

DISABILITY, POLICING, AND PUNISHMENT: AN INTERSECTIONAL APPROACH

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Disabled people of color are uniquely vulnerable to policing and punishment. Proponents of police reform and, more recently, police abolition note that disabled people, particularly people with psychiatric disabilities, are vulnerable to citation and arrest.¹ Indeed, data on the high percentages of people in prisons and jails who report having a diagnosed disability lend support to this claim. Some advocates have referred to the criminalization of mental illness as a way to describe these vulnerabilities and ground their calls for change in the criminal legal system.² Yet, even the compelling charge that mental illnesses are criminalized, or that prisons and jails are the “new asylums,”³ fails to fully account for the ways that race and disability work in tandem to render disabled people of color vulnerable to criminal legal system involvement.⁴ A more comprehensive account of mass incarceration and how it produces disability-based subordination is needed.

In this Essay, I provide a contemporary intersectional analysis of race, gender, and disability—namely, the experiences of disabled people of color in the criminal legal system, with a particular focus on policing and punishment systems. Doing so, I argue, demonstrates more specifically the unique vulnerabilities to policing and punishment that disabled people experience as a class and is more attuned to the particular vulnerabilities of disabled people of color. The sections that follow move beyond the criminalization of the mental illness frame and instead frame dangerousness and criminality as racist and ableist constructs that have been grafted onto “mental illness.” The Essay then moves to a discussion of police violence and mass incarceration, all while adding a disability lens to extant race-based critiques.

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1. JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., “DEFUNDING THE POLICE” AND PEOPLE WITH MENTAL ILLNESS 2 (2020), <http://www.bazelon.org/wp-content/uploads/2020/08/Defunding-the-Police-and-People-with-MI-81020.pdf>.

2. See, e.g., E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 530–31 (2019).

3. See LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 15 (2020) [hereinafter BEN-MOSHE, *DECARCERATING DISABILITY*] (critiquing this framework of using prisons and jails as new asylums).

4. *Id.* at 23.

I. Police Violence

Notions of dangerousness and criminality are influenced by racialized and ableist stereotypes. Though discussion of the origins of these stereotypes is beyond the scope of the Essay, these stereotypes proliferated during the height of the eugenics period. Theories linking criminality to mental defects can be traced to Victorian-era criminology. Historian Philip Jenkins writes that

[b]etween about 1830 and 1870, there emerged a number of theories about the connection between crime and defective mental states, and eugenics was essentially the synthesis of these well-established ideas. By the 1830s, an extensive literature had developed on the existence of mental types such as the idiot, imbecile or psychopath—all of whom fell short of insanity, but all likely to be found overrepresented in the criminal population. At the same time, phrenologists were suggesting that crime and evil were physiological conditions resulting from the structure of the brain. Thirdly, studies of criminal subcultures seemed to show the existence of ‘bad families’ in which crime was almost hereditary. By the 1860s, Morel had synthesized these theories to explain crime as a component of his detailed classification of ‘degenerate’ types. Crime, idiocy, epilepsy, alcoholism, insanity, all were likely to be found in ‘degenerate’ families.⁵

Scientific racism justified racist tropes, and stereotypes worked to align Blackness with criminality. In the burgeoning fields of the social sciences, mainly white scholars sought to “writ[e] race into crime.”⁶ Khalil Gibran Muhammad’s groundbreaking work demonstrates how race-disability constructs informed notions of criminality and Blackness:

Racial knowledge that had been dominated by anecdotal hereditarian, and pseudo-biological theories of race would gradually be transformed by new social scientific theories of race and society and new tools of analysis, namely racial statistics and social surveys. Out of the new methods and data sources, black criminality would emerge, alongside disease and intelligence, as a fundamental measure of black inferiority. From the 1890s

5. Philip Jenkins, *Eugenics, Crime and Ideology: The Case of Progressive Pennsylvania*, 51 PA. HIST. 64, 65–66 (1984).

6. See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 75 (2011).

through the first four decades of the twentieth century, black criminality would become one of the most commonly cited and longest-lasting justifications for black inequality and mortality in the modern urban world.⁷

These long-standing myths, stereotypes, and beliefs link ideas of Blackness and disability with notions of criminality. Throughout the eugenics period and through to today, these stereotypes not only racialized criminality but also grafted ableist notions of disability into understandings of criminality.⁸

As I have argued elsewhere, racist-ableist constructs create vulnerabilities to police violence and can create vulnerabilities to excessive and deadly force by law enforcement.⁹ These constructs matter, because without an intersectional account of subordination among disabled people, legal, policy, and social protections can be dangerously underinclusive.¹⁰ Indeed, the growing movement to transform policing and to end police violence has captured public attention, and the movement has increasingly recognized police violence disproportionately impacts disabled people.¹¹ Black, indigenous, and Latinx people with and without disabilities, as well as white persons with disabilities, have recognized their vulnerabilities to policing and police violence.¹²

In October 2016, Black Lives Matter activists denounced the shooting death of Deborah Danner, a sixty-six-year-old Black woman with psychiatric disabilities who was killed by NYPD officers during the course of what was labeled a mental health crisis.¹³ A resident in Danner's apartment building had called the police to report that Danner was acting "erratically."¹⁴ An emergency medical technician testified that she had arrived before the NYPD officer who shot Danner, Sergeant Hugh Barry, and was in the process of

7. *Id.* at 20–21.

8. *See id.* at xvii; BEN-MOSHE, *DECARCERATING DISABILITY*, *supra* note 3, at 5.

9. *See, e.g.*, Jamelia N. Morgan, *Policing Under Disability Law*, 73 *STAN. L. REV.* 1401, 1424 (2021); Jamelia Morgan, Essay, *Disability's Fourth Amendment*, 122 *COLUM. L. REV.* 489, 556 (2022) [hereinafter Morgan, *Disability's Fourth Amendment*].

10. *See, e.g.*, Morgan, *Disability's Fourth Amendment*, *supra* note 9, at 574–75.

11. *Id.* at 504–06.

12. *See id.* at 501, 504–06.

13. *Protest Held over NYPD Shooting of Deborah Danner in the Bronx*, ABC 7 (Oct. 19, 2016), <https://abc7ny.com/news/protest-held-over-nypd-shooting-of-deborah-danner-in-the-bronx/1562150/>; Chantal Da Silva et al., *Black Lives Matter Anniversary: Deborah Danner Is One of Many Who Did Not Have to Die*, *NEWSWEEK* (July 12, 2018, 9:39 AM EDT), <https://www.newsweek.com/black-lives-matter-deborah-danner-one-many-who-did-not-have-die-1009807>.

14. Da Silva et al., *supra* note 13.

attempting to explain to Danner why the police were at her apartment.¹⁵ According to the EMT technician, the police interrupted this conversation.¹⁶ NYPD officers reported that when they arrived at Danner's apartment door, Danner was armed with a pair of scissors.¹⁷ Officers testified that they persuaded Danner to put the scissors down.¹⁸ The EMT technician testified that she saw Danner retreat back into her room and then heard two shots fired.¹⁹ According to police testimony, Danner picked up a baseball bat and swung at Sergeant Barry, one of the six officers who had followed her to her bedroom.²⁰ The officer then shot Danner two times in the chest, killing her.²¹

In a poignant essay titled *Living with Schizophrenia*, Danner describes in intimate detail the experience of living day to day with the challenges and stigma of schizophrenia.²² In one eerily prescient passage, she stresses the importance of addressing the problem of police violence against people with psychiatric disabilities. She writes, "We are all aware of the all too frequent news stories about the mentally ill who come up against law enforcement instead of mental health professionals and end up dead. We *should* all be aware that these circumstances represent very, very serious problems that need addressing."²³ In her letter, Danner references another high-profile police shooting that took place over thirty years prior:

[One problem is] [t]eaching law enforcement how to deal with the mentally ill in crisis so as to prevent another "Gompers" incident. Many years ago, here in NY, a very large woman named Gompers was killed by police by shotgun because she was perceived as a 'threat to the safety' of several grown men who were also police officers. They used deadly force to subdue her because they were

15. James C. McKinley Jr., *Medic Offers Sharply Different Account of Woman's Death at Hands of Police*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/nyregion/barry-bronx-shooting-trial.html>.

16. *Id.*

17. *See id.*

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. Deborah Danner, Essay, *Living with Schizophrenia* (Jan. 28, 2012) (unpublished manuscript), <https://assets.documentcloud.org/documents/3146953/Living-With-Schizophrenia-by-Deborah-Danner.pdf>; Eli Rosenberg & Ashley Southall, *In Quick Response, De Blasio Calls Fatal Shooting of Mentally Ill Woman 'Unacceptable'*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/nyregion/nypd-sergeant-fatal-shooting-bronx-woman.html> (providing a link to Danner's essay).

23. Danner, *supra* note 22, at 4.

not trained sufficiently in how to engage the mentally ill in crisis. This was not an isolated incident.²⁴

Danner was likely referring to Eleanor Bumpurs, a sixty-year-old Black woman with physical and psychiatric disabilities who was killed by NYPD officers in October of 1984 during the course of eviction from her home in the Bronx.²⁵ Bumpurs was four months behind in her rent—less than \$100 worth per month.²⁶ NYPD officers alleged that Bumpurs attempted to attack them with a knife, though the first shot blasted away half of her hand.²⁷ Reviewing the case, the Bronx District Attorney’s Office reported that “[i]t was anatomically impossible for [Bumpurs] to hold the knife after the first shot,” an indication that she posed no threat when the NYPD officer killed her.²⁸ Patricia Williams’s classic article, *Spirit-Murdering the Messenger*, recounts the incident and how officials attempted to refute allegations of racism in the officer’s actions, writing that “[a]s to whether this shooting of a black woman by a white police officer had racial overtones, [Police Commissioner Ward] stated that he had ‘no evidence of racism.’”²⁹ Notably, in public remarks, Bronx District Attorney Mario Merola noted that “[o]bviously, one shot would have been justified. But if that shot took off part of her hand and rendered her defenseless, whether there was any need for a second shot, which killed her, that’s the whole issue of whether you have reasonable force or excessive force.”³⁰ As Williams opines,

In the Bumpurs case, the words of the law called for nonlethal alternatives first, but allowed some officer discretion in determining which situations are so immediately life endangering as to require the use of deadly force. This discretionary area was

24. *Id.* (emphasis omitted).

25. See Julia Jacobo, *Woman Killed by NYPD Had Written About ‘Problems’ on How Police Deal with the Mentally Ill*, ABC NEWS (Oct. 20, 2016, 3:21 PM), <https://abcnews.go.com/US/woman-killed-nypd-written-problems-police-deal-mentally/story?id=42938210>.

26. Michael Wilson, *When Mental Illness Meets Police Firepower; Shift in Training for Officers Reflects Lessons of Encounters Gone Awry*, N.Y. TIMES (Dec. 28, 2003), <https://www.nytimes.com/2003/12/28/nyregion/when-mental-illness-meets-police-firepower-shift-training-for-officers-reflects.html>; Selwyn Raab, *State Judge Dismisses Indictment of Officer in the Bumpurs Killing*, N.Y. TIMES (Apr. 13, 1985), <https://www.nytimes.com/1985/04/13/nyregion/state-judge-dismisses-indictment-of-officer-in-the-bumpurs-killing.html> (noting a monthly rent of \$98.65).

27. Raab, *supra* note 26.

28. *Id.*

29. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 132 (1987).

30. *Id.* at 131.

presumably the basis for the claim that Officer Sullivan acted legally. The law as written permitted shooting in general, and therefore, by extension of the city's interpretation of this law, it would be impossible for a police officer ever to shoot someone in a specifically objectionable way.³¹

Williams's words help to explain why, doctrinally, cases involving police use of deadly force against disabled people are so challenging—at least if the concern is how to better protect disabled people. How the encounter is framed—how the threat, relevant exigent circumstances, officer perceptions of overt or covert conduct, etc. are framed—drives whether courts find ultimately that the use of deadly force is objectively reasonable and therefore justified.³²

Considerable scholarly attention has been paid to the role of racial bias in decision-making on whether to use force, as well as the amount of force, including deadly force, against a suspect.³³ Critical accounts have acknowledged how the use of force is justified based on racialized fears, stereotypes, and implicit biases.³⁴ Beyond critiques, empirical studies support these conclusions and show that Black people in particular, and negatively racialized groups in general, are perceived by police officers as hyper-threatening, aggressive, violent, physically imposing, and even animal-like, which may render them vulnerable to excessive force.³⁵

31. *Id.* at 133.

32. *See, e.g.,* Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 400 (2016).

33. Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM 39, 45–46 (Michael J. Lynch et al. eds., 2008); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2962–66 (2015); Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 227 (2019); Rory Kramer & Brianna Remster, *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 LAW & SOC'Y REV. 960, 961 (2018).

34. Kenneth Lawson, *Police Shooting of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 37 U. HAW. L. REV. 339, 376 (2015); Kimberly Barsamian Kahn et al., *How Suspect Race Affects Police Use of Force in An Interaction over Time*, 41 LAW & HUM. BEHAV. 117, 123 (2017); Ariela Rutbeck-Goldman & L. Song Richardson, *Race and Objective Reasonableness in Use of Force Cases: An Introduction to Some Relevant Social Science*, 8 ALA. C.R. & C.L.L. REV. 145, 156 (2017).

35. *See* PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 25 (2017); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876–78 (2004).

Yet, there has been less attention paid in Fourth Amendment critical scholarship to how similar constructions facilitate uses of force (and excessive force) against disabled people and disabled people of color.³⁶ As discussed, pervasive social attitudes and stereotypes label disabled people as suspicious, threatening, or dangerous.³⁷ Beyond this, some stereotypes are disability specific, which heightens vulnerabilities to police violence. Individuals showing symptoms of psychiatric disabilities are often perceived as wholly irrational, entirely unable to control themselves.³⁸ These stereotypes matter in policing. Such identity constructions cast doubt on the utility of crisis intervention or de-escalation tactics, even in an era where police departments, policymakers, and reformers tout the importance of such approaches when dealing with people with psychiatric or intellectual and developmental disabilities. As a policy matter, if a particular individual with untreated psychiatric disabilities is depicted as “wild” and “dangerous,” law enforcement can easily supplant as inappropriate public health approaches calling for non-punitive forms of treatment and care. This risk is heightened when police respond to a mental health crisis where it is easy for officers to escalate the situation or resort to force to subdue perceived, though not always actual, imminent threats. As a doctrinal matter, these identity constructs inform and frame the nature of the encounter.³⁹ As I discuss below, often in situations where force is deployed against individuals in mental health crises, events on the ground are framed as emergencies without much interrogating by courts regarding the extent to which officer actions created the emergency conditions that then created a perceived need for force.⁴⁰

36. See Morgan, *Disability's Fourth Amendment*, *supra* note 9, at 494.

37. *Id.* at 510–12.

38. Cf. Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 409 (2001) (“If people labeled as mentally ill are filing complaints of discrimination in employment, it may derive from the existential anxiety occasioned by contact with someone whose behavior may be feared unpredictable, out of their or our control, or whose modes of social interaction startle those with the power to make employment decisions.”).

39. See, e.g., DAVID M. PERRY & LAWRENCE CARTER-LONG, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 18, 34, 39 (2016).

40. See Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 274–75 (2003).

I emphasize again that my intervention here is not to suggest that Fourth Amendment doctrine is a catch-all solution to policing problems. The disparities in use of force against people with multiple marginalized identities may reflect not just police bias, but also societal failures to provide social services, treatment, and other support.⁴¹ This is not to suggest that treatment alone will lead to less police violence because, of course, mental disability or intellectual/developmental disability is not itself the sole cause of police violence and should not be depicted as such.⁴² This legal intervention is aimed rather at insisting that courts heavily scrutinize disability in their reasonableness analysis.

Finally, and fundamentally, fully recognizing the Fourth Amendment rights of disabled people should contend with the notion that policing produces disability or disabilities. Use of force is a compliance tool, and its intent is to disable.⁴³ Whether for the purpose of effectuating an arrest, preventing escape, countering nonviolent or violent active or passive resistance, coercing compliance with police directives, or mitigating a perceived or actual threat, physical force is rendered to be disabling. Though the central function of policing (compliance through force) affects all, it inflicts intensified harms on disabled bodies and minds. Harms stemming from police force can be intensified due to existing physical disabilities or because pain-compliance tools are deployed against disabled people who are unable to understand or respond to police directives, as when these tools are used against individuals with psychiatric disabilities.

Race-disability constructs create pathways to police violence and justify the use of force, including excessive and deadly force. Race-disability constructs may, in fact, inform these determinations, but the failure to engage critically with disability in use-of-force analysis means that disability's role in constructing the threat, exigent circumstances, or perceptions of the officer is often unexplored or devalued. Camille Nelson's work illuminates a theoretical frame for examining how "[r]ace and disability morph into one

41. Diversion coupled with increased community-based treatment supports would go a long way in eliminating, in Devon Carbado's words, "pathways to police violence." See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017); JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., *supra* note 1, at 5.

42. Cf. Johnston, *supra* note 2, at 534–35 (making a similar argument in discussion on criminalization theory, recidivism, and "serious mental illness").

43. See *Est. of Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 905 (4th Cir. 2016) (referring to punching, wrestling maneuvers, and the use of pepper spray as "police officers' more traditional tools of compliance").

another to construct the perfect criminal who is perceived as requiring the use of disciplinary force and punishment.”⁴⁴

In use-of-force cases, disabled bodies and minds are constructed as posing physical barriers to compliance and total submission to police. *Moore v. City of Berkeley*⁴⁵ was a suit brought by the father of Kayla Moore, a Black trans woman with psychiatric disabilities.⁴⁶ On the day of her death, Moore’s roommate called the police and informed them that Moore was having a “psychotic episode.”⁴⁷ Officers were dispatched to the scene.⁴⁸ After arriving, the officers attempted to handcuff Moore; one of the officers put his weight on Moore’s torso, and another officer put pressure on her shoulder blades.⁴⁹ Officers reported that Moore was resisting.⁵⁰ Moore stopped breathing after the struggle with multiple officers and later died.⁵¹

The district court found that the officers “had a diminished interest in using force because they confronted, not someone who had committed a serious crime, but someone who was mentally ill.”⁵² At the same time, the district court determined that because Moore was so forcefully resisting arrest, the officers had little choice but to restrain her in the way they did, and thus the force was reasonable.⁵³ The Ninth Circuit affirmed the district court.⁵⁴ Notably, the Ninth Circuit’s affirmance did not mention Moore’s schizophrenia in its review of the district court’s excessive-force analysis but did mention Moore’s physical stature, noting that she “was a very large and strong person.”⁵⁵

44. Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 *FORDHAM URB. L.J.* 615, 618 (2016) [hereinafter Nelson, *Frontlines*].

45. No. C14-00669 CRB, 2016 WL 6024530 (N.D. Cal. Oct. 14, 2016).

46. *Id.* at *1; Nomy Lamm, *We Remember Kayla Moore*, *THE BODY IS NOT AN APOLOGY* (Mar. 2, 2015), <https://thebodyisnotanapology.com/magazine/we-remember-kayla-moore/>.

47. *See Moore*, 2016 WL 6024530, at *1.

48. *Id.*

49. *Id.* at *2.

50. *See id.* at *5.

51. *Id.* at *2. Despite the conduct from officers, the coroner concluded that the officers did not contribute to her death. *Id.*

52. *Id.* at *5.

53. *Id.*

54. *Moore v. City of Berkeley*, 801 F. App’x 480, 484 (9th Cir. 2020).

55. *Id.* at 483. Although Moore’s schizophrenia was mentioned briefly in the court’s recitation of the facts, the court failed to grapple specifically with her disability in its analysis. *See id.* at 482.

Racial meanings inform how behaviors and responses by disabled people of color are interpreted.⁵⁶ For negatively racialized and historically marginalized groups, disability labels can be fabricated to produce vulnerabilities to police violence or characterized as threatening to provide a basis for justifying use of force. The controversial diagnosis of “excited delirium” provides a useful and timely example. Excited delirium syndrome is a commonly cited cause of in-custody deaths following confrontations with law enforcement.⁵⁷ The International Association of Chiefs of Police (“IACP”) describes the symptoms of excited delirium syndrome as including, but not limited to, “extreme aggression or violence; excessive or superhuman strength; delusional behavior; and insensitivity to and extreme tolerance of pain.”⁵⁸ Excited delirium is a common cause of death when officers use force against persons in custody, typically through a stun gun or taser, chokehold, or physical restraint.⁵⁹ In recent years, critics have questioned the legitimacy of autopsy reports finding that individuals have died of excited delirium—a medical condition not recognized by the American Medical Association,

56. See Claudia Pena, *A Reaction to Beth Ribet’s Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 253, 253 (2010), 2 GEOJLMCRP 253 (Westlaw) (“Race is critical in defining how disability will be read, and will shape educational and institutional access in the future, and thus, life opportunities.”); Subini Annamma et al., *Animating Discipline Disparities Through Debilitating Practices: Girls of Color and Inequitable Classroom Interactions*, TCHRS. COLL. REC., May 2020, at 1 (“Girls of Color are overrepresented in school disciplinary actions based on subjectively judged, minor infractions.”); Subini Ancy Annamma et al., *Black Girls and School Discipline: The Complexities of Being Overrepresented and Understudied*, 54 URB. EDUC. 211, 232 (2019) (“[R]egrettably, the ‘inherited’ attributes of Black girls are often interpreted (against the framework of conventional femininity) as obstinate, aggressive, and disobedient behaviors.” (citation omitted) (quoting Horace R. Hall & Eleshia L. Smith, “*This Is Not Reality . . . It’s Only TV*”: African American Girls Respond to Media (Mis)Representations, 8 NEW EDUCATOR 222, 225 (2012))).

57. See, e.g., Justin Jouvenal, ‘Excited Delirium’ Cited in Dozens of Deaths in Police Custody. Is It Real or a Cover for Brutality?, WASH. POST (May 6, 2015) [hereinafter Jouvenal, ‘Excited Delirium’ Cited in Dozens of Deaths in Police Custody], https://www.washingtonpost.com/local/crime/existence-of-excited-delirium-ruling-in-va-womans-death-has-experts-split/2015/05/06/b1cc9499-ddaa-474c-9e8a-9ae89a9ae679_story.html.

58. Crime Prevention Comm., *Excited Delirium Syndrome*, in INT’L ASS’N OF CHIEFS OF POLICE, 2015 RESOLUTIONS ADOPTED AT THE 122ND ANNUAL CONFERENCE IN CHICAGO, ILLINOIS 21 (2015), <https://www.theiacp.org/sites/default/files/2018-08/2015Resolutions.pdf>.

59. See Jouvenal, ‘Excited Delirium’ Cited in Dozens of Deaths in Police Custody, *supra* note 57.

American Psychological Association, or the World Health Organization⁶⁰—after encounters with law enforcement or while in custody.⁶¹

Excited delirium was listed as the cause of death in an autopsy report in one high-profile case from 2015. Natasha McKenna was a thirty-seven-year-old Black woman diagnosed with bipolar disorder, schizophrenia, and depression.⁶² Deputies from the Fairfax County Sheriff's Department arrested McKenna on an outstanding warrant after she was charged with allegedly assaulting an Alexandria police officer in early January 2015.⁶³ McKenna died while in custody at the Fairfax County Adult Detention

60. Dahlia Lithwick, *Dying of Excitement*, SLATE (June 11, 2015, 1:32 AM), <https://slate.com/news-and-politics/2015/06/excited-delirium-deaths-in-police-custody-diagnosis-or-cover-up.html>. Controversially, the National Association of Medical Examiners and the American College of Emergency Physicians have recognized excited delirium as a medical condition. Terry McGuinness & Maurice Lipsedge, 'Excited Delirium', *Acute Behavioural Disturbance, Death and Diagnosis*, 52 PSYCH. MED. 1601, 1602 (2022); Méabh O'Hare et al., Perspective, *Police Keep Using 'Excited Delirium' to Justify Brutality. It's Junk Science*, WASH. POST (July 17, 2020, 10:55 AM EDT), https://www.washingtonpost.com/outlook/chokehold-police-excited-delirium/2020/07/17/fe907ec8-c6bc-11ea-b037-f9711f89ee46_story.html.

61. See, e.g., Mary Paquette, Editorial, *Excited Delirium: Does It Exist?*, 39 PERSPS. PSYCHIATRIC CARE 93, 93 (2003); Laura Sullivan, *Death by Excited Delirium: Diagnosis or Coverup?*, NPR (Feb. 26, 2007, 4:00 PM ET), <https://www.npr.org/templates/story/story.php?storyId=7608386>; Daniel Costello, 'Excited Delirium' as a Cause of Death, L.A. TIMES (Apr. 21, 2003, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-2003-apr-21-he-delirium21-story.html>.

62. Editorial, *What Happened to Natasha McKenna?*, WASH. POST (Feb. 20, 2015), https://www.washingtonpost.com/opinions/what-happened-to-natasha-mckenna/2015/02/20/4ef90ec0-b935-11e4-aa05-1ce812b3fdd2_story.html; Raymond F. Morrogh, Off. of the Commonwealth's Att'y, Report of Investigation: In-Custody Death 1 (Sept. 8, 2015), <https://s3.documentcloud.org/documents/2378800/mckenna.pdf>.

63. See Morrogh, *supra* note 62, at 13. The assault allegedly occurred while the officer was attempting to arrest McKenna in order to effectuate an involuntary mental health evaluation. See *id.* at 5–10. McKenna was hospitalized on a number of occasions during the first half of January. During this period, McKenna at times sought voluntary treatment and at other times, was involuntarily detained. See *id.* at 2–5. The full details are contained in the official report on McKenna's death. *Id.* at 1–51. According to the Fairfax County Sheriff's Department, three separate requests were made to the Alexandria Police Department to come pick up McKenna, but the pick-up never happened. Justin Jouvenal, *Death of Inmate at Fairfax Jail Becomes Contentious Issue in Sheriff's Election*, WASH. POST (Jun 21, 2015), https://www.washingtonpost.com/local/crime/death-of-inmate-at-fairfax-jail-becomes-contentious-issue-in-sheriffs-election/2015/06/21/0bc5196a-14fb-11e5-9518-f9e0a8959f32_story.html.

Center, and her cause of death was listed as excited delirium.⁶⁴ During her several days in custody, McKenna had exhibited symptoms of psychological distress.⁶⁵ On the day of her death, six deputies had attempted to forcibly extract McKenna from her cell and transport her to Alexandria themselves.⁶⁶ During the forcible extraction, McKenna was beaten, handcuffed, and shackled for more than twenty minutes before officers shocked her with a taser.⁶⁷ Her breathing stopped minutes later, followed by cardiac arrest.⁶⁸ Paramedics resuscitated her, but McKenna succumbed to her injuries days later.⁶⁹

What happened to Natasha McKenna is not an isolated occurrence. Though there is limited data on the actual number of in-custody deaths caused by excited delirium, one Amnesty International researcher estimates that between 2001 and 2008, seventy-five of the 330 deaths that involved the use of a taser on suspects by police were cited as caused by excited delirium.⁷⁰ In a 2015 resolution, the IACP acknowledged that “approximately 1 in 6 suspects in use-of-force incidents exhibited three or more of the classic signs of [excited delirium].”⁷¹ In that same resolution, the IACP announced that the association would assume a “leadership role in raising awareness by disseminating the Model Policy on [excited delirium syndrome], and encouraging law enforcement agencies to develop policies, procedures and training to enhance officer safety, protect the individual exhibiting [excited delirium syndrome] symptoms, and mitigate liability.”⁷² Excited delirium is a frequent justification for deaths in custody,⁷³ suggesting a potential explanation for the use of force or a cause of death. As critics maintain,

64. See Morrogh, *supra* note 62, at 38, 48; see also Tom Jackman, *The Death of Natasha McKenna in the Fairfax Jail: The Rest of the Story*, WASH. POST (Apr. 13, 2015), <https://www.washingtonpost.com/news/local/wp/2015/04/13/the-death-of-natasha-mckenna-in-the-fairfax-jail-the-rest-of-the-story/>.

65. See Morrogh, *supra* note 62, at 13–17.

66. *Id.* at 26–28; Jackman, *supra* note 64.

67. Morrogh, *supra* note 62, at 24–34.

68. *Id.* at 35–38.

69. *Id.* at 38.

70. Jouvenal, ‘Excited Delirium’ Cited in Dozens of Deaths in Police Custody, *supra* note 57.

71. Crime Prevention Comm., *supra* note 58, at 21.

72. *Id.* An earlier white paper by the IACP noted that “despite what it is called or whether it has been formally recognized, [excited delirium] is a real clinical concern for both law enforcement and the medical communities.” Christopher Baxter, *Excited Delirium: A Medical Emergency or Unscientific Excuse?*, NJ.COM (Oct. 1, 2014, 10:00 AM), https://www.nj.com/news/2014/10/excited_delirium_a_medical_emergency_or_unscientific_excuse.html.

73. Lithwick, *supra* note 60.

because autopsy reports typically list excited delirium rather than the stun gun or taser as the primary cause of death, the condition can serve as a cover for excessive force by law enforcement.⁷⁴ Deaths in officer-involved confrontations from excited delirium continue.⁷⁵

For negatively racialized persons, disability has been used to disempower, subordinate, and justify Black death. Disability can provide a direct basis for producing—or constructing—criminality or “criminals,” and can be erased or manipulated in order to justify the use of force.⁷⁶ In one recent example, police records related to the killing of Daniel Prude by officers from the Rochester Police Department included the notation, “Make him a suspect.”⁷⁷ In another example of this narrative in a case involving private violence, the actions of a twenty-five-year-old Black man, Ahmaud Arbery, in defending himself against an armed attack were explained by reference to his mental health record. In his letter to the Glynn County Police Department, District Attorney George E. Barnhill writes, “Arbery’s mental health records & prior convictions help explain his apparent aggressive nature and his possible thought pattern to attack an armed man.”⁷⁸ Focusing on disability along with race provides nuance to understanding the unique vulnerabilities of disabled people of color, like Prude, but also how it can be manipulated to justify

74. *Id.*; see also Baxter, *supra* note 72.

75. See, e.g., Associated Press, *Attorney: Man Tazed, Beaten in Police Custody Suffered from Mental Illness; His Death Is a Homicide*, WBRZ (June 11, 2020, 4:21 AM), <https://www.wbrz.com/news/attorney-man-tazed-beaten-in-police-custody-suffered-from-mental-illness-his-death-is-a-homicide/>. For cases that discuss “excited delirium” as the cause of an “officer-involved” death, see Rachel v. City of Mobile, 112 F. Supp. 3d 1263, 1290 (S.D. Ala. 2015); Galack v. PTS of Am., LLC, No. 4:13-CV-0288-HLM, 2015 WL 5692327, at *1 (N.D. Ga. July 6, 2015); Mann v. Taser Int’l, Inc., 588 F.3d 1291, 1304 (11th Cir. 2009); and Gregory v. Cnty. of Maui, 523 F.3d 1103, 1105–06 (9th Cir. 2008).

76. See, e.g., Nelson, *Frontlines*, *supra* note 44, at 618–19 (discussing ways in which negatively racialized individuals are labeled as crazy by law enforcement despite actual mental health diagnoses); Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 3 (2010) (discussing criminalization and excessive force against people of color with psychiatric disabilities).

77. Michael Wilson & Edgar Sandoval, *Documents Reveal How the Police Kept Daniel Prude’s Death Quiet*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/09/15/nyregion/rochester-police-daniel-prude.html>.

78. Letter from George E. Barnhill, Dist. Att’y, Waycross Jud. Cir., to Tom Jump, Captain, Glynn Cnty. Police Dep’t (Apr. 2, 2020), <https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf>. It is also imperative that I note that, in discussing how these labels have been used to denigrate negatively racialized groups, I also reject the use of such labels deployed to demean and dehumanize disabled people.

forms of violence and to reinforce ongoing forms of disability-based subordination.

That racial ideology worked (and works) to construct disability labels and categories for the purposes of segregation and confinement of those labeled as disabled and should not be taken to suggest that diagnoses for negatively racialized groups are inherently pathological in every individual case. Indeed, organizations and movements that address this issue of diagnosis are not united in their views on the value of diagnosis. For example, movements like the psychiatric survivors movement have challenged the dominance of medical professionals and the medical-industrial complex. In the diagnosis process, these groups have acknowledged the race-classed nature of diagnosis while also acknowledging the social import and necessity, in some cases, of diagnoses to this day.⁷⁹ In another case, the Black Panther Party openly advocated against the use of medical diagnoses to exclude Black students.⁸⁰ In her award-winning book, Alondra Nelson discusses the Party's clinics and how they operated on the idea that life experiences provided a mode of expertise to the benefit of the patients.⁸¹ As she notes, "The Black Panther organization endeavored to give voice to patients' experiences partly by privileging the judgment and perspective of those individuals or communities over that of healthcare professionals."⁸²

Centering disability in discussions on policing demonstrates how it functions to render *white* disabled people vulnerable to police violence. Different forms of privilege—such as those based on race, class, ability, sexuality, and citizenship—interact in such a way that an individual holding one type of privilege may still be marginalized in society based on the lack of another type of privilege. By centering discussions of policing on the lens on disability, along with race and racial privilege, it is easier to see how white disabled people are vulnerable to state police violence. More broadly, and in line with the important work of Professor Khiara Bridges, a focus on disability shows how a lack of able-bodied privilege interacts with race privilege and what harms may accrue vis-à-vis the state.⁸³ Though data on

79. See *Our Mission*, PROJECT LETS, <https://projectlets.org/mission> (last visited Apr. 24, 2022).

80. See ALONDRA NELSON, *BODY AND SOUL: THE BLACK PANTHER PARTY AND THE FIGHT AGAINST MEDICAL DISCRIMINATION* 136 (2011) (featuring Black Panther Party stories of African American women who were denied admission to nursing school based on their diagnoses of sickle cell anemia).

81. See *id.* at 84.

82. *Id.* at 88.

83. Cf. Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 450 n.5 (2019) (noting that her article "grapples with what the lack of class privilege

police use of force is limited, and data on disability and policing is limited even more so, available data suggests “that although white people and women are generally less at risk for police violence, this experience does not extend to white people and women who suffer from mental illness.”⁸⁴ Furthermore, according to researchers, “while non-Hispanic white people make up a relatively small percentage of the total population shot and killed by police overall, white people who showed signs of mental illness make up a large percentage of total non-Hispanic white deaths (32%) in police encounters.”⁸⁵

Of course, this should not be taken to suggest that white disabled people do not possess any race privilege in the policing context as a general matter. What I do suggest is that in police encounters, disabled white people, despite racial privilege, may face disadvantages on account of their disability. As Khiara Bridges has argued, in some cases, disabled people may be disadvantaged because of their white privilege—that is, white privilege may lead to white disadvantage.⁸⁶ Discussing the criminalization of white pregnant women who use opioids, Bridges writes that “these women possess a compromised, marginalized, ‘not-quite’ whiteness — a corrupted whiteness that has yielded to them a reduced racial privilege. . . . [T]he marginalized white women subject to arrest and prosecution for using opioids during pregnancy exist at the limits of whiteness.”⁸⁷ What this suggests, in Bridges’s words, is that “the racial privilege that they would otherwise have had has been limited — making it unable to protect its holders from penal state power.”⁸⁸ Some of the women that Bridges discusses are women with

might mean for race privilege”); Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 776 (2020) [hereinafter Bridges, *Race, Pregnancy, and the Opioid Epidemic*].

84. See Kyle Lane-McKinley et al., *The Deborah Danner Story: Officer-Involved Deaths of People Living with Mental Illness*, 42 ACAD. PSYCHIATRY 443, 445 (2018).

85. *Id.* Interestingly, the researchers also noted that “African Americans showing signs of mental illness make up a relatively small proportion of the total number of African American people killed by police when compared with the proportion of white people showing signs of mental illness who were killed by police.” *Id.* Such findings suggest that showing “suffering from mental illness does not place an African American individual at significantly greater risk” of police violence. *See id.*

86. Bridges, *Race, Pregnancy, and the Opioid Epidemic*, *supra* note 83, at 851.

87. *Id.* at 776 (emphasis omitted).

88. *Id.* (emphasis omitted).

disabilities.⁸⁹ Whether each pregnant woman charged with using opioids falls under the protections of the ADA is less to the point, but I raise it to provide a potential application of the broader theoretical claim: that white privilege may render white disabled people vulnerable to police violence.

II. Disability Incarcerated

No discussion on disability and the criminal legal system would be complete without the constellation of prisons, jails, immigration detention centers, and juvenile detention centers that make up the carceral state. In this Part, I focus only on prisons and jails, though advocacy in immigration detention centers and juvenile detention centers is growing in recent years.⁹⁰ The period of mass incarceration, or more accurately race- and class-based incarceration, and the rates of incarceration in the United States are unprecedented in the course of human history.⁹¹ The United States, with just 5% of the world's population, holds nearly 25% of those who are imprisoned.⁹² Racial critiques of mass incarceration are by now well known.⁹³ These critiques have brought to mainstream public consciousness and politics the harms of mass incarceration on communities of color and particularly low-income communities of color.⁹⁴ They have emphasized the

89. *See id.* at 830–32. Though the ADA does not provide coverage for people with substance use dependencies who are actively using, it does provide protections for those in treatment or formerly in treatment. *See* 42 U.S.C. § 12114(b)(1)–(2).

90. *See, e.g.,* Ted Hesson & Mica Rosenberg, *U.S. to Close, Scale Back Four Immigrant Detention Centers*, REUTERS (Mar. 25, 2022, 1:36 PM CDT), <https://www.reuters.com/world/us/us-plans-close-scale-back-four-immigrant-detention-centers-document-shows-2022-03-25/>; SAMANTHA HARVELL ET AL., URB. INST., *CLOSING YOUTH PRISONS: LESSONS FROM AGENCY ADMINISTRATORS* (2020), https://www.urban.org/sites/default/files/publication/101917/closing-youth-prisons-lessons-from-agency-administrators_1.pdf.

91. *See* Greg Miller, *The Invention of Incarceration*, KNOWABLE MAG. (Mar. 18, 2022), <https://knowablemagazine.org/article/society/2022/prison-history-ashley-rubin-qa>.

92. *Criminal Justice Reform*, EQUAL JUST. INITIATIVE, <https://eji.org/criminal-justice-reform/> (last visited Aug. 11, 2022) (citing James Cullen, *The United States Is (Very) Slowly Reducing Incarceration*, BRENNAN CTR. FOR JUST. (Jan. 18, 2017), <https://www.brennan-center.org/our-work/analysis-opinion/united-states-very-slowly-reducing-incarceration>).

93. *See, e.g.,* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

94. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–97 (2004).

racial disparities reflected in the criminal legal system, as well as the racial logics that have undergirded the unprecedented growth of incarceration.⁹⁵

Disability critiques are less well known, but within the last decade, there has been a surge of scholarship specifically focused on the experiences of disabled people in not just prisons and jails, but also on the carceral conditions replicated in psychiatric wards, group homes, and nursing homes.⁹⁶ A disability lens on the problem of mass incarceration is necessary for several reasons, including the disproportionate rates of disabled people in prisons and jails and the harsh conditions, challenges, and harms they experience while incarcerated.

Many American prisoners have at least one disability. The most recent national study, by the U.S. Department of Justice's Bureau of Justice Statistics, found that 26% of incarcerated people have a disability.⁹⁷ Specifically, the study found that 10% report a mobility impairment, 10% report that they are deaf or low-hearing, and 12% report that they are blind or low-vision (uncorrectable with glasses).⁹⁸ Prisoners also have intellectual disabilities, psychiatric disabilities, and chronic medical conditions:

Depending on the facility and the definition, 4% to 10% have an intellectual disability. And over half report symptoms that meet the criteria for various mental illnesses; mania and depression predominate, but 15% of state prisoners have symptoms of psychosis, such as delusions or hallucinations. Forty percent of prisoners have some kind of chronic medical condition—diabetes, cancer, heart disease, high blood pressure, etc. All these statistics are for post-conviction prisoners⁹⁹

95. See ALEXANDER, *supra* note 93; ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

96. See, e.g., BEN-MOSHE, *DECARCERATING DISABILITY*, *supra* note 3, at 37–40; Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, 15 *AMA J. ETHICS* 886, 886 (2013), <https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2018-05/mhst1-1310.pdf>.

97. LAURA M. MARUSCHAK ET AL., U.S. DEP'T OF JUST., *SURVEY OF PRISON INMATES, 2016: DISABILITIES REPORTED BY PRISONERS 1* (2021), <https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf>.

98. *Id.* at 1, 5.

99. Margo Schlanger, *Prisoners with Disabilities*, in *REFORMING CRIMINAL JUSTICE VOLUME 4: PUNISHMENT, INCARCERATION, AND RELEASE* 295, 295 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_4.pdf.

Women are the fastest-growing segment of the incarcerated here in the United States.¹⁰⁰ Forty-seven out of every 100,000 women were in prison in 2020,¹⁰¹ including one in 111 white women, one in eighteen Black women, and one in forty-five Latina women.¹⁰² Our nation incarcerates nearly one-third of all the women in prison worldwide, according to a 2014 report by the International Centre for Prison Studies.¹⁰³ Many of these incarcerated women are living with disabilities, and women with disabilities represent a high percentage of incarcerated women.¹⁰⁴ As many as 49.8% of women incarcerated in state institutions and 40.2% of women incarcerated in federal institutions meet the criteria for at least one disability.¹⁰⁵ Nearly 73% of incarcerated women in state institutions and 47% of incarcerated women in federal institutions used drugs regularly prior to incarceration.¹⁰⁶ Incarcerated women have higher rates of disability than the general population: “12% of females in the general population have symptoms of a mental disorder,” or a psychiatric disability—a term I use instead of mental illness or disorder—“compared to 73% of females in state prison, 61% in federal prison, and 75% in local jails.”¹⁰⁷

Incarcerated women were more likely than incarcerated men to report having a physical disability.¹⁰⁸ In a 2021 Bureau of Justice Statistics report, disability was defined to include hearing, vision, cognitive, and ambulatory

100. See Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> (“Women’s incarceration has grown at twice the pace of men’s incarceration in recent decades, and has disproportionately been located in local jails.”).

101. INCARCERATED WOMEN AND GIRLS, SENT’G PROJECT (2022), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

102. Michele Goodwin, *The New Jane Crow: Women’s Mass Incarceration*, JUST SEC. (July 20, 2020), <https://www.justsecurity.org/71509/the-new-jane-crow-womens-mass-incarceration/>.

103. Niall McCarthy, *Nearly a Third of All Female Prisoners Worldwide Are Incarcerated in the United States [Infographic]*, FORBES (Sept. 23, 2014, 8:46 AM EDT), <https://www.forbes.com/sites/niallmccarthy/2014/09/23/nearly-a-third-of-all-female-prisoners-worldwide-are-incarcerated-in-the-united-states-infographic/?sh=4153ab3f10af>.

104. See MARUSCHAK ET AL., *supra* note 97, at 3–4 (reporting disabilities for 49.8% of female state prisoners and 40.2% of female federal prisoners).

105. *Id.*

106. Barbara E. Bloom & Stephanie Covington, *Addressing the Mental Health Needs of Women Offenders*, in WOMEN’S MENTAL HEALTH ISSUES ACROSS THE CRIMINAL JUSTICE SYSTEM 160, 161 (citing CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUST., SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997, at 7 (1999)).

107. *Id.* (citing DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUST., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 4 (2006)).

108. See MARUSCHAK ET AL., *supra* note 97, at 1.

disabilities.¹⁰⁹ It also included disabilities that provide challenges with self-care and independent living, which refers to the ability to navigate daily life schedules, activities, and events without assistance.¹¹⁰ In the study, about 40% of women and 28% of men in prison and 50% of women and 39% of men in jail reported a disability.¹¹¹

Despite these significant numbers, there is evidence that prisons and jails are routinely failing to meet the needs of women with disabilities. A few anecdotal accounts demonstrate the nature and scope of the harms experienced by women with disabilities in particular:

- Forty-three-year-old Michelle Kindoll experienced multiple strokes while confined in a northern Kentucky jail.¹¹² Rather than providing her with proper treatment, jail personnel transferred Kindoll to an isolated cell for several days.¹¹³ While confined, she suffered multiple strokes.¹¹⁴ According to a federal lawsuit, “medical staff ignored her symptoms, which included a numb leg, curling arm and slurred speech,”¹¹⁵ and accused her of being disruptive.¹¹⁶
- Following amputation surgery, Martinique Stoudemire contracted MRSA, a serious bacterial infection, while at Huron Valley Women’s Facility.¹¹⁷ “Prison policy required that Stoudemire be quarantined in a segregation unit due to her infection . . . Stoudemire claimed that prison officials managing the Huron Valley Women’s Facility held her in solitary confinement for two weeks with limited medical assistance and absolutely no contact with a prison doctor. She alleged that she received ‘extremely poor medical care while in segregation,’ and that the ‘cells were not equipped to accommodate’

109. *Id.*

110. *Id.* at 1, 1 n.1, 5.

111. *Id.* at 1.

112. *Kindoll v. S. Health Partners*, No. 17-84-DLB-CJS, 2019 WL 1409842, at *1, *6 (E.D. Ky. Mar. 28, 2019); Max Londberg & Chris Mayhew, *NKY Jail Placed Woman Having Strokes in Solitary for Several Days. Now She’s Disabled, Suit Says*, CINCINNATI.COM (May 18, 2019, 5:05 PM ET), <https://www.cincinnati.com/story/news/2019/05/18/suit-nky-jail-put-woman-having-strokes-solitary-missed-symptoms/3721656002/>.

113. *Kindoll*, 2019 WL 1409842, at *3.

114. *Id.* at *6.

115. Londberg & Mayhew, *supra* note 112; *Kindoll*, 2019 WL 1409842, at *3–4.

116. *Kindoll*, 2019 WL 1409842, at *3.

117. JAMELIA MORGAN, ACLU, CAGED IN: SOLITARY CONFINEMENT’S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES 39 (2017), https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf.

her disability. Specifically, she alleged that she ‘was never provided with any assistive devices that might have allowed her to safely move between her bed, wheelchair, toilet, and shower,’ and that ‘[t]here was no call button, so Stoudemire had to shout when she needed assistance.’ Stoudemire was ‘forced to crawl from her bed to the toilet.’ On one occasion, she defecated on herself when staff failed to respond to her requests for assistance. During her two weeks in segregation, Stoudemire ‘received only one shower . . . and was required to dress her wounds herself, which put her at risk of infection.’ The Michigan Department of Corrections settled the suit with Stoudemire in May 2016, awarding her over \$200,000 for the harm caused.’¹¹⁸

- “Erika Rocha spent her 35th birthday confined at California Institution for Women in Chino Valley. The women in her tier threw her a Tinker Bell party to celebrate. . . . [O]n April 14, Rocha’s body was discovered hanging in her 10-by-15-foot cell. Rocha’s parole hearing had been scheduled for the next day. According to investigative reporters, stories like Erika’s have become far too common at California Institution for Women, a facility known for its surge in suicides and suicide attempts in the last few years. Six women have died by suicide at the prison since the start of 2013, and there have been 73 suicide attempts, according to the California Department of Corrections. Prisoner-rights advocates say the number of attempts is likely higher. The suicide rate at CIW, as reported by the Department of Corrections, is five times the state average, and four to five times the national average for all female inmates in state prisons.’¹¹⁹
- In 2019, Layleen Polanco, an Afro-Latinx trans woman died at Rikers Island after personnel failed to get her medical treatment when she had an epileptic seizure in solitary confinement.¹²⁰ Video

118. *Id.* (second and third alteration in original) (quoting *Stoudemire v. Mich. Dep’t of Corr.*, 614 F. App’x 798, 800 (6th Cir. 2015)).

119. Jamelia N. Morgan, *An Intersectional Approach to Understanding the Challenges Facing Incarcerated Women*, INSTITUTO BRASILEIRO DE CIÊNCIAS CRIMINAIS (Sept. 16, 2019), <https://www.ibccrim.org.br/noticias/exibir/7129/>.

120. Kate Sosin, *New Video Reveals Layleen Polanco’s Death at Rikers Was Preventable, Family Says*, NBC NEWS (June 13, 2020, 4:05 AM), <https://www.nbcnews.com/feature/nbc-out/new-video-reveals-layleen-polanco-s-death-rikers-was-preventable-n1230951>; Chelsia Rose Marcius, *Bronx District Attorney Will Not Pursue Charges in the Death of Transgender Woman Layleen Polanco at Rikers Island*, N.Y. DAILY NEWS (June 5, 2020, 4:32

footage from outside of her cell showed that guards waited for approximately an hour and a half before calling for medical help.¹²¹

These systemic failures within prisons and jails reflect the failure of prison systems to respond to the needs of disabled people. They also reflect the most recent iterations of legacies of institutionalization and segregation—twin forms of disability subordination persisting to the present day. The prevalence of disabled people in prison indicates widespread vulnerabilities to imprisonment but also criminalization produced by, as some scholars suggest, proximity to violence, poverty, houselessness, and a lack of access to appropriate and quality health care.

Psychiatric disability—whether diagnosed or mislabeled, and particularly where untreated—increases one’s risk of ending up in jail or prison. The high proportion of disabled people in carceral spaces suggests at the very least that the causes and consequences of disability might correspond with risk factors for incarceration. For example, poverty, lack of access to medical and mental health care, and lack of accessible and affordable housing stem from and produce debility and risks of incarceration.¹²² At the same time, I dispute the framing that prisons and jails are the “new asylums,” as informed by Liat Ben-Moshe’s work.¹²³ Ben-Moshe challenges the framing of prisons and jails as the new asylums because “such discourse reduces a much more complex process and points the blame toward an easy target—deinstitutionalization—and away from discussions of neo-liberal policies that led simultaneously to the growth of the prison system and to a lack of financial support for people with disabilities to live in the community.”¹²⁴ Thus, while it is important to understand how disabled people are rendered vulnerable to criminalization and incarceration, explaining criminalization and incarceration as simply a

PM), <https://www.nydailynews.com/new-york/ny-bronx-district-attorney-rikers-island-lay-leen-polanco-20200605-tpuks2n3q5fmpli5kzoaoqmcwy-story.html>.

121. Sosin, *supra* note 120.

122. See, e.g., Niloofar Ramezani et al., *The Relationship Between Community Public Health, Behavioral Health Service Accessibility, and Mass Incarceration*, BMC HEALTH SERVS. RSCH. 966 (2022), <https://doi.org/10.1186/s12913-022-08306-6>; *Disability & Socioeconomic Status*, AM. PSYCH. ASS’N (2010), <https://www.apa.org/pi/ses/resources/publications/disability>; *Connections Among Poverty, Incarceration, and Inequality*, INST. FOR RSCH. ON POVERTY (May 2020), <https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality/>; Kevin M. Simon et al., *Addressing Poverty and Mental Illness*, PSYCHIATRIC TIMES (June 28, 2018), <https://www.psychiatrictimes.com/view/addressing-poverty-and-mental-illness>.

123. See BEN-MOSHE, DECARCERATING DISABILITY, *supra* note 3, at 136.

124. *Id.* at 138 (“[T]he new asylums discourse medicalizes, pathologizes, and psychiatrizes what is a deeply political and socioeconomic issue.”).

product of disability is overly simplistic and inconsistent with empirical studies, as Lea Johnston's work has carefully demonstrated.¹²⁵

An intersectional approach to race and disability demonstrates how these vulnerabilities to harm are heightened for people of color and low-income people who have disabilities. Such an approach centers the well-documented problems of mass criminalization and mass incarceration as not only a racial-justice problem, but also a disability-justice problem. It focuses in on the complexities of the most recent iterations of legacies of institutionalization and segregation of disabled people.¹²⁶ If we see mass incarceration as, in part, a site of disability-based subordination, along with racial, gender, and class-based subordination, our approach to the problem of mass incarceration changes. And, importantly, an intersectional approach offers a lens through which to identify more inclusive and effective solutions to the problems identified.

125. *See, e.g.*, Johnston, *supra* note 2, at 521–22 (“Studies demonstrate that these [criminogenic risk] factors motivate the criminal activity of those with and without mental disorders alike.”).

126. *See, e.g.*, BEN-MOSHE, *DECARCERATING DISABILITY*, *supra* note 3, at 39; *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA* (Liat Ben-Moshe et al. eds, 2014).