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FOREWORD

THE DISABILITY FRAME

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“According to ADA Masks Not Required Anywhere in America!”¹ So read a flyer circulated on Facebook in the summer of 2020, as the global COVID-19 pandemic raged and mask mandates emerged throughout the United States. Compulsory masking violates the Americans with Disabilities Act

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¹ Noah Cook, FACEBOOK (June 29, 2020), <https://www.facebook.com/photo.php?fbid=3075350862526622&set=a.153644398030631&type=3&theater>.

(“ADA”), the flyer alleged.² This message and others like it were quickly debunked, but not before they went viral.³

At the same moment and within the same general context, arguments based on disability also appeared in a different valence, as people who favored masking articulated the connection between mask mandates and equal access to public programs and services. These arguments emerged particularly powerfully in the education context, where a lack of universal masking seemed to threaten (1) students whose disability or disabilities prevented them from wearing a mask but who would have benefitted from widespread masking, (2) medically vulnerable students, to whom COVID-19 posed grave health risks, and (3) any medically vulnerable people in students’ families or caregiving networks.⁴

These examples illustrate what we call “the disability frame”: the characterization of a particular controversy or problem as being “about” disability, which in turn can imply that disability-focused laws ought to resolve or adjudicate the issue.⁵ Sometimes, as in the anti-masking flyer, the

² See, e.g., Matthew Brown, *Fact Check: ADA Does Not Provide Blanket Exemption from Face Mask Requirements*, USA TODAY (July 15, 2020, 2:33 PM), <https://www.usatoday.com/story/news/factcheck/2020/07/15/fact-check-ada-disability-rights-and-face-mask-requirements/5391830002> [<https://perma.cc/LH3W-F5KV>] (discussing this post and other examples of COVID-19 libertarians invoking disability laws while debunking their substantive claims).

³ *Id.*

⁴ For a concise overview of these arguments, see Ruth Colker, *The K-12 Masking Wars*, REGUL. REV. (Aug. 30, 2021), <https://www.theregreview.org/2021/08/30/colker-k-12-masking-wars> [<https://perma.cc/U342-SCPM>]. That some disabled people or their allies portrayed universal masking as a prerequisite to fair educational access does not, of course, mean that all disabled people took that position, or that universal masking posed no obstacles to student learning. See, e.g., Zina Jawadi, *I Am a Medical Student with Significant Hearing Loss. Here’s What the Pandemic Has Been Like for Me and Others with My Disability*, AAMC (Jan. 6, 2022) <https://www.aamc.org/news-insights/i-am-medical-student-significant-hearing-loss-here-s-what-pandemic-has-been-me-and-others-my> [<https://perma.cc/GP9V-R5AG>] (noting that because masks “muffle voices and cover faces,” the “widespread use of masks” during the COVID-19 pandemic “disproportionally affected people . . . with hearing loss” and “exacerbate[ed]” preexisting “communication barriers”); Stephanie H. Murray, *Speech Therapy Shows the Difficult Trade-Offs of Wearing Masks*, ATLANTIC (Mar. 2, 2022), <https://www.theatlantic.com/family/archive/2022/03/how-masks-get-way-speech-therapy-kids/623332> [<https://perma.cc/2AFV-J4YT>] (documenting concerns that, for young children with speech or language disorders, masking interferes with therapy and noting that parents confronting mask mandates struggled to obtain exemptions or accommodations for their children); see also Michael McKee, Christa Moran, & Philip Zazove, *Overcoming Additional Barriers to Care for Deaf and Hard of Hearing Patients During COVID-19*, 146 JAMA OTOLARYNGOL HEAD NECK SURG. 781, 781 (2020) (discussing the risks of mandatory mask mandates to the ability of deaf people or those with low hearing to access health care in a meaningful way).

⁵ In using the term “frame” to anchor the symposium, we are indebted to Elizabeth Emens for her work on how “frames” shape decisions, namely, by “specifying the information and context that accompany the decision.” Elizabeth F. Emens, *Framing Disability*, 2012 ILL. L. REV. 1383, 1388 (2012). Emens identifies “moments when nondisabled people make decisions that implicate their future relationship to disability” and proposes “framing rules” that draw on what she calls the “inside view”

disability frame is invoked as a shield. The hope is that it will insulate someone from the reach of the state or exempt that person from an unwelcome or onerous responsibility such as a vaccination,⁶ jury service,⁷ or a criminal sentence.⁸ In other instances, as Craig Konnoth has highlighted in his synthetic account of “medical civil rights-seeking,” the disability frame functions more like a positive right.⁹ It offers access to a benefit or resource, such as housing, accessible transportation, personal assistance, educational services, health care, or income support.¹⁰ In still other instances, the frame

of disability, one that is more positive and more realistic than the “outside view.” *Id.* at 1387-88. See also Elizabeth F. Emens, *Getting It: The ADA After Thirty Years*, 71 SYRACUSE L. REV. 637, 645-60 (2022) (building on her earlier work on framing rules to delve into the difficult normative project of articulating what it means to “get” disability). This symposium builds on these insights, while exploring a different facet of framing and disability: the choice to apply a disability frame to an issue that could also be framed in a different way.

⁶ Such arguments are visible as early as the Progressive era, Rebecca Boorstein argues. See Rebecca A. Boorstein, *Calling the Shots: Civil Liberties and Anti-Vaccination Lawsuits in the Progressive Era United States, 1900-1920* (Apr. 1, 2022) (unpublished manuscript) (on file with author) (documenting and analyzing the civil libertarian invocation of disability in the case *People v. Ekerold*, 105 N.E. 670 (N.Y. 1914), involving a compulsory vaccination law for schoolchildren).

⁷ Disability remains grounds for preemptory challenges to jury service or discretionary excusal by the court in many states and federal courts. See, e.g., *United States v. O’Driscoll*, No. 4:CR-01-00277, 2002 U.S. Dist. LEXIS 25861, at *14 (M.D. Pa. Oct. 2, 2002) (“Do any of you request to be excused from jury service in this case because of disability, economic hardship, health concerns, family commitments (such as caring for a child or parent), work commitments, interference with educational plans or pre-existing travel plans?”); *Donelson v. Fritz*, 70 P.3d 539, 544 (Colo. App. 2002) (reasoning that exclusion of people with disabilities from jury service based on disability did not raise constitutional concerns under *Batson v. Kentucky*, 476 U.S. 79 (1986)).

⁸ Litigators, for example, can deploy the disability frame to secure carceral leniency for people with debilitating illnesses. See, e.g., 18 U.S.C. §§ 3582(d)(2)(A)(i), (d)(2)(B)(i) (requiring the Bureau of Prisons to “inform the defendant’s attorney, partner, and family members that they may prepare and submit on the defendant’s behalf a request [for compassionate release]” in cases of terminal illnesses or certain disabilities); Jasmine E. Harris, *The Truth About Harvey Weinstein’s Walker*, N.Y. TIMES (Jan. 30, 2020), <https://www.nytimes.com/2020/01/30/opinion/harvey-weinstein-walker.html> [<https://perma.cc/R3RX-EGYE>] (describing Harvey Weinstein’s use of a simple walker with tennis balls as a strategic demonstrative of the disability frame to mitigate liability in his sexual assault trial). During the COVID-19 pandemic, the disability frame has served as a public health remedy to reduce the population of individuals with disabilities in largescale congregate settings, such as jails and prisons. See Jasmine E. Harris, *Disability Law on the Frontlines*, 106 CORNELL L. REV. ONLINE (forthcoming 2022).

⁹ See Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1171-72 (2020) (describing how medical civil rights can function as both positive and negative rights).

¹⁰ See *id.* at 1217-20 (discussing positive rights that “routinely flow from medical status claims”); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 817 (2020) (“[T]he ADA . . . require[s] that programs and policies in employment, public accommodations, telecommunications, and public services seek to include people with disabilities, not just refrain from discriminating against them.”) In the popular media, such uses of the disability frame frequently coincide with references to disability fraud, as in the 2019 “Varsity Blues” college admissions scandal. See Jennifer Medina, Katie Benner & Kate Taylor, *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions->

functions as the basis for a more systemic or policy-level demand on the state. For example, we have seen the disability frame employed in campaigns to restrict abortion,¹¹ ban the death penalty,¹² impose public health measures,¹³

cheating-scandal.html [https://perma.cc/P8Q3-JH4K] (introducing the scandal with reference to a high schooler so “eager to enroll at the University of Southern California” that, for a price, he “was falsely deemed to have a learning disability so he could take his standardized test with a complicit proctor who would make sure he got the right score”). But as Konnoth and many others have noted, disability is now a widely accepted basis for channeling public benefits, protections, and resources. Konnoth, *supra* note 9; see also DEBORAH STONE, *THE DISABLED STATE* 12-13 (1984) (discussing how policymakers use disability as a basis for making decisions about how to distribute public benefits); STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION* (1989) (providing an overview of the various federal civil rights policies, going back to the 1960s, that affirmatively protect people with disabilities).

¹¹ See Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 598-608 (2017) (offering a historical account of the political role of disability in abortion debates, including how prolife organizations such as the National Right to Life Committee embraced disability as a justification for abortion restriction); see also Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2062-64 (2021) (noting Justice Thomas’s interest in the entwined histories of abortion, eugenics, and racism and explaining how advocates and judges might use this selective reading of history to cast legalized abortion as a now-condemnable manifestation of racial injustice); see generally Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, in *PRENATAL TESTING AND DISABILITY RIGHTS* 147 (Eric Parens & Adrienne Asch, eds., 2000) (explaining the negative messages that prenatal diagnoses and selective abortion send to people with disabilities).

¹² See, e.g., MICHAEL L. PERLIN, *MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES* 11-14 (2013) (providing several reasons why execution of defendants with mental disabilities is morally problematic and offering recommendations to curb these executions); MARK J. TASSÉ & JOHN H. BLUME, *INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES* 9-12 (2017) (citations omitted) (discussing *Atkins v. Virginia*’s prohibition on the death penalty for individuals with intellectual disabilities, state variation in legal definitions of intellectual disability, and the need for a unified federal definition to prevent disparate results).

¹³ See Aparna Nair, *Public Health Campaigns and the ‘Threat’ of Disability*, *WELLCOME COLLECTION* (Sept. 8, 2020), https://wellcomecollection.org/articles/X1YhrRAAAEt_izkW, [https://perma.cc/5KTY-QWXH] (“[M]any public health campaigns frame disability as the inevitable (and feared) consequence of undesirable or dangerous health behaviours.”); *id.* (describing the implicit “warning” that a smallpox vaccination poster gave when it displayed a visibly disabled man: blindness and disfigurement might result from failure to vaccinate). Historically, not-for-profit organizations regularly designed fundraising campaigns and, sometimes, their mission statements, around “curing” or eradicating a particular disease or disability. See, e.g., PAUL K. LONGMORE, *TELETHONS: SPECTACLE, DISABILITY, AND THE BUSINESS OF CHARITY* 43-58 (2016) (chronicling the history of telethons as a visible philanthropic device at the center of non-profit fundraising and the negative effects of telethons on realizing disability rights); Jacqueline Stenson, *Why the Focus of Autism Research is Shifting Away from Searching for a ‘Cure’*, *NBC NEWS* (Sept. 22, 2019, 7:42 AM), <https://www.nbcnews.com/health/kids-health/cure-autism-not-so-fast-n1055921> [https://perma.cc/XW3H-ZDTQ] (noting that Autism Speaks removed the word “cure” from its mission statement in 2016); HARRIET MCBRYDE JOHNSON, *TOO LATE TO DIE YOUNG: NEARLY TRUE TALES FROM A LIFE* 50 (2005) (describing an upbringing in which “telethons were ubiquitous” and all of them “depicted disability . . . as the worst fate imaginable”).

and preserve and enhance the reach of government-funded healthcare.¹⁴ Last and most darkly, the disability frame has sometimes functioned as a reason to deny people basic rights and freedoms, such as sexual agency.¹⁵

These diverse examples pull in many directions, but there is a unifying theme: contingency. For those who have invoked the disability frame, that invocation was not mandatory or foreordained. It may have seemed intuitive, perhaps because of practical or conceptual problems with other potential frames, but it was not the only possibility; consciously or not, the framer made a calculation, a choice. This symposium surfaces and interrogates that choice.

Why is the disability frame so broadly available at this moment? The contributions to this symposium and existing legal scholarship suggest at least three reasons. First, although the general public has tended to adopt a narrow view of who counts as “disabled” (only people who appear to have severe and

¹⁴ See John Nichols, *Disability-Rights Activists Are the Real Heroes of the Health-Care Fight*, THE NATION (July 28, 2017), <https://www.thenation.com/article/archive/disability-rights-activists-are-the-real-heroes-of-the-health-care-fight/> [<https://perma.cc/MD85-FWL8>] (crediting ADAPT and other disability rights organizers with blocking Republicans’ 2017 efforts to repeal the Affordable Care Act by framing the repeal as bringing certain death to people with disabilities). See also Kelly K. Dineen & Elizabeth Pendo, *Engaging Disability Rights Law to Advance Racial and Disability Justice for People with Substance Use Disorder*, 50 J.L. MED. & ETHICS 38 (2022) (arguing that disability rights laws could be used to secure better health care access and coverage for people with substance use disorder).

¹⁵ Narrow views of functional and decisional capacities of people with psychiatric, intellectual, and developmental disabilities have led lawmakers and courts to restrict the sexual agency of people with disabilities. This includes, in some instances, efforts to criminalize consensual sexual activity with nondisabled partners. Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. REV. 480, 495-99 (2018) (discussing the stakes in the regulation of disabled people’s sexuality); Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1234-43 (2015) (arguing for a more nuanced doctrinal framework to analyze claims of sexual assault in the context of older adults with dementia). In other instances, disability has served, and continues to serve, as a legal justification for the preventative removal of sexual decisionmaking and reproductive freedom. See, e.g., Robyn Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VA. L. REV. ONLINE 246, 250-256 (2021) (discussing cases of reproductive injustice involving people with disabilities, including Carrie Buck, Ashley X, and most recently, Britney Spears); ALISON KAUFER, FEMINIST, QUEER, CRIP 47-68 (2013) (discussing the case of Ashley X, a person with intellectual and developmental disabilities whose parents consented, when Ashley X was six years old, to a series of medical procedures to thwart puberty, all ostensibly for the purpose of giving her greater bodily autonomy in the future); Julia Epstein & Stephen A. Rosenbaum, *Revisiting Ashley X: An Essay on Disabled Bodily Integrity, Sexuality, Dignity, and Family Caregiving*, 35 TOURO L. REV. 197, 204-11 (2019) (characterizing the decision to subject Ashley X to medical procedures as one that “left . . . her body permanently altered” and “reflect[ed] an appropriation by others of Ashley’s inherent rights to her own bodily integrity and sexuality, thereby diminishing her dignity as a full human being”). Recounting these examples, we are reminded of Douglas Baynton’s powerful interpretation of the role of disability in U.S. history: often, it functioned as a “justification[] for inequality.” Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 33, 33-34 (Paul K. Longmore & Lauri Umansky, eds., 2001).

visible physical impairments),¹⁶ the legal definition of disability has long been more capacious and flexible. The nation's best-known disability law, the ADA, includes within its definition of disability those with an actual impairment, those with a record of such an impairment, and those without a limiting impairment who are nevertheless "regarded as" or perceived as having an impairment.¹⁷ In 2008, in response to a line of cases that adopted a narrow interpretation of the ADA's coverage,¹⁸ Congress passed the ADA Amendments Act, which "reinstat[ed] a broad scope of protection to be available under the ADA."¹⁹ To be sure, the legal category of disability remains contested and misunderstood,²⁰ but it is broad enough to include a substantial portion of the population within its ambit—including, potentially, the millions of Americans who have experienced "long COVID."²¹

¹⁶ See, e.g., Tobin Siebers, *Disability as Masquerade*, 23 LITERATURE & MED. 1, 1 (2004) (recounting an exchange at an airport with an airline representative who demanded that Siebers use a wheelchair if he wished to claim "disab[ility]" and board the aircraft early, leading Siebers to "exaggerate [his] limp whenever [he] board[ed] planes"); Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897 (2019) (defining "[t]he aesthetics of disability" as "visible sensory and behavioral markers that trigger particular aesthetic and affective judgments about marked individuals" and that mediate legal interpretation of disability laws).

¹⁷ 42 U.S.C. § 12102.

¹⁸ Courts spent the first eighteen years of the ADA focused on the scope of the "actual disability" prong, which asks whether the individual in question has a "mental or physical disability that substantially limits one or more major life activities." *Id.* § (1)(A). The existence of a defined class, some courts reasoned, meant that Congress intended to protect some but not all people with disabilities. See, e.g., Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 536-59 (1997) (describing cases that interpreted the definition of disability narrowly and, as a result, cast people with severe impairments as more deserving, or more legitimately disabled, than other people with disabilities). Also relevant is the Supreme Court's "Sutton Trilogy," *Sutton v. United Airlines*, 527 U.S. 471, 482 (1999), *Murphy v. United Parcel Service*, 527 U.S. 516, 521 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999), in which the Court held that the use of "mitigating measures," such as eyeglasses for a person with impaired vision, may preclude a person with a disability from claiming the protections of the ADA.

¹⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 (emphasis added). The implementing regulations underscore this intention. See Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, 76 Fed. Reg. 16977, 16978 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630) ("[T]he definition of disability under the ADA . . . shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA as amended, and the determination of whether an individual has a disability should not demand extensive analysis.") (emphasis added).

²⁰ See, e.g., Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 385 (2019) (documenting and explaining judicial resistance to recognizing particular plaintiffs as disabled); Jasmine E. Harris, *Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 33 (2020) (observing that, because of societal misunderstanding of disability, "legal enforcement of antidiscrimination laws" continues to be "seen as optional and aspirational, creating space for the current manifestations of disability discrimination during the coronavirus crisis").

²¹ See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, <https://www.hhs.gov/civil-rights/for->

Second, as Doron Dorfman notes, the word “disability” is even more capacious than the ADA and other disability-related laws suggest.²² In the English language, “disability” has signified various types of “inability, disadvantage, and impediment.”²³ This linguistic openness, Dorfman contends, has enabled people to stretch the concept of disability well beyond the biomedical realm.²⁴

Third, those who might be expected to police the use of the disability frame, such as government civil rights enforcers and people who identify as disabled, have been reluctant or unable to do so, for reasons this symposium explores. To return to our opening anti-masking anecdote, although the Department of Justice issued press releases in response to propaganda misstating the ADA,²⁵ the pervasiveness of misinformation and its key role in our polarized political ecosystem create difficulties for officials charged with enforcing state and federal disability civil rights laws.²⁶ Private citizens who know what is, and isn’t, a legitimate invocation of disability law face even greater challenges, because of their vulnerability to stigma and abuse.²⁷ One

providers/civil-rights-covid19/guidance-long-covid-disability/index.html [https://perma.cc/8FTF-JT2T](last visited Mar. 26, 2022) (explaining that long COVID can qualify as a disability under Titles II and III of the ADA, section 504 of the Rehabilitation Act, and section 1557 of the Affordable Care Act); see also *Science and Tech Spotlight: Long COVID*, U.S. GOV’T ACCOUNTABILITY OFFICE (Mar. 2, 2022), <https://www.gao.gov/products/gao-22-105666> [https://perma.cc/2JSD-RTLML] (citing estimates that between 7.7 and 23 million Americans have experienced “long COVID”).

²² Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. PA. L. REV. 1757, 1759 (2022); cf. Rabia Belt & Doron Dorfman, *Reweighting Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 176-77, 187 (2020) (noting the diversity of the disability community and the capacious and fluid conceptualizations of disability that the United Nations and the World Health Organization have propounded); Boorstein, *supra* note 6 (arguing that it is possible to see some version, or “formation,” of the “disability frame” well before the enactment of modern disability rights legislation and thus helpfully detaching the frame from the ADA and other landmark laws).

²³ Dorfman, *supra* note 22.

²⁴ *Id.*

²⁵ See, e.g., *The Department of Justice Warns of Inaccurate Flyers and Postings Regarding the Use of Face Masks and the Americans with Disabilities Act*, U.S. DEP’T JUST. (Jun. 30, 2020), <https://www.justice.gov/opa/pr/departement-justice-warns-inaccurate-flyers-and-postings-regarding-use-face-masks-and> [https://perma.cc/GY87-LUAM] (stating the Department of Justice had not issued or endorsed documents that the ADA exempted individuals from face mask requirements); *COVID-19 ALERT: Fraudulent Facemask Flyers*, U.S. ATTORNEY’S OFF., MIDDLE DIST. N.C. (Jun. 25, 2020), <https://www.justice.gov/usao-mdnc/pr/covid-19-alert-fraudulent-facemask-flyers> [https://perma.cc/8QWL-BDSX] (identifying as fraudulent face mask exception cards issued by Freedom to Breathe Agency, a private organization masquerading as a public agency).

²⁶ See Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1710-11 (2021) (arguing that society’s preexisting information deficits about the complexity and nuances of disability have hindered the interpretation of disability laws and their capacity to remedy disability discrimination).

²⁷ See Jasmine E. Harris & Karen M. Tani, *Debunking Disability Enforcement Myths*, REGUL. REV. (Oct. 25, 2021), <https://www.theregreview.org/2021/10/25/harris-tani-debunking-disability-enforcement-myths/> [https://perma.cc/4NGR-4AN3] (noting the tendency to characterize private

need only recall the verbal and physical attacks, resulting in hospitalization and even death, that retail workers experienced when they became caught up in the “masking wars.”²⁸

This symposium is not only about what makes possible the disability frame, but also about its growing appeal in the realms of legal scholarship and legal practice. Consider, for example, Joshua D. Blecher-Cohen’s recent Note on the criminalization of people who live with the human immunodeficiency virus (HIV) and the benefit, in that context, of recognizing people with HIV/AIDS as disabled.²⁹ Invoking the ADA, Blecher-Cohen argues, might provide a pathway to delegitimizing HIV-criminalization statutes, both in court and in the public’s eyes.³⁰ Along similar lines, Kevin Barry and others have argued that fair and equal treatment for transgender people requires that they be included in the ADA’s definition of disability.³¹ Related to this is a raft of scholarship addressing whether a characterization of pregnancy as disability is (1) legally plausible and (2) normatively desirable.³²

enforcers of disability civil rights laws as profiteers who score financial windfalls at the expense of hard-working small business owners). See also SARAH MARUSEK, POLITICS OF PARKING: RIGHTS, IDENTITY, AND PROPERTY 139 (2012) (explaining that “disability policy is at the mercy of the non-disabled public”).

²⁸ See, e.g., Neil MacFarquhar, *Who’s Enforcing Mask Rules? Often Retail Workers, and They’re Getting Hurt*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/coronavirus-masks-violence.html> [<https://perma.cc/5W43-FNL5>] (describing examples of violent interactions between customers and retail workers when the latter attempted to enforce mask mandates, including an incident in which a customer fatally shot a Family Dollar store security guard).

²⁹ Joshua D. Blecher-Cohen, Note, *Disability Law and HIV Criminalization*, 130 YALE L.J. 1560, 1564 (2021).

³⁰ *Id.* at 1581-82, 1603. For more on the history of HIV criminalization, see Aziza Ahmed, *Adjudicating Risk: AIDS, Crime, and Culpability*, 2016 WIS. L. REV. 627, 629-35 (2016) and generally AZIZA AHMED, RISK AND RESISTANCE: HOW FEMINISTS TRANSFORMED THE LAW AND SCIENCE OF AIDS (forthcoming 2023). On the operation of the disability frame in the context of substance use, see Kelly K. Dineen & Elizabeth Pendo, *supra* note 14.

³¹ Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 33 (2013); Kevin M. Barry, *Challenging Transition-Related Care Exclusions through Disability Rights Law*, 23 UDC/DCSL L. REV. 97, 108 (2020); Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25 (2019). The Fourth Circuit recently held that gender dysphoria meets the threshold definition of “disability” under the ADA, clearing the way for an incarcerated trans woman to use that law to challenge the misgendering, harassment, and violence she experienced in prison. *Williams v. Kincaid*, No. 21-2030, 2022 U.S. App. LEXIS 22728 (4th Cir. 2022). For a more expansive version of the argument that disability rights protections ought to extend not only to transgender individuals but also to others falling under the LGBT designation, see Alok K. Nadig, Note, *Ably Queer: The ADA as a Tool in LGBT Antidiscrimination Law*, 91 N.Y.U. L. REV. 1316, 1317 (2016).

³² See Jennifer Bennett Shinall, *Protecting Pregnancy*, 106 CORNELL L. REV. 987, 1001-03 (2021) (discussing the benefits and unintended consequences of the Pregnant Workers Fairness Act, a bill which would apply the ADA’s reasonable accommodation framework to all pregnancies regardless of whether a pregnancy impairs a major life activity); Nicole Buonocore Porter, *Accommodating Pregnancy Five Years after Young v. UPS: Where We Are & Where We Should Go*, 14 ST. LOUIS U.J. HEALTH L. & POL’Y 85-90 (2021) (discussing cases in which pregnancy was successfully framed as

In recent years, legal scholars have also employed the disability frame to address intractable problems that require fresh thinking.³³ For example, in her article *Blackness as Disability?*, Kimani Paul-Emile explores “the black racial designation as disabling” and asks whether “the doctrinal framework and normative commitments of disability law” might help “attend to race discrimination and structural inequality.”³⁴ In *Accommodating the Female Body*, Jessica Roberts borrows from disability studies to show how “the built environment serves as a situs of sex discrimination” and encourages readers to embrace universal design “as a means for both de-abling and de-sexing the workplace.”³⁵ In *Carceral Trauma and Disability Law*, Benjamin Hattem urges readers to recognize that “mass incarceration leads to mass trauma” and that “[d]isability law provides a promising means to address the psychological harms of incarceration.”³⁶ Still other scholars—sometimes in conversation with advocates and activists—have used the disability frame to tackle issues

a disability following the passage of the ADA Amendments); *see also* Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After Young v. UPS*, 50 U.C. DAVIS L. REV. 1423 (2017) (documenting the interaction of the Pregnancy Discrimination Act and the ADA in the wake of a 2015 Supreme Court case interpreting the former); Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125 (2016) (arguing that some approaches to accommodating pregnancy in the workplace risk undermining efforts to achieve gender equality); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 670-78 (1999) (summarizing the law’s receptivity to treating pregnancy as a disability under the ADA and then analyzing this legal landscape from the perspective of disability theory); *see generally* MARY CROSSLEY, EMBODIED INJUSTICE: RACE, DISABILITY, AND HEALTH (2022).

³³ See Jasmine E. Harris, *Reckoning with Race & Disability*, 130 YALE L.J.F. 916, 920-32 (2021) (analyzing existing scholarship on race and disability and how authors of this scholarship frame existing social problems in disability terms).

³⁴ Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 293 (2018). This article builds on an older conversation within disability legal studies about whether disability is the same kind of difference as, or a “different difference” from, other historically salient markers such as race and gender. *See, e.g.*, Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 583-84 (2004) (countering the tendency to distinguish the ADA from other antidiscrimination measures by noting these laws’ shared aspiration to remedy “historical inequities”).

³⁵ Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297, 1297 (2008).

³⁶ Benjamin C. Hattem, Note, *Carceral Trauma and Disability Law*, 72 STAN. L. REV. 995, 998-99 (2020); *see also* Jamelia Morgan, *The Paradox of Inclusion: Applying Olmstead’s Integration Mandate in Prisons*, 27 GEO. J. ON POVERTY L. & POL’Y 305, 308-315 (2020) (discussing the opportunities and challenges of applying Title II of the ADA and *Olmstead* within prisons to advance disability rights).

such as poverty,³⁷ climate change,³⁸ and the educational effects of adverse childhood experiences.³⁹

Indeed, as Rabia Belt noted in 2021 when reflecting on the thirty-year anniversary of the ADA and the disability-related inequities that the COVID-19 pandemic created and exacerbated, there are many ways that “social inequality produces debility and impairment.”⁴⁰ Belt explains:

These social inequities include people poisoned by lead; people hurt by police brutality; people harmed by hate crimes; and people surviving sexual violence. They are a crucial reason why the disability community is disproportionately Black and Brown, female, poor, and LGBTQ.⁴¹

It is rare, Belt notes, to see accounts of these injustices that explicitly “spell[] [them] out in disability terms”—but doing so is possible, and may be beneficial.⁴²

What we hope to add to this scholarship is an effort to think synthetically and normatively about the disability frame.⁴³ What does the disability frame

³⁷ Emily R.D. Murphy, *Brains Without Money: Poverty as Disabling*, 54 CONN. L. REV. 699 (2022) (drawing on research on how poverty affects the brain to explore the potential policy benefits of framing poverty as disabling).

³⁸ Sebastien Jodoin, Nilani Ananthamoorthy & Katherine Lofts, *A Disability Rights Approach to Climate Governance*, 47 ECOLOGY L.Q. 73, 76, 114 (2020) (advocating for “disability-inclusive climate solutions” as a way to both “fulfill the rights of persons with disabilities” and make progress toward carbon neutrality and “climate resilience”).

³⁹ See, e.g., *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1110-1112 (C.D. Cal. 2015) (finding that allegations of exposure to traumatic events may meet the legal definition of disability); Ann McGinley & Frank Rudy Cooper, *Intersectional Cohorts, DIS/Ability and Class Actions*, 47 FORDHAM URB. L.J. 293, 334-340 (2020) (arguing that cases like *Compton* satisfy federal class certification requirements because of plaintiffs’ common environmental trauma); see also Sarah D. Sparks, *Do Distressed Students Have a Right to Trauma-Sensitive Schooling?*, EDUC. WK. (Sept. 3, 2019), <https://www.edweek.org/teaching-learning/do-distressed-students-have-a-right-to-trauma-sensitive-schooling/2019/09> [<https://perma.cc/NX3K-3S4X>] (internal citations omitted) (discussing the strategy of framing trauma as a disability in three cases: *P.P. v. Compton Unified School District*; *Stephen C. v. Bureau of Indian Education*; and *Jane Doe v. New York City Department of Education*).

⁴⁰ Rabia Belt, *Disability, Debility, and Justice*, HARV. L. REV. BLOG, Mar. 4, 2021, <https://blog.harvardlawreview.org/disability-debility-and-justice/> [<https://perma.cc/LW2C-SQKK>].

⁴¹ *Id.*; see also Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL’Y & L. 282, 284-87 (2010) (framing the phenomenon of prison rape as at once a “form or manifestation of subordination” and a “process of disablement,” and evaluating “the prospects for using disability civil rights law . . . in the service of violently disabled prisoners”).

⁴² Belt, *supra* note 40; see also *id.* (“Highlighting the ex ante social inequities that produce debility is not without its risks. . . . On the other hand, there is also a big potential upside.”).

⁴³ Other scholars have laid important groundwork in their normative conversations about “medical civil rights.” See, e.g., Craig Konnoth, *The Normative Bases of Medical Civil Rights, in DISABILITY, LAW, AND BIOETHICS* 200, 200 (I. Glenn Cohen, Carmel Shachar, Anita Silvers, & Michael Ashley Stein, eds., 2020) (offering an explanation for why “a legal designation based on disability produces legal rights that are robust when compared to those that other designations

offer to those who use it? Is it better or worse than alternative frames? Does using the disability frame carry a price, and if so, who pays it? This symposium considers the possibility that selective deployments of the disability frame may not carry with them, or tend to produce, normative commitments to disability justice. It also grapples with the reality that, when faced with competing interests, decisionmakers and the broader public have tended to treat disability rights as negotiable, frail, or expendable.⁴⁴ Does the use of the broader disability frame help remedy that problem or merely perpetuate it? These inquiries form the basis for this symposium.⁴⁵

* * *

In what follows we summarize some of the themes of the symposium. But first we acknowledge the event that informed so much of our collective thinking.⁴⁶ In doing so, we also pay respect to the movements for disability

trigger”); Harris & Pamuku, *supra* note 10 (bringing together insights from critical race theory and health justice to explore the possibilities of a “civil rights of health” initiative); Belt & Dorfman, *supra* note 22, at 178-85 (identifying the dangers and challenges that can accompany claiming medical civil rights); Allison K. Hoffman, *How Medicalization of Civil Rights Could Disappoint*, 72 STAN. L. REV. ONLINE 165, 165 (2020) (expressing concern that embracing medical civil rights may lead to “a sociological narrowing” of our conceptions of justice and also risks turning medicalization into “a new situs for civil rights contests”). We understand medical civil rights-claiming as one facet of the disability frame.

⁴⁴ Harris, *supra* note 20, at 51 (“The current public health crisis and the emerging forms of disability discrimination simply reinforce these problematic norms and, as a result, render disability rights expendable.”).

⁴⁵ In this sense, this symposium falls squarely within the tradition of disability studies while also contributing to the growing body of literature known as disability legal studies. See Simi Linton, *What is Disability Studies?*, 120 PUBL’NS MOD. LANGUAGE ASS’N 18, 518 (2005) (offering a definition of disability studies focused on analyzing “how disability as a category was created to serve certain ends” while working to “weave disabled people back into the fabric of society”); Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 YALE J.L. & HUMANS. 63 (2006); Arlene S. Kanter, *The Law: What’s Disability Studies Got to Do With It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403 (2011); Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in OXFORD HANDBOOK OF LAW & HUMANITIES 145, 156-160 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020) (discussing the emergence of disability legal studies and tracing scholars’ efforts to incorporate the theories, lessons, and critiques of disability studies into law and legal scholarship).

⁴⁶ We also want to acknowledge the disability-related law review symposia that this one builds upon. Prior symposia devoted to one or more aspects of disability law include (but are not limited to) symposia hosted by Syracuse University Law Review (2021), American University Journal of Gender Social Policy and the Law (2020), Fordham Urban Law Journal (2020), University of the District of Columbia Law Review (2019), Touro Law Review (2019), Cardozo Law Review (2017), Ohio State Journal on Dispute Resolution (2014), Boston University International Law Journal (2009), Saint Louis University Journal of Health Law and Policy (2008), Alabama Law Review (2003), Stanford Law and Policy Review (2003), William and Mary Law Review (2003), Ohio State Law Journal (2001), and Thomas M. Cooley Law Review (1999).

rights and disability justice, and we memorialize the ways that we tried to bring the rarefied world of the law review symposium into better alignment with the goals of those movements.⁴⁷

The people that anchor a symposium and the process of constructing the event are as important as the animating theme.⁴⁸ Our goals in identifying participants were diversity and inclusion. The result was a mix of senior scholars and junior scholars, including junior scholars who do not hold tenure-track “podium” teaching positions. We also aspired to capture a range of backgrounds and experiences, including different intersections with disability and various disciplinary and methodological approaches (historical, sociological, etc.). We sought to prioritize diversity and inclusion in the work that would appear in the published version of the symposium by amplifying the voices of junior scholars and of people who bring to their scholarship the kinds of perspectives and experiences that remain underrepresented in the academy.

The scholarly contributions that follow benefited not only from conversation with other academics, but also with symposium participants who make their professional homes outside of academia. We are aware of the canyon that can exist between legal practitioners, policymakers, and legal academics, and we aspired to build bridges. We are particularly grateful to Rebecca Cokley, David Ferleger, Mehgan Sidhu, and Rebecca Serbin for their incisive comments at the event. They reminded us that the disability frame exists not only in court filings and law review articles, but also in philanthropic pursuits, activist campaigns that occur online and in the streets, and the films and TV shows we consume.⁴⁹ They also reminded us that being

⁴⁷ The event is viewable at University of Pennsylvania Law Review, *The Disability Frame (Vol. 170 Symposium)*, YOUTUBE (Mar. 26, 2022), <https://www.youtube.com/channel/UCid6Mn2YYHhQQg05bU-dpBQ?watch?v=6Us3E5TiOPY&list=PLJBnPepsYGDRPn3sHK5Cc7EfyMpg8yZp->, and transcribed at <https://www.dropbox.com/s/q7tadp09oz2x3n/The%20Disability%20Frame%20Transcript.pdf?dl=0> [hereinafter Transcript].

⁴⁸ See SINS INVALID, SKIN, TOOTH AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE 16-17 (2d ed. 2019) (offering a living history of the disability justice movement, including how that movement has responded to the limitations of individual rights frameworks and how it has aspired to center people with intersectional identities and experiences); A.J. Withers & Liat Ben-Moshe with Lydia X. Z. Brown, Loree Erickson, Rachel da Silva Gorman, Talila A. Lewis, Lateef McLeod & Mia Mingus, *Radical Disability Politics*, in ROUTLEDGE HANDBOOK OF RADICAL POLITICS, 178, 180, 184-87 (A.J. Withers & Liat Ben-Moshe eds., 2019) (bringing together disability organizers in Canada and the United States to discuss radical disability politics and its potential to move beyond single issue organizing in service of collective, radical organizing); see also Natalie Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 692 (2021) (“Disability Justice emerged in response to how the disability rights movement prioritized a single-issue civil rights framework at the expense of the lived experiences of disabled people who live ‘at intersecting junctures of oppression.’” (quoting SINS INVALID, SKIN, TOOTH AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE 12 (1st ed. 2016))).

⁴⁹ Transcript, *supra* note 47, at 100-03, 111-12.

able to reflect on the disability frame is a privilege that may not be available to lawyers and advocates in the trenches (or to disabled people, more generally). The clients and communities they represent often have urgent needs. Responding to those needs while adhering to strict rules of professional responsibility sometimes means meeting legal decisionmakers where they are, in terms of their understanding of disability.⁵⁰

Further bridging the worlds of academia, practice, and policy was our keynote speaker, Representative Ayanna Pressley. Connecting her personal history to the themes of the symposium, she invoked her experience with alopecia⁵¹ and the warm welcome she received from members of the disability community after she chose to reveal her diagnosis.⁵² She also offered insights into the types of policies that become imaginable when a politician simultaneously treats disability as a mainstream experience (rather than a marginal one) and refuses to construe disabled people as a single-issue constituency. Brilliantly distilling the concept of intersectionality,⁵³ she noted that “people don’t live in big check boxes”; a person’s experience with disability is often inseparable from their other circumstances, such as skin color, gender identity, and income level.⁵⁴ Responding to questions after her remarks, Representative Pressley described an approach to policymaking that draws on the disability frame to identify priorities but that does not allow the frame to limit her ability to see broader, shared experiences of precarity, vulnerability, and injustice.⁵⁵

We viewed audience participation as equally vital and aimed to foster it by taking steps to make content more accessible, building time for questions and answers into each symposium panel, offering multiple ways of asking

⁵⁰ Transcript, *supra* note 47, at 118-19.

⁵¹ Transcript, *supra* note 47, at 13; see also Jessica Moulite, *Exclusive: Rep. Ayanna Pressley Reveals Beautiful Bald Head and Discusses Alopecia for the First Time*, THE ROOT (Jan. 16, 2020, 11:35 AM), <https://www.theroot.com/exclusive-rep-ayanna-pressley-reveals-beautiful-bald-1841039847> [<https://perma.cc/6QVZ-GCXR>] (featuring an interview with Rep. Pressley describing her experience with alopecia). Alopecia is an autoimmune condition that causes hair loss.

⁵² Transcript, *supra* note 47, at 13 (“When I revealed my struggle with alopecia two years ago, the disability community embraced me.”); see also Ayanna Pressley & Rebecca Cokley, *There Is No Justice That Neglects Disability*, STAN. SOC. INNOVATION REV. (2022), https://ssir.org/articles/entry/there_is_no_justice_that_neglects_disability [<https://perma.cc/CY3V-4SM5>] (describing outreach from members of the disability community and explaining how Representative Pressley’s “dialogue with disability activists” affected her views toward policy).

⁵³ For foundational articulations of intersectionality, see generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) and Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

⁵⁴ Transcript, *supra* note 47, at 13.

⁵⁵ Transcript, *supra* note 47, at 14-15.

questions,⁵⁶ and including substantial breaks throughout the program.⁵⁷ The audience posed thoughtful questions to panelists that reflected broad interests in theory, doctrine, and practical application.

We hope that in the future we can gather an even wider array of perspectives and achieve greater inclusivity. Access and inclusion, like other social justice goals, require sustained attention over time. We recognize that scholarly conversations such as this one have historically excluded disabled people, especially disabled people who are negatively racialized, gender-nonconforming, or otherwise multiply marginalized. We recognize that so long as these voices are sidelined, disability justice is forestalled. We hope that this symposium, while surely imperfect, helps chart a different path.

* * *

As we reflect on the symposium, it is clear that the disability frame offers great opportunities but can also carry costs and constraints. We discuss each in turn.

Opportunities: One of the primary attractions of the disability frame is that it can suggest a path forward in contexts that otherwise look bleak. It can also open up new and productive ways of understanding experiences, problems, and even our legal past.

At the symposium convening, several participants discussed the significance of the disability frame to their own lives and those of their loved ones. The disability frame, like the frames of race, gender, class, and nationality/citizenship, provides a way for people to make sense of the world and their place in it. Historically, the disability frame has been at best a “mixed bag” for those designated “disabled” (or some variant of that term).⁵⁸ But there is also opportunity here. As Katie Eyer has noted elsewhere, and as

⁵⁶ For example, participants could type their question into the Q&A tab or call a dedicated phone line to request that the moderator read their question, or participants could ask their questions directly. These options offered participants choices as to what worked best for them as individuals. Designing the question-and-answer format allowed the organizers to think through questions of access and choice and, by thinking about design from the first thought, to consider universal designs that obviated the need for participants to ask for individual accommodations. *See, e.g.*, Transcript, *supra* note 47, at 2.

⁵⁷ For example, after consulting with various stakeholders and researching best practices for conference accessibility, the *Law Review* invested in high quality Communication Access Realtime Translation (CART) (with manual captioning for greater accuracy), American Sign Language (ASL) interpretation services, use of plain language, and, wherever possible, pre-circulated materials, all of which were standard modifications for the entire duration of the symposium. This required advance planning and coordination but reflected a collective commitment to meaningful access and inclusion.

⁵⁸ *See Harris, Taking Disability Public, supra* note 26, at 1684-85 (acknowledging the costs to individuals of disclosing disability, or being framed by others as disabled, while also highlighting the downsides of “privacy-enforcing norms in disability law” and society).

she reinforced in her symposium remarks, affirmatively “claiming disability” has the potential to foster a healthy and positive self-concept, to generate solidarity with other disabled people, and to reduce the exclusion and stigma that have too often accompanied disability.⁵⁹ Eyer also reminds us that, to some extent, people can choose how to frame their experiences and that this choice will present itself repeatedly in different contexts, enabling at least some individuals to reject the disability frame for some purposes (for example, claiming resources) while embracing it for other purposes (for example, advocating accessible work and learning environments).⁶⁰

Other symposium contributions affirm our earlier point about disability as a gateway to valuable resources and protections while underscoring that rarely do such opportunities come without some risk or uncertainty. For example, in his remarks at the symposium, Conor Dwyer Reynolds identified the Clean Air Act and its National Ambient Air Quality Standards as underappreciated vehicles for protecting people with asthma and for generally mitigating the disabling effects of polluted air.⁶¹ If regulatory gatekeepers would commit to integrating disabled people into the decisionmaking process, Reynolds argued, the Clean Air Act could simultaneously advance disability justice and perhaps mitigate the tension between environmentalists and the disability community.⁶² The disability frame as a gateway to resources and protections is also visible in *Disability Benefits as Poverty Law*, in which Karen Tani shows how poverty lawyers in the 1980s and 1990s turned to a disability-based income support program (Supplemental Security Income) to try to expand the welfare state during a

⁵⁹ Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 580-95 (2021); Transcript, *supra* note 47, at 73-77; see also Harris, *Taking Disability Public*, *supra* note 26, at 1725-36 (calling attention to the missed opportunities that result from legal structures that encourage individuals to keep their disability identity private).

⁶⁰ Eyer, *Claiming Disability*, *supra* note 59 at 609-610. Eyer emphasizes that not all people are able to “claim disability” in this selective way. Much turns on how apparent a person’s disability is and whether they have the resources to avoid relying on others for what they need. *Id.*; see also *id.* at 568-72 (noting how disability’s association with “functional limitation and an inability to work” serves as a “central obstacle” to claiming disability identity).

⁶¹ Transcript, *supra* note 47, at 83-88; accord Conor Dwyer Reynolds, *Crippling the Clean Air Act: On Seeing Environmental Law as Disability Law* (November 2021) (unpublished manuscript) (on file with authors).

⁶² Transcript, *supra* note 47, at 87-88; accord Reynolds, *supra* note 61. There are other examples of tension between environmentalists and the disability community. See, e.g., S.E. Smith, *Banning Straws Might Be a Win for Environmentalists. But It Ignores Us Disabled People*, VOX (July 19, 2018, 8:50 AM), <https://www.vox.com/first-person/2018/7/19/17587676/straws-plastic-ban-disability> [<https://perma.cc/9UNB-XEAU>] (explaining that efforts to ban plastic straws overlook the needs of those disabled people who require plastic straws to drink liquids); Britney Wilson, *Making Me Ill: Environmental Racism and Justice as Disability and Disability Justice*, 170 U. PA. L. REV. 1721, 1725 (2022) (providing examples of environmentalists’ past and present “misconceptions about disability”).

time when politicians were hostile to other forms of “welfare.”⁶³ These lawyers understood that if more poor children could qualify as disabled under federal law, they would have access to more public resources and they and their families would be more likely to thrive.⁶⁴ Whether this was the “best” strategy is difficult to say, but we gain important knowledge about the disability frame simply by recovering its past appeal.

Not only can the disability frame lead to material benefits, but it also holds the potential to remake or undo conditions that harm and exclude. Along these lines, Ruth Colker’s contribution to this symposium identifies great opportunity in those aspects of disability law that take a more “structural approach” to identifying and remedying exclusion (while critiquing the individualistic “reasonable accommodation framework” that more commonly comes to mind).⁶⁵ There is a world of “ex ante solutions” to discrimination that laws such as the ADA open up, Colker argues.⁶⁶ Jamelia Morgan takes a similar stance in her essay on the use of the disability frame in conditions of confinement litigation.⁶⁷ While noting that sometimes the disability frame can perpetuate stigma (a danger we return to below), it also offers a way of critiquing carceral conditions.⁶⁸ It can illuminate how particular circumstances and practices contribute to disablement.⁶⁹ It can demonstrate how policies that appear uniform, such as blanket strip searches, are deeply harmful to particular members of the population (e.g., survivors of sexual abuse) and therefore deserve greater scrutiny.⁷⁰

These productive reframings need not be limited to the realm of private civil litigation, Kaaryn Gustafson notes, nor need they be tethered to the ADA.⁷¹ The disability frame might also apply to public policy, writ large, Gustafson argues. In remarks at the symposium (incorporated into this

⁶³ Karen M. Tani, *Disability Benefits as Poverty Law: Revisiting the “Disabled State,”* 170 U. PA. L. REV. 1687 (2022).

⁶⁴ *Id.*

⁶⁵ Ruth Colker, *The ADA’s Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1812, 1820 (2022). On the deficits of the “reasonable accommodation framework,” specifically its requirement of an interactive process, see also Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. REV. 1826, 1857-70 (2021). For other examples of the kind of “ex ante solutions” Colker envisions, see Ruth Colker, *Toward Universal Design in the Classroom*, 70 J. LEGAL EDUC. (forthcoming 2022) and Ruth Colker, *Universal Design: Stop Banning Laptops!*, 39 CARDOZO L. REV. 483, 492-93 (2017), which advocates the elimination of classroom laptop bans.

⁶⁶ Colker, *The ADA’s Unreasonable Focus*, *supra* note 65.

⁶⁷ Jamelia Morgan, *Contesting the Carceral State with Disability Frames: Some Thoughts on Challenges and Possibilities*, 170 U. PA. L. REV. 1905 (2022).

⁶⁸ *Id.* at 1909.

⁶⁹ *Id.* at 1916.

⁷⁰ *Id.* at 1917.

⁷¹ Transcript, *supra* note 47, at 50-53. Professors Emens, Gustafson, and Harris discussed the “costs” of the disability frame during the symposium’s Roundtable session, transcribed and included in this Symposium volume.

volume in transcribed form), she invited attendees to imagine what might happen if policymakers were required to identify, and to add up, the premature deaths that result from particular policy choices—that is, to “tally[] the expendables.”⁷² This idea cleverly marries the impulse of cost-benefit analysis with the concerns of the disability justice movement, including that movement’s attention to the compounded discrimination and hardship experienced by people with intersectional, multiply marginalized identities. The notion of a death tally of the “expendables” also helpfully illustrates how the disability frame applies beyond legal claims-making to the realm of legislative advocacy and critique.

As we think about advocacy and critique, we learn from symposium participants that the disability frame also holds potential for established reform movements that are stymied or unduly narrowed by their current framing choices. Robyn M. Powell’s contribution to the symposium offers a powerful example. By urging proponents of reproductive justice to recognize their movement’s substantial overlaps with the movement for disability justice and to embrace a merged framework of “disability reproductive justice,” Powell suggests a more inclusive path forward.⁷³ This path would advance disabled people’s reproductive freedom and also gently remind advocates that the battle is about much more than abortion, important though that issue is.⁷⁴ This kind of shift in perspective is not unprecedented, as Britney Wilson demonstrates in *Making Me Ill: Environmental Racism and Justice as Disability and Disability Justice*.⁷⁵ Wilson’s Article recounts a history in which environmental justice advocates in the 1970s and 1980s turned to the disability frame after confronting the “near-impossibility of proving intentional race discrimination.”⁷⁶ Evaluating this strategic reframing is complex, Wilson notes, because of environmental justice advocates’ long history of casting disability as the villain in their stories about environmental harm, but this history is nonetheless a lesson in how the disability frame might bind together movements for justice.⁷⁷

A final opportunity that the disability frame offers is for scholars: the disability frame can change how we interpret our research and thereby help us produce new and useful knowledge. An example from the symposium is

⁷² Transcript, *supra* note 47, at 51-52.

⁷³ Robyn M. Powell, *Disability Reproductive Justice*, 170 U. PA. L. REV. 1851 (2022); *see also* Chin, *supra* note 48, at 715-717 (defining disability justice).

⁷⁴ Powell, *supra* note 73. The issue of abortion has particular significance after the Supreme Court’s recent decision overturning *Roe v. Wade*. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ____ (2022).

⁷⁵ Wilson, *supra* note 62.

⁷⁶ *Id.* at 1735.

⁷⁷ *Id.* at 1748.

Nate Holdren's essay on workers' compensation programs in the early twentieth century. By applying a disability frame to his historical research, he illuminates how the logic of workers' compensation programs transformed disability into a common-sense reason for employers to prune workers with physical impairments out of their labor pools. Denied formal access to employment, these individuals were then further disadvantaged, which helped naturalize the link between disability and economic precarity.⁷⁸ Likewise, in her remarks at the symposium and in published and forthcoming work, Rabia Belt has explained how much we can learn about political participation and citizenship when we apply a disability frame. Her research shows how state and local officials used ideas of mental competency to gatekeep the right to vote in the nineteenth and early twentieth centuries, ensuring that even as suffrage became more widely available, officials possessed an ostensibly neutral means to prevent "undesirable" people from exercising formal political power.⁷⁹ In Belt's words, "to be labeled mentally disabled meant the loss of political citizenship."⁸⁰ Belt's identification of this relationship also helps us understand how disability came to be seen as such a degraded status. As would-be voters discerned a connection between able mindedness and political power, many distanced themselves from the disability label.⁸¹ Contributions such as Belt's and Holdren's should prompt us to wonder how much more we might learn about our legal landscape if legal scholars in various fields tried applying the disability frame to their research.

Costs: The idea of cost appears in this symposium in at least two ways. First, "cost" appears as one of the mental associations that the disability frame carries with it: the general public is accustomed to thinking of disabled people as costly, both in terms of their medical needs and their access requests.⁸² Second, the idea of cost appears on one side of our normative ledger: although the disability frame has benefits, it also has costs.⁸³

⁷⁸ Nate Holdren, *Disability and Capitalism in the Aftermath of Workers' Compensation Laws*, 170 U. PA. L. REV. 1927 (2022).

⁷⁹ Transcript, *supra* note 47, at 19-22. Belt's remarks drew on material from her forthcoming book, *DISABLING DEMOCRACY IN AMERICA: MENTAL INCOMPETENCE, CITIZENSHIP, SUFFRAGE, AND THE LAW, 1819-1920*. For published work exploring similar themes, see, e.g., Rabia Belt, *Ballots for Bullets?: Disabled Veterans and the Right to Vote*, 69 STAN. L. REV. 435, 438-39 (2017); Rabia Belt, *Mass Institutionalization and Civil Death*, 96 N.Y.U. L. REV. 857, 862-63 (2021).

⁸⁰ Transcript, *supra* note 47, at 22.

⁸¹ Transcript, *supra* note 47, at 22.

⁸² Consider the ways in which society understands the access and the exercise of disability rights. See, e.g., Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 560-64 (2020).

⁸³ Some disability law scholars have addressed a related, though not always apparent or discussed, structural "cost." See, e.g., Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 591-97 (2015) (arguing that the very conditions that led to the broad-based

The notion that disabled people are “costly” is well established in the literature, as is the related notion that disabled lives have less value (a result, in part, of the disconnect between “inside” and “outside” views about the quality and happiness of disabled lives).⁸⁴ Many symposium participants spoke and wrote against this backdrop.

These notions are also deeply rooted historically. Before “disability rights” became a part of civil rights rhetoric, disability-based benefits engendered public distrust and derision because they were understood as a form of welfare, with a perceived cost to “taxpayers.”⁸⁵ One of the reasons that the ADA was able to become law with bipartisan support was because politicians sold disability rights as an antidote to costly forms of welfare—the sort of path from welfare to work that was so commonly discussed in the context of “welfare mothers.”⁸⁶ This same rhetoric strengthened public support for the independent living movement, which, like the ADA, advanced neoliberal capitalist values of work, productivity, individual responsibility, and independence.⁸⁷

promulgation of the ADA may limit its transformative potential because the core provisions require political will and agreement on public values, which may not exist vis-a-vis disability rights movements and political actors); Emens, *Framing Disability*, *supra* note 5, at 1409-10 (describing framing rules at key moments when nondisabled people interact with disability, which can produce “positive” attitudes and alternative information about disability); Harris, *supra* note 26, at 1687 (discussing how disability-related “information deficits” about the pervasiveness of disability in society, the breadth of functional capabilities of people with disabilities, and the scope of disability legal protections undermine the efficacy of the law).

⁸⁴ Emens, *Framing Disability*, *supra* note 5, at 1405-07; Emens, *Getting It: The ADA After 30 Years*, *supra* note 5, at 645-50; see also Harris, *supra* note 20, at 33-43 (2020) (describing examples of devaluation of disabled lives during the COVID-19 pandemic, such as discriminatory crisis standards of care and health care rationing).

⁸⁵ For a discussion about the intersection of disability law and political economy, see *A Conversation About LPE and Disability (Part I)*, LPE BLOG (Mar. 29, 2022), <https://lpeproject.org/blog/a-conversation-about-lpe-disability-part-1/> [https://perma.cc/G9HN-EWNK], and *A Conversation About LPE and Disability (Part II)*, LPE BLOG (Mar. 30, 2022), <https://lpeproject.org/blog/a-conversation-about-lpe-disability-part-2/> [https://perma.cc/3Z3U-BHS6]. See also Karen M. Tani, *Compensation, Commodification, and Disablement: How Law Has Dehumanized Laboring Bodies and Excluded Nonlaboring Humans*, 119 MICH. L. REV. 1269, 1272 (2021) (describing the conceptual costs of workers compensation systems, which have allowed and even encouraged employers to engage in a “style of cost-benefit thinking”).

⁸⁶ See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 957 (2003) (“[D]uring the period in which the ADA was proposed, considered, and enacted, supporters of the bill frequently invoked the costs of dependency as a major justification for antidiscrimination legislation for people with disabilities.”); see also LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* (2016) (contextualizing the promulgation of the ADA, including by noting the political appeal of arguments correlating disability rights with independence from government aid).

⁸⁷ Bagenstos, *supra* note 86, at 954. Professor Bagenstos’s later work threads the needle and argues that the very “future of disability law” lies in reconciliation with its ties to the welfare state as the antidiscrimination remedy.

The cost narrative remained influential—and in fact became more pervasive—in the wake of the ADA, because scholars and policymakers were keen to learn (1) whether disability inclusion was as costly as critics feared, and (2) how perceptions of cost were shaping judicial interpretations of the ADA. Since then, empirical research on costs associated with reasonable accommodations has indicated primarily de minimis expenditures for employers, with the benefits of accommodations accruing to disabled and nondisabled employees.⁸⁸ Disability scholars have also proposed more nuanced accountings of cost, not limited to employer expenditures on accommodations and inclusive of third-party benefits.⁸⁹ But the cost narrative clearly influenced social and legal perceptions of disability inclusion, as Linda Hamilton Krieger has explained.⁹⁰ In her work on post-ADA “backlash,” she shows the narrow interpretations that judges gave to statutory terms such as “disability” and “reasonable accommodations,” which in turn limited the ADA’s remedial reach.⁹¹

⁸⁸ See, e.g., JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 3-5 (2020) <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628&action=download&pubtype=pdf> [<https://perma.cc/B2XL-WZ8J>] (finding that a majority of employers surveyed reported zero costs associated with reasonable accommodations (fifty-six percent) or a de minimis one-time cost of \$500 (thirty-nine percent) and benefits such as retention); Helen A. Scharz, Kevin M. Scharz, D.J. Hendricks & Peter Blanck, *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917 (2006) (discussing empirical studies, including JAN report, estimating de minimis costs of providing reasonable accommodations to employees with disabilities); Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 902, 902 n.122 (1997) (describing an empirical study of approximately five hundred accommodations over the course of two decades pre- and post-ADA in which the majority of accommodations (72 percent) had no direct costs to the employer, and less than one percent cost more than five hundred dollars); Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 842-43 (2008) (arguing that conversations about the costs and benefits of accommodations too often fail to capture third party benefits to nondisabled employees and to “sub-ADA disabled” employees—that is, employees with impairments that may not meet the legal definition of disability); Yaron Covo, *Reversing Reverse Mainstreaming*, 75 STAN. L. REV. (forthcoming 2023) (discussing the “benefits” to nondisabled people that flow from disability inclusion in the education context) (on file with authors). Recent research suggests that, for some industries, COVID-19 may have further reduced the costs to employers and surfaced additional benefits of providing workplace accommodations. See, e.g., Jennifer Bennett Shinall, *Without Accommodation*, 97 IND. L.J. 1147, 1176 (2022).

⁸⁹ See, e.g., Emens, *Integrating Accommodation*, *supra* note 88, at 842-43 (discussing third-party benefits); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 144-78 (2003) (proposing a nuanced “accommodations cost continuum” law and economics doctrinal model of “reasonable accommodations”).

⁹⁰ Linda Hamilton Krieger, *Socio-Legal Backlash in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 340, 375 (Linda Hamilton Krieger ed., 2003).

⁹¹ *Id.* at 349-50, 374-75; see, e.g., *Vande Zande v. Wis. Dep’t Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (interpreting the meaning of “reasonable” relative to costs to the employer, referencing the preamble of the ADA which “actually ‘markets’ the Act as a cost saver,” and concluding that the

Turning now to the second way in which the idea of cost figures into this symposium: It is clear that the disability frame has benefits and it also has costs. Strategic deployment of the disability frame, without proper context, comes with potential risks for individuals and broader political action. In the context of transgender justice, for example, disability rights strategies may increase an individual's available antidiscrimination safety net in the face of anti-trans violence, but the disability frame may also work at cross purposes and perpetuate the notion that particular sex or gender identities are pathological, individual deficits in need of a cure.⁹² Similarly, as Jamelia Morgan noted in the context of representing an incarcerated disabled person, an unnuanced deployment of the disability frame may further entrench existing stigma and reproduce conceptions of individual deficiency, thus undermining movements for disability justice.⁹³

Importantly, the costs of adopting the disability frame will vary depending on the existence of other marginalized identities which, as Congresswoman Pressley noted in her keynote, may make people with intersectional identities hypervisible and invisible at the same time.⁹⁴ Thus, communities of color may question the voluntary embrace of the disability frame when state and private actors have actively sought to impose this label on them as a way of signaling physical or mental inferiority.⁹⁵

Constraints: A third keyword for us is “constraints.” We recognize that all frames have particular boundaries and limits; they allow us to see particular facets of the world with great focus and clarity. But in doing so, they may also inhibit our perspective.

The constraints that attach to the disability frame depend, of course, on how the person deploying the frame understands disability and disability law. To the extent that a particular deployment of the disability frame invokes an individualistic understanding of disability rights, it is necessarily limiting. Ruth Colker and Robyn Powell make this point.⁹⁶ To the extent that a

“[cost] savings [would] be illusory if employers are required to expend many more billions in accommodation than will be saved by enabling disabled people to work”).

⁹² See, e.g., Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 35 (2013) (discussing the wide-ranging attitudes of the transgender community toward gender identity disorder as a pathological diagnosis); *id.* at 44-45 (discussing concerns that recognizing gender identity disorder as a disability under the ADA could have a stigmatic impact); see also Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 40, 47-51 (2011) (critiquing the medicalization of trans identity, particularly as a way to advance rights).

⁹³ Transcript, *supra* note 47, at 79-83.

⁹⁴ Transcript, *supra* note 47, at 15.

⁹⁵ See Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 941-44 (2021) (discussing the “tensions at the intersections” of race and disability among Black communities in response to Chadwick Boseman's death from cancer).

⁹⁶ Colker, *The ADA's Unreasonable Focus on the Individual*, *supra* note 65, at 1814; Powell, *Disability Reproductive Justice*, *supra* note 73 at 1882.

particular use of the disability frame relies on strictly medical understandings of disability, with medical professionals adjudicating who is sufficiently disabled, this, too, is a constraint. Karen Tani's essay engages this point,⁹⁷ as does the generative recent debate on "medical civil rights."⁹⁸

The disability frame is also constrained by ideas and forces outside of it, such as the deployment of cost-benefit analysis as the predominant tool of sociolegal evaluation.⁹⁹ In this context, reforms such as mandating a death tally of "expendables" or building out a more robust understanding of the "benefits" of disability inclusion may not go far enough, because they in some sense accept a market-oriented metric. Whether these reforms perpetuate a flawed metric or fundamentally reorient it will likely depend on how effectively they surface and contest the ableist baseline underwriting so much of law and public opinion, as Roundtable participants attempted to do.¹⁰⁰

And, of course, even the most well-considered attempts to use the disability frame will not be self-executing—another constraint. Emens notes that even seemingly straightforward compliance with existing disability laws requires time and labor. She also notes that these compliance costs have tended to fall disproportionately on "frontline" workers, many of whom lack the "guidance, support, recognition, or compensation" that should come with this additional work.¹⁰¹ In a political economy in which "frontline" workers tend to lack power, there is a risk that using the disability frame to address injustice will perpetuate other forms of inequity.

Can the disability frame be invoked in ways that avoid these constraints? This symposium suggests a cautious "yes." But it will not be easy. As Rabia Belt has noted, the concept of disability is at once legal, social, political, and cultural.¹⁰² In the modern U.S., Nate Holdren adds, building on the work of Marta Russell, disability is also entangled with the imperatives of

⁹⁷ Tani, *supra* note 63, at 1693.

⁹⁸ See *supra* note 43.

⁹⁹ See, e.g., Karen M. Tani, *Symposium on The Future of Cost-Benefit Analysis: The Limits of the Cost-Benefit Worldview: A Disability-Informed Perspective*, LPE BLOG (Oct. 12, 2021), <https://lpeproject.org/blog/the-limits-of-the-cost-benefit-worldview-a-disability-informed-perspective/> [<https://perma.cc/F2UW-WSVZ>] (discussing the structural limitations of a cost-benefit approach in the context of disability and noting scholarly discussions in this area); ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY (2022) (charting the rise and current dominance of an "economic style" of reasoning, which encompasses cost-benefit analysis).

¹⁰⁰ See Transcript, *supra* note 47, at 47-48 (discussing the imbalanced, "one-way" understanding of costs and benefits that frequently appears in discussions of disability inclusion and noting a tendency to describe nondisabled people as those who bear the financial burden while people with disabilities reap the benefits).

¹⁰¹ Transcript, *supra* note 47, at 49.

¹⁰² Transcript, *supra* note 47, at 19-22.

capitalism.¹⁰³ We should understand this complexity as its own form of constraint. A policymaker or advocate simply cannot bring the disability frame to a particular issue without carrying with them complex chains of meaning that are difficult to control and may have unintended consequences.

* * *

Ultimately, this symposium asks more questions than it answers, but we believe that it creates a valuable starting point for collective conversation about the disability frame, its utility, and its dangers. Equally important, this symposium has attempted to make a statement about inclusion in legal academia: inclusion must mean more than the content of our conversations; it extends to the design and format of the spaces (physical or virtual) that host these conversations and to the people invited to participate in and facilitate these discussions.

Why is this particular conversation worth having? One reason is that the disability frame, like disability, seems unlikely to go away anytime soon. The trend is unmistakable. But more important, collective analyses of the promise and peril of the disability frame offer opportunities for addressing a deep and longstanding problem. As contributions to this symposium illustrate, many of the institutions that structure American life function in ways that subordinate and exclude, and when confronted, they tend to reduce the problem or harm to an individual one. We need a shared language for disrupting this pattern. We hope that this symposium will help to develop one and that the disability frame may offer both descriptive and normative structures to facilitate further conversations.

¹⁰³ Holdren, *supra* note 78, at 1931; *see also* Marta Russell, *Disablement, Oppression, and Political Economy*, 12 J. DISABILITY POL'Y STUD. 87, 87 (2001) (analyzing disability through a Marxist frame, in which the term "disabled is used to designate the socioeconomic disadvantages imposed on top of a physical or mental impairment").

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