, 2019) [hereinafter Fatal Force].

<sup>16</sup>. Beth Ribet, Incarceration and Persons with Disability: A Guide to Legal Advocacy in Law and Social Services, REPAIR 1 (2017), <http://repair-connect.org/docs/2017-Ribet-Incarceration-Persons-Disabilities.pdf>.

<sup>17</sup>. 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, 1895–96 (2002).

<sup>18</sup>. See, e.g., Rasho v. Walker, No. 1:07-cv-01298-MMM (C.D. Ill. May 25, 2018); Civil Complaint for Declaratory & Injunctive Relief, Babu v. Cty. of Alameda, No. 4:18-cv-07677 (N.D. Cal. Dec. 28, 2018); Revised Second Amended Complaint, Coen v. Georgia Dep't of Corr., No. 5:16-cv-353-MTT (M.D. Ga. June 20, 2018); Class Action Complaint for Declaratory & Injunctive Relief, T.C. v. Kern Cty., No.1:18-at-00121 (E.D. Cal. Feb. 21, 2018); Civ. Class Action Complaint for Declaratory & Injunctive Relief, Murray v. Cty. of Santa Barbara, No. 2:17-cv-08805 (C.D. Cal. Dec. 6, 2017); Complaint For Declaratory & Injunctive Relief, Disability Rights Florida, Inc. v. Jones, No. 4:16-cv-00047-WS-CAS (N.D. Fla. Jan. 26, 2016); First Amended Complaint for Injunctive Relief & Compensatory & Punitive Damages, Blue v. Maryland Dep't of Pub. Safety & Corr.

grams and services, denying them mental health care, or failing to provide them with accommodations such as emergency alarms for deaf prisoners or sign language interpreters during critical encounters, to placing incarcerated people with mental or psychiatric disabilities<sup>19</sup> in solitary confinement without proper medical and mental health treatment. As a 2007 World Health Organization report succinctly put it, “[p]risons are bad

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Servs. (DPSCS), No. 1:16-cv-00945-RDB (D. Md. Sept. 6, 2016); Class Action Complaint, Lewis, et al. v. Cain, et al., No. 3:15-cv-00318-BAJ-RLB (M.D. La. May 20, 2015); First Amend. Complaint, Dunn v. Thomas, No. 2:14-cv-00601-WKW-TFM (M.D. Al. July 25, 2014); Civil Class Action Complaint for Declaratory & Injunctive Relief, Hernandez v. Cty. of Monterey, No. 5:13-cv-02354-PSG (N.D. Cal. May 23, 2013).

<sup>19</sup>. In this Article, I use the term psychiatric disabilities to refer to conditions that are commonly referred to as “mental illness.” By doing so, my intention is to “challenge the notion of ‘mental health’ and ‘mental illness’ and instead support the idea that humans have many different emotional experiences and mental states.” Syrus Ware et al., It Can’t Be Fixed Because It’s Not Broke: Racism and Disability in the Prison Industrial Complex, in DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA 178, 180 (Liat Ben-Moshe et al. eds., 2014) [hereinafter DISABILITY INCARCERATED]. As Ware et al. noted, “[t]erminology that suggests that there is but one valid mental state (one deemed to be ‘healthy’) and several invalid mental states (described as ‘illnesses’) is inherently ableist and contrary to the tremendous work and advocacy against these categorizations by psychiatric survivors, consumers, and so on.” Id.

for mental health”<sup>20</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>21</sup> Yet, the growth in incarcerated people with disabilities among those held in prisons and jails across the country is a troubling yet comparatively underexplored aspect of mass incarceration and its horrifying impacts. People with disabilities are disproportionately overrepresented in the criminal legal system.<sup>22</sup> A recent report by the Department of Justice’s Bureau of Justice Statistics estimated that approximately 30% of people who are incarcerated in state and federal prison and 40% of people incarcerated in jail have a cognitive or physical disability.<sup>23</sup>

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<sup>20</sup>. WORLD HEALTH ORGANIZATION, INFORMATION SHEET: MENTAL HEALTH AND PRISONS (2007), [https://www.who.int/mental\\_health/policy/mh\\_in\\_prison.pdf](https://www.who.int/mental_health/policy/mh_in_prison.pdf).

<sup>21</sup>. Ware et al., supra note 19, at 170.

<sup>22</sup>. JENNIFER BRONSON ET AL., U.S. DEP’T OF JUSTICE, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/dpji1112.pdf>. The report defines disability to include “hearing, vision, cognitive, ambulatory, self-care, and independent living, which refers to the ability to navigate daily life schedules, activities, and events without assistance.” Id.; see also REBECCA VALLAS, CTR. FOR AM. PROGRESS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA’S JAILS AND PRISONS, at 1 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf>.

<sup>23</sup>. BRONSON ET AL., supra note 22.

Indeed, when compared to society at large, prisoners are almost three times more likely and incarcerated people in jails are more than four times more likely to report having a disability.<sup>24</sup> Although a full discussion of the factors contributing to the overrepresentation of people with disabilities in prisons and jails is beyond the scope of this Essay,<sup>25</sup> some scholars have argued that deinstitutionalization, or the closure of state mental health facilities in response to rampant human rights abuses, and the corresponding lack of investment in community-based mental health services and affordable housing, led to this population surge.<sup>26</sup>

Disability in prison is also racialized and gendered.<sup>27</sup> Low-income, Black, Latinx, and indigenous people are “disproportionately disabled

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<sup>24.</sup> Id. The most commonly reported disability was cognitive disability (approximately 20% of incarcerated people in prison and 30% of people in jail reported a cognitive disability). Id. at 2, 3. Ambulatory disabilities ranked second (10% of respondents in both prisons and jails reported an ambulatory disability). Id. at 3.

<sup>25.</sup> See generally Dae-Young Kim, Psychiatric Deinstitutionalization and Prison Population Growth: A Critical Literature Review and Its Implications, 27 CRIM. JUST. POL'Y REV. 3 (2016) (discussion of existing literature on the impacts of mental hospitalization on imprisonment).

<sup>26.</sup> See, e.g., Jennifer Pokempner & Dorothy E. Roberts, Poverty, Welfare Reform, and the Meaning of Disability, 62 OHIO ST. L.J. 425, 449 (2001); Ribet, supra note 16, at 2–3.

<sup>27.</sup> Ware et al., supra note 19, at 169.

and disproportionately incarcerated.”<sup>28</sup> Incarcerated women are disproportionately survivors of sexual abuse and assault—and the traumas they experience as a result of these acts of sexual violence produce disabilities, including PTSD, depression, and anxiety.<sup>29</sup> Some of these disabilities are diagnosed, some are not. According to a 2017 study, 86% of the women who had been detained in jail were survivors of sexual assault.<sup>30</sup> Transgender and gender nonconforming (TGNC) incarcerated people reported high rates of physical and sexual harassment and abuse: according to one study, whereas 12% of non-TGNC respondents reported experiencing physical assault, 22% of TGNC respondents, 28% of TGNC respondents of color, and 33% of TGNC feminine respondents reported experiencing physical assault.<sup>31</sup> Among incarcerated respon-

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<sup>28</sup>. Allison C. Carey et al., Preface: An Overview of Disability Incarcerated, in DISABILITY INCARCERATED, supra note 19, at xi.

<sup>29</sup>. Sarah E. Ullman et al., Structural Models of the Relations of Assault Severity, Social Support, Avoidance Coping, Self-Blame, and PTSD Among Sexual Assault Survivors, 31 PSYCHOL. WOMEN Q. 23, 23 (2007).

<sup>30</sup>. Rachel Leah, 86 Percent of Women in Jail Are Sexual-Violence Survivors, SALON (Nov. 11, 2017, 9:00 PM), <https://www.salon.com/2017/11/11/86-percent-of-women-in-jail-are-sexual-violence-survivors>.

<sup>31</sup>. Protected and Served? Jails and Prisons, LAMBDA LEGAL, <https://www.lambdalegal.org/protected-and-served/jails-and-prisons#2> (last visited Apr. 22, 2019). According to Lambda Legal, “[n]early one in six transgender Americans—and one in two black transgender people—has been

dents overall, 27% reported experiencing sexual harassment, compared to 34% of TGNC respondents and 37% of TGNC respondents of color.<sup>32</sup>

## II. DEFINING AND UNDERSTANDING ABLEISM

Ableism is a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society.<sup>33</sup> Ableism recognizes “disabil-

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to prison.” Transgender Incarcerated People in Crisis, in LAMBDA LEGAL, TRANSGENDER RIGHTS TOOLKIT 1, 5 (Dec. 5, 2013), [http://www.lambdalegal.org/sites/default/files/transgender\\_booklet\\_-\\_incarcerated.pdf](http://www.lambdalegal.org/sites/default/files/transgender_booklet_-_incarcerated.pdf).

<sup>32</sup>. Protected and Served? Jails and Prisons, *supra* note 31.

<sup>33</sup>. 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, 286 (2010).

ity”<sup>34</sup> as a social construction<sup>35</sup>—albeit an important political and cultural identity—and is itself a social process. The social construction of disability offers a model that is distinct from the medical understandings of disability, which “characterizes a physical or mental difference as a deviation from the norm,”<sup>36</sup> thereby failing to acknowledge “the myriad ways that science and medicine are ‘inside’ culture, not pure, objective sets of practices immune from any imprint of power, culture, identity, or time/

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<sup>34</sup>. “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” G.A. Res. 61/106, U.N. Doc A/RES/61/106, at 4 (Dec. 13, 2006); see also Ribet, supra note 33, at 285 (“This conception of disability is more consistent with a social constructionist, as opposed to a traditional medical model, in that it recognizes that barriers external to the person play a substantial or at times primary role in making a condition a basis for inability or hindrance.”).

<sup>35</sup>. “The term social constructionism has been used to describe positions claiming that what is assumed and understood to be objectively real by persons in the course of their activities is more accurately said to be constructed by those persons in their thoughts, words, and interactions.” Scot Danforth & William C. Rhodes, Deconstructing Disability: A Philosophy for Inclusion, 18 REMEDIAL & SPECIAL EDUC. 357, 359 (1997) (citations omitted).

<sup>36</sup>. Pokempner & Roberts, supra note 26, at 426 n.7.

place.”<sup>37</sup> As a social process, ableism involves labeling, or pathologizing, bodies and minds as deviant, abnormal, incapable, incompetent, dependent, or impaired.<sup>38</sup> Language is one of many tools to enforce ableism;<sup>39</sup> through language violence is meted out,<sup>40</sup> as are cultural and professional norms that determine who can be classified as “disabled,” providing additional support for the notion that diagnoses and medical labels are

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<sup>37</sup> Vivian M. May & Beth A. Ferri, Fixated on Ability: Questioning Ableist Metaphors in Feminist Theories of Resistance, 27 PROSE STUD. 120, 121 (2006).

<sup>38</sup> Nirmala Erevelles, Crippin’ Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline, in DISABILITY INCARCERATED, supra note 19, at 81, 84.

<sup>39</sup> See, e.g., James L. Cherney, The Rhetoric of Ableism, 31 DISABILITY STUD. Q., no. 3, 2011 (“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.autistichoya.com/p/ableist-words-and-terms-to-avoid.html> (last updated Dec. 17, 2018).

<sup>40</sup> See generally Robert Cover, Violence and the Word, 95 YALE L.J. 1601, 1601 (1990).

infused with sociocultural dimensions.<sup>41</sup> Cultural and professional norms are particularly effective at enforcing ableism in carceral spaces as often “prison staff is generally untrained and unqualified to identify or understand physical and mental differences . . . [P]risoners whose physical bodies, mental states, and health status are labeled as different are often seen as troublemakers and end up being further punished through institutional charges and administrative segregation.”<sup>42</sup>

Ableism is present in institutional policies and practices, particularly policies and practices that distinguish “serious mental illnesses,” or “serious” psychiatric disabilities, from those that are labeled or regarded as less serious.<sup>43</sup> Labeling certain disabilities as “serious” results in a kind of hierarchy of disability, for instance, as among those disabilities that permit access to appropriate and ongoing treatment<sup>44</sup> and programming

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41. See Danforth & Rhodes, supra note 35, at 359 (discussing Mercer et al. as demonstrating that “mental [disability] is not so much an internal condition as it is a social assignment occurring within the judgments and defined terms of the professionals who are responsible for label categories”).

42. Ware et al., supra note 19, at 174.

43. ASS’N OF STATE CORR. ADM’RS & THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 184–95 (2018) (listing definitions of serious mental illness in forty-three jurisdictions).

44. . . . Settlement Agreement and General Release at 8–9, Disability Rights Network of Pa. v. Wetzel, No. 1:13-CV-00635 (M.D. Pa. Jan. 5,

within prisons, those not “serious” enough to warrant such treatment and programming, and those that, from the institutions perspective, are simply part of the “discomforts” experienced in prison, or even the result of malingering.<sup>45</sup> Moreover, ableism is reflected in the insistence that disability manifests in the same, or specific ways in all bodies and minds,<sup>46</sup> such as through a specific diagnosis, or the failure to recognize disabilities when manifested through symptoms that are periodic, such as insomnia, frequent but manageable, such as with bouts involving panic attacks, or susceptible to charges of malingering, such as with fibromyalgia.<sup>47</sup>

#### A. How Current Eighth Amendment Jurisprudence Reinforces Ableism

The Eighth Amendment prohibits prison officials from depriving prisoners of basic human needs or holding incarcerated people in conditions that pose a substantial risk of serious harm where prison officials are aware of that risk and recklessly disregard that risk of harm.<sup>48</sup> To deter-

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2015).

<sup>45.</sup> The Supreme Court may have facilitated such thinking by noting that “the Constitution does not mandate comfortable prisons.” *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

<sup>46.</sup> JASBIR K. PUAR, *THE RIGHT TO MAIM: DEBILITY, CAPACITY, DISABILITY*, at xiv–xv (2017).

<sup>47.</sup> See, e.g., Complaint at 3, *Shaw v. Pa. Dep’t of Corr.*, No. 1:17-cv-00229-SPB (W.D. Pa. Aug. 21, 2017).

<sup>48.</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

mine whether an Eighth Amendment violation has occurred, courts perform a two-part inquiry.<sup>49</sup> The objective prong asks a court to consider whether the conditions amount to a denial of “the minimal civilized measure of life’s necessities” or pose a “substantial risk of serious harm.”<sup>50</sup> To prevail on the first prong, the plaintiff must demonstrate a deprivation of a single, identifiable human need, such as health, safety, or exercise.<sup>51</sup> The second prong of the inquiry asks a court to determine whether the prison officials are sufficiently culpable or deliberately indifferent to the health and safety of prisoners.<sup>52</sup> To amount to deliberate indifference a

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<sup>49.</sup> Farmer, 511 U.S. at 834.

<sup>50.</sup> Id.; see also Johnson v. Wetzel, 209 F. Supp. 3d 766, 776 (M.D. Pa. 2016).

<sup>51.</sup> Wilson, 501 U.S. at 304. Several courts have recognized social interaction and environmental stimulation as basic human needs. See, e.g., Johnson, 209 F. Supp. 3d at 777; Shoatz v. Wetzel, No. 2:13-cv-0657, 2016 WL 595337, at \*8 (W.D. Pa. Feb. 12, 2016); Wilkerson v. Stalder, 639 F. Supp. 2d 654, 677–78 (M.D. La. 2007); Ruiz v. Johnson, 37 F. Supp. 2d 855, 914–15 (S.D. Tex. 1999), rev’d and remanded, 243 F.3d 941 (5th Cir. 2001). “[I]n the absence of interaction with others, an individual’s very identity is at risk of disintegration.” Williams v. Sec’y Pa. Dep’t of Corr., 848 F.3d 549, 566–68 (3d Cir. 2017) (describing the dehumanizing effect of long-term isolation).

<sup>52.</sup> See, e.g., Farmer, 511 U.S. at 837.

defendant must “know[] of and disregard[]” a deprivation or “an excessive risk to inmate health or safety.”<sup>53</sup>

The requirement by some courts that plaintiffs manifest a diagnosis of “mental illness,” where these disabilities are not preexisting, shifts the focus of the constitutional injury to diagnosed disabilities rather than the (often causally linked) so-called SHU-syndrome, or symptoms stemming from incarceration in Secure Housing Units (i.e., serious harms).<sup>54</sup> This interpretation disadvantages plaintiffs held in solitary who experience serious physical and psychological harms, but who are undiagnosed, misdiagnosed, unwilling or unable to report to prison medical care staff, or not taken seriously by medical staff when reported. The interpretation also misconstrues Supreme Court precedent. First, the Supreme Court has held that the Eighth Amendment requires either a deprivation of basic human needs or a substantial risk of serious harm. As one appellate court concluded, today there exists an overwhelming “scientific consensus”<sup>55</sup> that solitary confinement, or isolation beyond fifteen days, places individuals at risk of serious psychological and physical harm,

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<sup>53.</sup> Id.

<sup>54.</sup> See, e.g., Porter v. Pa. Dep’t of Corr., No. CV 17–763, 2018 WL 5846747, at \*13–14 (W.D. Pa. Nov. 8, 2018); Bowman v. Owens, No. 5:15-CV-0067-MTT, 2015 WL 2159454, at \*3 (M.D. Ga. May 7, 2015); Kirkpatrick v. Johnson, No. 11–1013-GPM, 2012 WL 171609, at \*4 (S.D. Ill. Jan. 20, 2012) (complaint dismissed with prejudice as frivolous under 28 U.S.C. § 1915A (2018)).

<sup>55.</sup> Williams, 848 F.3d at 574.

including “[a]nxiety and panic . . . [d]epression, post-traumatic stress disorder, psychosis, hallucinations, paranoia, claustrophobia, and suicidal ideation.”<sup>56</sup> Indeed, these SHU-related symptoms are objectively serious: these symptoms can worsen over time and taken together inflict serious physical and psychological harm. In some cases, the SHU-related symptoms may be sufficient to establish the required culpable state of mind on the part of prison officials, even where not accompanied with an official diagnosis by prison medical staff, because the adverse effects of solitary are themselves well known among corrections officials.<sup>57</sup>

Second, and relatedly, requiring disability to manifest represents a failure to fully appreciate the scientific evidence that identifies social interaction and environmental stimulation as basic human needs.<sup>58</sup> Solitary

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<sup>56.</sup> Id. at 566.

<sup>57.</sup> See generally Brief of Former Corrections Directors as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, *Mizzoni v. Nevada*, 601 F. App’x 561 (9th Cir. 2015) (No. 18–16184).

<sup>58.</sup> See, e.g., *Shoatz v. Wetzel*, No. 2:13-cv-0657, 2016 WL 595337, at \*8 (W.D. Pa. Feb. 12, 2016); *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 777 (M.D. Pa. 2016); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 677–78 (M.D. La. 2007); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 914–15 (S.D. Tex. 1999), rev’d and remanded, 243 F.3d 941 (5th Cir. 2001). “[I]n the absence of interaction with others, an individual’s very identity is at risk of disintegration.” Williams, 848 F.3d at 566–68 (describing the dehumanizing effect of long-term isolation); Erica Goode, Solitary Confinement: Punished for Life, N.Y. TIMES (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/>

confinement strips an individual of meaningful social interaction. Beyond verbal communications through vents in prison walls, ceilings, and floors, which may be prohibited, monthly noncontact visits with family, where permitted, if at all,<sup>59</sup> legal visits, and superficial interactions with staff during searches, transports, and cell-side contacts, people in solitary are deprived of meaningful human interaction and engagement. Even if a person held in solitary does not have a mental health diagnosis and cannot mental establish decompensation even through use of a retained expert, the conditions of isolation—namely 22 hours or more of lockdown per day with limited social interaction and stimulation—amount to a deprivation of a basic human need.

Third, requiring disability to manifest before finding an Eighth Amendment violation fails to acknowledge the obviousness of the risk, again, particularly in light of the scientific consensus regarding the harms of solitary confinement. Indeed, this consensus is largely reflected among prison officials who manage prisons with restrictive housing units (i.e., units where individuals are held in solitary confinement).<sup>60</sup> The particular disability manifestation requirement strays from the Court's recognition in

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health/solitary-confinement-mental-illness.html.

<sup>59</sup>. See Chesa Boudin et al., Prison Visitation Policies: A Fifty-State Survey, 32 YALE L. & POL'Y REV. 149, 160 (2013).

<sup>60</sup>. . ASS'N OF STATE CORR. ADM'RS, RESTRICTED STATUS HOUSING POLICY GUIDELINES (Aug. 3, 2013), <https://www.asca.net/pdffdocs/9.pdf>.

both Farmer v. Brennan<sup>61</sup> and Hope v. Pelzer,<sup>62</sup> that a factfinder may infer deliberate indifference where the risk of harm is obvious.<sup>63</sup> Requiring disability to manifest to establish an Eighth Amendment violation erases serious risk of harm in the disability context and replaces it with actual harm, imparting inequality into the framework for Eighth Amendment claims, but only where the harms result in a psychological harm or physical harms that go unreported.

Fourth, requiring disability to manifest ignores the systemic deficiencies that plague the provision of health care in American prisons and jails.<sup>64</sup> Disabilities may be present and diagnosed at intake into the prison, for example, develop through violence, arise from sudden accidents or other forms of disablement, or manifest over time with aging. Whether a particular physical, mental, or psychiatric disability is identified and diagnosed depends on the quality and effectiveness of the prison's health care system. Stated differently, the quality of prison health care can influence whether a plaintiff has a diagnosis or not, and broadly, whether that individual is identified as having a disability.

Fifth, the disability manifestation requirement lacks a critical race lens. The requirement burdens racial groups, particularly for incarcerated

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61. . 511 U.S. 825 (1994).

62. . 536 U.S. 730, 738 (2002).

63. . Farmer, 511 U.S. at 841–42.

64. . Andrew P. Wilper et al., The Health and Health Care of US Prisoners: Results of a Nationwide Survey, 99 AM. J. PUB. HEALTH 666, 666 (2009).

people of color, who are less likely to be diagnosed with disabilities<sup>65</sup> and more likely to be mis- or over-diagnosed<sup>66</sup> by clinicians in the free world. It also fails to acknowledge that historically marginalized groups may find it challenging to identify as having a disability,<sup>67</sup> or report

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<sup>65.</sup> Paul L. Morgan et al., Replicated Evidence of Racial and Ethnic Disparities in Disability Identification in U.S. Schools, 46 EDUC. RESEARCHER 305, 306 (2017).

<sup>66.</sup> Thomas McGuire & Jeanne Miranda, Racial and Ethnic Disparities in Mental Health Care: Evidence and Policy Implications, 27 HEALTH AFF. 2 (2008); Harold W. Neighbors et al., Racial Differences in DSM Diagnosis Using a Semi-Structured Instrument: The Importance of Clinical Judgment in the Diagnosis of African Americans, 43 J. HEALTH & SOC. BEHAV. 237, 246 (2003).

<sup>67.</sup> Ribet, supra note 16, at 15 (“Therefore, inviting an incarcerated person who does not already identify as ‘disabled’ or as a ‘person with a disability’ to make a disability-based legal claim will generally have social and psychological import. Psychological responses to the label ‘disability’ will vary of course, but commonly may include discomfort associated with stereotypes of weakness or incapacity, trauma or grief associated with feeling damaged in instances when disability developed due to prison conditions or other violent or harmful life experiences, fear and anxiety associated with the medical implications of particular diagnoses, and general aversion to the idea of disability as negative. Ethnoracial, religious, gender, sexual and class identities can also complicate the experience of identifying with disability.”).

disabilities, an obstacle that is amplified in hypermasculine<sup>68</sup> and violent carceral settings.<sup>69</sup>

The manifestation of a diagnosed disability requirement imposes a heightened showing in cases where mental and psychiatric disabilities are harms alleged and endured. With such a requirement, it is not surprising that the pleadings and briefs on behalf of incarcerated people challenging solitary confinement are drafted to show plaintiffs with mental or psychiatric disabilities as suffering, weak, damaged, and deteriorated.<sup>70</sup> Representing clients in a manner other than degraded by the dehumanizing conditions of solitary confinement and prison generally

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<sup>68.</sup> See generally Sharon Dolovich, Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail, 102 J. CRIM. L. & CRIMINOLOGY 965, 1008 (2013).

<sup>69.</sup> See, e.g., John Beauge, Doctor Accused of Raping Muncy Prison Inmate Three Times, PENN LIVE (Oct. 29, 2015), [http://www.pennlive.com/midstate/index.ssf/2015/10/post\\_798.html](http://www.pennlive.com/midstate/index.ssf/2015/10/post_798.html); Matthew Haag, 7 Prison Guards in Pennsylvania Charged with Sexually Abusing Inmates, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/pennsylvania-prison-guards-sexual-abuse.html>; Ashley McBride, Trans Woman Sues California Prison System Alleging Rape, Slurs, Retaliation, SFGATE, <https://www.sfgate.com/crime/article/Trans-woman-sues-CA-state-prison-system-alleging-13518711.php#photo-16743859> (last updated Jan. 8, 2019).

<sup>70.</sup> But see generally Civil Compl. for Declaratory and Injunctive Relief, Babu v. Cty. of Alameda, No. 18-sv-07677 (N.D. Cal. Dec. 28, 2018).

would warrant dismissal of the complaint. Yet, these portrayals are representations of clients—who they are, what harms they have endured, the effects of those harms on their daily lives, and what the law should do about it. These portrayals communicate social meanings on disability, constructing the meaning of disability through words that assign value to the conditions and characteristics of bodies and minds. In this way, the law reinforces ableism.

## B. How Lawyers Construct & Reinforce Ableism

In cases challenging the treatment of people with disabilities—whether cases challenging denials of medical and mental health care or denials of access to prison programs, services, and activities—lawyers representing people with disabilities are forced to represent their clients as physically, mentally, and emotionally damaged. In the typical, well-pleaded section 1983 complaint brought on behalf of incarcerated people with disabilities, the weaknesses and challenges of disability are on full display, not because of any individual plaintiff's inability to overcome obstacles or challenges in carceral settings (as is often the nature of ableism reflected in rhetoric about people with disabilities in free society) but rather because prisons inherently were not built to meet the needs of people with physical or mental disabilities. Indeed, this mode of representation and the rhetoric employed appears not only reasonable given the strategic considerations noted above but also consistent with rules of professional conduct requiring zealous advocacy.

Yet, although these practical concerns appear paramount in the immediate, or short-term, perspective of an attorney–client relationship

or legal strategy, in the longterm, this mode of representation and rhetoric may harm the long-term interests of clients with disabilities, legal or otherwise. Though lawsuits can work to undo discrimination—both individual<sup>71</sup> as well as pervasive and systematic<sup>72</sup>—against incarcerated people with disabilities, no single lawsuit can fundamentally alter this paradigm. Ableism through rhetoric confines the image of disabled prisoners<sup>73</sup> as an identity to the limited parameters of the carceral space—“medical areas,”<sup>74</sup> “special needs units,” “psychiatric observation

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<sup>71.</sup> See, e.g., First Amended Complaint for Injunctive Relief & Compensatory & Punitive Damages, *Blue v. Dep’t of Pub. Safety & Corr. Servs.*, No. 1:16-cv00945-RDB (D. Md. Sept. 6, 2016) (describing claims brought by class of blind prisoners who alleged that they were not provided with materials for grievance forms and procedures in an accessible format).

<sup>72.</sup> See, e.g., *Armstrong v. Brown*, 103 F. Supp. 3d 1070, 1072 (N.D. Cal. 2015). The court in *Armstrong* found that the California Department of Corrections and Rehabilitation had placed persons with mobility disabilities into administrative segregation for extended periods of time due to a lack of accessible housing—in direct violation of the court’s prior orders. Id.

<sup>73.</sup> The use of “disabled” as opposed to “with disabilities” connotes a political identity.

<sup>74.</sup> The ADA regulations prohibit public entities, including prisons, from housing incarcerated people in medical units unless they are receiving medical care. 28 C.F.R. § 35.152 (2019). A recently filed lawsuit challenged the exclusion of incarcerated people in medical units from

cells,” “deaf and blind units,” “suicide watch units,” and other “treatment units.” In some cases, remedies sought include specialty units that separate people with disabilities into separate general population units because they provide the opportunity to hold people with disabilities in housing units that are safer or staffed with prison personnel specifically trained to provide services to the particular subgroup, for instance, blind, Deaf, or Deaf-blind incarcerated people. These specialty units are also preferred to units that segregate people with disabilities into solitary confinement in medical units,<sup>75</sup> or protective custody.<sup>76</sup> Confined to spaces where they are seen as sick, ill, dangerous, or different, as may arguably be the case with specialty units, such prison arrangements are a far cry from the animating spirit and purposes of the ADA, which sought to integrate people with disabilities and end the legacy of social exclusion and segregation.<sup>77</sup> That said, the goal of fully integrating people

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programming. See Blakinger, supra note 3 (noting prisoners in medical units can only participate in “fraction” of programs offered to individuals in general population).

<sup>75.</sup> But see 28 C.F.R. § 35.152 (prohibiting placement in medical units unless incarcerated person is “actually receiving medical care”).

<sup>76.</sup> Jamelia N. Morgan, Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities, 24 BUFF. HUM. RTS. L. REV. 81, 144–45 (2018).

<sup>77.</sup> See 42 U.S.C. § 12101 (2019) (“[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and

with disabilities into the harsh conditions of confinement that characterize most prisons seems imprudent. In particular, “[b]ecause of the ways that prisons are constructed, imagined, and maintained, rampant ableism and racism affect the daily lives of many prisoners.”<sup>78</sup> Through effective at reducing immediate or ongoing harms, legal remedies that grant program access and greater inclusion into carceral spaces structurally incapable of treating incarcerated people with disabilities humanely may be unable to meaningfully protect the lives of clients with disabilities in the long-run.

The mode of representation—namely, that which presents disability as a type of weakness, pathology, or deficiency—reinforces a set of beliefs which normalize the mistreatment and abuse of people with disabilities both within the legal system and beyond. These beliefs become normalized and once normalized then provide a basis for justifying this same mistreatment and abuse. In some cases, efforts to spare clients with disabilities from the long-term harms of solitary confinement effectively require clients to be presented as physically, cognitively, or

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communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . . .”); see also Luticha Doucette, If You’re in a Wheelchair, Segregation Lives, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/opinion/if-youre-in-a-wheelchair-segregation-lives.html>.

<sup>78</sup>. Ware et al., supra note 19, at 163.

psychologically damaged beings.<sup>79</sup> In those specific cases, a legal victory may mean sparing a client of a life lived in long-term isolation. Yet, where the pathology of disability is reinforced, even a legal victory could entail settlement measures with heightened security restrictions in albeit less isolating conditions, or continued segregation with more time out of cell. This is true even where these heightened security measures or continued segregation are not justified by a current and ongoing penological interest. This is in part because the tropes of disability, imbued with ableism, are hard to undue. Once created and reinforced, even when done with the best intentions to advance the interests of the client, these damaging constructs can further the client's own marginalization in carceral spaces. Indeed, the same portrayals of disability in carceral spaces—as dangerous without treatment, psychologically deteriorated, psychologically distressed, in mental health crisis—characterizations sufficient to show psychological damage from long-term isolation, may result in involuntary institutionalization or death at the hands of law enforcement on street corners in cities across America.<sup>80</sup> Moreover, these tropes

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<sup>79.</sup> But see *Dunn v. Dunn*, 219 F. Supp. 3d 1100, 1123 (M.D. Ala. 2016) (“What these plaintiffs must show is that they have been subjected to the harmful policies and practices at issue, not (necessarily) that they have already been harmed by these policies and practices.”). When seeking only injunctive relief, a plaintiff need not wait until he suffers an actual injury because the constitutional injury is the exposure to the risk of harm. *Parsons v. Ryan*, 289 F.R.D. 513, 521 (D. Ariz. 2013).

<sup>80.</sup> See Fatal Force, supra note 15.

of disability do little to facilitate, if not actively undermine, the development of a group identity or consciousness, particularly among individuals with disabilities who find themselves in prisons, jails, and other institutional settings.

### III. PATHWAYS FORWARD

Changing ableism in prison reform litigation requires a commitment to changing the cultural and professional norms that shape ongoing practices found in this area of law. The first step towards change typically calls for awareness, but awareness in itself may lack the necessary intersectional approaches for work centered in eliminating human suffering, indignities, and oppression. Instead, prison litigators should work to develop a type of “multidimensional consciousness.”<sup>81</sup> In their article, Agencies of Transformational Resistance, Covarrubias and Revilla explain the concept in the following way:

We re-conceptualize “awareness” as a dynamic and achieved multidimensional consciousness that consists of a sophisticated critique of how multiple, intersecting structures of domination (e.g., racism, capitalism, sexism, heteronormativity, etc.) interact with each other and impact one’s social and political situation as part of an historical condition. Consciousness is understood as a fluid process within which those who are developing it will be at different levels at different times in their lives. There is a range of consciousness within each

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<sup>81</sup>. Alejandro Covarrubias & Anita Tijerina Revilla, Agencies of Transformational Resistance, 55 FLA. L. REV. 459, 466 (2003).

specific dimension. These degrees of consciousness are ranked in terms of their critical nature such that it is understood that having a higher degree of consciousness, or being more critical, is desirable. Furthermore, one can achieve a high degree of consciousness along one dimension (e.g., a race consciousness), but can be unconscious along another dimension (e.g., gender consciousness).<sup>82</sup>

A multidimensional consciousness recognizes that people with disabilities have diverse lived experiences and possess multiple identity traits that may intersect and overlap to compound the forms of marginalization and oppression they experience while incarcerated.<sup>83</sup> Scholars Liat Ben-Moshe, Chris Chapman, and Alison Carey, authors of the

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<sup>82.</sup> Id.

<sup>83.</sup> See Carol Gill & William Cross, Jr., Disability Identity and Racial-Cultural Identity Development: Points of Convergence, Divergence, and Interplay, in RACE, CULTURE, AND DISABILITY: REHABILITATION SCIENCE AND PRACTICE 33, 49 (Fabricio E. Balcazar et al. eds., 2010) (“Disability status intersects with multiple axes of diversity and marginalization, including race, gender, sexuality, class/caste, and age. Moreover, varieties of impairment—physical, sensory, learning, psychiatric—contribute to disabled people’s diversity of experience and perspectives.”); Subini Ancy Annamma et al., Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersection of Race and Dis/ability, 16 RACE ETHNICITY & EDUC. 1, 12 (2013) (“DisCrit emphasizes multidimensional identities . . . rather than singular notions of identity, such as dis/ability, social class, or gender.”).

anthology Disability Incarcerated, make a similar argument when they note that “[d]isability, situated alongside other key lines of stratification such as race, class, nationality, and gender, is central to understanding the complex, varied and interlocking ways in which incarceration offers and is made out to be normal, neutral, politically necessary, and beneficial.”<sup>84</sup> Multidimensional consciousness provides a tool to inform client interactions, communications, and strategic decisions on how to represent clients and argue their legal claims.

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 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>85</sup> Central to the Disability Justice framework is the notion that “all bodies are unique and essential, that all bodies have strengths and needs that must be met.”<sup>86</sup>

As the quote suggests, ableism functions in society in multiple ways: from language to cultural practices to institutional and professional

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<sup>84</sup>. Carey et al., supra note 28, at x.

<sup>85</sup>. Patty Berne, Disability Justice - A Working Draft by Patty Berne, SINS INVALID (Jun. 10, 2015), <http://sinsinvalid.org/blog/disability-justice-a-working-draft-by-patty-berne>.

<sup>86</sup>. Id.

norms. Prison litigators can begin to challenge ableism in prison reform litigation in the following ways:

Prison litigators can expand the models of disability represented to the court in court filings. Court filings are opportunities to resist ableism prevalent in carceral systems. By focusing on portraying clients as disabled not only because of medical diagnosis but also because of disabling prison and jails conditions, attorneys can move beyond disability discrimination and work towards challenging the more insidious, structural ways that ableism propagates in carceral spaces.

Prison litigators can use language that reflects these structural harms inflicted on individuals with disabilities, as well as those without disabilities but who also experience disabling conditions. Pleadings and briefs should emphasize the ways in which prison conditions produce new disabilities and exacerbate existing disabilities. Clients should be consulted in determinations on whether to use “people-first” or “identity-first” language.<sup>87</sup> Language such as “suffers from (/victim of/afflicted with) mental illness,” which denotes pity, and phrases such as “John is schizophrenic,” which conflates the medical diagnosis with the person, should be replaced with “lives with a mental health condition” or “person labeled with/with a mental or psychiatric disability” and “John has schizophrenia.”<sup>88</sup> Prison litigators should also resist adopting the language of prison

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<sup>87</sup>. See, e.g., Brown, supra note 39.

<sup>88</sup>. David Sussman, Ten Commandments for How to Talk About Mental Health, PSYCHOL. TODAY (June 15, 2017), <https://www.psychologytoday.com/us/blog/the-recovery-coach/201706/>

systems where possible, particularly with respect to mental health terminology, such as “serious mental illness.” Such terminology reinforces a hierarchy of disabilities, privileges visible disabilities, and ignores the insidious ways disabilities develop over time as a result of harsh prison conditions.

Prison litigators can recognize that rights-centered advocacy is one tool in the toolkit for resisting what Dr. Craig Haney has referred to as the “War on Prisoners.”<sup>89</sup> Families of incarcerated people, abolitionists, and advocates against racialized gender-based violence have all engaged in multi-pronged advocacy to directly confront and work to undermine prison industrial complex. Prison litigators should work to support these efforts, through strategic partnerships (e.g., litigation, legislative advocacy, etc.) and funding for services, labor, and time, where appropriate.

## CONCLUSION

That ableism exists in prison litigation should not discourage prisoner rights advocates from zealously advocating on behalf of incarcerated people with disabilities to ensure that their constitutional rights are recognized and protected. Given the pervasive, devastating and ongoing harms of incarceration experienced by incarcerated clients with disabilities, the call to action is an urgent one. Yet, the urgency of this advocacy should not prevent advocates for incarcerated people from recognizing

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ten-commandments-how-talk-about-mental-health.

<sup>89</sup>. Craig Haney, Counting Casualties in the War on Prisoners, 43 U.S.F. L. REV. 87, 88 (2008).

the longer term goal—namely, that of working to dismantle the systems of oppression that are a cause and consequence of the over-representation of people with disabilities in this era of mass incarceration. As prisoners' rights advocates, we must strategically and consciously resist ableist discourses and ideologies that present our clients as deserving of constitutional protection only where physical or psychological damage is readily apparent, or diagnosable. Advocates must acknowledge structural disablement within carceral spaces and use language that affirms the humanity of people with disabilities locked up behind bars or steel doors. Finally, we must recognize that the movement to end mass incarceration will extend beyond the confines of impact litigation or individual representation and involve building strategic alliances between lawyers and directly impacted communities to build power to dismantle structural ableism in the criminal legal system and beyond.