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ABSTRACT

This essay re-frames the issue of prison rape as a problem of disablement – that is an institutional and systemic process which has as its consequence the infliction of physical and psychiatric conditions which are or become disabling. The discussion proceeds with a critical consideration of the Prison Litigation Reform Act as a barrier to prison rape litigation, and the failure of the Americans with Disabilities Act to offer a means to remedy the dynamics of disablement in incarceration. The paper concludes with discussion of the limitations and prospects of related areas and developments in law, including the recently proposed National Prison Rape Elimination Commission standards for eliminating sexual violence in U.S. penal systems, and the recently adopted UN Convention on the Rights of Persons with Disabilities.

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I. INTRODUCTION

In spring of 2009, Fox network sent a promotional mailer to the Lesbian/Bisexual/Gay/Transgender magazine, The Advocate.¹ The

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mailer featured a press release for the series finale of the television show, *Prison Break*, and also contained a bar of soap, explained by an invitation for viewers to “lather up excitement” for the finale. For those unfamiliar with the pop cultural reference, the bar of soap invokes repeated on-screen depictions of prison rape throughout the series. The fact that sexual violence in U.S. jails and prisons is perceived as a joke is a familiar and entrenched phenomenon. However, Fox network was not simply treating rape here as humorous. The advertisement presumed and reinforced the notion that the public (or at least a presumed gay male demographic) would find images of rape in the context of incarceration erotic and therefore pleasurable. Bypassing, at least in this discussion, how this assumption is indicative of a particular set of premises about objectification and queer sexualities – my purpose in raising this particular instance is to note that it indicates more than indifference or trivialization. It suggests that the existence of prison rape is desired or important in some manner, to people who are not incarcerated. Lest it be argued that this example is just indicative of an attempt to capitalize on a particular ‘gay’ market and has no implications beyond this niche, it bears noting that while certainly prison rape scripts are a familiar feature in pornography geared towards gay and bisexual male audiences, the depiction of prison rape in heterosexual pornography set in imagined women’s prisons is comparably prevalent.

Moreover, the pleasure involved in envisioning same-sex prison rape need not be (admittedly) homo-erotic in order to play to the public. In 1995, the ska/punk band Sublime released a single version of its song “Date Rape,” which rapidly became one of its most popular offerings. The song involves a pseudo- or quasi-feminist retributive narrative in which the imagined female protagonist is date raped, reports to law enforcement, and with a degree of vigilance and vehemence which certainly belies contemporary date rape prosecution and conviction statistics, the criminal justice system sentences the perpetrator to prison

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2 *Id.*


4 See FEMINISM & PORNOGRAPHY (Drucilla Cornell, ed. 2000); ECLECTIC VIEWS ON GAY MALE PORNOGRAPHY (Todd G. Morrison, ed. 2004).


6 The exaggerated legal response is more striking in part because of the racial politics of the song, which makes a point in the first stanza of describing the perpetrator as having “light skin, light blue eyes.” See SUBLIME, DATE RAPE (Gasoline Alley Records Inc. 1995), available at http://sublimespot.com/sublim
for 25 years, where he is “butt-raped by a large inmate.”\(^7\) In the music video that accompanied the song, the famed pornography actor, Ron Jeremy was recruited to play both the judge in the rape trial, and also the “large inmate” who commits the prison rape.\(^8\)

Law/pornography undergo a notable fusion here – the act of inmate rape, literally perpetrated by the court, is simultaneously associated with the desire to distance from or punish sexual violence and criminality, while in the same instance sexual assault is eroticized. The violent or vengeful impulse which colors the act of this ‘righteous’ and entertaining rape, allows viewers who might not want to perceive themselves as getting “lather(ed) up” over same-sex activity to enjoy the imagery; the prison/rape context makes it an acceptable pleasure. And appreciating an acknowledged rape also engenders no stigma, as it is embodied within a supposedly feminist or anti-rape politic and thoroughly legitimated by law.

The song ends with the words, “I can’t take pity on men of his kind, even though he now takes it in the behind.”\(^9\) I will mostly bypass the provocation for analysis embodied in the framing of anal sex as implicitly piteous (and the coding of the inmate as implicitly gay), in terms which suggest that it is as much, if not mainly, the physical nature of the act, as the violent and dehumanizing context, which makes it so negative. My point here is to note that the act of rape is the endpoint of public consumption. Who or what the inmate might be afterwards, what he might experience as a consequence, is outside of the boundaries of the song or video, or the terrain of most jokes and popular representation.

Nevertheless, the question of what being raped in a prison, jail or detention facility means afterwards is the catalyst for this paper.\(^10\) In

\(^7\) Sublime, supra note 6.
\(^8\) Sublime, Date Rape Music Video (Gasoline Alley Records Inc. 1995).
\(^9\) Sublime, supra note 6.
\(^10\) Unless designated, most of my analysis applies to the three categories: prisons, jails and immigration detention centers. For brevity’s sake, I am using the term “prison” as a broader signifier, indicating dynamics common to all three contexts. This is not to say that the instances and context of prison rape are undifferentiated by the type of facility, but only that exploring the differences...
beginning with the troubling and compelling popular representations in the
prior paragraphs, I am not attempting to structure or introduce a
broader analysis of popular culture and the representation of
incarceration. My initial agenda is to note that the issue of prison sexual
violence ought not to be understood solely as a side effect of a
dysfunctioning penal system or of an indifferent criminal legal system,
but rather as an activity which in some sense serves and is engendered
by the public desire to sexually and symbolically destroy the bodies of
criminalized people. Recognition of this mass socio-psychological
animus is critical in beginning to conceive of both the consequences of
prison rape, and of the legal structures which fail to prevent it, or to
allow for meaningful prospects for recuperation or later safety.

To this end, the concept of “disablement” is critical to my project.
The term was previously applied to the incarceration context by
disability community advocates Marta Russell and Jean Stewart.11 As I
employ it here, both drawing from and building on their definition, it has
two meanings. First, as Russell and Stewart acknowledge, it refers not
simply to the presence of disability, but to the social, political, legal and
economic processes by which people who have disabilities are
subordinated.12 In other words, it is not the presence of a dis
ability (or at
least not only) which results in negative consequence or “impairment,”
but the socio-cultural reaction to it. The recently adopted United Nations
Convention on the Rights of Persons with Disabilities embodies a
similar conception of the relationship between disability and cultural
context, stating:

Persons with disabilities include those who have long-
term physical, mental, intellectual or sensory

will not be my project in this paper. Some of the points proffered in this paper
also do or can apply to juvenile detention facilities, military incarceration, and
forensic psychiatric hospitals. However, given the scope of this paper, I will not
attempt to explore these contexts in any specificity. I also acknowledge existing
debates within prisoner rights advocacy sectors about the best language to
designate sexual assault in prisons. I specifically acknowledge the imperative to
refer to “prisoner rape,” rather than “prison rape,” in the interests of
emphasizing and humanizing the person, rather than focusing on the location of
the event. Although I appreciate the complexity of the issues, and the dilemmas
of humanization in this particular brutal context, my choice to use the language
“prison rape” is consistent with my emphasis on disablement as a systemic
process, not simply located in individual experiences (though experience is
always important), but reflective of institutional and structural agendas and
dynamics.
11 Marta Russell & Jean Stewart, Disablement, Prison & Historical
ew.org/0701russell.htm [hereinafter Russell].
12 Id.
impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.\textsuperscript{13}

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.\textsuperscript{14}

In addition, I also apply a second meaning to the term “disablement”. Disablement indicates more than the interpretations of or responses to impairment, injury, illness, or difference. It also implicates the origin or cause of disability. In other words, I reference disablement as the process by which some disabilities are socially produced, and more specifically are produced by violence, inequity and subordination. Not all disabilities fall into this category. For instance, disabilities which are the consequence of relatively normative aging, of accidents not exacerbated by a social vulnerability, or – in some cases -- are genetic in origin\textsuperscript{15}, would not fit my conception of disabilities produced by disablement. A related and useful designation is the term “emergent disability,” which initially manifested in social work literatures in the 1990s,\textsuperscript{16} and was then introduced into legal discourse by Dorothy Roberts and Jennifer Pokempner.\textsuperscript{17} As I invoke the term here, emergent disabilities are disabilities which would not exist, or would not be substantial, but for a context of social inequity.


\textsuperscript{14} See \textsc{CLAIRE H. LIACHOWITZ}, \textsc{Disability as a Social Construct: Legislative Roots} (1988); \textsc{Critical Disability Theory: Essays in Philosophy, Politics, Policy & Law} (Dianne Pothier & Richard Devlin, eds., 2006) [hereinafter Pothier].

\textsuperscript{15} It should be acknowledged that even disabilities which are genetic can still be socially constructed, both in how they are read and interpreted, and because a variety of social factors, including for instance bio-weaponry, can lead to genetic changes which are disabling. For related discussion, see \textsc{M. ROBERT COOKE-DEEGAN}, \textsc{The Gene Wars: Science, Politics & the Human Genome} (1994).


It is relevant to acknowledge existing sociological and socio-historical theories addressing the medicalization of deviance, or the process by which real or imagined differences in bodies, psyches, or cognition which are not necessarily in themselves an organic experience of impairment, illness, injury or suffering, are defined as, or as symptomatic of, disease.\(^{18}\) Although the medicalization of deviance is a crucial subject generally and for the purposes of a critical disability analysis, I am intentionally distinguishing emergent disabilities as conditions which do involve some injury, illness, or impairment, and are not solely a negative social reaction to what is otherwise a benign or imagined difference. In other words, emergent disabilities, though undoubtedly exacerbated by ableism – i.e. the subordination of people with disabilities – are also reflective of a physical and/or psychological experience of externally inflicted suffering or damage. Relative at least to this second meaning of disablement, disablement can be understood as the process of creating emergent disabilities, or alternately, emergent disabilities are the consequence of disablement.

My task in this paper is two-fold. First, I examine the phenomenon of prison rape, as a form or manifestation of subordination which has as its consequence not only the infliction of immediate and severe suffering, but also the imposition of longer term psychological and physical injuries, illnesses, and impairments. In other words, I confront prison sexual assault as a process of disablement. Second, I approach the problem as it’s salient for prisoner rights litigation and advocacy – what would it mean to attempt to advocate for survivors of prison rape, from the perspective of acknowledging rape victims as people who have been sexually/violently disabled? In unpacking this challenge, I look first to a statutory barrier to virtually all prisoner litigation in federal courts in the United States – namely, the Prison Litigation Reform Act (“PLRA”).\(^{19}\)

I next consider what the prospects for utilizing disability civil rights law, and particularly the (recently amended) Americans with Disabilities Act (“ADA”), in the service of violently disabled prisoners, generally, and relative to the limits imposed by the PLRA.\(^{20}\) I argue specifically that while the potentials of the ADA as a mechanism for prisoner advocacy are very limited in multiple respects, the ADA can conceivably be used – whether in direct advocacy or public discourse – to challenge the barriers posed by the PLRA. In other words, I argue that there is a

\(^{18}\) See Peter Conrad & Joseph M. Schneider, Deviance & Medicalization: From Badness to Sickness (1980).
conflict between the two federal statutes, which has yet to be explicitly recognized in virtually any sphere.

Although my emphasis remains on prison rape, it should be acknowledged that the question of violent disablement is not limited only to sexual violence as cause; it relates to a wide range of issues intrinsic in contemporary prison, jail and detention facility conditions, and therefore this piece of my discussion is relevant for prisoner advocacy broadly. I then turn more briefly to review some of the statutory, textual and constitutional bases for legal advocacy, attending to the Prison Rape Elimination Act (“PREA”), 8th amendment and torts-based litigation, and the possible, albeit limited influence of relevant international legal conventions. Finally, in the conclusion I reflect again on some of the critical implications of prison rape as disablement.

II. PRISON RAPE AS A CUMULATIVE EXPERIENCE OF DISABLEMENT

The relationship between sexual violence and psychological trauma is now well established in clinical, social science, and public health literatures. The constellation of mental health consequences commonly

21 Russell, supra note 11; see TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT (1999) [hereinafter KUPERS]. For additional related discussion on the issue of mental illness and incarceration, see Terry Kupers et al., Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs, 36 CRIM. JUST. & BEHAV. 1037 (2009). My purpose in focusing on prison rape is not intended to treat it as thoroughly distinct from other incarceration-related brutalities – i.e., prison rape is an extreme, but not aberrant or exceptional manifestation of the context in which it occurs. However, I am also highlighting the issue of prison rape as disabling, rather than broadly structuring this discussion around the concept of incarceration as disabling or disablement (also a valid framing, certainly), because I believe the extreme traumatic consequences of sexual violence make the dynamics of disablement especially obvious. Further, as noted momentarily, the issue of prison rape is one of the limited areas where recent U.S. statutory interventions have advanced prisoner rights in any way – and therefore strategically, there is a particular use in more carefully explicating its consequences, in order to build on existing prisoner rights discourse.


associated with sexual assault, whether designated as rape trauma syndrome specifically\textsuperscript{24} or post-traumatic stress disorder more broadly,\textsuperscript{25} entail extreme and often prolonged distress meriting substantial access to healthcare and recuperative resources, under any circumstances. The incarceration context compounds the problem of sexual assault related trauma in multiple ways. First, the options for escaping proximity to the perpetrator of the assault are typically very limited or non-existent.\textsuperscript{26} Therefore, even if the sexual assaults are not continuing or impending (and they often are), the prospect for creating an environment which feels emotionally safe -- if such a thing were conceivable, while incarcerated -- enough for the notion of “recovery” to be meaningful, is comparably unlikely. As a consequence, the experience of traumatic stress is likely to be constant or unrelenting. This is true in part because of the memory or internalized harm caused by the instant of a sexual assault. However, it is amplified in the incarceration context, because the dynamics which engendered the assault maintain relentless emotional and physical vulnerability. Prison rape victim Rodney Hulin, whose written pleas for help, before he eventually hanged himself, became part of the anecdotal and evidentiary foundation for the passage of PREA, described the emotional reality in this way, in his letter appealing to a prison administrator:

\begin{quote}
I have been sexually and physically assaulted several times, by several inmates. I am afraid to go to sleep, to shower, and just about everything else. I am afraid that when I am doing these things, I might die at any minute. Please sir, help me.\textsuperscript{27}
\end{quote}

Second, prison rape is often not a secret experience, in the sense that people who are raped during incarceration may be humiliated or stigmatized in the perceptions of the prison staff and other inmates. In male facilities, the experience of being raped marks the victim as a

\textsuperscript{24}Rape Trauma Syndrome, first coined by Ann Burgess & Lynda Holstrom, is understood as a specific type of post-traumatic stress. Burgess, supra note 23.

\textsuperscript{25}For discussion of symptomology, see FRIEDMAN, supra note 23; VAN DER KOLK, supra note 23.


“punk,” someone who has lost masculine status or been feminized by sexual assault.\textsuperscript{28} For female inmates, where the perpetrator of a sexual assault is more likely to be (though not always) a male staff person, a variety of fairly classic forms of victim-blame may be deployed; for instance, she may be subject to stigma associated with presumed promiscuity, and subjected to more harassment or assaults by other staff.\textsuperscript{29} In either instance, being marked as a victim in a closed environment carries with it the likelihood of harassment, and the possibility of more violence.

Third, the vast majority of facilities do not offer access to rape counselors, and in some instances, no mental health treatment is available at all.\textsuperscript{30} Even where some form of psychological counseling exists, the prospects for establishing “continuity of care” — meaning consistent and regular access to a clinician with whom one can build some degree of trust or rapport -- are likely to be disrupted by understaffing and staff turn-over, or by prison disciplinary procedures, such as solitary confinement or administrative segregation, which may specifically be visited on rape victims who report, as a form of protective custody.\textsuperscript{31} So, in essence, prison rape victims are immersed in a state of extreme psychological crisis, without any likelihood of a meaningful therapeutic outlet with which to manage or alleviate the experience.

Although clinical research specific to post-traumatic stress in prison contexts is minimal,\textsuperscript{32} broader clinical literatures indicate that living with


\textsuperscript{29} See generally, Kim Shayo Buchanan, Impunity: Sexual Abuse in Women’s Prisons, 42 HARV. C.R.-C.L. L. REV. 45 (2007) (discussing the framing of women who have supposedly sold themselves or “consented” to relationships with guards, for instance, in order to obtain protection from more predatory guards or receive some favors or benefits, as blameworthy); Human Rights Watch, All too Familiar: Sexual Abuse of Women in U.S. State Prisons (1996), available at http://www.hrw.org/legacy/reports/1996/Us1.htm, (last visited July 3, 2009) [hereinafter HRW2] (discussing systemic biases against prisoner testimony about prison rape, and the framing of women who report and litigate as “sluts”).

\textsuperscript{30} See KUPERS, supra note 21.

\textsuperscript{31} See generally HRW2, supra note 29; Giovanna Shay & Johanna Kalk, More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act, 29 CARDozo L. REV. 291 (2007) [hereinafter Shay]. It should additionally be acknowledged that these types of essentially punitive measures (even where framed as protective) can also have more negative mental health and disabling consequences.

\textsuperscript{32} But see KUPERS, supra note 21; see MICHAEL L. PERLIN & HENRY A. DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS: CASES AND
unmitigated and aggravated traumatic stress for substantial periods of time have wide-ranging and serious consequences for physical health and longevity.\textsuperscript{33} Sleep deprivation due to nightmares or hyper-vigilance, physical deterioration due to lack of exercise (for instance as a consequence of depressive lethargy or dissociative immobilization or deterioration),\textsuperscript{34} digestive distress or failure to engage in self-care vis-à-vis nutrition and hydration, adrenaline fatigue, and consequential repressed immune system function, are all relatively common – even predictable – consequences of remaining in a condition of what is essentially, existential crisis.\textsuperscript{35} I advance this piece of my analysis to make the point that even absent other physical injuries or infection, the psycho-somatic or “mind/body” connections inherent in the experience of exacerbated traumatic stress are substantial enough to not only cause psychiatric disability, but also potentially chronic or substantial physical illness or impairment, and may ultimately contribute to premature mortality.

However, prison rape is quite often also immediately physically injurious.\textsuperscript{36} Referencing male-on-male rape, Human Rights Watch notes, “Forced anal penetration may cause intense pain, abrasions, soreness, bleeding, even, in some cases, tearing of the anus or transmission of the HIV virus.”\textsuperscript{37} Prison assaults may be accompanied by physical assaults, sometimes specifically to subdue resistance, leading to any range of physical injuries.\textsuperscript{38} For female victims, the additional risk of unwanted pregnancy, with accompanying medical consequences particularly given inadequate healthcare access and/or restricted access to abortion is also salient.\textsuperscript{39} Again, the inadequacy of healthcare in most facilities is substantial.\textsuperscript{40} This deficit contributes to the likelihood that prospectively

\textsuperscript{33} See FRIEDMAN, supra note 23; MARY BETH WILLIAMS & JOHN F. SOMMER, JR., SIMPLE & COMPLEX POST-TRAUMATIC STRESS DISORDER: STRATEGIES FOR COMPREHENSIVE TREATMENT IN CLINICAL PRACTICE (Haworth Maltreatment and Trauma Press 2002).
\textsuperscript{35} See id.
\textsuperscript{36} See generally Deborah M. Golden, It’s Not all in my Head: the Harm of Rape and the Prison Litigation Reform Act, 11 CARDOZO WOMEN’S L.J. 37 (2004) [hereinafter Golden] (addressing the misunderstanding of rape trauma as distinct from physical injury).
\textsuperscript{37} HRW, supra note 26, at 84.
\textsuperscript{38} Id.
\textsuperscript{39} See HRW2, supra note 29; Buchanan, supra note 29, at 46.
\textsuperscript{40} See generally ROBERT B. GREIFINGER, PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES (Springer Science+Business Media, LLC 2007)
temporary injuries will become permanent or aggravated impairments, or lead to infections. Further, the risks of sexually transmitted disease transmission, particularly given that most facilities do not allow for or provide condom distribution, are paramount. The Department of Justice acknowledges that AIDS-related illnesses are now the second leading cause of death among prison inmates.

Although attention to the medical and psychological consequences of incarceration is still a developing area within interdisciplinary scholarship, few if any of the points here are truly new terrain; the fact that imprisonment and violence have negative health consequences is well-established. My intervention here is to assert that it is meaningful to understand incarceration, and prison rape specifically, as experiences which are not just unhealthy, but disabling. Conceiving of prison rape as an experience in which bodies and psyches are broken or wounded, and in which the damage – predictably, though not inevitably becomes a permanent condition altering physicality and mentality, helps to surface the significance of sexual violence not just as a brutal immediate experience, but as a material and tangible change in a person’s life-course and longevity. In a hypothetical scenario wherein an inmate has a single experience of sexual violence, is released soon after, and has access (economically, socially, and medically) to the range of resources in the community needed to enable recovery, it is conceivable that while a rape experience will always be emotionally scarring, alleviation of post-traumatic stress can occur within a period of a few years, and any other medical needs can be tended to, absent any incurable infections (such as HIV).

In other words, it is not universally or inherently a given that every prison rape experience would have to be in its long-term consequences, permanently disabling. However, given the fact that as noted most sexual assaults are not isolated incidents, that prison sentences and rates of incarceration are increasing, and that resources facilitating health during prisoner re-entry are usually very limited, it does not overstate


44 See Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Re-entry as an Opportunity to Confront & Counteract Racism*, 6 *Hastings Race & Poverty*
the case to say that prison rape is likely to be permanently disabling in one or more ways, nearly all of the time, and certainly at least temporarily disabling in all instances (allowing for recognition of post-traumatic stress disorder as a legally and medically cognizable disability.).

Before considering what implications this framing might have for the purposes of prisoner advocacy, my last task is to consider who the victims of sexual assault in prisons are likely to be. Certain demographic patterns are indisputable in terms of incarceration rates in the United States, namely the disproportionate racial composition of the prison population by people of color, very particularly African-Americans, and also disproportionately Chicano/Latino and indigenous populations, and of poverty-class and working class people, generally and within the racial demographics.

A documented though less widely recognized pattern is the disproportionate incarceration of people with existing disabilities. This dynamic manifests for several reasons: First, the de-institutionalization of people with mental disabilities in the later twentieth century, absent meaningful social and economic supports, fed into criminalization of people who had previously been receiving mental health treatment, for

L.J. 259 (2009) (discussing the need for improved health services as a facet of prisoner re-entry, particularly for re-entering people of color).

Although post-traumatic stress disorder was already sometimes recognized as a cognizable legal disability, (due in part to the needs of veteran populations) the prospects for achieving this recognition have been strengthened by the amendment of the ADA. As the ADA is now implemented, disability is defined to include mental impairments “which substantially limits one or more major life activities”, where “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” See ADA, supra note 20. Post-traumatic stress disorder can for instance create difficulties with self-maintenance, eating, sleeping, breathing (due to panic or anxiety), concentrating, thinking, or communicating, and having at least one if not more of these types of difficulties is certainly common. See FRIEDMAN, supra note 23; VAN DER KOLK, supra note 23.


47 See PREA, supra note 22; JOHN W. JACOBSON, JAMES A. MULICK & JOHANNES ROJAHN, HANDBOOK OF INTELLECTUAL & DEVELOPMENTAL DISABILITIES (2006); Russell, supra note 11.

48 I should qualify here that I am not suggesting that the history or contemporary practices of coercive psychiatric institutionalization were particularly preferable
instance for vagrancy or homelessness.\(^{49}\) Second, people with disabilities are disproportionately likely to be or become poor as a consequence of marginalization from occupational sectors, housing, and education (particularly where ableism interacts with racism and classism, for instance in public education).\(^{50}\) Poverty generates vulnerability to criminalization for illegitimate economic survival activities, and also mitigates against affording adequate legal defense.\(^{51}\) And third, people with disabilities are disproportionately represented among the racialized, working class and poor populations who are subject to disproportionate incarceration, because the same macro-dynamics of classism and racism to criminal incarceration; de-institutionalization can in most respects be understood as a shift of certain populations of people with disabilities from one destructive context, to another. For background on the relationship between disability and psychiatric abuse, see Lennard J. Davis, The Disability Studies Reader (2006).

\(^{49}\) See e.g. J.D. Robinson & Z.C. Johnson, From De-Institutionalization to Penal Incarceration: Impact on the Black Community, 1 Nat’l Black Nurses Assoc. 27 (1986-87); B.S. Brown, The Impact of Politic & Economic Changes Upon Mental Health, 53 Amer. J. of Orthopsychiatry 583 (1983); Paul J. Carling, Return to Community: Building Support Systems for People with Psychiatric Disabilities (1994); Developments in the Law, The Impact of the Prison Litigation Reform Act on Correctional Mental Health Litigation, 121 Harv. L. Rev. 1145 (2008) [hereinafter Development]. There is also a related dynamic in which while mental illness may play a role in culpability for crime, the recognition of mental illness as a mitigating factor is often racially disparate – meaning specifically that the criminal activity of for instance, African-Americans, is likely to be perceived as “normal”, such that assessment or recognition of mental illness is unlikely to occur, with negative consequences for sentencing. See Melissa Thompson, Race, Gender & Mental Illness in the Criminal Justice System (2005).


\(^{51}\) See Sharon L. Snyder & David T. Mitchell, Cultural Locations of Disability (2006) (acknowledging the impoverishment of people with disabilities); William C. Heffernan & John Kleining, From Social Justice to Criminal Justice: Poverty & the Administration of Criminal Law (2000) (addressing a variety of dynamics by which poor clients are both disproportionately punished, and poorly represented or acknowledged in criminal justice applications). It is also salient that aside from the economic barriers to legal representation, finding a lawyer who is cognizant of and competent to represent clients with disabilities is an intersecting and intense challenge.
which result in incarceration also produce emergent disabilities, for
instance due to malnutrition, inadequate healthcare, state violence,
environmental racism, or labor exploitation.\textsuperscript{52}

Adding these components of the picture to the previous discussion of
disablement, the relationship between disability and incarceration can be
understood in this way: people who are already disabled, particularly
when disability intersects with (and may in fact be caused by) race and
class, are disproportionately likely to become incarcerated; once
incarcerated anyone who is not already disabled is likely to become so
(not solely because of prison rape, but because of the broader spectrum
of prison conditions),\textsuperscript{53} and those who already are disabled are likely to
develop more, or more aggravated disability.

Although this gives us a broader picture of the relationship between
incarceration and disablement, the next step in this explication involves
consideration of who – among those disproportionately vulnerable to
incarceration – will then most likely be targeted for sexual assault. The
demographics here primarily include the young, males who are or are
perceived to be feminine, gay, or bisexual, MTF (male-to-female)
transgender women and girls, inmates (male, female, transgender) who
have been in systems of prostitution, female inmates with past sexual
abuse histories (though granted this describes many incarcerated women

\textsuperscript{52} On the relationship between racism, poverty and emergent disability, \textit{see} Pokempner, \textit{supra} note 17.

\textsuperscript{53} Russell & Stewart’s critique of the dynamics of disablement particularly
acknowledges this point. \textit{See} Russell, \textit{supra} note 11. Given that I am
specifically framing prison rape as disablement, but also asserting that
incarceration more broadly is very frequently disabling, it’s important to clarify
the relationship between prison rape and the broader incarceration context.
Prison rape should be understood as a manifestation of systemic and structural
aspects of incarceration – i.e. it is one particularly brutal outgrowth of an
already very physically and psychologically damaging set of incarcerating
processes. The case of prison rape is an angle in to understanding how and
where incarceration alters and wounds inmates in frequent prolonged or
permanent ways. My assertion that incarceration broadly is disabling however,
is important, in mitigating against advocacy responses which treat prison sexual
violence as a singular – or one of a few – extremities in need of reform in an
otherwise functional system. And, while I certainly assume that prison rape
victims and survivors are in need of disability-conscious advocacy, as noted,
existence within institutions which are already likely to be disabling in a variety
of ways can make it complicated to pinpoint prison rape as a singular cause of at
least some emergent disabilities. Further, disability can be an ‘escalating’ or
compounding experience – wherein one health issue exacerbates or generates
others – such that treating or remedying or relieving harms caused by sexual
assault often is unachievable without a more holistic platform of recuperative
and recovery resources. In other words, while prison rape is to some extent
especially disabling, it does not operate discretely.
and people who have or are perceived to have disabilities, whether physical, psychiatric, or cognitive. In other words, vulnerability to prison rape exists at the juncture of systems of subordination based on race and class (as precursors to incarceration), as well as gender, age, sexuality, and prior history of being abused and exploited (some of which may also be precursors to incarceration as well as the basis for vulnerability within the prison system), and disability (as both a precursor to incarceration, and then a basis for vulnerability).

The relationship between disability and prison rape actually entails a tri-part dynamic, as it may be first a precursor to incarceration, then a basis for the sexual assault, and then again the additional or compounded consequence of experiencing rape. With emergent disabilities which are the product of racial, class, gender, sexual or related dynamics of subordination, the process of disablement through prison violence might be understood as a process of further shattering or breaking down the already broken – in a sense cementing or completing whatever work white supremacy, patriarchy, and capitalism outside of the prison context have not already done, in producing irreversibly damaged bodies and psyches. In this sense prison disablement is not (just) about ableism or disability subordination as a supposedly discrete system. I contend that it indicates a process in which the violent creation of disability, and the subordination of those who are then both literally damaged, and also socially stigmatized, is a vehicle for and intrinsic process in racial, class, gender, sexual, age-based and inter-related forms of subordination. Further dissection of this deeply intersectional and multi-level dynamic relative to individual experiences of survival, victim-blame and culturally and sexually located stigma, efforts to secure safety or healthcare, engagement with prison administration, prisoner re-entry, or public health could easily encompass the rest of this discussion. However, my second task in this paper is to consider what legal advocacy could mean, given this kind of critical, intersectional disability-conscious framing, and I turn to this question now.

54 See Kayleen A. Islam-Zwart & Peter W. Vik, Female Adjustment to Incarceration as Influenced by Sexual Assault History, 31 CRIM. JUST. & BEHAV. 521 (2004).
56 In this regard, I am very indebted to the work of Kimberlé Crenshaw, who first introduced the concept of intersectionality, as a designation of the co-constitution of forms of subordination, with particularly damaging or insidious
III. THE PRISON LITIGATION REFORM ACT, RAPE & PRISONERS WITH DISABILITIES

The PLRA was passed in 1996, as part of Newt Gingrich’s Contract with America. Its ostensible purpose was to combat frivolous, costly litigation by prisoners, which presumably constituted an abuse of the legal process. Absent empirical data actually demonstrating a substantial problem with frivolous as opposed to substantive litigation, the Congressional debate featured a “Top 10” series of cases. The most infamous is a distorted representation of a suit about improper debiting of an inmate’s account for peanut butter, which then was represented as litigation about what kind of peanut butter was available in a prison, intended to associate prisoner litigation generally with non-existent or minor grievances. The PLRA’s various components have essentially devastated the prospects for using the federal courts in the service of prisoner advocacy or progressive prison reform, as collectively they restrict types and duration of relief and remedy, place barriers in the way of prisoner’s ability to file suit at all, and mediate against the prospects of finding legal representation. The statute has since been a primary consequences at the juncture of particular vulnerabilities and social dynamics. See Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, & Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, Demarginalizing the Intersection of Race & Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory & Antiracist Policies, U. CHI. LEGAL F. 139 (1989). Although I do not delve in great depth in this paper into the promises and challenges entailed in generating a theory of intersectionality, this dialogue implicates both a conception of ‘disability intersectionality’, and an attempt to advance critical disability theory within law. For related discussion, see Beth Ribet, Surfacing Emergent Disability within a Critical Race Theoretical Paradigm, Presentation at the Annual Meetings of the Law & Society Association, Montreal, Canada (May, 2008). See THOMAS F. BURKE, LAWYERS, LAWSUITS & LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002).


PLRA, supra note 19.
Given existing critique, my task in this paper is not to review the provisions of the PLRA in any depth. At the time of this publication, and at the urging of the National Prison Rape Elimination Commission, a body established under PREA, as well as that of human rights advocates, it appears that efforts to amend the PLRA in order to remove some barriers to sexual assault related litigation may be successful in the near future. My purpose here is to consider the current incarnation of the PLRA through a disability-conscious lens, relative to the issue of sexual violence. I suggest that while softening the restrictions imposed by the PLRA relative to sexual abuse claims is not useless, the various components of the PLRA are still too prohibitive, generally, and specific to the issue of the capacity of many prisoners with disabilities to navigate the legal system. Working from the premise that prison rape is relentlessly disabling, I contend first that the PLRA poses a compounded set of barriers relative to both sexual violence and disability, and that amending the PLRA without addressing the barriers it poses to disabled persons is certain to be inadequate in enabling prison rape litigation.

Much of the existing attention to the hazard the PLRA poses, particularly to rape survivors, has focused on the “physical injury requirement,” which states that absent a showing of physical injury, prisoner suits may not make a claim for damages (although injunctive relief is still possible). Although most courts conceive of sexual assault as a “physical” injury, it is not a foregone conclusion, and has been used to bar prison rape litigation. That is, as Deborah Golden notes, some courts seem wary about solidly affirming that violence which is sexual is presumptively physical, or creating “physical” injury. My additional intervention here is to note that the PLRA in this regard, is also

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63 See PREA, supra note 2; NPREC, supra note 5.
64 See PLRA, supra note 19; Golden, supra note 36.
66 Id.
consistent with judicial resistance to recognizing that the infliction of mental illness is presumptively a cognizable harm, rising to the level of an actionable tort, constitutional, or human rights violation.\(^{67}\) As Justice Rehnquist, writing for the court, specifically frames the issue:

\[\text{[N]obody promised them [inmates] a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression and the like. They have been convicted of a crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction.}^{68}\]

In other words, immersion in a context which creates mental illness (in this instance, “psychological depression”) can at least potentially be understood as a defensible penalty.

Some criticism has also focused on section 7(a), or the “exhaustion requirement,” which mandates that in suits relating to prison conditions in federal courts, prisoners must exhaust all existing internal facility grievance procedures, before beginning the process of filing a legal claim.\(^{69}\) The only exception to this requirement is with habeas corpus petitions based on imminent risk of serious harm, which would not apply to sexual assaults that have already occurred.\(^{70}\) Criticism of the PLRA’s exhaustion requirement relative to sexual assault focuses on the particular risks that prisoners may have to take by documenting the assault within the prison bureaucracy, particularly where the perpetrator

\(^{67}\) See, e.g., *Atiyeh v. Capps*, 449 U.S. 1312, 1315-16 (1981) [hereinafter *Atiyeh*] (asserting that prisons have no obligation to house prisoners in conditions which do not result in the development of mental illnesses such as depression).

\(^{68}\) Id.


is, for instance, a prison staff member.\textsuperscript{71} Grievance procedures may also entail a requirement of verbal negotiation or meeting with any person who is the subject of complaint, which, whether the perpetrator is a staff person or fellow inmate, is likely to be emotionally traumatic at the least, if not physically dangerous.\textsuperscript{72}

A less recognized problem with the exhaustion requirement is that prison grievance procedures often involve no provisions for accessibility to prisoners with disabilities (as well as prisoners with English/literacy limits). They may, for instance, require filling out forms which are inaccessible to people with visual disabilities, manual dexterity limitations, or reading, developmental or cognitive disabilities.\textsuperscript{73} Even where prisoners are able to secure legal representation, facility regulations often will not allow attorneys to file internal forms on the client’s behalf, so a prisoner who is not able to comprehend or manage the process, or, for instance, who is in traumatic shock and unable to take action on his or her own behalf, can not proceed with a claim.\textsuperscript{74}

Another component of the PLRA restricts the ability of inmates to file a claim \textit{in forma pauperis}, meaning without paying filing and court fees, if the inmate has attempted to advance three prior claims which have been dismissed by the court as frivolous or failing to state a valid claim.\textsuperscript{75} On its face, this restriction might appear quasi-sensible if it were true that prisoners had access to legal representation or knowledge of the law and nevertheless persisted in filing claims with improper phrasing or procedural compliance. Of course, the reality is that most prisoners have limited, if any, knowledge of self-advocacy in the legal process, and it would be entirely possible that an inmate could have attempted to


\textsuperscript{72} See Fathi, \textit{supra} note 71. Some prisons and jails have been explicitly advised to craft procedures requiring verbal negotiation with alleged offenders or targets of complaint, before beginning any written documentation. See, e.g., Stacey A. Blankenship, \textit{Reducing Jail Liability by Utilizing the Prison Litigation Reform Act}, \textit{available at} http://www.dklaw.com/SAB_Reducing_Jail_Liability.htm (last visited Nov. 19, 2009).


\textsuperscript{74} I am indebted to Deborah Dorfman, managing attorney of the Los Angeles regional office of Disability Rights California, for alerting me to this limitation.

\textsuperscript{75} See Prison Litigation Reform Act of 1995 § 7.
advance multiple past claims which while having merit, were each dismissed. Given that the vast majority of inmates are poor, and wages for prison labor are miniscule, removing access to the *in forma pauperis* filing option essentially negates access to the courts for those who run afoul of the provision, excepting those with substantial savings or external support (who also would be more likely to be able to afford an attorney).\textsuperscript{76} Further the PLRA explicitly restricts the compensation attorneys representing inmates can recover from damages to a significant extent, such that inmates are increasingly reliant on very scarce access to pro bono representation.\textsuperscript{77} All of these barriers pose a significant problem for prisoners at large, but they become nearly and sometimes entirely insurmountable for rape survivors who are dealing with the disabling consequences of violence. To consider this point, it is useful to imagine trying to study and acquire enough knowledge of the law in order to properly advance a claim, while suffering from severe sleep deprivation as a consequence of rape trauma syndrome. Further, the terror, intimidation and insecurity which are emblematic of traumatic-stress disorders,\textsuperscript{78} may also at least in some instances, negatively affect the ability of inmates to express themselves or even to construct a coherent, linear narrative or statement of facts, absent the assistance of an attorney.

The recent 2009 recommendations of the National Prison Rape Elimination Commission propose that Congress amend the first two provisions discussed here, i.e. the physical injury requirement, and the exhaustion requirement, specifically to remove barriers to sexual abuse litigation.\textsuperscript{79} There is currently no move at this level, to address the barriers posed by the restriction on *in forma pauperis* filing.\textsuperscript{80} However, more broadly, attention to prison rape as disabling lends itself to a comprehensive critique of amendment schemas which only involve exemptions for litigation explicitly related to prison liability for specific instances of sexual assault.

Receiving punitive or compensatory damages, or injunctive relief to stop ongoing abuse, are both important measures. But, they do not in


\textsuperscript{78} See FRIEDMAN, supra note 23; VAN DER KOLK, supra note 23.

\textsuperscript{79} See NPREC, supra note 55.

\textsuperscript{80} Id.
themselves adequately remedy the fact that whatever damage has been done by sexual abuse is likely to be ongoing, and inmates will still need access to the courts to deal with that harm as it continues to manifest. A year or two or ten years later, the HIV infection, or sleep or digestive disorder, or ulcer, or unrelenting post-traumatic stress will not have stopped even if the actual assaults have, and prisoners still will be confronting needs for healthcare, therapy, relief from prison labor expectations, reasonable accommodation of disabilities in a variety of arenas, or even compassionate release, most of which will likely require litigation. However, where the originating incidents happened some time before, have already been litigated, or where it is difficult to prove definitively that they are the primary or sole cause of the resulting disabilities, there is no prospective exemption, and each of the problems I have outlined above still apply. In other words, even a ‘softer’ or amended version of the PLRA is very likely to bar prison rape survivors from adequate access to the courts, because the graduated and long-term disabling consequences of violence interact with statutory barriers to make the litigation process inaccessible. In essence, nothing short of repeal of the PLRA is likely to be adequate in addressing legislative barriers to confronting prison rape as a process of disablement.

IV. DISABLEMENT & THE AMERICANS WITH DISABILITIES ACT: THE LIMITS OF AND PROSPECTS FOR CIVIL RIGHTS ADVOCACY

The subject of accessibility prompts my next question: what are the prospects for using disability civil rights law to address the disabling consequences of prison rape? In explicating this query, I note three points. First, the ADA, as the primary (though not sole) statutory mechanism used to advance disability civil rights litigation, when filtered through the impositions present under the PLRA, is weakened to the point where it is often unable to be effective in advancing even a basic standard of non-discriminatory treatment. Second, the ADA does not conceive of disablement as a civil rights issue – meaning that disability civil rights are about discriminatory treatment on the basis of disability, rather than the violent infliction of disability as a form of subordination or discrimination. Third, although the ADA does not in itself offer mechanisms which can pose a significant challenge to disablement in the U.S. penal system, it could be used to challenge the barriers to litigation imposed by the PLRA. In other words, I contend that there is an unacknowledged conflict of federal statutes relative to the accessibility imperatives of the ADA, and the barriers posed by the PLRA, and ideally, prisoner advocates should attempt to use the ADA to neutralize, circumvent, and/or strengthen a push for repeal of the PLRA.

On the first point, the PLRA has also been used to curtail the scope and impact of the ADA in prison litigation, particularly relative to court redress, by imposing additional constraints on remedies which must
place minimal burden on the state\textsuperscript{81} (as opposed to the ADA’s premise that accommodations are reasonable where they do not pose an undue burden).\textsuperscript{82} In other words, the expectation that plaintiffs show that an accommodation poses the least restrictive or demanding burden, as opposed to not posing an undue hardship, provides sufficient leeway to allow penal institutions to avoid liability for anything other than extraordinarily obvious and extreme instances of overt discrimination. Ideally, absent these barriers, the ADA could be used to challenge a number of at least peripherally related issues involving prison sexual violence, such as denial of accessible medical resources or compromised physical/sexual safety due to pre-existing or inflicted disabilities, both of which could conceivably be articulated within an anti-discrimination framework. I look next however, to the limits of the ADA relative to disablement, supposing one is able to get to court.

The relationship of the ADA to formalist equality and anti-discrimination paradigms is a subject of consideration in disability civil rights scholarship, and implicates legal conceptions of the boundaries of “discrete and insular minorities,” the nature of discriminatory treatment, and the supposed immutability or medical objectivity of disability, as compared to legal categories such as race and sex.\textsuperscript{83} Without delving more deeply into this literature, my primary point here is that, with some contention on the finer points, the ADA, its predecessors, its and counterparts\textsuperscript{84} are understood as “part and parcel of the anti-discrimination project.”\textsuperscript{85} After the ADA’s passage, there were multiple attempts to resist its application in prisons and jails, and its applicability

\textsuperscript{81} See PLRA, supra note 20; Armstrong v. Davis, 2000 WL 369622 (9th Cir. 2000); John Parry, Disability Discrimination Law in Correctional Facilities 24 Crim. Just. 20 (2009).

\textsuperscript{82} ADA, supra note 20.


\textsuperscript{84} The ADA was preceded and influenced by the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355; and it continues to be informed by the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344. In addition, civil rights related to youth and public education is also covered under the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

\textsuperscript{85} Mary Crossley, Reasonable Accommodation as Part & Parcel of the Antidiscrimination Project, 35 RUTGERS L.J. 861, 863 (2004).
in immigration detention facilities continues to be non-existent. This dispute was finally resolved through the Supreme Court ruling in Pennsylvania v. Yeskey, wherein the court clarified that prisons are public entities for the purposes of ADA claims. The pressing question at hand, since Yeskey has affirmed the ADA’s reach, is whether or how the statute, as the primary mechanism intended to protect and articulate the rights of people with disabilities in the U.S., can be used to prevent disablement or to alleviate some of its consequences. To answer this question, it is helpful to engage in a little critical pondering about the relationship between disability and equality.

Equality, as posited in the ADA, is about the integration of people with disabilities into various arenas of social, economic and political life. It is predicated on the mitigation or removal of structural barriers which inhibit that prospect where inaccessibility equates to discrimination. Unlike race, and to some extent sex, the law consistently recognizes that it is not simply “seeing” disability or treating disability differently, which purportedly engenders discrimination. Disability is a “real” difference in the conception of courts and policymakers; therefore, to mold it into a civil rights framework largely grounded in formalist notions of equality – in which differences are meant to be overcome – I suggest that the notion of reasonable accommodation plays a kind of bridging function. Disabilities which can be (reasonably) accommodated can be – not precisely erased – but properly fit into a slightly adjusted structure; they are not irremediable deficiencies preventing their bearers from becoming structurally like, or at least supposedly treated almost like, people who do not have disabilities.

Limited critical attention has been paid to the terrain of supposedly “unreasonable” accommodation, which, in practice, usually indicates accommodations that cost an entity or institution money or involve more than token re-structuring. Where disability cannot be reasoned with or disciplined into an “equitable” structure, there is a kind of void in the civil rights equality narrative, occasionally punctuated by discourse.

88 See ADA, supra note 82, at § 12101(b).
89 See Bagenstos, supra note 83.
91 But see Marta Russell, Disablement, Oppression and the Political Economy, 12 J. DISABILITY POL’Y STUD. 87 (2001).
92 Here the concept of burden as conceived in the ADA encompasses not just expense, but also any administrative demands. See ADA, supra note 82.
about unfair advantage or cheating/burdening the system, but mostly simply lacking any further word. I propose that people with disabilities that cannot be remedied or managed by reasonable accommodation are, to some extent, placed conceptually outside, or at least at the far margins, of equality (though this is not to say that the subordination of people with disabilities is actually outside of, or other than, intrinsic to social organization); and, whether incarcerated or relegated to social welfare systems, their needs cease to be part of the anti-discrimination schema.

This critical framing allows for more nuanced contemplation of the limitations of the ADA relative to prisoner rights litigation. I note two limitations in particular. First, the conception of discrimination in equal protection and civil rights paradigms generally, and the ADA specifically, implicates some standard of normal or acceptable treatment, presumably posited against a comparative reference group of non-disabled persons. However, in the context of incarceration, one must ask, who is the comparative group? Is it other prisoners, or people who are not incarcerated?

If the reference group is other inmates, although it is possible to note differential treatment of particular disabilities and advocate for things like accessible toilets or forms or texts, or equivalent access to the outdoors or to resources, there is no comparative standard wherein people are not either already disabled, or at high risk of disablement. The escalating destruction of health and functionality are “normal,” therefore there is no discrimination or way to frame disablement as such. If the reference group is ‘outside,’ advocates will face the

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94 Here I acknowledge the work of Devon Carbado, who has noted that the metaphor of margin and center can sometimes obscure the centrality of (racial) subordination in dominant schemas. See Devon W. Carbado, Racial Naturalization, 57 AM. Q. 633 (2005). An inter-related point applies here, particularly when disability is understood as, among various things, a project of racial subordination – i.e. though people with disabilities can be understood as marginalized from power, the destruction embodied in systemic disablement is not peripheral, but central to the project of racism manifesting through mass incarceration.

95 See KUPERS, supra note 21.

96 See, e.g., Benyamini v. Marijuano, No. 1:06-cv-01096-AWI-NEW, 2007 WL 2580548 (E.D. Cal. Sept. 5, 2007) (holding that the ADA is meant to address discriminatory treatment as compared with other inmates, rather than to ensure any basic human rights platform for prisoners with disabilities).
challenge of how to frame the treatment of similarly situated persons given the particular extremities of incarceration, and the courts’ presumption that, even where inmates are clearly being damaged, except perhaps relative to the most glaring torturous excesses, deference must be given to prison administrators.97 Prisons are already “different” spaces, where differential treatment is expected.

Second, the protections entailed in the ADA are finite both to the population and temporal scope of coverage. In other words, while for instance race or sex-based anti-discrimination doctrine frequently applies to the treatment of all persons – in the process generally obscuring that for instance white and/or male demographics are not vulnerable structurally to racial or gender subordination respectively – disability civil rights apply only to people who are already disabled.98 Ironically, a delineation of a vulnerable group that – in the context of race or gender discrimination – might possibly reflect a more nuanced conception of subordination,99 relative to disability, tends to limit the possibilities for fully acknowledging harm. That is, at least an initial experience of disablement or emergent disability is outside the scope of disability rights – people who are not already disabled do not have disability rights.

For people with emergent disabilities, rights begin only when one has already been injured, harmed or impaired. Further at least in the realm of civil rights, disability rights are not historicized or retro-active,  

97 The courts’ deference to prison administrative discretion is particularly embodied and deployed through the Supreme Court decision in Turner v. Safley, 482 U.S. 78, 78 (1987) [hereinafter Turner] (holding that an abrogation of constitutional rights may be permissible where related in some manner to “legitimate penological interests”).
98 A contrast point is Australia’s Disability Discrimination Act of 1992, which acknowledges that disability discrimination can encompass disabilities which do not yet exist, whether due to “the presence in the body of organisms capable of causing disease or illness”, or as constituted by a disability that “may exist in the future.” Act No. 135 of 1992, available at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/31452800B62A28B7CA256FC00020014A/$file/DisabilityDiscrimination1992_WD02.pdf, (last visited Nov. 24, 2009). In this schema, anyone can conceivably have the right to be discriminated against on the basis of disabilities, based on the recognition is a prospect – in other words, the focus shifts more towards the nature of discriminatory treatment and is less reliant on tests for the validity of the disability (perceived, actual, present or future) which engendered it.
99 This is not to say that when law enforces boundaries on who may be covered by for instance statutes prohibiting racial discrimination, the categorizations are always helpful. See Kaaryn Gustafson, Disability, Fluidity, and Measuring Without Baselines, 75 Miss. L.J. 1007 (2006) (noting the parallels between court-imposed policing of group membership boundaries, based respectively on race/indigeneity, and disability).
though as I have discussed elsewhere the conception of disability as inflicted or caused or a basis for liability is certainly present in areas such as worker’s compensation law or torts doctrine. In other words, as an anti-discrimination statute, the ADA does not even implicitly or prospectively acknowledge a right not to be violently disabled. Nor does it frame the rights which are its terrain – meaning how people who are already disabled are treated – in terms which acknowledge that public entities, employers, or institutions may or should bear any extra burden, not just to “accommodate” origin-less impairments, but to bear the burden of adjusting to mitigate discrimination based on harms they have in fact caused.

Taking these two points together, my contention is that disability civil rights paradigms broadly and the ADA specifically, contains neither: a) an inherent standard of good or humane treatment strong enough to ensure that in the context of incarceration, people with disabilities will not be brutalized (even where they are not, in legal terms, discriminated against), or b) a conception of rights which acknowledges not just the issue of differential treatment on the basis of disability, but also the right not to have disability violently imposed, or to recuperation, remedies or reparation when emergent disabilities have been inflicted. My purpose here is to argue that the ADA is deeply inadequate to the challenges of addressing the human rights of prisoners who are already, or are almost inevitably becoming disabled – and here though my primary focus is on prison rape, I acknowledge again that disablement in prisons is produced through many dynamics, of which sexual violence is one extreme. However, I am also not suggesting that the ADA is useless, and to this end I turn to the possibility of using its premises as one of a number of needed advocacy mechanisms which may be employed to pose a deeper challenge to the legitimacy of the PLRA.

I have proceeded through this discussion thus far using a fairly expansive conception of disability, encompassing many experiences and conditions which are not visibly detectable, and which are not limited to


101 Id.

102 Again, as noted earlier, my premise is not that prison violence or conditions, or sexual violence specifically must necessarily always be permanently disabling, but rather that the brutalities of the incarceration context, combined with the lack of legal remedies, and a paucity of medical or recuperative resources, both within and external to the incarceration context (i.e., on re-entry) make disablement very predictable.

103 See KUPERS, supra note 21; Russell, supra note 11.
the most stereotypical representations – i.e. those implicating wheelchairs, canes, seeing eye dogs, sign language, or obvious cognitive or developmental impairment. This more expansive conception is both consistent with the definitions put forth in the ADA in its original form, and even more strongly reinforced by the ADA Amendments Act, which is quite explicit in acknowledging a range of illnesses and medical conditions as within the scope of cognizable disabilities.\textsuperscript{104}

Although the potential utility of the law is less limited in this regard, it is also true that social conceptions of disability have rarely expanded as the legal framing has; it is still common for prisoner advocacy organizations and prison litigators to conceive of people with disabilities as a discrete subset of incarcerated populations (albeit disproportionately present compared to the general population), whose rights and needs and concerns are not applicable to prison populations at large.\textsuperscript{105} I also certainly do not intend to be overly casual about imposing identity/definition. Many people who are incarcerated, even while experiencing deteriorating mental or physical health, may never conceive of themselves or be recognized by others as disabled – and may not want that designation, given the accompanying stigma.

My intervention here however, is to consider the fact that most incarcerated persons, based on the damaging consequences of incarceration – and all prison rape victims – could legitimately claim the legal status of being a person with one or more disabilities. If we think of prisoners as a population who – by and large – have a right to what civil rights protections do exist based on disability, and of incarceration as a process of mass disablement – with prison rape constituting one extreme dynamic within that mass process – it then becomes possible to ask: is a statute which targets or limits the rights of prisoners consistent with existing disability civil rights law? Of course this question could still be asked even without conceiving of disablement as a collective experience. I am deliberately focusing on the near-universality of disability in prisons because it allows for a stronger challenge to the PLRA.

In other words, while the recent National Prison Rape Elimination Commission recommendations carve out exceptions specifically targeted


\textsuperscript{105} Few advocacy and scholarly frames substantially question Bureau of Justice representations of disability in prisons and jails. See Laura M. Maruschak & Allen J. Beck, U.S. Dep’t of Justice, Medical Problems of Inmates (Tom Hester, ed., 2001) (1997) [hereinafter Maruschak] (estimating the proportion of prisoners with disabilities as substantially higher than the general population, but still under 40% of those incarcerated). For an exception, see Kupers, supra note 21.
towards prison rape victims, I do not just want to advance a parallel case for creating certain limited exemptions for prisoners who are identifiably disabled (which among other things, can require diagnostic processes not always readily available in prisons, given limited healthcare resources). This is also particularly important since claiming a diagnosis of disability – where it is not readily visible or widely known – can make an incarcerated person more vulnerable to violence or victimization.\textsuperscript{106}

Rather, I suggest that the barriers and impositions generated by the PLRA should be read and interrogated from the position that ‘normal’ prisoners are people with at least one, and very likely several disabilities, and should then be assessed for its consistency with or contravention of the ADA. The tension between the premises of the PLRA, and the spirit and text of the ADA are mostly evident. In a broader sense, the ADA was purportedly created, in large part, to mitigate or eliminate barriers. The PLRA was created specifically to erect them, relative to inmate access to the courts.\textsuperscript{107} More specifically, as already explicated, the exhaustion requirement mandates participation in processes which may be inaccessible on various fronts (and are nevertheless treated as mandatory by many courts), including for people with visual, hearing (where mediation without an interpreter is expected), motor-functional, developmental, learning or literacy-related, psychiatric or cognitive disabilities. The physical injury requirement excludes adequate legal recognition of the rights of people with mental and psychiatric disabilities. The “three strikes” policy limiting the option to file \textit{in forma pauperis} can be interpreted as disproportionately punishing or marginalizing inmates with developmental, cognitive, learning or literacy-related, psychiatric, or motor-functional disabilities, all of whom may have particular difficulty in crafting a legally acceptable claim when self-representing.

The inclusion of psychiatric disabilities is important here, as it acknowledges that traumatized prisoners (including rape survivors) may have particular difficulty with legal or bureaucratic processes due to intimidation, disruption in cognitive processing, memory lapses, or any other variety of symptoms which may accompany post-traumatic

\textsuperscript{106} See MARUSCHAK, \textit{supra} note 105; NPREC, \textit{supra} note 55. By victimization in this context, I reference in part – more sexual violence, based on the perception of psychological or physical vulnerability. However, I also acknowledge that disability-based harassment, physical assaults, or other maltreatment can be forms of victimization associated with being perceived as disabled. And, stigma associated with mental illness further compounds the difficulties associated with reporting, seeking support or recourse, or engaging in any self-advocacy. More specific to the case of prison rape, while post-traumatic stress is an inevitable consequence of sexual assault, acknowledging it may have punitive or negative consequences.

\textsuperscript{107} See Boston, \textit{supra} note 62.
I am not attempting to anticipate or discuss every problematic provision of the PLRA here and its prospective incompatibility with the ADA as this could easily yield a new article. However, I will note now that the specific planks of the PLRA which for instance, limit attorney compensation or the breadth or longevity of remedies, injunctive relief or court monitoring can all be critiqued on the grounds that they create disparate negative impact for prisoners who have many disabilities, and are most likely to be very poor, least likely to be able to handle litigation at all, and in need of more substantial court protections. Of course, pursuing individual ADA claims challenging the PLRA would likely have very limited impact absent recognition that remedies or relief should apply to all prisoners. But whether through class-based litigation challenging specific provisions of the PLRA as disability discrimination, or as a discursive tactic in policy advocacy, naming the PLRA as a statute which intrinsically facilitates disability discrimination is an unexplored and potentially productive avenue.

As a mechanism of a relatively formalist anti-discrimination paradigm, the ADA’s potential to more deeply challenge disablement and the subordination of people who are incarcerated is as discussed, admittedly limited. And in this paper, I do not take up the challenge of considering whether the alternate goal should be a more substantive formation of equality less focused on mainstreaming and accommodation, or an entirely different discourse which moves away from the idea of equality as a normative goal. The crux of this piece of the analysis is to note that even within the limited precepts of a contemporary civil rights schema, the ADA can be utilized to challenge some of the legal barriers and obstacles which currently inhibit prisoner advocacy.

V. A BRIEF CONSIDERATION OF ADDITIONAL PROSPECTS FOR LEGAL INTERVENTION

In this remaining discussion, I touch on a few related thoughts about the legal terrain relevant to advocacy for survivors of prison rape and the dynamic of disablement. First, I consider the limitations and useful facets of the Prison Rape Elimination Act (PREA). Second, I review some of the prospects and challenges for prisoner advocacy on this front using either Eighth Amendment jurisprudence or torts claims related to prison conditions or administrative liability. Third, I engage in a very initial consideration of the relationships of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

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108 See Van Der Kolk, supra note 23.
109 See PLRA, supra note 19.
Punishment (“CAT”)\textsuperscript{111} and the more recently adopted UN Convention on the Rights of Persons with Disabilities (“CRPD”)\textsuperscript{112} to the matter at hand.

My discussion of PREA is limited to noting just three points. First, in the statute’s preamble, the disproportionate incarceration of and sexual vulnerability of people with disabilities, specifically people with mental illnesses, is noted quite explicitly as an area of concern in combating the problem of prison rape.\textsuperscript{113} Second, PREA is also fairly unique in actually explicitly acknowledging at least a piece of the dynamic of disablement, also in the preamble. On this point, it should be acknowledged that the framing of the problem within the statute is not that the infliction of illness (specifically either infectious disease, post-traumatic stress disorder, or depression) causes prisoners to experience suffering or constitutes a human rights violation, but rather that the production of mental and physical illnesses is costly, both from a prison budget and public health cost perspective.\textsuperscript{114} Nevertheless, it constitutes a federal statutory acknowledgement that by allowing prison rape to continue unabated, penal institutions are engendering the production of new health problems. When read through, the definition of disability advanced under the ADA in its current form can be acknowledged as legally cognizable disabilities,\textsuperscript{115} and in my schema can be understood as emergent disabilities. Third, while the Act includes noteworthy, but still limited, mechanisms to sanction or strongly influence institutions which are resistant to its agenda, PREA creates no legal cause of action which can be utilized by inmates.\textsuperscript{116} In other words, the statute which comes closest to explicitly confronting the problem of prison rape as disablement in any substantial fashion is also limited in the manifestation of actual remedies or advocacy tools that may be helpful to advocates on the ground.\textsuperscript{117} However, the utility of PREA as a

\begin{footnotesize}
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\item[\textsuperscript{112}] CRPD, supra note 13.
\item[\textsuperscript{113}] Prison Rape Elimination Act of 2003 § 15601(3).
\item[\textsuperscript{114}] Id. at § 15601(14)(a), (c)-(d), § 15602(8)-(9).
\item[\textsuperscript{116}] See generally, Dan Bell, “They Deserve It”: Male Prison Rape is Still Not Taken Seriously, Despite the Huge Number of Victims, THE NATION, July 10, 2006, at 18, 19 (discussing limitations of the PREA generally); Alice Ristroph, Prison and Punishment: Sexual Punishments, 15 COLUM. J. GENDER & L. 139, 174-87 (2006); ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICA’S PRISONS 62 (2004).
\item[\textsuperscript{117}] It should be acknowledged that the initial presentation of the NPREC standards, if adopted as the prevailing corrections standard at the federal level will strengthen the actual impact of PREA on an important count – corrections
\end{enumerate}
\end{footnotesize}
discursive tool for legitimating federal authority for the purposes of policy advocacy should still be acknowledged.

My discussion of torts and Eighth Amendment jurisprudence is also intended to be cursory, touching on a few points related to the previous section. The key point relative to Eighth Amendment jurisprudence is that the problem of disablement implicates a central issue in the interpretation of the phrasing “cruel and unusual.” The question here is not new: Must harmful treatment be both cruel and unusual in order to rise to the level of a constitutional violation? It is not an insurmountable challenge to make the case that permanently, negatively, and substantially altering a person’s health or functionality is cruel. However, contending that it is unusual -- whether the term is interpreted as abnormal or as not central to the prison’s mission or function -- is a tougher argument, and in fact runs counter to some of my core agendas in this paper. This is not to affirm the assertions that prison administrations may make that disabling harm must be tolerated in deference to administrative discretion, but rather to acknowledge that as I have contended, the infliction of emergent disabilities is both a mundane consequence of incarceration, and as argued initially, reflects systems which fail to at least, on paper, adopt the standards, will lose access to Department of Justice funding. See NPREC, supra note 55; PREA, supra note 22. Furthermore, one existing sanctioning mechanism already exists through the NPREC annual review of prisons and jails, in which 10% of correctional facilities are reviewed in each year, and the three which are ranked ‘worst’ of those surveyed are called to appear before the Prison Rape Elimination Commission and account for their failures. The hearing does not in itself impose sanction, but may have some public discursive utility. Public sanction of this kind may also be helpful to prisoner litigants suing prisons or jails for allowing or facilitating sexual abuse, as it can help to meet the prevailing standard/burden on plaintiffs to establish that a penal institution has been deliberately indifferent to the risk or likelihood of sexual assault. See Farmer v. Brennan, 511 U.S. 825 (1994). However, adoption of standards is not at present a prospect accompanied by federal enforcement – in other words “adoption” of standards may be a token gesture, within more resistant penal institutions. And again, public sanction is essentially a process of public critique and exposure – while it has public relations impact which may translate into systemic alterations, PREA does not place an explicit statutory burden on states to alter practices, when its institutions are found to be among the worst. And of course, with prison sexual violence at epidemic rates, facilities under review may still be very severely dysfunctional, and nevertheless not merit the status of being one of the three worst facilities identified in a given review year. My critical point here is that though PREA has some useful components and influence, it does not in itself give inmates or prisoner advocates a statutory basis to challenge disablement, or anything else, through the courts.

118 Again, the challenge here is to overcome the standards encompassed in the “Turner test”, see Turner, supra note 97.
part of the substantial, if not admitted function of U.S. prisons, jails and detention centers.

Notwithstanding, the Supreme Court decision in Farmer v. Brennan explicitly designated prison rape as distinguishable from acceptable or tolerable levels of violence or harm which may be inflicted on inmates.\footnote{See Farmer \textit{supra} note 117.} As Justice Souter, writing for the court, noted: “Being violently assaulted in prison is simply not part of the penalty that criminals pay for their offenses against society.”\footnote{Id.} Although I would accept this statement only as an ideal or aspiration, rather than an accurate description of the current functioning of U.S. penal systems, it designates the act of prison rape as outside the realm of “usual” punishment. The challenge in dealing with the disabling consequences of sexual violence then is to attempt to expand the conception of constitutional rights to include the right not to be violently disabled, generally or by rape specifically.

While rape itself is at least in formal terms, unacceptable, it is not a foregone conclusion that deterioration of medical or psychological health will be understood as a violation of rights, except in the more comparatively extreme instances,\footnote{See Atiyeh, \textit{supra} note 67; Jamie Fellner, \textit{A Conundrum for Corrections, a Tragedy for Prisoners: Prisons as Facilities for the Mentally Ill}, 22 \textit{WASH. U. J.L. \& POL’Y} 135 (2006); John J. Gibbons, \textit{Confronting Confinement}, 22 \textit{WASH. U. J.L. \& POL’Y} 385 (2006); Sharon Dolovich, \textit{State Punishment \& Private Prisons}, 55 \textit{DUKE L.J.} 437 (2005). I also note that the Supreme Court ruling in \textit{Estelle v. Gamble} establishes a “deliberate indifference” standard for medical neglect, which is mirrored later in Farmer v. Brennan. See \textit{Estelle v. Gamble}, 429 U.S. 97, 104 (1976); Farmer, \textit{supra} note 117. When considering that the dynamics of disablement as I have delineated in this paper are barely cognizable even by prisoner rights advocates, much less through existing legal frames, the idea of deliberate indifference, which requires some degree of consciousness, is virtually an impossible standard.} or that when disablement is caused by rape, it will be easy to legally establish the causal relationship, particularly absent adequate healthcare and integrated diagnostics. In other words, even where rape may be acknowledged and condemned, and further where a prison administration is found culpable,\footnote{The standards established in Farmer, while condemning prison rape as unacceptable, also establish a high burden for plaintiffs seeking to establish administrative culpability, based as noted, on a “deliberate indifference standard.” See Farmer, \textit{supra} note 117.} the question remains whether inmates who are raped will have what I term (emergent) disability-based rights, for instance related to recuperation, alleviation of medical and psychological damage, and changes in the structural environment. Absent a disability civil rights paradigm which
remedies or even acknowledges disablement however, 8th amendment advocacy remains a necessary site for efforts to unmask and disrupt the dynamic of sexually violent disablement.

Turning next to the subject of torts litigation, I have two points to advance. First, it bears noting that one of the few existing means around the PLRA involves circumventing its reach – meaning avoiding federal court litigation.\textsuperscript{123} Doing so often negates the prospect of federal 8th amendment claims, and may also preclude ADA and other civil rights claims arising under federal statutory authority. However, pursuing claims under state constitutions or civil rights statutes and/or through torts litigation remains a viable option.\textsuperscript{124} I will not advance any discussion of state civil rights or constitutional mechanisms here, other than to note that a few states have moved to cut off this “loophole” in the PLRA by passing textually similar state statutes, sometimes including even harsher provisions.\textsuperscript{125} However, on the subject of torts claims, I want to acknowledge that unlike disability civil rights law, torts litigation related to disability is in fact premised on the idea of disability as caused, or as having an origin, or as I have termed it elsewhere, disability-as-injury.\textsuperscript{126} In fact framing disability in terms which designate the infliction of suffering and liability for tragedy is intrinsic in the process of translating disability into quantifiable damages.

The dissonance between the conception of disability in torts law, and in civil rights law is a broader subject than I tackle in this paper. But, I want to note that while the objectification of disability as damage, in order to get damages implicates a number of dehumanizing or problematic assumptions, it is also an existing site in which the infliction of disability is recognized, and therefore can not be ignored in terms of its productive applications. Without delving more deeply, I note here that bridging or hybridizing the conception of disability as a basis for rights in civil rights law, and as an inflicted harm in torts law, may constitute a means to make the phenomenon of disablement more legally substantiated.

In similar vein, I turn last to the prospective options for making the dynamics of disablement more visible or stretching the boundaries of contemporary human rights laws, utilizing concepts embedded in the United Nations CAT and the CRPD. On the former, I have one primary

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\textsuperscript{123} See PLRA, supra note 19.
\textsuperscript{124} It should be acknowledged that state courts sometimes allow for very limited prospects for institutional reform. See Alison Brill, Rights Without Remedy: The Myth of State Court Accessibility after the Prison Litigation Reform Act, 30 CARDozo L. REV. 645 (2008).
\textsuperscript{125} See e.g., Wisconsin State Prison Litigation Reform Act, W.S.A. 814.25(2).
\textsuperscript{126} Ribet, supra note 100.
\end{footnotes}
concern, related to a sentence in Article I which defines torture in terms that include an exemption, stated as follows: “It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”\(^{127}\) Despite this limitation, the United States has been subject to fairly strong criticism from the United Nations, in repeated instances where compliance with the CAT has been evaluated relative to U.S. penal systems, and particularly relative to the issue of prison rape.\(^{128}\) My suggestion here is that attention to the dynamics of disablement may add yet more weight and dimension to advocacy efforts geared towards de-legitimating legally sanctioned forms of deprivation, negligence, and violence. In other words, recognizing that cumulatively and over time, the consequences of disablement can include severe suffering, loss of various abilities and life functions, and will often engender premature mortality, points to the fact that those forms of harm currently “inherent in” lawful sanctions are devastating enough that their legality should be more carefully interrogated.

Similar to my consideration of 8th amendment doctrine, I suggest that there is an opportunity, through attention to the dynamics of disablement, to expand recognition of torture in U.S. prisons in terms which recognize the overall systemic hierarchies that not only engender but exacerbate the consequences of rape. In other words, it is not only prison rape which is torturous, but the various forms of institutional structural neglect and violence (for instance, including substandard healthcare) which ensure that the consequences of rape will devastate bodies and psyches in particularly irreparable ways. I do not mean to be naïve about the degree to which the United Nations can meaningfully sanction or influence the United States criminal justice system.\(^{129}\) However, I suggest that there is public discursive potential in addressing prison rape not as a discrete phenomenon in any way separable from its context, but as a reflection of a systemic set of dynamics which are intrinsic in the U.S. penal system and which should in totality be named as torturous, and violations of international law.

On the CRPD, I have two comments. I have argued in some depth elsewhere that the ultimate construction of the CRPD missed a substantial opportunity to acknowledge emergent disabilities, and in that

\(^{127}\) CAT, supra note 111.


\(^{129}\) For helpful discussion of the power relations which inform the deployment of human rights discourse, and the ability to enforce human rights sanctions, see Deborah M. Weissman, The Human Rights Dilemma: Rethinking the Humanitarian Project, 35 COLUM. HUM. RTS. L. REV. 259 (2004).
respect, is reflective of the globalization of U.S. disability civil rights and equal protection frameworks; i.e. it is structurally similar and limited, in terms comparable to the ADA. However, the CRPD contains at least two useful relevant provisions that the ADA does not. First, it acknowledges the disproportionate vulnerability of people with disabilities to violence, and conceives of this problem as within the terrain of disability human rights. Although the CRPD does not at any point conceive of disablement as I have discussed it here – or acknowledge the violent production of new disabilities as a human rights issue, it is at least an initial foothold to allow for acknowledgement that disability rights should include freedom from violence. This potential is somewhat strengthened by the fact that it explicitly acknowledges that people with disabilities as such, should not be disproportionately vulnerable to torture (though not that people disabled by torture should have specific rights).

Second, unlike the ADA or any U.S. domestic federal statute, in Article 4, the CRPD mandates an explicit commitment to the principle of universal design – meaning the creation of resources, spaces and products which are already accessible, without accommodation or adaptation. The critique I advanced in the previous section in which I argued that the PLRA can be framed as inherently contravening the ADA, can be understood as a new application of the principle of universal design. Universal design originated as a concept in architecture, and has since been applied to education, technologies, programs, public resources and services, and a range of products and goods. My suggestion here is that the principle of universal design can also apply to law and policy more robustly, meaning that laws and policies should be constructed in terms which do not require special exemptions or accommodations, in order to avoid discriminating against people with disabilities.

Within this schema, the PLRA should be repealed or at least drastically modified, based as I have contended, on a conception of “prisoners” which includes (and in this instance, should actually

130 See Ribet, supra note 98.
131 See CRPD, supra note 13.
132 Id.
134 Id.
135 See SOREN GINNERUP, ACHIEVING FULL PARTICIPATION THROUGH UNIVERSAL DESIGN (2009).
presume) people with disabilities. The CRPD does not already explicitly anticipate or acknowledge this kind of application; the closest language it contains which might be read to conceivably indicate statutes or laws is the phrasing “standards and guidelines,” or conceivably in Article 2, “programmes.” However, it is at least a limited conceptual basis to argue for the reconstruction of statutes which particularly enable and engender disability subordination. At the time of this publication, President Obama has indicated a United States commitment to become a signatory to the CRPD, which makes the question of its prospective interventionist potential relative to domestic law pressing.

My purpose in this section is not to chart or comprehensively anticipate how the conception of prison rape as disablement might influence or interrogate the presumptions and practice of each of the densely constituted areas of law I acknowledge here. I have included these initial ruminations primarily to illustrate that both in challenging the PLRA, and in finding alternate mechanisms that may be utilized beyond the limits of the ADA, or in conjunction with its precepts, it will be necessary to engage a variety of legal frames and praxis.

VI. CONCLUSION

I began this discussion with the assertion that prison rape is not a side effect of incarceration, but rather a manifestation of systems of subordination which in totality have the particular purpose and effect, whether or not it is acknowledged, of generating mass disablement of incarcerated persons. Though my task in this paper is not to carefully consider the broader relationship between U.S. incarceration and white supremacy or capitalism, my analysis here would not be complete without at least acknowledging some of the implications of systemic disablement. One of my critiques in this paper touches on the ways in which law fails to humanize and conceptualize incarcerated persons, and their experiences of suffering. Given that, in remedial vein, it is worthwhile to acknowledge for a moment what it means for individuals to be broken, damaged, forcibly and violently changed, and to have the damage alternately be ignored, or treated as a basis for more stigma or punishment. The toxicity of rape trauma and somatic injury needs to be understood as having no expiration date, no limits in its destructive

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136 See CRPD, supra note 13.
138 For very thoughtful and multi-faceted discussion on this subject, see ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).
potential, in any instance where institutions fail to allow for safety, recuperation, and full acknowledgement of the inflicted harm. Further, it matters that while prison rape can cross demographics and happen to virtually any inmate conceivably, it also does not transcend or ignore racial, gender, sexual, class, age or disability-based identities, dynamics or vulnerabilities. Vulnerability, at the intersections of systems of subordination, drives and determines where and how prison rape occurs.

In a context where inmates are often disappeared from social conception as part of any framework other than the criminalized and socially worthless, it is also a necessary intervention to remember that victims of prison rape – who are disproportionately poor people of color with disabilities, and are frequently located at sites of intensified gender and sexual stigma or vulnerability as well – also are configured and located in a variety of communities, and often re-enter those communities as they exist external to the prison environment. Therefore, we need to understand the phenomenon of disablement as not just individually damaging, but as a mechanism by which those populations who are disproportionately vulnerable to incarceration are socially and politically “crippled.” Where family and community members develop escalating health needs, and prisoners in the process of re-integration and re-entry face not just the stigma of incarceration but the barriers to employability and social integration which accompany disability, the economic and medical consequences serve to keep communities in crisis or survival mode, with resulting incapacitation of collective abilities to resist systemic subordination.

This socio-cultural analysis should not be treated as separable from my statutory and doctrinal explication. Although I hope some of my specific critiques will in fact contribute to more direct advocacy intervention or legislative reform, my project here is not exclusively an attempt to find any coherent basis for substantiating opposition to disablement through existing legal frames and structures. My related agenda has entailed confrontation of the manner in which certain aspects of law, such as the PLRA, serve to help ensure the uninterrupted production of wounded and damaged bodies and psyches, and other aspects of law geared towards purported equity or human rights goals exacerbate or do not even conceive of the problem, and/or are severely inadequate bases for advocacy. In other words, law is directly implicated in the process of mass, and unacknowledged disablement, through prison rape, and the broader context of systemic violence which enables sexual assault. The challenge at hand for advocates and for critical, feminist and race-conscious scholars involves not just considering how to operate within or use the law, but also how to disrupt its function in making the harm of prison rape as disablement incomprehensible, invisible, or where it is acknowledged at all, a site for retributive pleasure.