
ARTICLE

DISABILITY AS METAPHOR IN AMERICAN LAW

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In recent decades, the term disability has become associated with the legally protected minority group of people living with impairments and the social oppression directed at this group. Yet in the legal realm, the term disability has also been used as a metaphor that carries meaning beyond the scope defined in disability law. This Article identifies such use of disability as metaphor in two legal contexts. The first is the linguistic use of disability as metaphor for disadvantage: inability and impediment generally. I show how courts and legislators use the term to describe the inability to file a claim, the inability to continue in a legal role, and the disadvantages inflicted by state action in equal protection jurisprudence. The second context is what I call “disability frame advocacy”: when scholars and advocates use disability rights frameworks and disability as metaphor to advocate for resources, recognition, and redress for members of oppressed groups who do not live with disabilities.

This Article is the first to explore both types of metaphoric uses of disability in American law. It makes a descriptive claim and a normative claim. After excavating the use of disability as a linguistic metaphor in legislation and case law,

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and then describing examples of disability frame advocacy, the Article connects the two. It suggests that the expansive linguistic use of disability in legal discourse has enabled scholars and advocates to engage in disability frame advocacy and stretch the concept of disability well beyond the biomedical realm. Second, the Article explains why using disability as metaphor—both linguistically and in advocacy—is problematic. My claim is that using disability as metaphor perpetuates a simplistic understanding of disability, relies on an outdated and one-dimensional version of the social model of disability, and thus downplays the role of impairment and the person's body and mind. In addition, the use of disability as metaphor disregards and marginalizes the lived experiences of people with disabilities and the history of disability rights. When the concept of disability is stretched too far beyond the concept of impairment, it dilutes the significance of what it means to live with disabilities and causes the lived experiences of disabled people to seem trivial and commonplace. This Article therefore calls on scholars, legislators, judges, and advocates to adopt a bio-psycho-social model of disability, to avoid the use of disability as metaphor, and to prevent backlash against disability rights and the further marginalization of people with disabilities.

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INTRODUCTION

In recent years, advocates and legal scholars have increasingly used disability rights law strategically to argue for protection of marginalized groups that do not live with impairments,¹ including transgender, poor, homeless, and Black people, among others.² I call such strategies “disability frame advocacy.”³ Those using disability frame advocacy strategies seek to expand the concept of disability beyond its legal definition in disability rights legislation, which is aimed at protecting the rights of people living with a wide array of impairments as a discrete and insular minority group.⁴

This Article makes two claims in regard to the use of disability frame advocacy. First, it argues that a possible reason for the emergence of the disability frame discourse is the longstanding *metaphorical* use of the term disability in cases, statutes, and legal discourse to mean disadvantage or inability. The loose linguistic use of the term disability, I argue, partially contributes to the attempts to expand disability rights law to other groups and social issues; i.e., engaging in disability frame advocacy. In other words, the extensive use of the term disability in American law as a metaphor for inability, disadvantage, and impediment leads others to view disability as an open category.

My second claim shifts from an explanatory register to a normative one: I argue that the concept of impairment is crucial to the legal definition of disability, and therefore necessary to access disability rights protections, particularly in the context of accommodations. While recognizing that language is hard to control and that linguistic openness can be a gift in some contexts, I argue that in the domain of law, scholars and advocates should be exceedingly cautious in using the concept of disability to talk about situations that do not involve mental or physical *impairment*. The Americans with Disabilities Act (ADA), the United States’ most comprehensive disability discrimination statute, is limited to a class that is defined by the experience

1 For a discussion of how the role of a physical or mental impairment has been used to create a disability in both the academic field of disability studies and under federal disability law, see *infra* Section V.A.

2 See *infra* Part IV.

3 Disability frame advocacy is part of “the disability frame” phenomenon. See Jasmine E. Harris & Karen M. Tani, *Foreward: The Disability Frame*, 170 U. PA. L. REV. 1663, 1664 (2022).

4 The status of disability as a discrete and insular minority was acknowledged in the findings and purpose section of the original language of the Americans with Disabilities Act of 1990, which described people with disabilities as “a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.” Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 329 (1990) (amended 2008).

of impairment.⁵ To establish its protected class—those who have a disability—the ADA sets out three conditions: “(A) a physical or mental impairment that substantially limits one or more major life activities;” “(B) a record of such an impairment;” or “(C) being regarded as having such an impairment.”⁶ This definition not only protects a person who presently has an impairment, but also extends the antidiscrimination protection of the ADA to those who had one in the past (e.g., a cancer survivor) and to those with a perceived impairment (e.g., a person “regarded as” having a mental illness by others). Yet, those who are “regarded as” having an impairment do not receive the right to reasonable accommodations.⁷ Therefore, when scholars and advocates claim disability status for groups who lack impairments, they threaten to erode the legal and theoretical foundations of disability law.

In this Article, I explain why it is problematic to invoke disability frame advocacy strategies that use disability as a metaphor. As a threshold matter, the strategic use of disability frame advocacy suggests a universal view of disability that will likely create a backlash⁸ and erode the legitimacy of

5 This is unlike other federal civil rights laws—like the Civil Rights Act of 1964—that generally have no protected classes and symmetrically protect everyone under categories such as race, sex, or religion. As Samuel Bagenstos argues,

American civil rights laws generally have no protected classes. A law that prohibits race discrimination protects blacks, whites, and everyone else; a law that prohibits gender discrimination protects men and women; and a law that prohibits religious discrimination protects believers of all faiths as well as nonbelievers. But disability discrimination law is different. The ADA, for example, protects individuals against discrimination only if they have a “disability” as defined by the statute.

SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 34 (2009).

6 42 U.S.C. § 12102(1).

7 See *infra* text accompanying notes 186–187.

8 Debates about what counts as disability and who should be protected under disability rights law are not new. These debates famously led to an amendment of the ADA in 2008 that combatted the stringent judicial interpretation of the term. In the first twenty years after its enactment, courts chipped away at the ADA’s expansive definition of disability in what has been recognized as the backlash against the ADA. See Linda Hamilton Krieger, *Introduction to BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 1, 5 (Linda Hamilton Krieger ed., 2003) (“Indeed, by 1996 many in the disability community were speaking of an emerging judicial backlash against the ADA.”). The trigger to the ADA Amendments Act of 2008 (ADAAA) was a series of Supreme Court decisions in employment discrimination cases. First, it was the *Sutton* trilogy from 1999 that instructed courts to consider the ameliorative effects of mitigating measures when deciding whether plaintiffs had a disability, which had the effect of narrowing the scope of those who could be considered disabled under the ADA. See *Sutton v. United Airlines*, 527 U.S. 471, 475 (1999) (“[T]he determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment.”); *Murphy v. United Parcel Serv.*, 527 U.S. 516, 518–19 (1999) (upholding the lower court’s decision that denied relief to a disabled petitioner because the petitioner took medication for hypertension); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S.

disability rights.⁹ As I have claimed in a recent piece,¹⁰ if everyone is somehow disabled, then no one should receive the legal protection that the disability rights law aims to provide, as that is designed for the specific minority group of people with disabilities.¹¹ Second, the use of disability as metaphor and the disability frame advocacy strategies ignore, and therefore undermine, the historical and cultural context of the disability rights movement and the lived experiences of people with disabilities. Third, I argue that the use of disability as metaphor in case law and legislation is not necessary and can therefore be avoided. Fourth, using disability as a metaphor for disadvantage contradicts the concept of disability pride—one of the tenets of the disability justice movement. The word disability, I ultimately contend, should be used as a term of art and not as a metaphor when discussing legal rights.

I begin the Article in Part I by briefly defining the term metaphor and describing the use of metaphorical speech in legal discourse and texts. In Part II, I describe the use of disability metaphors in American culture and everyday life. Subsequently, in Part III, I continue by examining the use of disability metaphors in statutes and case law. In Part III, I specifically discuss the use of disability as a metaphor in three contexts: the inability to file a claim (i.e., legal disabilities), the inability to continue in a legal role, and the disadvantage inflicted by legislation or state action in the context of equal protection claims under the Fourteenth Amendment. In Part IV, I detail how the use of disability as metaphor in legal discourse may have influenced the use of the disability frame advocacy in litigation and legal

555, 565-66 (1999) (concluding that mitigation measures are dispositive in determining whether an individual meets the ADA's definition of disability). Three years later, in *Toyota v. Williams*, a unanimous Court explicitly stated that the ADA's definition of disability should be "interpreted strictly to create a demanding standard for qualifying as disabled." See *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 197 (2002). The goal of the ADAAA amendments was to refocus the ADA on issues of employment discrimination and qualifications of people with disabilities in the job market, as opposed to ensuring the plaintiffs' standing, meaning their status as having a disability. Although the ADAAA did not reshape the original definition of disability, it did determine that this definition should be interpreted broadly. See 42 U.S.C. § 12102(2)(A)-(B) (explaining that major life activities "include, but are not limited to" the specific actions listed in the section); see also Elizabeth F. Emens, *Disabling Attitudes: US Disability Law and the Amendment Act*, 60 AM. J. COMP. L. 205, 211 (2012) ("The ADAAA expressly aims to 'carry out the ADA's objectives . . . by reinstating a broad scope of protection.'" (quoting 42 U.S.C. § 12101(b)(1))).

⁹ In a similar vein, in 2008 Richard Ford discussed how "racism-by-analogy claims" that attempted to apply civil rights legislation against racial discrimination to other groups could cause backlash against efforts to ensure racial quality. See RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 174-177 (Picador ed., 2009).

¹⁰ See Doron Dorfman, *The Universal View of Disability and Its Danger to the Civil Rights Model*, in *DEFINING THE BOUNDARIES OF DISABILITY: CRITICAL PERSPECTIVES* 37, 39 (Licia Carlson & Matthew C. Murray eds., 2021).

¹¹ *Id.* at 39-40.

scholarship. I proceed to identify what is wrong with the use of disability as a metaphor through disability frame advocacy claims in Part V. Put briefly, these claims perpetuate an outdated understanding of disability through the original social model by downplaying the role of impairment and the “bodymind,”¹² thus disregarding and marginalizing the lived experiences of people with disabilities and the history that led to creation of disability rights laws. Finally, in Part VI, I conclude by offering a normative way forward—one that moves beyond the use of disability as metaphor.

This Article is the first examination of the metaphoric use of the word disability in American law, and thus it is not meant to be all-encompassing. I hope this Article inspires readers to search for uses of disability as a metaphor in other areas of law, thus furthering the analysis I have offered.

I. METAPHORS IN LAW

The word metaphor comes from the Greek word *meta pherein*, which means “to carry over.”¹³ A metaphor “‘carries over’ a meaning from one context to another.”¹⁴ The essence of a metaphor is understanding one concept in terms of another.¹⁵

In their canonical 1980 book, *Metaphors We Live By*, George Lakoff and Mark Johnson argue that metaphoric speech exists well beyond the literary realm and lyrical pieces.¹⁶ Metaphors are ubiquitous in everyday life, and they hold significance well beyond language.

Take, for example, the concept of argumentation generally and legal argumentation specifically. We talk about argumentation using metaphors

¹² “Bodymind” is a term of art in disability studies. The use of one word alludes to the observation that “mental and physical processes not only affect each other but also give rise to each other—that is, because they tend to act as one, even though they are conventionally understood as two—it makes more sense to refer to them together, in a single term.” Margaret Price, *The Bodymind Problem and the Possibilities of Pain*, 30 *HYPATIA* 268, 269 (2015). As disability studies scholar Margaret Price wrote: “I started using *bodymind* freely, mostly because I was tired of saying *body-and-mind* all the time, and unhappy about the implicit division created by the coordinating conjunction.” *Id.*; see also SAMI SCHALK, *BODYMINDS REIMAGINED: (DIS)ABILITY, RACE, AND GENDER IN BLACK WOMEN’S SPECULATIVE FICTION* 5 (2018) (“Bodymind is a materialist feminist disability studies concept from Margaret Price that . . . insists on the inextricability of mind and body and highlights how processes within our being impact one another in such a way that the notion of a physical versus mental process is difficult, if not impossible to clearly discern in most cases.”).

¹³ See STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 53 (2001).

¹⁴ *Id.*

¹⁵ See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5 (2003).

¹⁶ *Id.* at 3.

related to wars,¹⁷ carrying over terms from the battlefield, such as “the claims are *indefensible*,” and the “criticisms were *right on target*.”¹⁸ This language affects how we behave and, in this context, the way we argue. For example:

We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his positions and we defend our own. . . . We plan and use strategies. If we find a position indefensible, we can abandon it and take a new line of attack. Many of the things we *do* in arguing are partially structured by the concept of war. Though there is no physical battle, there is a verbal battle, and the structure of an argument—attack, defense, counterattack, etc.—reflects this.¹⁹

In short, metaphors influence how we think, learn, process information, and act.²⁰

Cognitive theory teaches us that metaphors have both cognitive and semantic contents and that metaphorical inference occurs frequently and unconsciously.²¹ Metaphors are often used as tools that shape opinions in

¹⁷ Wars have also been used as metaphors to describe historical periods (e.g., the Cold War era) and influence the governing law, specifically protection of rights and government powers. As legal historian Mary Dudziak explains,

Just as Americans changed their clocks during World War II, we adjust ourselves to a different order of time during war. Wartime is not merely a regulation of the clock; it is the calibration of an era. Once we enter it we expect the rules to change. . . .

. . . .

Dividing time into wartime and peacetime offers a convenient way to periodize history, but more is at stake in our construction of wartime. Law is thought to vary depending on what time one is in.

MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 15-16 (2012).

¹⁸ See LAKOFF & JOHNSON, *supra* note 15, at 4 (emphasis in original).

¹⁹ *Id.*

²⁰ *Id.*; see also Paul H. Thibodeau & Lera Boroditsky, *Metaphors We Think With: The Role of Metaphors in Reasoning*, 6 PLOS ONE 1, 5 (2011) (summarizing experimental results that show how presenting different metaphors related to crime lead people to devise different solutions to solve the problem). For a critique of Lakoff and Johnson’s theory from a disability studies perspective, arguing that it does not account for the myriad ways in which different bodies and minds experience the world physically, cognitively, and through their senses, see Amy Vidali, *Seeing What We Know: Disability and Theories of Metaphor*, 4 J. LITERARY & CULTURAL DISABILITY STUD. 33, 34 (2010). Scholars have also examined the effect of the use of metaphors in the medical realm. See Mildred K. Cho, Nina Varsava, Stephanie A. Kraft, Gary Ashwal, Katie Gillespie, David Magnus, Kelly E. Ormond, Alex Thomas, Benjamin S. Wilfond & Sandra S.-J. Lee, *Metaphors Matter: From Biobank to a Library of Medical Information*, 20 GENETICS MEDICINE 802, 802 (2018) (“We argue that, because metaphors such as *biobank* can influence public attitudes and interpretation of complex scientific concepts, yet have culturally specific meanings, the choice of metaphorical terms requires careful consideration to engender trust, especially among populations underrepresented in biobank-related research.”).

²¹ WINTER, *supra* note 13, at 50-51; see also Robert Sapolsky, *This Is Your Brain on Metaphors*, N.Y. TIMES (Nov. 14, 2010, 4:32 PM), <https://opinionator.blogs.nytimes.com/2010/11/14/this-is->

areas such as politics. Classic examples include the Nazi framing of Jews as a “disease within the body of the people” which helped enable the Holocaust,²² or the post 9/11 “war on terrorism” that set the stage for the invasion of Afghanistan.²³ Likewise, public discourse regarding crime commonly turns offenders into animals that “prey on unsuspecting victims” and must be “tracked” down and “caught,” thereby othering them.²⁴ And if a criminal is an animal, it would seem to follow that they must be caged or euthanized like a dog.²⁵

Metaphors also exist in the legal realm and are often used to structure concepts that later translate into actions.²⁶ Law allegedly prefers “the objective over the subjective, the literal over the metaphorical, and the rational over the imaginative.”²⁷ Yet legal actors (i.e., legislators, judges, and attorneys) employ metaphors in their professions—metaphors such as “chain of causation, corporate speech, [and] statutory rape.”²⁸ Many even think about law itself in terms of metaphor. In the mid-1980s, the late legal scholar Milner Ball wrote how the metaphorical view of the “law [as] the bulwark of freedom,” which promises equal justice, is flawed.²⁹ Much like his contemporaries in critical legal studies, Ball discussed how such a metaphor of equality masks aggression and structural injustice against women, people of color, and other disempowered groups in society.³⁰ Ball thus sought to demonstrate how metaphors can conceal or highlight certain aspects of a concept and thus affect perceptions and actions.³¹

your-brain-on-metaphors [<https://perma.cc/7334-CN3X>] (“[The] neural confusion about the literal versus the metaphorical gives symbols enormous power . . .”).

²² See Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845, 867 (2007); see also SUSAN SONTAG, *ILLNESS AS METAPHOR* 83-84 (1978) (concluding that Hitler’s description of Jews as “a racial tuberculosis among nations” analogous to a cancer was “an incitement to violence”).

²³ Johnson, *Mind, Metaphor, Law*, *supra* note 22, at 868.

²⁴ Thibodeau & Boroditsky, *Metaphors We Think With*, *supra* note 20, at 1 (emphasis in original). For a discussion of the use of metaphors that have a similar “othering” effect in immigration law, see Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1569 (2011).

²⁵ Cf. Thibodeau & Boroditsky, *Metaphors We Think With*, *supra* note 20, at 2 (“Might talking about crime as a beast lead people to propose dealing with a crime problem the same way as one would deal with a literal wild animal attack?”).

²⁶ See Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 888 (2010) (“But the law has such stories, too. Just like any other story, the law’s story will need characters, a plot, and perhaps a prop here and there. Metaphor can help provide all of these elements of the story.”).

²⁷ WINTER, *supra* note 13, at 44.

²⁸ MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* 23 (1985).

²⁹ *Id.* at 23, 27.

³⁰ *Id.* at 25.

³¹ *Id.* at 22; see also LAKOFF & JOHNSON, *supra* note 15, at 10 (“In allowing us to focus on one aspect of a concept (e.g., the battling aspects of arguing), a metaphorical concept can keep us from focusing on other aspects of the concept that are inconsistent with that metaphor.”).

II. DISABILITY AS METAPHOR

Disability studies scholars have drawn attention to the use of the term disability as a metaphor in myriad contexts.³² In their seminal book *Narrative Prosthesis*, David Mitchell and Sharron Snyder explored disability as a metaphor in literary pieces ranging from Sophocles to Melville.³³ Mitchell and Snyder argue that authors use the disabled body as a metaphor to explore otherness—the “outside the norm”—more generally than speaking about the per se impairment or pathology of the character.³⁴ Disability is thus a narrative device: a crutch or prosthesis upon which the plot leans on when discussing macro-level concepts.³⁵ Similarly, Susan Sontag famously wrote how illnesses are used as metaphors in both political discourse and literary pieces to create provocation around social issues.³⁶ She focused specifically on tuberculosis and cancer—and later on HIV/AIDS³⁷—to demonstrate how blame, punishment, and shame associated with those illnesses influence the way patients are treated by the medical establishment and society at large.³⁸ More recently, Sunaura Taylor discussed “ecological metaphors of health”—such as “the collapse of Earth’s life support systems, or the decline of ocean

³² See SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 126 (1998) (“The metaphors that allude to disability or invoke disability imagery are everywhere, and the ideas they are based on are accepted so casually that we will have a hard time dissuading people from using them.”).

³³ See DAVID T. MITCHELL & SHARON L. SNYDER, NARRATIVE PROSTHESIS: DISABILITY AND THE DEPENDENCE OF DISCOURSE 48, 50 (2001).

³⁴ *Id.* at 49.

³⁵ See *id.* (“Our phrase *narrative prosthesis* is meant to indicate that disability has been used throughout history as a crutch upon which literary narratives lean for their representational power, disruptive potentiality, and analytical insight. . . . [W]e want to demonstrate that the disabled body represents a potent symbolic site of literary investment.”); see also *id.* at 62 (“The ability of disabled characters to allow authors the metaphorical ‘play’ between macro and micro registers of meaning-making establishes the role of the body in literature as liminal point in the representational process.”). Interestingly, film scholar and phenomenologist Vivian Sobchack—who is an amputee—argued against using the term prosthetics metaphorically or figuratively since

the primary context in which “the prosthetic” functions literally rather than figuratively has been left behind as has the experience and agency of those who, like myself, actually use prostheses without feeling “posthuman” and who, moreover, are often startled to read of all the hidden powers their prostheses apparently exercise both in the world and in the imaginations of cultural theorists.

Slava Greenberg, *Stories Our Bodies Tell: The Phenomenology of Anecdotes, Comings Out, and Embodied Autoethnographies*, 14 REV. DISABILITY STUD. 1, 11 (2018).

³⁶ See SONTAG, ILLNESS AS METAPHOR, *supra* note 22, at 82 (“The melodramatics of the disease metaphor in modern political discourse assume a punitive notion: of the disease not as a punishment but as a sign of evil, something to be punished.”).

³⁷ SUSAN SONTAG, AIDS AND ITS METAPHORS 24-26, 45 (1989).

³⁸ See SONTAG, ILLNESS AS METAPHOR, *supra* note 22, at 58 (“Any important disease whose causality is murky, and for which treatment is ineffectual, tends to be awash in significance. . . . The disease itself becomes a metaphor. Then, in the name of the disease (that is, using it as a metaphor), that horror is imposed on other things. The disease becomes adjectival.”).

health”—to bring attention to the impact of environmental crises and climate change on people’s health and consequent disablement.³⁹

Disability scholars have drawn attention to the ubiquitous use of ableist language and disability metaphors in everyday life⁴⁰ and academic discourse.⁴¹ As Vivian May and Beth Ferri argue, “when disability shows up in our everyday language it almost always signals ignorance, confusion, lack, absence, and ineptitude.”⁴² Accordingly, these scholars claim that terms such as “crippling,” “lame,” or “crazy” enforce negative meanings to the term disability and degrade people with disabilities.⁴³ An exception to disability metaphors representing negative traits or conditions is the Western idea of “blind justice.”⁴⁴ The icon of justice, a blindfolded woman bearing a series

³⁹ Sunaura Taylor, *Age of Disability: On Living Well with Impaired Landscapes*, ORION MAG. (Nov. 9, 2021), <https://orionmagazine.org/article/age-of-disability> [https://perma.cc/RNC5-S9VU].

⁴⁰ See generally LINTON, *supra* note 32, at 126; BRENDA JO BRUEGGEMANN, LEND ME YOUR EAR: RHETORICAL CONSTRUCTIONS OF DEAFNESS 34-35 (1999); Vivian M. May & Beth A. Ferri, *Fixated on Ability: Questioning Ableist Metaphors in Feminist Theories of Resistance*, 27 PROSE STUD. 120, 126-27 (2005).

⁴¹ See LENNARD DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM, AND OTHER DIFFICULT POSITIONS 87 (2002) (“The extent to which people with disabilities are excluded from the progressive academic agenda is sobering, and the use of ableist language on the part of critics and scholars . . . is shocking to anyone who is even vaguely aware of the way language is implicated in discrimination and exclusion.”); May & Ferri, *Fixated on Ability*, *supra* note 40, at 127 (“Ableist metaphors also slip into scholarly discourse as evidence of any number of negative qualities or attributes.”); Sami Schalk, *Metaphorically Speaking: Ableist Metaphors in Feminist Writing*, 33 DISABILITY STUDIES. Q. (2013), <https://dsq-sds.org/article/view/3874/3410> [https://perma.cc/TD22-DL48] (“[D]ominant cultural ideas about, and (mis)representations of, blindness are the factors that make blindness a useful source domain, enabling metaphors of blindness to be generally understood in everyday and academic linguistic practices.”).

⁴² May & Ferri, *Fixated on Ability*, *supra* note 40, at 127.

⁴³ See *id.* at 126-27, 132 (“Just as whiteness frequently operates as an unstated/unmarked racial norm . . . able-bodiedness continues to operate as the unstated/unnoticed bodily norm both in analogies to disability and in metaphors for freedom and agency.”); see also Lydia X. Z. Brown, *Ableism/Language*, AUTISTIC HOYA (Sept. 14, 2022), <https://www.autistichoya.com/p/ableist-words-and-terms-to-avoid.html> [https://perma.cc/YJ4F-GEJ3] (providing a glossary of commonly used ableist phrases). For a recent call to legal professionals to refrain from ableist language, see Meg E. Ziegler, *Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability*, 61 B.C. L. REV. 1183, 1207-08 (2020), and Rebecca Cokley, *Calling Trump Unwell Doesn’t Hurt Trump. It Hurts Disabled People*, WASH. POST (June 16, 2020, 3:10 PM), <https://www.washingtonpost.com/outlook/2020/06/16/mock-trump-hurts-disabled> [https://perma.cc/U4H2-LKE8].

⁴⁴ See Doron Dorfman, *The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor*, 5 CAMBRIDGE J. INT’L & COMPAR. L. 272, 305 (2016) (“The image of the blind Icon of Justice has been a fixture in the Western world for hundreds of years. Nonetheless, not much has been written about the complexities and obstacles that stand in the way of placing actual blind judges on the bench. Nor has the Icon been used to represent a social struggle regarding disability rights.”). Meanwhile, the use of sensory disabilities like blindness or deafness is used to illustrate a negative meaning through phrases such as “turn a blind eye to” or “fallen on deaf ears.” See Brown, *supra* note 43 (listing ableist phrases used in everyday discourse); see also Joshua Sealy-Harrington, *Embodying Equality: Stigma, Safety and Clément Gascon’s Disability Justice Legacy*, 103 SUP. CT. L.R. 197, 235-37 (2021) (“The metaphorical use of blindness is often critiqued

of symbolic objects,⁴⁵ represents the aspiration that judges achieve “metaphoric blindness,” or the expectation that judges adjudicate the cases before them fairly and impartially (i.e., blindly) while disregarding any characteristics of the litigants that are irrelevant to the essence of the dispute.⁴⁶

Disability metaphors also exist in sports.⁴⁷ Consider the term “handicap”⁴⁸ used in various sports like golf, bowling, horse racing, and sailing to describe a “method of offsetting the varying abilities or characteristics of competitors in order to equalize their chances of winning.”⁴⁹ In golf,⁵⁰ for example, handicap stands for the number of strokes a golfer can remove from their

by disability justice advocates for substituting disability for undesired, or more specifically here, blindness for ignorance.”); Elizabeth F. Emens, *What’s Left in Her Wake: In Honor of Adrienne Asch*, 44 HASTINGS CTR. REP. 19, 20 (2014) (describing her debate with late bioethicist and disability studies scholar, Adrienne Asch, regarding whether disability metaphors, and specifically the use of blindness as metaphor, can ever be neutral or positive).

⁴⁵ See Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1741-1743 (1987) (“For much of the Western world’s history, Justice has been depicted as a large female figure, sometimes draped, sometimes naked, holding or surrounded by a series of props identified as her attributes. Commonly, she carries a scale and/or a sword.” (citation omitted)).

⁴⁶ See Dorfman, *The Blind Justice Paradox*, *supra* note 44, at 275-77 (“[Blindness] is considered to accompany the positive virtues of divine spirit, divine wisdom, clairvoyance, and fair and untainted judgment.”).

⁴⁷ The examples of disability metaphors in sports are particularly interesting because they are actually part of the rules of the competition, which makes them closer to legal discourse than everyday discourse. For a discussion of the “law-ness of sports systems,” see Mitchell N. Berman, “Let ‘Em Play”: *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1329 (2011).

⁴⁸ The history of the term handicap in sports dates back to seventeenth-century England, while only “[b]y the early twentieth century, one needed only to say ‘the handicapped’ to be understood as speaking of disabled people.” See Douglas C. Baynton, “*These Pushful Days: Time and Disability in the Age of Eugenics*,” 13 HEALTH & HISTORY 43, 47-48 (2011) (describing the history of the term handicap). Even though the use of the term handicap in sports predates the association of the term with disability, I still argue that it should be considered a metaphoric use in contemporary times: through time, the term has been more clearly and commonly associated with disability than with sports. See *infra* text accompanying notes 61–64. For a discussion of the changes made to metaphoric use of the term disabled in recent years in other sports, such as Major League Baseball, see *infra* notes 248–249 and accompanying text.

⁴⁹ See *Handicap (Sports)*, BRITANNICA, <https://www.britannica.com/sports/handicap-sports> [<https://perma.cc/NNN4-7FDN>].

⁵⁰ Coincidentally, one famous Supreme Court case regarding disability modifications under Title III of the ADA had to do with a golf tournament. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 664 (2001). The case involved professional golfer Casey Martin, who lived with Klippel-Trenaunay-Weber Syndrome, “a degenerative circulatory disorder that obstruct[ed] the flow of blood from his right leg back to his heart.” *Id.* at 668. The question was whether Martin as “a disabled contestant,” could be denied the use of a golf cart because it would “‘fundamentally alter the nature’ of the tournaments . . . to allow him to ride when all other contestants [had to] walk.” *Id.* at 664-65 (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)). The Court ruled for Martin, held that Title III covers athletes in sporting events, that modifications and accommodations should be granted to them after an individualized inquiry has been made, and that in this case Martin’s request of the waiver from the walking rule should have been granted. *Id.* at 681, 688, 690.

total score for a round (the lower the handicap, the better the player).⁵¹ This system allows less advanced golfers to deduct their handicap and play in the same tournaments with more advanced golfers.⁵² This metaphor thus joins the list of those referring to disability as a disadvantage.

Even though these examples of disability metaphors are outside the scope of my analysis in this Article, they inform my thinking on the topic. In this Article, I investigate only the term disability as it appears in legislation and case law. As I will demonstrate in the next Part, courts and legislators often use the term disability as a metaphor for limitation or disadvantage and expand its meaning beyond that of people with impairments. This semantic use of the word fits within the conventional way of thinking about disability as “deficiency” or “defect” within the individual or as a personal tragedy.⁵³ Yet, as I will explain later, contemporary understandings of disability challenge the notion of disability as an individualistic, tragic, and medicalized concept, and advocate toward a complex understanding of disability as not only a personal but also a collective experience.

⁵¹ See *Golf Handicap Guide*, TODAY'S GOLFER (Dec. 18, 2014), <https://www.todaygolfer.co.uk/tips-and-tuition/tuition-features/golf-handicap-guide> [<https://perma.cc/8RJV-BWEJ>].

⁵² See *Handicapping*, BBC SPORT, http://news.bbc.co.uk/sport2/hi/golf/rules_and_equipment/4748865.stm [<https://perma.cc/8D4U-VPAM>] (explaining the concept of handicap and system of handicapping in golf).

⁵³ See 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, 409 (2011) (“Disability Studies embodies values based on viewing the person with a disability not as a victim of pathology, but as one who is limited more by social attitudes and environmental barriers than any inherent ‘defect’ or ‘deficiency’ within the person that must be remedied.”); see also Mike Oliver, *Social Policy and Disability: Some Theoretical Issues*, 1 DISABILITY, HANDICAP & SOC’Y 5, 6 (1986) (“[Most writers on social policy] have accepted the general view of disability as a personal tragedy. From this it logically follows that the reasons why disabled people cannot or do not participate fully in society stem directly from the physical or psychological limitations of the disabled person . . .”); MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 2 (1990) (“As far as disability is concerned, if it is seen as a tragedy, then disabled people will be treated as if they are the victims of some tragic happening or circumstance.”); Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 YALE J.L. & HUMANITIES 63, 69 (2006) (arguing that disability studies should focus “on the social and cultural construction of disability,” resist “the overpowering medicalization and pathologization of disability,” and abandon “its view as an individual misfortune”); BAGENSTOS, *supra* note 5, at 18-19 (“Perhaps most significant to disability rights activists, the view of disability as a personal tragedy obscures the social practices that exclude ‘the disabled’ from the opportunity to participate fully in society.”); Adi Goldiner, *Understanding “Disability” as a Cluster of Disability Models*, J. PHIL. DISABILITY (Apr. 5, 2022), https://www.pdcnet.org/collection/fshow?id=jpd_2022_0999_4_4_11&pdfname=JPD_Goldiner.pdf&file_type=pdf [<https://perma.cc/VFW9-4UWL>] (describing the “tragic conception of disability” and the tragedy model that often conflates with the medical model).

III. DISABILITY AS METAPHOR IN AMERICAN LAW

The disability metaphor in law—which stands at the heart of this Article—is made available through a common linguistic phenomenon called “lexical ambiguity,” also known as semantic ambiguity.⁵⁴ Most words in English can refer to more than one concept and are thus ambiguous. A study found that eighty-four percent of the entries in the widely used Wordsmyth Dictionary have more than one meaning, and thirty-seven percent of the entries have five or more meanings.⁵⁵

One common form of lexical ambiguity is polysemy: a situation in which there is ambiguity between semantically related words. For example, the word “run” is a polysemous word with many related dictionary definitions that somewhat overlap in meaning, yet require the reader to decipher which exact definition of the word the writer is referring to (e.g., “the athlete runs down the track,” “the mayor runs for election,” and “the film runs at the cinema”).⁵⁶

Disability is a polysemous word. The Merriam-Webster Dictionary initially defines it as “a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person’s ability to engage in certain tasks or actions or participate in typical daily activities and interactions” or as “an impairment.”⁵⁷ Yet it also recognizes the word to mean “a disqualification, restriction, or disadvantage” or “lack of legal qualification to do something.”⁵⁸ Black’s Law Dictionary also defines disability in a similar way⁵⁹: “1. The inability to perform some function; an objectively measurable condition of impairment, physical or mental,” or “2. Incapacity of the eyes of the law.”⁶⁰

⁵⁴ Jennifer Rodd, *Lexical Ambiguity*, in THE OXFORD HANDBOOK OF PSYCHOLINGUISTICS 96 (Shirley-Ann Rueschemeyer & M. Gareth Gaskell eds., 2d ed. 2018).

⁵⁵ Jennifer Rodd, Gareth Gaskell & William Marslen-Wilson, *Making Sense of Semantic Ambiguity: Semantic Competition in Lexical Access*, 46 J. MEMORY & LANGUAGE 245, 250 (2002).

⁵⁶ Rodd, *Lexical Ambiguity*, *supra* note 54, at 97–98. For the ways in which polysemy surfaces in many areas of law, see Daniel J. Hemel, *Polysemy and the Law*, 76 VAND. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4264800 [<https://perma.cc/JZY8-YQFA>].

⁵⁷ See *Disability*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/disability> [<https://perma.cc/94NZ-ANHZ>].

⁵⁸ *Id.*

⁵⁹ In their study of the use of metaphors in everyday life, Lakoff and Johnson mentioned that dictionaries do not usually include metaphoric speech. See LAKOFF & JOHNSON, *supra* note 15, at 115. Yet, with the term disability, there seems to be an alignment of the disadvantage and impeding metaphor and the actual semantic of a word that literally means inability. See Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1131 (2016) (“[T]he very semantics of the word ‘disability’ may communicate lack of ability.”).

⁶⁰ *Disability*, BLACK’S LAW DICTIONARY (11th ed. 2019). The second definition relates to the Social Security Act’s (SSA) definition of disability, which is different from the ADA’s. Black’s Law Dictionary explains the difference between the SSA’s and ADA’s definitions of disability. See *id.* For further discussion on the distinctions between the SSA’s and ADA’s definitions of disability, and the manner in which empowered disability identity influenced by the social model of disability plays

Language is dynamic and prone to change. Words tend to develop new meanings in accordance with society and culture.⁶¹ The last few decades brought about a significant change in the societal, theoretical, and legal treatment of disability.⁶² Therefore, I claim that nowadays the word disability has become most identified with the social movement, the collective identity, the body of laws aimed at protecting the rights of disabled people, the lived experience of those living with impairments, and the social oppression that is directed at them.⁶³ In light of this legal and social recognition, I argue that, through time, other types of uses of the word disability as disadvantage, inability, or impediment have become metaphoric uses. The practice of using disability as a linguistic metaphor should no longer be invoked in legislation and case law today.⁶⁴

In this Part, I will describe how legislation and case law use disability as a metaphor in multiple contexts. In all these instances, disability means something unrelated to impairment; rather, it takes on meaning related to disadvantage, inability, or impediment. Courts discussing Social Security

out in the process of applying for Social Security Disability Benefits, see Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 L. & SOC. INQUIRY 195 (2017), and Doron Dorfman, *Disability Identity in Conflict: Performativity in the U.S. Social Security Benefits System*, 38 T. JEFFERSON L. REV. 47 (2015).

⁶¹ See Rodd, *Lexical Ambiguity*, *supra* note 54, at 99 (“Any individual speaker of a language will continue to gain new meanings/senses for the words that they already know throughout their lifetime.”).

⁶² See Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 622 (2017) (“The first theoretical foundation for a fully developed right to access is disability studies, a theoretical perspective that in recent decades produced a rich scholarship of disability critique in various academic fields. Disability studies have entered the legal sphere as well . . .”).

⁶³ In recent years, as the societal awareness of disability rights has increased, discussions about the appropriate terminology regarding people with disabilities have surfaced. A significant portion of these discussions has revolved around semantical choices between Person-First Language (i.e., people with disabilities) and Identity-First Language (i.e., disabled people). See, e.g., Ziegler, *Disabling Language*, *supra* note 43, at 1211-12; EMILY LADAU, DEMYSTIFYING DISABILITY: WHAT TO KNOW, WHAT TO SAY, AND HOW TO BE AN ALLY 10-15 (2021); Erin E. Andrews, Robyn M. Powell & Kara Ayers, *The Evolution of Disability Language: Choosing Terms to Describe Disability*, 15 DISABILITY & HEALTH J. 101328 (2022). Another part of these discussion stems directly from the semantic and metaphoric view of the term disability as disadvantage. The consensus within the disability community is that euphemisms for the word disability are demeaning due to their attributed negative semantic metaphoric meanings—interpretations such as “differently abled” or “challenged” or “special needs.” Disability activists urge others not to “dance around disability” and to “just say the word” to normalize the term and show there is no shame in it. See LADAU, *supra* at 16-18. For instance, a campaign by Lawrence Carter-Long, a disability rights advocate, has urged the public to avoid such euphemisms. See Barbara J. King, *‘Disabled’: Just #SayTheWord*, NPR (Feb. 25, 2016, 2:27 PM), <https://www.npr.org/sections/13.7/2016/02/25/468073722/disabled-just-saytheword> [<https://perma.cc/K7N9-VXDK>]; see also Erin E. Andrews, Anjali J. Forber-Pratt, Linda R. Mona, Emily M. Lund, Carrie R. Pilarski & Rochelle Balter, *#SaytheWord: A Disability Culture Commentary on the Erasure of “Disability”*, 64 REHABILITATION PSYCH. 111, 113 (2019).

⁶⁴ For examples of how the use of disability as metaphor in sports and legislation has been revoked, see *infra* text accompanying notes 248–252. Those examples, I argue, should inform further calls for reform that seek to eliminate metaphoric uses of the term disability in legal discourse.

Disability Benefits or disability insurance—contexts in which disability is defined as the inability to work⁶⁵—articulate this distinction well:

“A factual disability is an incapacity caused by illness or injury that prevents a person from engaging in his or her occupation,” whereas “[a] legal disability includes all circumstances in which the law does not permit a person to engage in his or her profession even though he or she may be physically and mentally able to do so.”⁶⁶

A. *Disability as Inability to File a Claim*

One context in which legal actors use the term disability as a metaphor for disadvantage is that of “legal disabilities.” According to renowned legal theorist Wesley Newcomb Hohfeld’s classic conception of fundamental legal terms, disability is the opposite of a legal power⁶⁷: the “capacity to do a thing.”⁶⁸ Later, legal actors used the term “legal disabilities” to describe disadvantages imposed on marginalized populations and individuals who do not have impairments in myriad aspects of citizenship.⁶⁹

The influential treatise Blackstone’s *Commentaries on the Laws of England*,⁷⁰ defines a person under a legal disability as including “an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a *praemunire*, not *in rerum natura* (being only a fictitious person), an infant, a feme-covert,⁷¹

⁶⁵ See *Goomar v. Centennial Life Ins. Co.*, 855 F. Supp. 319, 325 (S.D. Cal. 1994) (describing how courts have distinguished between “factual disabilities” and “legal disabilities”); see also *Pogue v. Nw. Mut. Life Ins. Co.*, No. 18-5291, 2019 WL 1376032, at *2-3 (6th Cir. Feb. 7, 2019) (explaining the legal standard that courts have used to differentiate between factual disabilities and legal disabilities).

⁶⁶ *Pogue*, 2019 WL 1376032, at *2-3 (quoting *Mass. Mut. Life Ins. v. Jefferson*, 104 S.W.3d 13, 26 (Tenn. Ct. App. 2002)). Section 423(d) of the Social Security Act defines disability as “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment.” 42 U.S.C. § 423(d)(1)(A). In my previous work, I have discussed the conceptual gap between the SSA’s and the ADA’s definition of disability and explored how the gap between these definitions tangibly manifests in the lives of disabled benefits claimants. See Dorfman, *Re-Claiming Disability*, *supra* note 60, at 204; Dorfman, *Disability Identity in Conflict*, *supra* note 60, at 61-62.

⁶⁷ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 44 (1913).

⁶⁸ *Id.* at 24.

⁶⁹ See Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 *GEO. J.L. & MOD. CRITICAL RACE PERSP.* 209, 230 (2010) (“Building further on the theme of Western xenophobia and the notion of disability as ‘other,’ it is useful to consider the fusion of ableism, sexism, racism, and heterosexism in constructs of nationhood and national purity.”).

⁷⁰ See generally Alan Watson, *The Structure of Blackstone’s Commentaries*, 97 *YALE L.J.* 795 (1988).

⁷¹ Historically, the term feme covert was used to refer to a married woman. See *Feme Covert*, *MERRIAM-WEBSTER*, <https://www.merriam-webster.com/dictionary/femecovert> [<https://perma.cc/5Q8W-CQCU>]; see also *United States v. Yazell*, 382 U.S. 341, 343 (1996) (explaining that in the early twentieth century the Texas law of coverture did not allow a married woman to contract for property, and describing this as “her disability to contract”).

or a monk professed.”⁷² Legislators and courts have also expanded the category of legal disabilities in the context of inability to file a claim against those with “habitual drunkenness” (i.e., alcoholism),⁷³ those who are citizens or subjects of a country at war with the United States,⁷⁴ and those whose professional license has been revoked.⁷⁵

At common law, people with legal disabilities lack legal capacity to sue, and accordingly, the statute of limitations does not run against them.⁷⁶ This issue has been famously applied to the doctrine of adverse possession in property law. Under the adverse possession doctrine, a person in possession of land that is owned by another without that landowner’s consent (i.e., the adverse possessor)⁷⁷ may be able to acquire a valid title to the land if they occupy it for a sufficient period of time.⁷⁸

The landowner in those situations will try to toll (i.e., extend) the beginning period of adverse possession to prevent the adverse possessor from gaining title. One way the landowner can toll the statute of limitations before it begins to accrue is to claim a “disability.”⁷⁹ In this context, courts have long interpreted the term disability as a metaphor—one that means an inability to exercise the legal right over the land, thus preventing adverse possessors from occupying the land for a period of time and gaining title.⁸⁰ Factors

⁷² 3 WILLIAM BLACKSTONE, COMMENTARIES *301.

⁷³ See, e.g., *Weber v. State*, 45 N.Y.S.2d 834, 836 (App. Div. 1944) (“Infancy, along with incompetency, habitual drunkenness, and the like, are legal disabilities.”).

⁷⁴ See MASS. GEN. LAWS ch. 260, § 8 (2022) (noting that a person may be “disabled from commencing an action” because they are citizen of a country that is at war with the U.S.).

⁷⁵ See *Pogue v. Nw. Mut. Life Ins. Co.*, No. 18-5291, 2019 WL 1376032, at *2 (6th Cir. Feb. 7, 2019) (“A legal disability may result from incarceration, the suspension of a professional license, surrendering a professional license as part of a plea agreement or to avoid disciplinary action, or practice restrictions imposed by a licensing board.”).

⁷⁶ See *Morgan v. People*, 158 N.E.2d 24, 26 (Ill. 1959) (“By the common law all [] persons [with a legal disability] lacked legal capacity to sue and therefore while they were under such disability the Statute of Limitations did not run against them.”).

⁷⁷ See William G. Ackerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 84 (1996) (describing the early common law definition of the adverse possession doctrine).

⁷⁸ The period of time required for an adverse possessor to acquire title ranges between three and twenty years, depending on the jurisdiction. See JESSE DUKEMINIER ET AL., PROPERTY, 73 (9th ed. 2017); see also Ackerman & Johnson, *Outlaws of the Past*, *supra* note 77, app. at 111-12 (collecting the adverse possession statutes, and the time required to gain title, for each of the fifty states).

⁷⁹ If the landowner becomes disabled during the statutory period, the statutory period will not be tolled and may continue uninterrupted for the benefit of the adverse possessor. See, e.g., *Bunce v. Wolcott*, 2 Conn. 27, 32 (Conn. 1816) (“[I]t has been long [recognized] in this state, that a statute of limitation can never begin to run during the existence of a disability, though when it once begins, it will not be interrupted by an intervening disability.”).

⁸⁰ See Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 748 n.25 (1986) (“The common law tradition [] is to grant extensions of the statute of limitations to those who are minors, insane, prisoners, or out of the jurisdiction, but only if this ‘disability’ existed on the day the trespasser moved in.”); see, e.g., *M’Iver v. Ragan*, 15 U.S. (2 Wheat) 25, 31 (1817); *Bucklin*

determining the disability of the landowner can include the landowner's young age, the fact that the landowner was incarcerated and thus unable to stay on the land,⁸¹ or the landowner's mental impairment⁸² (i.e., having an unsound mind).

Legal disabilities have also been employed in the context of incarcerated persons. Courts have traditionally referred to incarceration itself as a legal disability,⁸³ which entails the revocation of rights⁸⁴ such as suffrage,⁸⁵ unlimited access to the mail,⁸⁶ or the right to sue and appear in court.⁸⁷ Courts

v. Ford, 5 Barb. 393, 397 (N.Y. Gen. Term 1849); Berkin v. Marsh, 44 P. 528, 529 (Mont. 1896); Roberts v. Bailey, 470 S.W.3d 32, 40 (Tenn. 2015).

⁸¹ The Kentucky statute of adverse possession construes the term "disability" in this context to also mean the inability of the landowner to watch over their land because they were "out of the United States in the employment of the United States or of this state at the time the cause of action accrued." KY. REV. STAT. ANN. § 413.060 (West 2022); see also Lewis v. Marshall, 30 U.S. (5 Pet.) 470, 474-75 (1831) (explaining that Kentucky's adverse possession statute extended the statute of limitations for ten years after disabilities were removed).

⁸² This last factor aligns with my proposed understanding of disability as involving impairment of some kind. See Lennart V. Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 SW. L.J. 590, 592 (1962) (indicating that Texas's adverse possession statute defined persons under as disability as including a "person of unsound mind"); Lee Anne Fennell, *Efficient Trespass: The Case for 'Bad Faith' Adverse Possession*, 100 NW. U. L. REV. 1037, 1063 n.113 (2006) ("Disability statutes provide extra time on the statute-of-limitations clock where the record owner suffered at the time of adverse entry from a specified 'disability' such as minority, mental illness, or imprisonment."); Lynn Foster & J. Cliff McKinney, II, *Adverse Possession and Boundary by Acquiescence in Arkansas: Some Suggestions for Reform*, 33 U. ARK. LITTLE ROCK L. REV. 199, 201 (2011) ("[I]f the true owner of the property is under a disability, almost all states will toll the statute during at least the period of disability. Common disabilities are legal incapacity, minority, imprisonment, absence from the state, or military service.").

⁸³ See, e.g., *Bianchi v. Bellingham Police Dep't*, 909 F.2d 1316, 1318 (9th Cir. 1990) ("In light of these precedents, we hold that actual, uninterrupted incarceration is the touchstone for determining disability by incarceration."); *Hawkins v. Justin*, 311 N.W.2d 465, 467 (Mich. Ct. App. 1981) ("Our review persuades us that the purpose of the statute in question is to recognize that persons in prison are under a disability and their access to the judicial process has been impaired . . .").

⁸⁴ See, e.g., *Austin v. Medicis*, 230 Cal. Rptr. 3d 528, 540 (Cal. Ct. App. 2018) ("[A]lthough prisoners were stripped of all civil rights during their incarceration—a legal disability that prevented them from bringing civil actions or appearing in court—they would get those rights back when they were released."); *Landman v. Royster*, 333 F. Supp. 621, 645 (E.D. Va. 1971) ("[C]ourts must keep in mind that a recognized valid object of imprisonment is not just to separate and house prisoners but to change them. When it is asserted that certain *disabilities* must be imposed to these ends, courts may still inquire as to the actuality of a relation between means and end." (emphasis added)).

⁸⁵ See, e.g., *Ray v. Commonwealth*, 263 F. Supp. 630, 631 (W.D. Pa. 1967) (upholding a statute which prevented incarcerated persons from voting).

⁸⁶ See, e.g., *id.* (Noting that "the right to unlimited access to the mails" is a constitutionally permissible "suppression of rights of individuals after they have been incarcerated").

⁸⁷ See, e.g., *Branch Banking & Tr. Co. v. Davis*, No. CIV.A. 3:04-01055, 2008 WL 5099627, at *3 (S.D. W. Va. Dec. 2, 2008) (noting that in West Virginia, an inmate who files suit loses their right to be represented by a guardian, and in the absence of a waiver or a guardian ad litem, a suit cannot be maintained against a prisoner); *Campbell v. Guy*, 520 F. Supp. 53, 55 (E.D. Mich. 1981), *aff'd*, 711 F.2d 1055 (6th Cir. 1983) ("Incarceration, in many instances, is a disability to the commencement of legal action which properly tolls the running of a statute of limitations due to lack of free access to

have employed the disability metaphor when determining whether a state can constitutionally revoke any or all of these rights. The use of this metaphoric language in the context of incarceration is particularly ironic because a very high percentage of prisoners have impairments and are, in fact, considered to be people with disabilities under disability rights law. Nonetheless, they rarely succeed in gaining the recourse and accommodations they need.⁸⁸

Although some legal disabilities have been revoked—for example, a married woman’s inability to bring an action on her own accord,⁸⁹ or, in certain states, a child’s inability to be a claimant in malpractice suits⁹⁰—many legal disabilities are still recognized in law. These legal disabilities infringe upon certain individuals’ ability to file claims in both federal⁹¹ and state⁹² courts.

the Courts.”); Ruiz v. Ahern, No. 20-CV-01089-DMR, 2020 WL 4001465, at *6 (N.D. Cal. July 15, 2020) (“[H]istorically, state prisoners were not able to bring civil actions while they were incarcerated because they were considered ‘civilly dead.’” (quoting *Austin*, 230 Cal. Rptr. 3d at 539)).

⁸⁸ See generally Jamelia Morgan, *Contesting the Carceral State with Disability Frames: Challenges and Possibilities*, 170 U. PA. L. REV. 1905, 1906-09 (2022); Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 976-80 (2019); Margo Schlanger, *Prisoners with Disabilities*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 295-301 (Erik Luna ed., 2017); Prianka Nair, *The ADA Constrained: How Federal Courts Dilute the Reach of the ADA in Prison Cases*, 71 SYRACUSE L. REV. 791, 793-94 (2021); Rabia Belt, *The Fat Prisoners’ Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future*, 110 GEO. L.J. 785, 809-11 (2022).

⁸⁹ See, e.g., Walker v. Swayzee, 3 Abr. Pr. 136, 136 (N.Y. Ct. C.P. 1856) (“The statutes of 1848 and 1849 removed many if not all of the legal disabilities of coverture to the possession and enjoyment by the wife of a separate estate, and having conferred upon married women the power to hold real and personal estate, as if unmarried, established and subjected her to all the rights, obligations and liabilities incidental to such possession.”); Marcus L. Moxley, *North Carolina Baptist Hospitals, Inc. v. Harris: North Carolina Adopts a Gender-Neutral Approach to the Doctrine of Necessaries*, 66 N.C. L. REV. 1241, 1244 (1988) (“Having recognized the separate estate of the wife, . . . the general assembly [of North Carolina] removed the remaining disabilities of married women to contract and to convey property in their own names.”).

⁹⁰ For example, a state law in Indiana overturned the legal disability by reason of infancy and allowed persons between the ages of six and twenty one to file malpractice claims. See *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 603 (Ind. 1980) (“[T]here is no legal disability of malpractice claimant by reason of their infancy as between age 6 and 21.”). But the laws in states like Ohio and Colorado still define legal disability as including children under the age of 18. See OHIO REV. CODE ANN. § 2131.02 (West 2022) (“‘Legal disability’ . . . includes the following: (A) Persons under the age of eighteen years; (B) Persons of unsound mind; (C) Persons in captivity; (D) Persons under guardianship of the person and estate, or either.”); COLO. REV. STAT. ANN. § 13-81-101 (West 2022) (“‘Person under disability’ means any person who is a minor under eighteen years of age, a mental incompetent, or a person under other legal disability and who does not have a legal guardian.”). In addition, under Maryland law “[i]mprisonment, absence from the State, or marriage are not disabilities which extend the statute of limitations.” MD. CODE ANN., CTS. & JUD. PROC. § 5-201 (West).

⁹¹ See 28 U.S.C. § 2501 (“A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.”).

⁹² See, e.g., ARIZ. REV. STAT. ANN. § 12-502 (2022) (“If a person entitled to bring an action . . . is at the time the cause of action accrues either under eighteen years of age or of unsound mind, the period of such disability shall not be deemed a portion of the period limited for commencement

B. *Disability as Inability to Proceed in a Legal Role*

In procedural law—both civil and criminal—the term disability appears as an expanded concept that embraces the inability of a legal actor to continue taking on the role assigned to them. In this context, therefore, the meaning of disability diverges from the term of art adopted in disability rights law.

Rule 25 of the Federal Rules of Criminal Procedure, titled “Judge’s Disability,” notes that a judge can be replaced by another during a jury trial if “the judge before whom the trial began cannot proceed because of death, sickness, or other *disability*.”⁹³ Case law has interpreted the term disability under these circumstances to not only relate to a biomedical impairment, but also to mean the death of the judge’s immediate family member,⁹⁴ or a judge’s need to recuse themselves from the matter.⁹⁵

A recent case, with heavy political undertones, illustrates how recusal has been portrayed as a disability. In 2019, the Court of Appeals for the D.C. Circuit considered whether a special counsel, appointed by the deputy attorney general, had the authority to subpoena witnesses in the investigation into Russian interference in the 2016 presidential election.⁹⁶ After Attorney General Jeff Sessions—a presidential appointee—had recused himself from the investigations due to his relationship with President Trump, the Deputy Attorney General appointed Special Counsel Robert Mueller to preside over

of the action”); 735 ILL. COMP. STAT. 5/13-211 (2015) (“If the person entitled to bring an action, . . . is under the age of 18 years or is under a legal disability, then he or she may bring the action within 2 years after the person attains the age of 18 years, or the disability is removed.”); ME. REV. STAT. ANN. tit. 14, § 853 (2013) (“If a person entitled to bring any of the actions [listed under certain statutes] . . . is a minor, mentally ill, imprisoned or without the limits of the United States when the cause of action accrues, the action may be brought within the times limited herein after the disability is removed.”); MASS. GEN. LAWS ch. 204, § 22 (2022) (“[P]ersons out of the commonwealth and minors and others under legal disability to sue when their right of action first accrues may commence such action at any time within five years after the removal of the disability or after their return to the commonwealth.”); MINN. STAT. § 541.15 (2021) (suspending the period of limitations for a cause of action while a plaintiff is under eighteen years of age, insane, an alien or citizen of a country at war with the United States, or when the beginning of the action is stayed by injunction or statutory prohibition); TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (West 2021) (“(a) For the purposes of this subchapter, a person is under a legal disability if the person is: (1) younger than 18 years of age, regardless of whether the person is married; or (2) of unsound mind. (b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.”).

⁹³ FED. R. CRIM. P. 25(a) (emphasis added).

⁹⁴ See, e.g., *State v. Young*, No. W2002-03012-CCA-R3DD, 2005 WL 314114, at *19 (Tenn. Crim. App. Feb. 9, 2005) (concluding the death of an immediate family member constituted a disability under Rule 25(a) of the Tennessee Rules of Criminal Procedure, a rule identical to its federal counterpart, and thus upholding the substitution of a judge under such circumstances).

⁹⁵ See *United States v. Sartori*, 730 F.2d 973, 976 (4th Cir. 1984) (“The term ‘other disability’ in Rule 25(a) includes disability by reason of recusal.”); see also *United States v. Colon-Munoz*, 318 F.3d 348, 355 (1st Cir. 2003).

⁹⁶ *In re Grand Jury Investigation*, 916 F.3d 1047, 1051 (D.C. Cir. 2019).

the matter.⁹⁷ Special Counsel Mueller subsequently subpoenaed Andrew Miller, an aide to President Trump's campaign adviser Roger Stone, requiring him to produce documents and appear before the grand jury. Miller refused to cooperate and challenged Special Counsel Mueller's authority on the grounds that Mueller's appointment had been unlawful.⁹⁸ Miller contended that the deputy attorney general lacked authority to appoint Mueller as special counsel.⁹⁹

In deciding the case, the court interpreted section 508(a) of Title 28 of the United States Code, which provides: "In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office."¹⁰⁰ The court looked to dictionaries for the definition of the word "disability," finding that it meant "the 'inability to do something' or 'lack of legal qualification to do a thing.'"¹⁰¹ The court ruled against Miller and determined that "[at] the time of the Special Counsel's appointment then, the Attorney General had a 'disability' because he lacked legal qualification to participate in any matters related to that conflict."¹⁰² The court then compared its interpretation of section 508(a) to that of Rule 25(a) of the Federal Rules of Criminal Procedure.¹⁰³ The court interpreted the Rule's inclusion of the term disability to encompass recusal, illustrating the metaphorical understanding of disability as inability or impediment.¹⁰⁴

This case embraces the term disability as a metaphor for an expanded understanding of the word, one that goes beyond the concept of physical or mental impairment. In this case, disability was interpreted to mean a recusal that prevents a legal actor from performing his job. In the words of the court: "the Attorney General's single-issue recusal is a 'disability' that created a vacancy that the Deputy Attorney General was eligible to fill."¹⁰⁵

⁹⁷ Attorney General Sessions worked on Donald Trump's presidential campaign. The Department of Justice regulations provided that "no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship' with any person 'involved in the conduct that is the subject of the investigation or prosecution.'" *Id.* at 1050 (quoting 28 C.F.R. § 45.2).

⁹⁸ *Id.* at 1051.

⁹⁹ *Id.* at 1055.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 642 (1981)).

¹⁰² *Id.*

¹⁰³ *Id.*; see also FED. R. CRIM. P. 25.

¹⁰⁴ *In re Grand Jury Investigation*, 916 F.3d at 1055.

¹⁰⁵ *Id.* at 1056.

C. *Disability as Disadvantage in the Supreme Court's Equal Protection Jurisprudence*

Disability as a metaphor for disadvantage and the term “legal disability” have appeared in equal protection cases under the Fourteenth Amendment.¹⁰⁶ For example, in 1972, the Supreme Court struck down a Louisiana statute that denied the right of “dependent unacknowledged, illegitimate children to recover under Louisiana’s workmen’s compensation laws benefits for the death of their natural father,” as it violated the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁷ The Court used the term disability as a metaphor to mean disadvantage, concluding its decision by saying that: “imposing *disabilities* on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”¹⁰⁸

In the 1973 case *San Antonio Independent School District v. Rodriguez*, the Supreme Court examined whether the Texas school district’s financial system, which relied on local property taxation, violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against poor students in the district who lived in low property tax base areas and thus received less funding for their schools.¹⁰⁹ The questions before the Court were whether the Texas system of financing public education operated to “the disadvantage of some suspect class” or “impinge[d] upon a fundamental right,” and whether such system rationally furthered some legitimate state purpose.¹¹⁰ The Court held that the disparities in the educational system were not “the product of purposeful discrimination against any group or class,” and that the system furthered a legitimate purpose or interest.¹¹¹ For our purposes, however, what is important here is that when discussing the treatment of the “traditional indicia of suspectness,” the Court noted that the critical question was whether “the class is [] saddled with such *disabilities*, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to

¹⁰⁶ Under the Fourteenth Amendment’s Equal Protection Clause, a law that treats a suspect classification of people different to others similarly situated is subject to heightened scrutiny. *See* *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938); *see also* Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1190-91 (2020).

¹⁰⁷ *See* *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972).

¹⁰⁸ *Id.* at 175 (emphasis added). The use of the term “disability” in *Weber* is cited in courts to this day. *See, e.g.*, *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 618 (4th Cir. 2017).

¹⁰⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4-5 (1973).

¹¹⁰ *Id.* at 17-18.

¹¹¹ *Id.* at 55.

command extraordinary protection from the majoritarian political process.”¹¹²

Three years later, in *Massachusetts Board of Retirement v. Murgia*, the Supreme Court relied on the *Rodriguez* holding when it considered whether older people could be considered a suspect class in a case about a police officer forced into retirement at the age of fifty.¹¹³ The Court answered in the negative, again using disability as metaphor for disadvantage:

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not . . . been subjected to unique *disabilities* on the basis of stereotyped characteristics not truly indicative of their abilities.¹¹⁴

Ever since, courts have been citing *Rodriguez* and *Murgia*’s definition of a suspect class under the Fourteenth Amendment’s equal protection doctrine, which uses the term disability as a metaphor for disadvantage.¹¹⁵

Two decades later, the Supreme Court applied the term disability to restrictions on antidiscrimination protections for the LGBTQ+ community. In *Romer v. Evans*,¹¹⁶ the Court reviewed an amendment to Colorado’s Constitution that repealed city ordinances that had extended antidiscrimination protections to sexual orientation under the Equal Protection Clause of the Fourteenth Amendment.¹¹⁷ In his opinion, Justice Kennedy used the term disability several times as a metaphor for the disadvantages faced by LGBTQ+ individuals—disadvantages that could only be explained by the presence of

¹¹² *Id.* at 28 (emphasis added). Similarly, two years earlier, the California Supreme Court used the term “legal and social disabilities” to hold that a law that prohibited the hiring of women as bartenders was unconstitutional under the Equal Protection Clause, as it “disable[d]” women. *See Sailer Inn, Inc. v. Kirby*, 485 P.2d 529, 540-41 (Cal. 1971). The court further stated:

Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote

. . . .

Laws which disable women from full participation in the political, business and economic arenas are often characterized as “protective” and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible.

Id.

¹¹³ *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 308-09 (1976).

¹¹⁴ *Id.* at 313 (emphasis added).

¹¹⁵ *See, e.g., Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 426-27 (Conn. 2008); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 672 (Tex. Ct. App. 2010); *Able v. United States*, 968 F. Supp. 850, 862 (E.D.N.Y. 1997), *rev’d*, 155 F.3d 628 (2d Cir. 1998).

¹¹⁶ *Romer v. Evans*, 517 U.S. 620, 623 (1996).

¹¹⁷ *Id.* at 624.

animus.¹¹⁸ The Court concluded that the amendment creates a “broad and undifferentiated *disability* on a single named group.”¹¹⁹

In the 2014 landmark case *United States v. Windsor*, the Supreme Court concluded the Defense of Marriage Act (DOMA) was unconstitutional under the Due Process Clause of the Fifth Amendment.¹²⁰ In its decision, the Court once again used the term disability as metaphor for disadvantage.

¹¹⁸ *Id.* at 629-32. The Supreme Court invoked animus in limited instances, mainly in cases involving claims brought by groups that did not obtain suspect class status and are therefore subject only to rational basis standard of review. At that lowest level of scrutiny, the party challenging the law needs to prove that the law in question served no legitimate government interest—a standard that has proven to be a very difficult burden and would likely cause them to lose the case. Proving animus could be a way to overcome this hurdle. Animus means channeling “government power to burden out-groups” because of their identity and nothing more. See WILLIAM ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 3-4 (2017). Therefore, according to the Court, laws motivated by animus lack a legitimate governmental purpose and thus could change the outcome in a case involving an equal protection challenge otherwise doomed by the application of rational basis review. See Macfarlane, *Procedural Animus*, *supra* note 106, at 1191-93. Animus could thus “render either state or federal laws invalid.” *Id.* at 1189; see also Katie Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 218-22 (2019).

¹¹⁹ *Romer*, 517 U.S. at 632 (emphasis added). Justice Kennedy explained that the members of the affected class were subjected to a change in legal status that deprived them of the protections granted to them by city ordinances in their private and public lives, a change that imposed upon them “a special disability.” *Id.* at 627, 631. Under these circumstances, the Court could not find any rational relationship between a legitimate government interest and the broad legal disabilities that Amendment 2 imposed on LGBTQ+ individuals. *Id.* at 632. Because animus remained the only possible explanation for Amendment 2, the Court decided to strike down Amendment 2. *Id.* at 632-33. Courts have since extensively cited *Romer*’s terminology of disability as metaphor. See, e.g., *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 992 (D. Neb. 2005); *Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1233-34 (10th Cir. 2008); *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary*, 572 U.S. 291, 371-72 (2014); *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012); *Northville Downs v. Granholm*, No. 08-11858, 2009 WL 483076, at *8 (E.D. Mich. Feb. 25, 2009).

¹²⁰ *United States v. Windsor*, 570 U.S. 744, 775 (2013). *Kennedy v. Mendoza-Martinez* is an example of an older Supreme Court case in which the term disability was used as a metaphor for disadvantage inflicted by a statute in the context of the Due Process Clause of the Fifth Amendment. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). There, the Court discussed whether the penalty of deportation under the Immigration and Nationality Act of 1952 was a violation of the Fifth Amendment. *Id.* at 146. In the words of the Court: “The question of whether or not a statute is punitive ultimately depends upon whether the *disability* it imposes is for the purpose of vengeance or deterrence, or whether the *disability* is but an incident to some broader regulatory objective.” *Id.* at 208 (emphasis added); see also *id.* at 168-69 (“The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character Whether the sanction involves an affirmative disability or restraint . . . [is] relevant to the inquiry and may often point in different directions.”). Interestingly, the Court also used the word disability in its non-metaphorical sense (i.e., to mean a condition involving an impairment) when describing the circumstances of the plaintiff who evaded the draft. See *id.* at 218 (“The record also makes clear that in 1946 Cort was called up under the Selective Service law, physically examined, and classified as 4F because of *physical disability*.” (emphasis added)).

It emphasized that DOMA imposed a *disability* on same-sex couples, demeaned them, violated their dignity, and lowered their status.¹²¹

The irony is that while the Supreme Court evoked the term disability as a metaphor in its equal protection jurisprudence, it refused to recognize disability as a protected class under the Fourteenth Amendment. In *City of Cleburne v. Cleburne Living Center Inc.*,¹²² the Court noted the difficulty of differentiating “mentally retarded” individuals from other groups who also live with immutable disabilities, lack of political power, and vulnerability to public prejudice.¹²³ The *Cleburne* decision “cast a large shadow” on the constitutional treatment of disability.¹²⁴ Yet it served as a catalyst for the enactment of the ADA, which aimed to ameliorate “the systematic inferior treatment of disabled people.”¹²⁵

In this Part, I illustrated how legislation and case law have employed disability as metaphor to mean disadvantage, impediment, or inability more broadly. In the next Part, I describe how scholars and advocates have made a similar move using disability as a metaphor for advocacy purposes, a phenomenon I term “disability rights advocacy.” My claim is that such disability frame advocacy has been influenced by the metaphoric use of the term disability in legal texts. Courts’ and legislators’ loose application of the term disability may have inspired the too-easy adoption of a disability rights framework to advocate for resources, recognition, and redress for disempowered groups *outside of* people with impairments.

¹²¹ See *Windsor*, 570 U.S. at 775 (“The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a *disability* on the class by refusing to acknowledge a status the State finds to be dignified and proper.” (emphasis added)).

¹²² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985).

¹²³ *Id.* at 445-46. Martha Minow highlighted the problem with the Court’s approach in *Cleburne*:

Justice White’s opinion for the majority acknowledges that the Court’s prior decisions authorize intense judicial scrutiny of classifications affecting groups whose members have experienced “a ‘history of purposeful unequal treatment’ or have been subjected to unique disabilities on the basis of stereotyped characteristics, not truly indicative of their abilities.” Yet the majority concludes that mentally retarded people really are different from others and that this characteristic of difference is relevant to legitimate governmental purposes.

MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 109 (1990) (quoting *Cleburne*, 473 U.S. at 441).

¹²⁴ See Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 548 (2014).

¹²⁵ Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 111 (2002). Scholars have argued that the *Cleburne* decision also helped in the development of LGBTQ+ rights jurisprudence. See, e.g., William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621, 627 (2017) (“[T]he work of lower courts and the Supreme Court itself in building upon *Cleburne* has raised the prospect of a new type of equal protection review, one that is more granular, rather than focused on across-the-board heightened scrutiny for a particular type of discrimination.”).

IV. ENTER DISABILITY FRAME ADVOCACY

In his famous work, disability historian Douglas Baynton showed how during the nineteenth and early twentieth centuries, the category of disability served as a tool for exclusion in America—one that prevented groups from obtaining freedoms and equality under the law by depriving women the right of suffrage, denying freedom and civil rights to Black people, and restricting the immigration of Jewish people.¹²⁶ All those groups were portrayed as disabled and thus undeserving of equal citizenship. Disability was therefore used as a metaphor to justify exclusion. Nowadays, however, the tides have turned, and disability is used as a metaphor to justify legal protection.

Disability rights law is unique within the American civil rights tradition, as it includes a distributive element of “positive rights” that compels the state and private actors to affirmatively provide reasonable accommodations for people with disabilities.¹²⁷ Most American civil rights law is grounded in “negative rights,” or the prohibition of government interference with private behavior.¹²⁸ This accommodation mandate—meaning the positive rights element of disability rights—is an attractive tool in the eyes of other

¹²⁶ Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 33, 33 (Paul K. Longmore & Lauri Umansky eds., 2001).

¹²⁷ See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 329 (1990) (amended 2008) (stating that the purpose of the Act was to provide a “clear and comprehensive national mandate” for elimination of discrimination on the basis of disability); see also Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 561 (2020) (“The ADA broke new ground in American legal tradition, not only by prohibiting disability discrimination in all areas of public life but also by further combining a distributive element of ‘positive rights’ that compels the state and private actors to affirmatively provide accommodations for disabled people.”); Ruth O’Brien, *A Subversive Act: The Americans with Disabilities Act, Foucault, and an Alternative Ethic of Care at the Global Workplace*, 13 TEX. J. WOMEN & L. 55, 65-66 (2003) (“Relief from this type of discrimination is different than Title VII of the Civil Rights Act because employers might (but not always) be required to accommodate an employee. This anti-discrimination protection can therefore be regarded as a positive rather than a negative right.”); see generally Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 6 (2005).

¹²⁸ See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 40-41 (1999); see also Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1392-93 (1984) (“The contemporary rhetoric of rights speaks primarily to negative ones. By abstracting from real experiences and reifying the idea of rights, it creates a sphere of autonomy stripped of any social context and counterposes to it a sphere of social life stripped of any content.”); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1209 (2007) (“[T]he full inclusion of a socially marginalized group requires invoking both negative and positive rights; antidiscrimination prohibitions can prospectively prevent prejudicial harm, while equality measures are needed to remedy inequities that exist due to past practices.”).

advocates and scholars working on inequality to bring social change for historically disadvantaged minorities.¹²⁹

It therefore should not come as a surprise that in the decades following the legal recognition of people with disabilities as worthy of rights, legal protections, and reasonable accommodations, disability rights law emerged as a prevailing litigation and advocacy strategy. Lawyers and legal scholars seeking creative avenues to protect the needs of other oppressed communities have started using disability as a metaphor to claim legal protection of other groups.¹³⁰ This strategy was later identified as part of “the disability frame” phenomenon. I refer to such use of disability as metaphor as disability frame advocacy.

Jasmine Harris and Karen Tani defined the disability frame as

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.¹³¹

This Article is particularly concerned with disability frame advocacy, meaning the various uses of the disability frame that stretch the concept of disability beyond the existence of some type of impairment to protect disempowered groups other than disabled people, for reasons I explain in Part V.¹³²

¹²⁹ See Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 301 (2018) (“[D]isability law provides a better approach to addressing race discrimination and structural disadvantage than current race law and . . . a blackness-as-disability model would work by applying it to two areas where race discrimination and systemic inequities have been particularly intractable problems: education and policing.”).

¹³⁰ See generally Rabia Belt & Doron Dorfman, *Reweighting Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176 (2020).

¹³¹ See Harris & Tani, *Foreward: The Disability Frame*, *supra* note 3, at 1664.

¹³² I am not concerned about strategic invocations of the disability frame that center the experiences of disabled people or otherwise surface well-established forms of disability-based discrimination. For example, the disability frame has been employed in litigation arguing that the ADA should serve as a way to allow masking for disabled individuals in schools, universities, and the workplace as a modification to anti-mask legislation that states such as Iowa, Virginia, and Texas had enacted during the COVID-19 pandemic. See Mical Raz & Doron Dorfman, *Bans on COVID-19 Mask Requirements vs Disability Accommodations: A New Conundrum*, JAMA HEALTH FORUM, AUG. 6, 2021, at 1 (“Requiring a full return to in-person work for all individuals, while banning mask requirements, is discriminatory against individuals with certain disabilities. Accordingly, allowing mask requirements is an important form of disability accommodation.”); see also Doron Dorfman & Mical Raz, *Students with Disabilities Could Sue Their Schools to Require Masks*, WASH. POST (Aug. 19, 2021), <https://www.washingtonpost.com/outlook/2021/08/19/school-masking-americans-disability-act> [<https://perma.cc/XCU4-CG4L>]. A federal district court in Virginia accepted this claim. See *Seaman v. Virginia*, No. 3:22-CV-00006, 2022 WL 872023, at *27 (W.D. Va. Mar. 23, 2022). And so did the Eighth Circuit. See *Arc of Iowa v. Reynolds*, 24 F.4th 1162, 1167-68 (8th Cir 2022). In May 2022, the Eighth Circuit vacated as moot the district court’s preliminary injunction to allow masking in schools due to a change in conditions, i.e., the availability of COVID-19 vaccination

In 2018, Kimani Paul-Emile used disability as a metaphor in her article *Blackness as Disability?* to examine “the broad theoretical and practical implications of using disability law to understand the meaning of race and respond to racial discrimination and structural inequality.”¹³³ The statement “Blackness as disabling”¹³⁴ stands as a metaphor, as Paul-Emile explains that “Blackness, of course, is not by itself an impairment.”¹³⁵ Therefore, Paul-Emile’s article is properly understood as a theoretical endeavor to use disability as a metaphor.¹³⁶

In 2020, Craig Konnoth described how litigants and advocates¹³⁷—including, among others, transgender persons,¹³⁸ people with opioid use

for children (which were not available at the time the Iowa litigation started). See *Arc of Iowa v. Reynolds*, 33 F.4th 1042, 1044 (8th Cir. 2022). Importantly, Judge Kelley noted that the district court, on remand, could allow for masking as a reasonable accommodation for Iowa school children through interpretation of the state law: “Irrespective of the outcome of this litigation, parents of children with disabilities may still seek accommodations to ensure their children may safely access their schools as the COVID-19 pandemic wears on. Section 280.31 explicitly includes an exception when ‘any other provision of law’ requires face coverings.” *Id.* at 1050 (Kelly, J., dissenting). Nevertheless, in July 2022, the Fifth Circuit rejected such a claim in *E.T v. Paxton*. See *E.T v. Paxton*, 41 F.4th 709, 721 (5th Cir. 2022). Scholars have also used the disability frame to protect the rights of people with impairments in prison litigation. See Morgan, *Contesting the Carceral State with Disability Frames*, *supra* note 88, at 1920–21; Jasmine E. Harris, *Disability Law on the Frontlines*, 106 CORNELL L. REV. ONLINE 23–24 (forthcoming 2022) (manuscript at 23–24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3705552 [perma.cc/PH4R-LKR7] (discussing how during the COVID-19 pandemic, disability rights organizations utilized the integration mandate established by the Supreme Court in the disability rights case *Olmstead v. L.C.* to argue for reducing the population of individuals with disabilities in custodial spaces, including prisons, due to public health concerns). On the strategic use of the integration mandate of *Olmstead v. L.C.* to promote disability rights in a variety of contexts through class action litigation, see Steven Schwartz & Kathryn Rucker, *The Commonality of Difference: A Framework for Obtaining Class Certification in ADA Cases After Wal-Mart*, 71 SYRACUSE L. REV. 841, 881–886 (2021).

¹³³ Paul-Emile, *Blackness as Disability?*, *supra* note 129, at 301.

¹³⁴ *Id.* at 296, 299, 300.

¹³⁵ *Id.* at 298.

¹³⁶ See Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J. F. 916, 925 (2021) (describing Paul-Emile’s article as “fit[ting] within the broader comparative subordination frame precisely because it too treats race and disability as distinct”).

¹³⁷ Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1190–97 (2020). Konnoth’s article yielded two responses upon its publication critiquing his normative claims. See Belt & Dorfman, *Reweighing Medical Civil Rights*, *supra* note 130, at 177; Alison K. Hoffman, *How Medicalization of Civil Rights Could Disappoint*, 72 STAN. L. REV. 165, 165 (2020). Konnoth responded to these critiques. See generally Craig Konnoth, *Medical Civil Rights as a Site of Activism: A Reply to Critics*, 73 STAN. L. REV. ONLINE 104 (2020).

¹³⁸ See Konnoth, *Medicalization and the New Civil Rights*, *supra* note 137, at 1190–92. For a discussion of a recent Fourth Circuit case recognizing gender dysphoria as a disability under the ADA, see *infra* text accompanying notes 190–197. Coverage of this matter in national news stated that this case was “part of a national legal push both for trans rights to be considered under the Americans With Disabilities Act.” See Rachel Weiner, *After Living as a Woman for 20 Years, She Was Jailed with Men*, WASH. POST (May 27, 2022, 4:02 PM), <https://www.washingtonpost.com/dc-md-va/2022/05/26/transgender-jail-lawsuit-ada> [<https://perma.cc/T8DP-TB53>]. For other legal scholarship

disorder,¹³⁹ students who experienced inflicted trauma,¹⁴⁰ and those who are homeless¹⁴¹—have been trying (with varying degrees of success) to use medical framing and disability law to promote their rights and interests in and outside the courts.¹⁴² For those advocates and for Konnoth, “[m]edical

applying the disability rights frame to transgender people, see Kevin Barry & Jennifer Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, 127 *YALE L.J. F.* 373 (2017), Kevin M. Barry, *Challenging Inaccurate Sex Designations on Birth Certificates Through Disability Rights Law*, 26 *GEO. J. ON POVERTY L. & POL’Y* 313 (2019), and Kevin M. Barry, *Challenging Transition-Related Care Exclusions Through Disability Rights Law*, 23 *UDC L. REV.* 97 (2020).

139 Konnoth, *Medicalization and the New Civil Rights*, *supra* note 137, at 1194-97.

140 *Id.* at 1189-91.

141 *Id.* at 1196-98.

142 Another area in which disability frame advocacy was once prominent is that of the rights of pregnant employees. In the 2015 Supreme Court case *Young v. United Parcel Service, Inc.*, the defendant denied a pregnant delivery driver light duty work as an accommodation, even though the plaintiff’s doctors had instructed her not to lift more than 20 pounds. See *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 211 (2015). UPS denied this request despite having previously accepted similar lifting accommodations for people with disabilities covered under the ADA and those who were injured on the job. *Id.* at 211. Young claimed that UPS violated the Pregnancy Discrimination Act, which was added into Title VII of the Civil Rights of 1964 in 1978. *Id.* at 211-12. UPS claimed that it was not discriminating on the basis of pregnancy because it had a neutral, non-pregnancy-related policy to determine eligibility for accommodations. *Id.* The Supreme Court rejected both of these positions as extreme and held that employers who refused to grant accommodations to pregnant employees while granting similar accommodations to people with disabilities (or to others for different reasons) must demonstrate legitimate non-discriminatory reasons for doing so. *Id.* at 229. The employee may then provide “sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden [on pregnant employees]” to win the case. *Id.* Pregnant women are therefore in a different situation from people with disabilities in situations of failure to accommodate, as under the Pregnancy Discrimination Act (PDA) the right to be accommodated depends on whether the employer is granting accommodations to other employees. In its regulation to implement the ADAAA, the EEOC clarified that an uncomplicated pregnancy is not considered an impairment standing alone; however, it is a condition that can create impairments. See 29 C.F.R. § 1630.2(h), app. (2016) (“It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition.”). Yet because the facts of *Young* arose prior to the effective date of the ADAAA, the Supreme Court had no cause to consider how the ADAAA affected its analysis. See *Young*, 575 U.S. at 217-19 (declining to discuss the significance of the ADAAA). Courts have generally followed the EEOC’s direction and have not considered an uncomplicated pregnancy a disability. See *Areheart, Accommodating Pregnancy*, *supra* note 59, at 1134 (“Courts have similarly followed suit, on the rationale that pregnancy is ‘normal’ and ‘healthy’—i.e., it is not the result of a physiological disorder and thus is categorically not an impairment or disability. In other words, a ‘normal’ pregnancy does not produce ADA covered limitations, but conditions that arise due to complications in a pregnancy may qualify as disabilities.”). For further discussions on the relationship between disability rights law and pregnancy, see 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), and Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After Young v. UPS: Where We Are and Where We Should Go*, 14 *ST. LOUIS U. J. HEALTH L. & POL’Y* 73 (2020). Scholars have also applied the social model as a “heuristic lens” without invoking the disability frame to discuss

claims are malleable, contingent, and . . . fundamentally social phenomena.”¹⁴³ In his view, technological and social advancements “enhance the autonomy of individuals who invoke medical status to alleviate disadvantage and decrease the stigma they experience.”¹⁴⁴ Under this logic, illness or disability can be used as a metaphor for whatever disadvantage or impediments society constructs regarding a group of individuals. Konnoth, however, does not stop at a descriptive analysis of the use of medical framing on the ground. His article is provocative and controversial because he views such a move toward medicalization as normatively positive.¹⁴⁵

A few scholars have invoked disability rights to discuss people living in poverty. In 2013, James Ryan explicitly used the metaphor *poverty as disability* in the title of an article arguing for reforming the Individuals with Disabilities Education Act (IDEA) and expanding it to include poor students.¹⁴⁶ Ryan argues that “given advances in neuroscience research that reveal the impact of poverty on cognitive development,” it is no longer justifiable to exclude students of low socioeconomic status from services provided under the IDEA.¹⁴⁷ More recently, in an article that also uses disability as a metaphor in its title, Emily Murphy claimed that the law should see *poverty as disabling*.¹⁴⁸ Similar to Ryan, Murphy also bases her claims on recent neuroscience studies that demonstrate how poverty adversely affects brain development during childhood and later in life.¹⁴⁹

In terms of legal arguments, in both Ryan and Murphy’s accounts, there is a “missing impairment problem” at the time of litigating under either the IDEA, the ADA, or the Social Security Act for the rights of the poor as

sex discrimination at the workplace. See Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1299, 1303 (2008) (“Sex discrimination law could benefit from a similar leap from the medical model to the sociopolitical or civil rights model.”); see also Michelle A. Travis, *Gendering Disability to Enable Disability Rights*, 150 CALIF. L. REV. 837, 839-40 (2017).

¹⁴³ Konnoth, *Medicalization and the New Civil Rights*, *supra* note 137, at 1174.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 1212-21 (advocating for employment of the medical civil rights framework); see also Craig Konnoth, *The Normative Bases of Medical Civil Rights*, in *DISABILITY, HEALTH, LAW, AND BIOETHICS* 200, 201 (I. Glenn Cohen, Carmel Shachar, Anita Silvers & Michael Ashley Stein eds., 2020) (“Both as a theoretical and a legal matter, disability designations borrow from medical designations. Thus, conceptualization of disability . . . essentially turns on conceptualization of medical status in a particular context.”).

¹⁴⁶ See generally James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455 (2013).

¹⁴⁷ *Id.* at 1458.

¹⁴⁸ See generally Emily R. D. Murphy, *Brains Without Money: Poverty as Disabling*, 54 CONN. L. REV. 669 (2022). Unlike Paul-Emile who asserted that Blackness may be considered a disability under the ADA, Murphy posits that poverty *produces* disability. Nevertheless, at the time of claiming rights under disability law for people living in poverty, under Murphy’s argument, these people do not have any impairment. Thus, the argument also suffers from a missing impairment problem.

¹⁴⁹ *Id.* at 714-15.

disabled. This means that while poverty is a social problem that may cause an impairment in the future,¹⁵⁰ it is not an impairment in and of itself. Once an impairment develops, an impoverished claimant who is discriminated against or desires to become eligible for Social Security Disability Benefits could invoke disability law, but to say that people who live under a certain poverty level could claim disability before they develop an impairment is to use the term disability as a metaphor for disadvantage.

A similar conclusion regarding a missing impairment problem could also be extrapolated from the much-publicized opinion in *P.P. v. Compton Unified School District*.¹⁵¹ In September 2015, Judge Michael Fitzgerald denied a school district's motion to dismiss a class action complaint filed against it by high school students and teachers in Compton, an underserved city in Southern California with a majority Black and Brown population. The plaintiffs in this case argued that complex trauma stemming from the conditions of poverty, violence, and sexual abuse, family deportation, incarceration, systemic

¹⁵⁰ Such impairments could be post-traumatic stress disorder (PTSD) or complex post-traumatic stress disorder (cPTSD), which are both covered under the ADA. Under current law, such claims would need to center the impairment and its substantial limitations on "one or more major life activities," based on the ADA's definition of disability, instead of on the conditions leading up to the creation of the impairment (such as poverty), as it has been currently framed. See *supra* notes 6, 8 and accompanying text. Relatedly, Rabia Belt has recently called on scholars to consider the inequities that produce impairment in the first place, as such a move "could help connect disability justice with other social movements." See Belt, *The Fat Prisoners' Dilemma*, *supra* note 88, at 826-27. Yet she admits such a move would "be difficult for a disability rights movement that is wary of calling attention to the negative aspects of impairment because of how overdetermined they are" and because of the need "[to] grapple with the pitfalls of treatment and cure," which are sensitive topics within the disability justice community. *Id.* The recognition of PTSD as a disability under the ADA has garnered discussion from both scholars and the courts. See, e.g., Benjamin C. Hattem, Note, *Carceral Trauma and Disability Law*, 72 STAN. L. REV. 995, 1030-31 (2020) (describing the diagnosis of PTSD under the DSM-5, concluding that all plaintiffs with a PTSD diagnosis under the DSM-5 should meet the ADA's definition of disability, and noting that some courts deciding cases after the issuance of the DSM-5 have still found that plaintiffs with PTSD do not qualify as having a disability for the purposes of the ADA); Doron Dorfman, *Suspicious Species*, 2021 U. ILL. L. REV. 1363, 1373 (2021) (describing how service animals that help alleviate PTSD symptoms are covered under the ADA regulations); C.L. v. Del Amo Hosp., Inc., 992 F.3d 901, 914 (9th Cir. 2021) ("Service dogs in particular have been 'associated with clinically significant reductions in [PTSD] symptoms' compared to usual care alone." (quoting Marguerite E. O'Haire & Kerri E. Rodriguez, *Preliminary Efficacy of Service Dogs as a Complementary Treatment for Posttraumatic Stress Disorder in Military Members and Veterans*, 86 J. CONSULTING & CLINICAL PSYCH. 179, 184 (2018))).

¹⁵¹ *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098 (C.D. Cal. 2015). In that case, some of the plaintiffs had a record of disability, but some of them did not have a mental or physical impairment at the time of the filing. See *id.* at 1103-06. For a discussion of the case and the complaint, see Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, 95 N.Y.U. L. REV. 766, 805-08 (2020), and Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Dis/ability, and Class Actions*, 47 FORDHAM URB. L.J. 293, 306-09 (2020). As Jasmine Harris concluded about the latter discussion of the case, "[w]hile McGinley and Cooper deploy an intersectional lens to their analysis of trauma and race, their main engagement with disability studies and legal scholarship is to think of disability law as a remedy and a hook." Harris, *Reckoning with Race and Disability*, *supra* note 136, at 926.

racism, and discrimination should be considered a disability under Title II of the ADA, section 504, and the Department of Education's Regulations implementing section 504.¹⁵² The plaintiffs argued that denial of "trauma-sensitive" accommodations to support the students and teachers would violate disability rights law by not allowing them to have meaningful access to a "free appropriate public education."¹⁵³ The court was somewhat sympathetic to the plaintiffs' argument that "if a threatening situation persists beyond the brain's initial alarm reaction, the body enters either [a] state of fight or flight, or will begin to move through a dissociative continuum,"¹⁵⁴ a situation that "can result in neurobiological effects constituting a physical impairment for purposes of the Acts."¹⁵⁵ It seems that the court made sure to keep its language suggestive and its ruling limited,¹⁵⁶ both because of the early stage of the litigation and due to the need to focus on the potential future trauma-related impairment. The court was not questioning whether exposure to traumatic events could cause a disability, but rather determining if such exposure does not guarantee the creation of disability. Therefore, moving forward, plaintiffs will need to actually bring a claim for an existing impairment later in the trial when defining their class to prove disability under the law. Put differently, disability cannot serve as a metaphor for disadvantage.¹⁵⁷

¹⁵² See *P.P. v. Compton*, 135 F. Supp. 3d at 1104 (discussing the students' various traumatic experiences). Nicole Tuchinda discussed how section 504 and the Individuals with Disabilities Education Act can be invoked to help accommodate situations where childhood trauma exacerbates existing disabilities for public school students:

The promise of making IEPs and 504 plans trauma-responsive is that interventions provided to children with disabilities will become more effective and more children who suffer from trauma of all sorts—abuse, neglect, family dysfunction, parental incarceration or mental illness, community violence, bigotry, or historical or intergenerational trauma—will make educational progress. Further, trauma-responsive education will help children to heal from trauma, thereby diminishing the severity of impairments caused by trauma and decreasing the likelihood that they will act with violence or pass trauma's effects on to their children.

Tuchinda, *The Imperative for Trauma-Responsive Special Education*, *supra* note 151, at 772.

¹⁵³ See *P.P. v. Compton*, 135 F. Supp. 3d at 1106, 1114 (arguing that when students are denied accommodations, they are denied their right to public education).

¹⁵⁴ See *id.* at 1110 (quotation marks omitted) (clarifying the human body's alarm reaction process).

¹⁵⁵ See *id.* at 1110-11 (holding that trauma can be considered a physical impairment). An Arizona district court reached a similar decision in another case. See *Stephen C. v. Bureau of Indian Educ.*, No. CV-17-08004, 2018 WL 1871457, at *4 (D. Ariz. Mar. 29, 2018) ("[T]he Court finds that Plaintiffs have adequately alleged that complex trauma and adversity can result in physiological effects constituting a physical impairment that substantially limits major life activities within the meaning of Section 504 of the Rehabilitation Act.").

¹⁵⁶ See *P.P. v. Compton*, 135 F. Supp. 3d at 1103 ("The Court simply acknowledges the *allegations* that exposure to traumatic events *might* cause physical or mental impairments that *could* be cognizable as disabilities under the two Acts." (emphasis in original)).

¹⁵⁷ Perhaps more important than the theoretical argument, the case seems to have had a positive effect on the lives of students and teachers. While the case eventually settled, six years after the

Notably, historians and social policy scholars have criticized similar arguments, which they refer to as the “pathologies of poverty,”¹⁵⁸ by pointing to the ways they have been weaponized against poor people.¹⁵⁹ An example is the ways in which conservative welfare discourse since the 1960s “has conceptualized poverty as an illness, medicalizing social barriers to achieving ideals of individual responsibility and diligence” to shrink the welfare state.¹⁶⁰

My claim in the first part of the Article is that the scholars and advocates who engage in disability frame advocacy, deploying disability analogies to other disempowered communities, were not the first ones to use disability as a metaphor. This same “carrying over” of disability to mean other disadvantage, inability, or impediment has long been embedded in law, as I have demonstrated in Part III. Without making a causal inference, I claim that such a broad use of the term disability may have inspired scholars and advocates to stretch the concept well beyond the biomedical realm. Excavating the semantic and metaphoric use of the term disability in American law might therefore contribute to our understanding of current trends in litigation and scholarship that engage in disability frame advocacy to promote the rights of people who do not have impairments.

I do not wish to criticize the good intentions of advocates and scholars who seek to promote social justice and advance the rights of other disempowered communities. Yet, I argue that the use of disability as metaphor has consequences for the disability community. In the next Part, I address the issues with using disability as a metaphor and such an invocation of the disability frame.

litigation, the school district “created an innovative model of trauma-informed practices that have proven to be an enormous success for students, parents and the Compton community.” See *Landmark Federal Class Action Lawsuit Results In Innovative Trauma Programming*, COMPTON UNIFIED SCH. DIST. (Feb. 24, 2021), <https://www.compton.k12.ca.us/news-release/news/2021/class-action-lawsuit> [<https://perma.cc/U6TJ-9NBC>].

¹⁵⁸ See MICHAL KRUMER-NEVO, *RADICAL HOPE: POVERTY-AWARE PRACTICE FOR SOCIAL WORK* 19–21 (2020); see also Mical Raz, *Reducing Child Poverty Is a No Brainer—But Not Because of Effects on Children’s Brains*, WASH. POST (Jan. 28, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/01/28/reducing-child-poverty-is-no-brainer-not-due-effects-childrens-brains> [<https://perma.cc/XR9V-WAAG>].

¹⁵⁹ See DARYL MICHAEL SCOTT, *CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996*, at 141–44 (1997) (discussing the contention between social scientists over “the pathology of the poor,” specifically poor Black people, in the 1950s); see also ALICE O’CONNOR, *POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY* 39, 76–77 (discussing “the black lower-class pathology” associated with poor Black people and immigrants in the 1930s and 1940s).

¹⁶⁰ MICAL RAZ, *WHAT’S WRONG WITH THE POOR? PSYCHIATRY, RACE, AND THE WAR ON POVERTY* 174 (2013).

V. THE PERILS OF DISABILITY AS METAPHOR AND DISABILITY FRAME ADVOCACY

The trend disability law scholars have noticed with growing apprehension is the ease with which “disability,” “disability rights,” and “disability accommodations,” have been adopted into legal scholarship concerned with social justice and minority rights of other populations, including people who do not live with impairments.¹⁶¹ While the last Part took a descriptive approach to such disability frame advocacy, this Part makes a normative claim. In this Part, I illustrate the problem with using the term disability as a metaphor for disadvantage more broadly, and homogenizing all forms of oppression as disability.

A. *Relying on an Outdated Social Model and the Missing Impairment Problem*

The social model of disability, which shifts focus from individual medical treatment to the environment and society, has been a revolutionary concept and a cornerstone of disability studies and advocacy.¹⁶² This model was originally developed in England in the 1970s by a radical organization composed of physically disabled men known as the Union of Physically Impaired Against Segregation (UPIAS) and was later translated into academic writing by the late British scholar Michael Oliver.¹⁶³ It makes the distinction between the impairment (i.e., the pathology) and the disability (i.e., the social meaning attributed to the impairment).¹⁶⁴ This distinction resembles that between sex

¹⁶¹ See discussion *infra* Part IV. I do not see a problem with invocations of the disability frame to advance rights of people with impairments in creative ways, something that has been an important and well-established tactic. See *supra* note 132 and accompanying text.

¹⁶² See generally ROSEMARIE GARLAND THOMSON, *EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE* 8-9 (1997); ROBERT MCRUER, *CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY* 22-23 (2006).

¹⁶³ See Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in *THE OXFORD HANDBOOK OF LAW AND HUMANITIES* 145, 147 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2019).

¹⁶⁴ See TOBIN SIEBERS, *DISABILITY THEORY* 73 (2008) (“The social model challenges the idea of defective citizenship by situating disability in the environment, not in the body.”). As disability studies scholar Michael Ralph has written, the concept of impairment dates back to scientific assessments done by medical experts and actuaries at the beginning of the nineteenth century to uphold a differential hierarchy of Black enslaved people and bonded workers. See Michael Ralph, *Impairment*, in *KEYWORDS IN DISABILITY STUDIES* 107, 108 (Rachel Adams, Benjamin Reiss & David Serlin eds., 2015) (“This genealogy of the term ‘impairment’ thus points to a long entanglement of race and disability as proxies for the value of a human life.”); see also Baynton, *Disability and the Justification of Inequality in American History*, *supra* note 126, at 37 (“Disability arguments were prominent in justifications of slavery in the early to mid-nineteenth century and of other forms of unequal relations between white and black Americans after slavery’s demise.”).

and gender in gender studies.¹⁶⁵ The construction of normality and human difference has been fundamental for disability scholars and activists, who adopted the social model and view disability not as an inherent disadvantage but rather as a legitimate variation of human diversity.¹⁶⁶

The social model, in its original simplistic and dichotomous form, was nevertheless incredibly beneficial in creating a unified agenda that helped establish a social movement consisting of people with a wide variety of impairments.¹⁶⁷ The underlying idea of the social model—the shift in focus

¹⁶⁵ See SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 5 (1996) (“The more I learned about other people’s experiences of disability and reflected upon my own, the more connections I saw between feminist analyses of gender as socially constructed from biological differences between females and males, and my emerging understanding of disability as socially constructed from biological differences between the disabled and the non-disabled.”); Mark Sherry, *Overlaps and Contradictions Between Queer Theory and Disability Studies*, 19 *DISABILITY & SOC’Y* 769, 776 (2004) (“The feminist deconstruction of the public/private divide, the distinction between sex and gender, and the development of the analytical category of the ‘Other’ were groundbreaking analytical tools upon which both Queer Theory and Disability Studies would later develop”); see generally MICHAEL OLIVER, *UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE* 37-38 (1996).

¹⁶⁶ See Mary Crossley, *The Disability Kaleidoscope*, 74 *NOTRE DAME L. REV.* 621, 656 (1999) (“Disability theorists argue that, far from being a natural and obvious classification, the very concept of a ‘normal human being’ is socially constructed and therefore socially and culturally relative.”); Baynton, *Disability and the Justification of Inequality in American History*, *supra* note 126, at 35-37 (discussing the development of the concept of normality in the mid-nineteenth century and early twentieth century); Belt & Dorfman, *Disability, Law, and the Humanities*, *supra* note 163, at 146 (“Disability studies concerns itself with human difference and the ways people with disabilities have been pushed out of what society conceives as the ‘normal.’ The critique of normalcy as an historically socially constructed category has thus been a cornerstone in the field.”); see generally LENNARD J. DAVIS, *ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY* 23-49 (1995).

¹⁶⁷ Dorfman, *Re-Claiming Disability*, *supra* note 60, at 200. What unites people with different impairments is the subordination and stigma they experience because of them. The original ADA acknowledged this point by stating that people with disabilities have a “history of purposeful unequal treatment” and have been “relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals.” Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 329 (1990) (amended 2008); see also Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 *VA. L. REV.* 397, 401 (2000) (“Even though people with ‘disabilities’ may have vastly different medical conditions—indeed, many may experience no medical limitations at all—they have one crucial thing in common: a socially assigned group status that tends to result in systematic disadvantage and deprivation of opportunity.”); Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 *NOTRE DAME L. REV.* 1415, 1419-20 (2007) (discussing how modern disability legal policy was developed as a response to “historical practices of invidious segregation” in multiple areas such as education, voting rights, and institutionalization); Belt & Dorfman, *Disability, Law, and the Humanities*, *supra* note 163, at 149 (“Focusing on social attitudes and stereotypes toward people with disabilities [(i.e., the social model)] created a common ground for people experiencing discrimination and exclusion based on a variety of impairments.”); Adrienne Asch & Michelle Fine, *Introduction: Beyond Pedestals*, in *WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE AND POLITICS* 6 (Michelle Fine & Adrian Asch eds., 1988) (“Why should a limb-deficient girl, a teenager with mental retardation, or a blind girl have anything in common with each other, or with a woman with breast cancer or another woman who is recovering from a stroke? What they share is similar treatment by a sexist and disability-phobic

from a medical model of disability to the social oppression that contributes to the creation of disability—served as the driving force behind the rise of the independent living and disability rights movements in California.¹⁶⁸ It also influenced how people with disabilities view themselves—as a minority group with a distinct social identity. Through an affirmative process,¹⁶⁹ people with disabilities started viewing themselves as deserving of rights instead of pity and paternalism.¹⁷⁰ Similar to other oppressed groups, some started to see their disability as a source of pride.¹⁷¹

society. This is what makes it likely that they will be thrown together in school, in the unemployment line, in segregated recreational programs, in rehabilitation center, and in legislation.”).

¹⁶⁸ Belt & Dorfman, *Disability, Law, and the Humanities*, *supra* note 163, at 147-49. Nevertheless, Adam Samaha criticized the view of the social model an appropriate normative basis for creating policy and argued for alternative normative theories to inspire disability policy. See Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1252-53 (2007) (“Although the social model is one way to define disability and a field of inquiry, it is not a disability policy. Deciding how to respond to ‘disability’ depends on a normative framework that cannot be supplied by the model. This framework might be libertarian, utilitarian, egalitarian, some combination thereof, or something else.”). Mark Weber later responded to Samaha’s criticism:

The model has recently received criticism on the ground that, at least in its unadorned form as the social relations approach, it does not justify policy prescriptions for changing the physical and social environment Many, perhaps most, middle aged persons are disabled from reading fine print. Nobody proposes that all reading materials (the environment and its artificial barrier) be made large-print when the easy personal adaptation of reading glasses (an individual, medical appliance fix) is available. The point of the social relations or civil rights model is instead that paying attention to the role of the environment opens up the option of changing social conditions and attitudes and demonstrates the injustice of refusing to do so when changes in the environment would be justified under whatever social philosophy one embraces. For those committed to egalitarian ideals, significant environmental changes are indicated. This is why the model moves so seamlessly from social relations to civil rights, and why the civil rights model is so crucial in discussing modern policy prescriptions.

Mark C. Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, 25 GA. ST. U. L. REV. 575, 594-95 (2009) (citations omitted).

¹⁶⁹ British disability studies scholars John Swain and Sally French discussed “the affirmative model” of disability, which reframes disability as a positive personal identity and a source of pride. See John Swain & Sally French, *Towards an Affirmation Model of Disability*, 15 DISABILITY & SOC’Y 569, 569-71 (2000).

¹⁷⁰ See Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCIS. & L. 41, 42-43 (1996) (describing how people with disabilities have shifted the view of their identity and their disability rights); see generally JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 104 (1993).

¹⁷¹ See ELI CLARE, EXILE AND PRIDE: DISABILITY, QUEERNESS, AND LIBERATION 110 (1999) (“I do know that every time I hear disabled people call themselves freaks, my decades-old self-hatred collides head-on with my relatively newfound pride.”); KATHARINA HEYER, RIGHTS ENABLED: THE DISABILITY REVOLUTION FROM THE U.S., TO GERMANY AND JAPAN, TO THE UNITED NATIONS 58-59 (2015) (“[Embracing] disabilities as a vital part of [one’s] identity . . . underscores not only the importance of reclaiming disability as a positive form of identity but also strengthens the analogy to other identity-based movements.”); Dorfman, *Re-Claiming Disability*, *supra* note 60, at 201 (“[Those embracing the social model] might take pride in their life experiences and their bodies and claim disability as a life-enriching experience, a part of a positive cultural

Yet the social model has not stood still. The concept has been revised through the years and has evolved quite significantly since its origin in the 1970s. Over time, disability studies scholars noted that the social model is centered around the experiences of certain people with physical or sensory disabilities—whereby an accessible environment can remove many of their barriers for equal citizenship—but does not account for the needs of people with mental and developmental disabilities or those living with chronic illnesses.¹⁷²

heritage, or at least a salient and defining aspect of identity.”); Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 555 (2021) (“[T]hose who do not claim a disability identity are far less likely to experience the concrete benefits of disability civil rights laws—and the more amorphous benefits of understanding the social or diversity/minority model of disability or embracing disability pride.”); JENNY MORRIS, PRIDE AGAINST PREJUDICE: A PERSONAL POLITICS OF DISABILITY 1 (1991) (describing her identity as a “disabled woman” as a “source of strength and liberation”).

¹⁷² Disability philosopher Susan Wendell underscored this point, stating:

I believe that in thinking about the social construction of disability we need to strike a balance between, on the one hand, thinking of a body’s abilities and limitations as given by nature and/or accident, as immutable and uncontrollable, and, on the other hand, thinking of them as so constructed by society and culture as to be controllable by human thought, will, and action. We need to acknowledge that social justice and cultural change can eliminate a great deal of disability while recognizing that there may be much suffering and limitation that they cannot fix.

WENDELL, *supra* note 165, at 45. Moral philosopher Eva Feder Kittay reaches a similar conclusion in her important work on the ethics of care that draws on her experience caring for her daughter, Sesha, who lives with significant cognitive and physical disabilities:

[I]t is important to understand that some dependencies are not constructs and are inevitable in the sense that they are rooted in our biology and not constructed by social arrangements, even if the form they take will be culturally shaped. A person with paraplegia may be dependent on a personal assistant, but not dependent financially if employment opportunities are truly open to people with disabilities. Still, the need for an assistant to help with certain activities of daily living is not constructed. The need of my daughter Sesha, who cannot feed, toilet, or do anything for herself, is not socially constructed.

Eva Feder Kittay, *A Theory of Justice as Fair Terms of Social Life Given our Inevitable Dependency and our Inextricable Interdependency*, in CARE ETHICS AND POLITICAL THEORY 51, 56 (Daniel Engster & Maurice Hamington eds., 2015). Other scholars have similarly critiqued the social model on the grounds that it ignores the subjective experiences of the pains of both impairment and disability. See, e.g., Mike Oliver, *If I Had a Hammer: The Social Model in Action*, in DISABLING BARRIERS—ENABLING ENVIRONMENTS 7, 8 (John Swain, Sally French, Colin Barnes & Carol Thomas eds., 2d ed. 2004) (summarizing criticisms of the social model). Some legal scholars have also pointed out the limits of the social model and the antidiscrimination of the ADA. They instead argue for a “social welfare approach” that relies on distributive justice principles. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 23–24 (2004) (arguing that disability advocates should “challenge the resistance to social welfare intervention” that has animated “the limiting doctrines applied by courts”); David A. Weisbach, *Toward a New Approach to Disability Law*, 2009 U. CHI. LEGAL F. 47, 50 (2009) (“The social model has not resolved these problems in a convincing way. The goal of this Article is to begin the development of an alternative approach to disabilities based directly on an explicitly stated theory of distributive justice: welfarist theories.”). Mark Weber and Matthew Diller argued that a social welfare approach is compatible with the antidiscrimination approach and that “[s]ocial insurance insures against

Importantly, critiques of the social model warned about the disappearing of the body from disability discourse.¹⁷³ Having a disability, they rightly claim, is not only about *social oppression but also about the experience of pain and suffering*,¹⁷⁴ along with *missing out on certain abilities/experiences that may be subjectively valued*,¹⁷⁵ which are often part of living with disabilities and

discrimination as well as the specific risks that are the programs' focus." See Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, *supra* note 168, at 590; see also Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1006-07 (1998) ("There is no inherent contradiction between the idea that some individuals should receive income support as a response to their disabilities and the notion that our society should remove obstacles faced by persons with disabilities in the job market and the workplace. Indeed, income support and civil rights protection can be seen as two essential parts of a comprehensive disability policy."); Mark C. Weber, *Disability Rights, Welfare Law*, 32 CARDOZO L. REV. 2483, 2502 (2011) ("It is perfectly consistent with civil rights to provide assistance to people who are the victims of ongoing discrimination.").

¹⁷³ The idea is that the shift to focus on social oppression disregarded the effects that physical impairments have on the individual. See Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12 DISABILITY & SOC'Y 325, 328 (1997) ("The shift to a social oppression model of disability consigns the bodily aspects of disability to a reactionary and oppressive discursive space."); Goldiner, *Understanding "Disability" as a Cluster of Disability Models*, *supra* note 53 ("The Social model of disability has been criticized for disregarding impairment and its associated disadvantage . . ."); JOEL MICHAEL REYNOLDS, *THE LIFE WORTH LIVING: DISABILITY, PAIN, AND MORALITY* 78-79 (2022) (referring to those critiques as "the first wave" of criticism of the social models).

¹⁷⁴ For instance, twenty years ago, Tobin Siebers claimed that

the greatest stake in disability studies at the present moment is to find ways to represent pain and to resist models of the body that blunt the political effectiveness of these representations. I stress the importance of pain not because pain and disability are synonymous but to offer a challenge to current body theory and to expose to what extent its dependence on social constructionism collaborates with the misrepresentation of the disabled body in the political sphere. There are only a few images of pain acceptable to current body theory, and none of them is realistic from the standpoint of people who suffer pain daily. The dominant model defines pain as either regulatory or resistant, and both individualize pain in ways that blunt its power to mobilize group identity. In the first case, pain is the tool used by society to enforce its norms. The second case usually spins off from the first, describing pain as a repressive effect that nevertheless produces an unmanageable supplement of suffering that marks out the individual as a site of resistance to social regulation. Despite the dominant principle that individuality is only an ideological construction, many body theorists turn to pain to represent a form of individuality that escapes the forces of social domination. Indeed, pain often comes to represent individuality as such, whether individuality is a part of the theory or not.

SIEBERS, *supra* note 164, at 61.

¹⁷⁵ Disability philosopher Elizabeth Barnes underscored this point:

[A]s anyone who is disabled can tell you, not everything about disability is a bed of roses. Moreover, I don't find it plausible that—as is sometimes asserted—all, or at least the most substantial, bad effects of disability are socially mediated. Sure, some of the bad effects of disability are caused by social attitudes and social prejudices. But at least for many disabilities, there would be things about them that were difficult or

should not be obscured.¹⁷⁶ The reality is that changes in societal attitudes and the built environment will not alleviate the disadvantage for people with certain bodies/minds.¹⁷⁷ Ultimately, disability is also a health issue and thus requires support and care alongside an accessible environment.¹⁷⁸ In

unpleasant even in an ideal society. And while many people value and enjoy being disabled, not everyone values and enjoys being disabled. More strongly, I find it plausible that some people wouldn't like being disabled even in an ideal society.

ELIZABETH BARNES, *THE MINORITY BODY: A THEORY OF DISABILITY* 78 (2016); *see also id.* at 93-94 ("Some popular mere-difference views of disability—most notably some versions of the social model of disability—scribe all the bad effects of disability to social prejudice (indeed, on at least some readings of the social model, disability itself entirely consists in social prejudice)."). Importantly, Adrienne Asch critiqued the notion of the subjective value given to certain abilities/experiences:

[Many] confuse the claim that having a capacity, skill, or experience is a good, with the claim that lacking a capacity, skill, or experience is inevitably bad. This confusion is due in part to the failure to distinguish the absence from the loss of a skill, capacity, or type of experience, and in part from the overly-narrow description of what is good or valuable.

Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA. ST. U. L. REV. 315, 318 (2003).

¹⁷⁶ *See* Swain & French, *Towards an Affirmation Model of Disability*, *supra* note 169, at 571-72 ("It is our contention that an affirmative model is developing out of individual and collective experiences of disabled people which directly confronts the personal tragedy model not only of disability but also of impairment."); JONATHAN STERNE, *DIMINISHED FACULTIES: A POLITICAL PHENOMENOLOGY OF IMPAIRMENT* 31-32 (2021) ("As many writers in the field have noted, the social model of disability was important for overcoming the idea of disability as a defect inherent in an individual, but it had a difficult time dealing with pain, fatigue, and chronic illness, where subjects are in some sense divided against themselves, where a subject's lived experience of the body prevents them from embracing a constructivist account of its disability story, or simply where access to care requires strategic medicalization."); *see generally* WENDELL, *supra* note 165, at 27.

¹⁷⁷ *See* WENDELL, *supra* note 165, at 45 ("In my view, then, disability is socially constructed by factors such as social conditions . . . Much, but perhaps not all, of what can be socially constructed can be socially (and not just intellectually) deconstructed, given the means and the will."); *see also* Belt, *The Fat Prisoners' Dilemma*, *supra* note 88, at 822 (arguing that addressing negative treatment due to belittling assumptions about disabled people's bodies and minds is less complicated than "is addressing negative aspects of impairments," as "irrespective of social conditions, some people's bodies hurt or may have disorders or conditions that could lead to pain"). In the words of late scholar Christina Crosby who became paralyzed in a cycling accident at the age of 50:

Even if universal design should magically appear everywhere and signal a sea change in public understanding of what it means to be disabled, that fact would not touch the neurological pain lighting up my body, or my balky bowels that move only when highly disciplined with laxatives and enemas, or counteract the loss of endless bodily pleasures.

Christina Crosby, *My Lost Body: The Radical Claim of Militancy and Mourning*, GUERNICA MAG. (Feb. 13, 2017), <https://www.guernicamag.com/my-lost-body> [<https://perma.cc/8XXE-GAXX>].

¹⁷⁸ *See* Tom Shakespeare, *Still a Health Issue*, 5 DISABILITY & HEALTH J. 129, 129-30 (2012) ("However, the social model of disability—at least in its strong form—does not seem to capture the complexity of disabled people's lives. For many people with disabilities their mental or physical issues play an important part in their sense of self, and explain many of the limitations they experience."); TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS REVISITED* 83 (2d ed. 2014) ("The health

this spirit, late disability studies scholar Tobin Siebers advanced the “theory of complex embodiment,” which

raises awareness of the effects of disabling environments on people’s lived experience of the body, but it emphasizes as well that some factors affecting disability, such as chronic pain, secondary health effects, and aging, derive from the body. These last disabilities are neither less significant than disabilities caused by the environment nor to be considered defects or deviations merely because they are resistant to change. Rather, they belong on the spectrum of human variation¹⁷⁹

Disability has therefore been revised as a far more complex and nuanced concept than construed by the original dichotomous social model. Disability is an interactive process between the individual, the impairment, the person’s bodymind, and the environment.¹⁸⁰ This evolved view of disability as an interactive bio-psycho-social process has not only been acknowledged by disability scholars¹⁸¹ but has also been recognized by the UN Convention on

needs of disabled people are rarely taken into account in disability studies.”). Adi Goldiner elaborates on this tension in her recent piece:

Despite the tension between the two models, some views combine elements of both. These views recognize the roles of impairment and social barriers in creating social disadvantage and exclusion facing disabled people. Such views are best understood as associated with “intermediate” models in the debate regarding the cause of disabled people’s social exclusion. For instance, Tom Shakespeare’s (2014) “Interactional” model views disability as the result of the interaction between intrinsic and extrinsic factors in people’s lives. Intrinsic factors include (but are not limited to) impairment and extrinsic factors include (but are not limited to) social barriers and oppression.

Goldiner, *Understanding “Disability” as a Cluster of Disability Models*, *supra* note 53.

¹⁷⁹ SIEBERS, *supra* note 164, at 25.

¹⁸⁰ Belt & Dorfman, *Disability, Law, and the Humanities*, *supra* note 163, at 156. For an early articulation of the creation of disability through “the disablement process,” which later inspired the World Health Organization’s definition of disability, see Lois M. Verbrugge & Alan M. Jette, *The Disablement Process*, 38 SOC. SCI. & MED. 1, 1-2 (1994).

¹⁸¹ Sociologists who pioneered thinking about disability as an interactive process between impairment and social environments include Saad Nagi, Gary Albrecht, and Irving Zola. See Saad Z. Nagi, *Disability Concepts Revisited: Implications for Prevention*, in *DISABILITY IN AMERICA: TOWARD A NATIONAL AGENDA FOR PREVENTION* 309, 325 (Andrew M. Pope & Alvin R. Tarlov eds., 1991) (assessing the frameworks that govern disability conceptualization, classification, and theory construction); GARY L. ALBRECHT, *THE DISABILITY BUSINESS: REHABILITATION IN AMERICA* 60 (1992) (“Impairments and disabilities are socially produced; that is, they are a product of the interplay between individuals and the physical, biological, and sociocultural environments that characterize their society.”); Carmelo Masala & Donatella Rita Petretto, *From Disablement to Enablement: Conceptual Models of Disability in the 20th Century*, 30 *DISABILITY & REHAB.* 1233, 1234 (2008) (“Nagi . . . defined disability as an ‘expression of a physical or a mental limitation in a social context’: . . . a gap between the individual’s capabilities and the demands created by the physical and social environment.” (citation omitted)); Irving K. Zola, *Disability Statistics, What We Count and What It Tells Us: A Personal and Political Analysis*, 4 *J. DISABILITY POL’Y STUD.* 9, 30 (1993) (“Having a disability is not a fixed status, but rather a continually changing, evolving, and interactive process.

the Rights of People with Disabilities¹⁸² and by the World Health Organization.¹⁸³

At least in this sense, federal law mirrors this revised model of disability by recognizing the essential role of impairment in conceptualizing disability.¹⁸⁴ Both the ADA's and its precursor, the Rehabilitation Act's, threshold definition of disability requires that individuals have "a physical or mental impairment that substantially limits one or more major life activities."¹⁸⁵ Even the third prong of the definition of disability which

It is not something that one is or is not, but instead is a set of characteristics everyone shares to varying degrees and in varying forms and combinations.").

¹⁸² See G.A. Res. 61/106, annex I, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) ("[D]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others . . ."); see also ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* 7-11, 49 (2015).

¹⁸³ World Health Organization [WHO], *Towards a Common Language for Functioning, Disability and Health: ICF*, at 9 (2002), <https://cdn.who.int/media/docs/default-source/classification/icf/icfbeginnersguide.pdf> [<https://perma.cc/HGY5-PJWE>] ("A better model of disability . . . is one that synthesizes what is true in the medical and social models, without making the mistake each makes in reducing the whole, complex notion of disability to one of its aspects. This more useful model of disability might be called the *biopsychosocial* model." (emphasis in original)); see also Jerome Bickenbach, *Disability, Health, and Difference*, in *OXFORD HANDBOOK OF PHILOSOPHY OF DISABILITY* 46, 49-51 (Adam Cureton & David T. Wasserman eds., 2018) (discussing the definitions of disability and impairment under the World Health Organization's International Classification of Functioning, Disability and Health (ICF)).

¹⁸⁴ It is nevertheless important to acknowledge that scholars have shown how in practice "agencies and courts adopt a medical model of disability in assessing impairment," specifically relying on medical assessment and documentation. See Crossley, *The Disability Kaleidoscope*, *supra* note 166, at 689; see also Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 *IND. L.J.* 181, 192 (2008) ("Despite the ADA's conceptual bent, a social view of disability has not taken root in America. . . . Rather, the medical model remains firmly entrenched, aided by the media and reflected in the recent decisions handed down by federal courts. . . . In fact, popular and judicial opinions about protections for those with disabilities depend largely on how people conceptualize disability and the nature of problems faced by people with physical impairments."); Dorfman, *Re-Claiming Disability*, *supra* note 60, at 202 ("Governmental agencies rely almost exclusively on medical certifications to assess a person's ability to work [and eligibility for Social Security disability benefits]."); Katherine A. Macfarlane, *Disability Without Documentation*, 90 *FORDHAM L. REV.* 59, 81 (2021) ("A system in which doctors, but not disabled individuals themselves, are consulted to determine whether a disability exists and how it should be accommodated embraces the medical model of disability. In such a system, disability only exists if a doctor has recorded its existence in medical records.").

¹⁸⁵ 42 U.S.C. § 12102(1)(A). Nevertheless, it is important to state that the definition of disability under the ADA is still a broad one and that it includes a wide variety of disabilities. That definition includes conditions more traditionally thought as disabilities (like paraplegia or Multiple Sclerosis) and conditions that are less visible and might not immediately come to mind when thinking of disability (like Attention-Deficit/Hyperactivity Disorder or fibromyalgia) as well as more "severe" disabilities and less "severe ones." As long as there is an impairment involved, the perceived deservingness of the plaintiff or claimant should not play into the disability determination and eligibility for accommodations under the law. In other words, I by no means endorse any kind

extends coverage under the ADA to people without actual or records of disability but who nonetheless experience discrimination based on a perception that they have a disability, makes it clear that such a person needs to be “regarded as having *such an impairment*.”¹⁸⁶ Additionally, a person without an impairment who falls under the “regarded as” category does not have a right to accommodations.¹⁸⁷ The EEOC and the courts have also held that a healthy pregnancy is not considered a disability because “it is not the result of a physiological disorder,” or, in other words, there is no impairment to be found.¹⁸⁸ In conclusion, legally and conceptually, there can be no disability without an impairment, and this impairment is not just *socially constructed* as difference but is actually *manifested* as difference in the bodymind.¹⁸⁹

of hierarchy within the population of people with disabilities. I have previously discussed the notion of perceived deservingness by visibility. See Dorfman, *[Un]Usual Suspects*, *supra* note 127, at 563 (“To assess deservingness, I use the common misconception about how disability should manifest itself—being clearly visible and easily detectable—thus, presumably, signaling a higher degree of deservingness. Nonvisible or less apparent disability signals a lower degree of deservingness.”); see also *id.* at 609 (“The International Symbol of Access has been successful in raising public awareness of the issue of disability accommodations. At the same time and perhaps because it was the way to educate the public about the existence of disability rights, it also defined a narrow view of disability as solely a physical, clearly visible condition, specifically that of the wheelchair user. The symbol thus created a deservingness cognitive bias against other types of disabilities.”); Dorfman, *Suspicious Species*, *supra* note 150, at 1401 (“Disability studies scholars have pointed to the marginalization of people with mental disabilities and chronic illnesses, usually considered less visible, within the disability community and academic discourse that typically focuses on people with physical or sensory disabilities. Similarly, the law itself seems to reproduce a disability hierarchy that disadvantages people with mental disabilities.”). Scholars have further explored the concept of deservingness of disability by perceived severity of the disability. See Nicole Buonocore Porter, *A Defining Moment: A Review of Disability & Equity at Work, Why Achieving Positive Employment Outcomes for Individuals with Disabilities Requires a Universal Definition of Disability*, 18 EMP. RTS. & EMP. POL’Y J. 289, 328 (2014) (reviewing *DISABILITY & EQUITY AT WORK* (Jody Heymann et al. eds., 2014)) (“The other problem with a broad definition of disability is that there is likely to be a great deal of backlash from individuals with traditional disabilities (such as those mentioned above under the narrow definition of disability) and those who are concerned that benefits given must be carefully doled out to only the most deserving.”).

¹⁸⁶ See 42 U.S.C. § 12102(1)I (emphasis added).

¹⁸⁷ See 42 U.S.C. § 12201(h) (“[A] public entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) solely under subparagraph (C) of such section.”). For an important discussion on this point, see Emens, *Disabling Attitudes*, *supra* note 8, at 216-17.

¹⁸⁸ See *supra* note 142 and accompanying text.

¹⁸⁹ See DAN GOODLEY, *DISABILITY STUDIES: AN INTERDISCIPLINARY INTRODUCTION* 125 (2d ed. 2017) (“When we find disability then we also find impairment.”). Needing to prove the existence of an impairment to prove disability under the ADA is not itself a negative thing. Yet as Katherine Macfarlane recently discussed, it is the reliance on medical professionals to prove the existence of impairment under the ADA that is burdensome and problematic for disabled employees. See Macfarlane, *Disability Without Documentation*, *supra* note 184, at 59, 70, 92. This chase for documentation and proof of impairment has been termed by Elizabeth Emens as “*medical admin.*” See Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV.

In 2022, the Fourth Circuit also recognized the crucial role of impairment in determining standing, or determining that the plaintiff is a person with a disability, under the ADA. In *Williams v. Kincaid*, a transgender woman who was housed with male inmates in jail in Fairfax County, Virginia, and who suffered harassment as a consequence, was successful in invoking protection under the ADA and the section 504 through a § 1983 claim.¹⁹⁰ The Fourth Circuit determined that gender dysphoria could be considered a disability only if it “result[ed] from physical impairments.”¹⁹¹ The court based its determination specifically on the fact that the plaintiff had been receiving hormone treatment for her gender dysphoria for fifteen years.¹⁹² The district court had originally dismissed the plaintiff’s attempt to recognize gender dysphoria as a disability under the ADA¹⁹³ based on the specific exclusion of “gender identity disorders not resulting from physical impairments” in the original language of the statute.¹⁹⁴ The Fourth Circuit, however, overturned the decision and concluded that “while the older DSM pathologized the very existence of transgender people, the recent DSM-5’s diagnosis of gender dysphoria takes as a given that being transgender is not a disability and

2329, 2342-44 (2021) (explaining the various administrative costs associated with being a disabled individual).

¹⁹⁰ *Williams v. Kincaid*, 45 F.4th 759, 763-64 (4th Cir. 2022).

¹⁹¹ *Id.* at 770 (quoting 42 U.S.C. § 12211(b)(1)) (alterations omitted). The court’s reasoning further elaborated on this point:

In light of the broad scope of the ADA and the implementing [EEOC] regulations, we conclude that Williams has alleged sufficient facts to render plausible the inference that her gender dysphoria results from physical impairments. Williams alleges that the medical treatment for her gender dysphoria consisted primarily of a hormone therapy, which she used to effectively manage and alleviate the gender dysphoria she experienced, and that she had received this medical treatment for fifteen years. . . .

. . . .

These allegations suffice to raise the reasonable inference that Williams’ gender dysphoria results from a physical impairment. In particular, the need for hormone therapy may well indicate that her gender dysphoria has some physical basis.

Id. at 770-71 (citations and alterations omitted).

¹⁹² *Id.* at 770.

¹⁹³ *Id.* at 765-66.

¹⁹⁴ *Id.* at 766 (citing 42 U.S.C. § 12211(b)). In 1990, with the enactment of the ADA, “the definition of disability in the Rehabilitation Act was also amended to incorporate these exclusions.” Leslie Francis, *Illegal Substance Abuse and Protection from Discrimination in Housing and Employment: Reversing the Exclusion of Illegal Substance Abuse as a Disability*, 2019 UTAH L. REV. 891, 902 (2019); see also 29 C.F.R. § 1630.3(d)(1) (“Disability does not include: (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders . . .”). For a description of the legislative history behind the exclusions of “sexual behavior disorders” from the ADA that point to homophobic and moral opprobrium, see Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 36-38, 42-44, 50 (2004).

affirms that a transgender person's medical needs are just as deserving of treatment and protection as anyone else's."¹⁹⁵ Therefore, gender dysphoria is not considered a "gender identity disorder not resulting from a physical impairment," according to the current medical understanding and the DSM-5. As gender dysphoria entails "distress and other disabling symptoms," it is not excluded from the ADA.¹⁹⁶ Important for our discussion, the court once again enshrined the connection between impairment and disability status under antidiscrimination law.¹⁹⁷ In evaluating this case, it is critical to acknowledge that, normatively speaking, the connection between impairment and disability status, which requires formal medical diagnosis of gender dysphoria, can lead to problematic results.¹⁹⁸ Nevertheless, from a descriptive standpoint, a record of impairment (or being regarded as having

¹⁹⁵ *Williams*, 45 F.4th at 767, 769. DSM standards for "Diagnostic and Statistical Manual of Mental Disorders" and is a "publication of the American Psychiatric Association detailing diagnostic criteria for hundreds of psychiatric disorders." See *Diagnostic and Statistical Manual of Mental Disorders*, ENCYC. BRITANNICA (July 28, 2022), <https://www.britannica.com/topic/Diagnostic-and-Statistical-Manual-of-Mental-Disorders> [<https://perma.cc/4ESX-V85E>]. The Fourth Circuit is not the first federal court to recognize gender dysphoria as a disability under the ADA. In 2017, prior to the Supreme Court decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), a District Court in Pennsylvania also made such determination in an employment discrimination case under Title VII of the Civil Rights Act. See *Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017). The *Blatt* decision has been hailed by transgender activists at the time as a landmark victory for transgender rights. See *Berry & Levy, Blatt v. Cabela's Retail, Inc. and a New Path for Transgender Rights*, *supra* note 138, at 375; see also *Konnoth, Medicalization and the New Civil Rights*, *supra* note 137, at 1169, 1191-93.

¹⁹⁶ *Williams*, 45 F.4th at 768. The Fourth Circuit continued, stating that "in light of the 'basic promise of equality . . . that animates the ADA,' we see no legitimate reason why Congress would intend to exclude from the ADA's protections transgender people who suffer from gender dysphoria." *Id.* at 773 (quoting Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494, 510 (4th Cir. 2016)). The Supreme Court also used animus theory and its implantation with regard to LGBTQ+ individuals in *Romer v. Evans* to determine that the exclusion of gender identity disorders from that ADA was done due to animus. See *Romer v. Evans*, 517 U.S. 620, 623 (1996) ("Amendment 2 fails, indeed defies, even this conventional inquiry. . . . [I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." (emphasis added)). For further discussion of the Supreme Court's treatment of the animus theory in *Romer v. Evans*, see *supra* notes 116-119 and accompanying text.

¹⁹⁷ As a staff attorney at GLBTQ Legal Advocates & Defenders (GLAD) arguing the case specifically said: "Lawyers bringing disability discrimination claims for clients with gender dysphoria are not arguing that being transgender is a disability, or that being trans reflects on anyone's ability to accomplish certain things." Orion Rummler, *Gender Dysphoria Is a Protected Disability, Federal Appeals Court Finds*, 19TH (Aug. 18, 2022, 5:26 PM), <https://19thnews.org/2022/08/gender-dysphoria-disability-ada-williams> [<https://perma.cc/7XNY-WPPR>].

¹⁹⁸ As Rabia Belt and I have written before, it can leave uninsured transgender people or those who do not have the time, desire, or money to get diagnosed, without antidiscrimination protection, creating de facto two subgroups within the transgender community in terms of legal status. See *Belt & Dorfman, Reweighing Medical Civil Rights*, *supra* note 130, at 184. Getting medical documentation also comes with significant hardship, as documented by disability law scholars. See *supra* note 184 and accompanying text.

an impairment)¹⁹⁹ is part of the requirement for standing under federal disability antidiscrimination law as it is written today and under disability studies as well.

The evolution of the social model, and the theory of complex embodiment that recognizes the role of impairment and the bodymind in disability, is exactly what is missing from the semantic and metaphoric use of disability broadly and from arguments under disability frame advocacy specifically. While scholars invoking disability frame advocacy refer to the social model,²⁰⁰ likely unintentionally, some of them apply it in its original premise (rather than in the modern and nuanced bio-psycho-social alteration) to make their arguments. Some applications of the disability frame to describe the oppression of Black, pregnant, transgender, and poor people, as well as other minority communities, suffer from what I term a missing impairment problem.²⁰¹ Disability frame advocacy strategies rely on an outdated model of disability, which simply do not account for the need to have some kind of manifestation of difference in the bodymind of the individual claiming disability. Though it might be tempting for scholars, advocates, and litigators to think of disability as something entirely socially constructed, in reality, as well as under the law, disability without a physical or mental manifestation is not a disability.

I, of course, do not embrace a medical model of disability wherein disability equals impairment or pathology.²⁰² Instead, I call upon those who use disability law to embrace a nuanced view of disability, one that manifests

¹⁹⁹ Although, as mentioned, those “regarded as” having an impairment are not entitled to accommodations as a remedy under the ADA. See *supra* notes 186–187 and accompanying text.

²⁰⁰ See, e.g., McGinley & Cooper, *Intersectional Cohorts, Disability, and Class Actions*, *supra* note 151, at 323–24; Barry & Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, *supra* note 138, at 387; Murphy, *Brains Without Money*, *supra* note 148, at 743, 756 n.332; Konnoth, *Medicalization and the New Civil Rights*, *supra* note 137, at 1180 n.58; Paul-Emile, *Blackness as Disability?*, *supra* note 129, at 328–330.

²⁰¹ See *supra* notes 146–157 and accompanying text.

²⁰² In the words of Susan Wendell:

It seems possible to pay more attention to impairment while supporting a social constructionist analysis of disability, especially if we focus our attention on the phenomenology of impairment, rather than accepting a medical approach to it. Knowing more about how people experience, live with, and think about their own impairments could contribute to an appreciation of disability as a valuable difference from the medical norms of body and mind.

Susan Wendell, *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, 16 *HYPATIA* 17, 23 (2001); see also STERNE, *supra* note 176, at 19 (“To [create a phenomenology of impairment] means, as so many authors have argued in recent years, moving beyond the split between a medical and a social model of disability to a conception of biology as having historical dimensions, and history as having biological dimensions. It is possible to contest the compulsory medicalization of people with disabilities, without dismissing the reality of bodily and subjective differences that have physical, physiological, somatic, or perceptual aspects and implications.”).

in the bio-psycho-social model of disability, which the original social model developed into.²⁰³ As Jay Dolmage reminds us, “Social constructionism,” which underlies the outdated version of the social model, “in some ways, can be used as a method of silencing. Particularly, social construction can remove the focus on the practicality of differences of bodies and minds.”²⁰⁴

Disability creates difference. Living with disabilities means having a variety of unique lived experiences that should not be erased. An outdated version of the social model that views disability solely as a social construction dilutes those experiences and the meaning of disability.

B. *Diluting Lived Experiences*

Drawing on the missing impairment problem, we can critique disability frame advocacy on the grounds that it dilutes the meaning of living with a disability. Today, after the historic “disability revolution” recognizing the rights of disabled people,²⁰⁵ disability remains the best word we have to describe the lived experience affected by both physical and mental experiences and societal oppression.²⁰⁶ Disability is not merely a theoretical exercise.

After all, it was Ellen Samuels’s experiences at doctors’ offices and physiotherapy pools as a chronically ill grad student that led her to conceptualize “crip time.”²⁰⁷ It was the determination by the New York City Board of Education that Judith Heumann could not teach second grade because she used a wheelchair, and the lawsuit she filed as a consequence, that led her to become an internationally recognized disability rights advocate.²⁰⁸ And it was the experience Haben Girma had in a college cafeteria, unable to access the menus and refused an electronic version, that led her to be interested in disability rights and become the first Deaf-blind graduate of Harvard Law School.²⁰⁹ These are, of course, just three examples of the many important

²⁰³ See *supra* notes 172–183 and accompanying text. As Rabia Belt argues, “the way forward necessitates recognizing the importance of the body and possible negative aspects of impairment without falling into the trap of ableism, challenging negative ableist social conditions without overemphasizing overly positive disability chronicles, and avoiding the resurrection of the medical model of disability.” Belt, *The Fat Prisoners’ Dilemma*, *supra* note 88, at 824.

²⁰⁴ JAY TIMOTHY DOLMAGE, *ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION* 54 (2017).

²⁰⁵ I borrow the phrase “disability revolution” from the title of Katharina Heyer’s book. See HEYER, *supra* note 171.

²⁰⁶ See *supra* notes 62–64 and accompanying text.

²⁰⁷ “Crip time” addresses the ways people with disabilities experience time differently from nondisabled individuals. See Ellen Samuels, *Six Ways of Looking at Crip Time*, *DISABILITY STUD. Q.* (2017), <https://dsq-sds.org/article/view/5824/4684> [<https://perma.cc/B5ME-8YBT>].

²⁰⁸ JUDITH HEUMANN & KRISTEN JOINER, *BEING HEUMANN: AN UNREPRESENTANT MEMOIR OF A DISABILITY RIGHTS ACTIVIST* 51, 60–61 (2020).

²⁰⁹ HABEN GIRMA, *HABEN: THE DEAFBLIND WOMAN WHO CONQUERED HARVARD LAW* 153–66 (2019). Members of the Deaf community use the term “Deaf” with a capital D “to signify a

contributions to the development of disability theory and the disability justice framework that are directly informed by lived experiences of disabled individuals. As disability activist and writer Alice Wong put it: “Staying alive is a lot of work for a disabled person in an ableist society.”²¹⁰ Such life experiences are unique to people with disabilities and embody what it means to live with impairments.

In making disabled people’s lived experiences a priority, I do not mean to imply that people who engage in disability frame advocacy are unaware of what it means to live with a disability or that they bear any kind of animus toward disabled people. My point is that when the concept of disability is stretched too far beyond the concept of impairment, it becomes harder for people to recognize what is unique about living with an impairment.

Using disability as metaphor thus erases the agency of people who are living with impairments, as it assumes that the disability experiences they live through every day are trivial and commonplace. It dilutes the meaning of living with an impairment.²¹¹ To help illustrate this point, think about the use of metaphors in another context. For example, if everyone’s working conditions are described as “slaving away,” it might become harder to appreciate what the actual experience of slavery was like. To borrow from Sara Ahmed’s theory, invoking the disability metaphor is, in a way, “to become without becoming,” meaning an appropriation of the other’s difference, pain, and experience.²¹²

Continually including oppressed groups that do not live with impairments under the umbrella of disability—as those engaged in disability frame advocacy have done—arguably creates a “universal view of disability.”²¹³ Such

cultural community as a contrast to a lower-case deafness that identifies hearing loss. Some members of this community reject the label of disability altogether and consider themselves a cultural and linguistic minority that views their hearing impairment as ‘Deaf gain.’” Belt & Dorfman, *Disability, Law, and the Humanities*, *supra* note 163, at 150-51.

²¹⁰ Alice Wong, *Introduction*, in *DISABILITY VISIBILITY: FIRST-PERSON STORIES FROM THE TWENTY-FIRST CENTURY*, at xv, xv (2020).

²¹¹ Other scholars have made similar arguments regarding diluting resources and protections through the expansion of antidiscrimination law. See Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protection*, 86 *IND. L.J.* 1219, 1247 (2011) (“Universal expansion of civil rights laws also presents another new risk. It could dilute the rights of disadvantaged groups by trivializing the more serious harms of discrimination and undermining support for antidiscrimination in general.”).

²¹² SARA AHMED, *STRANGE ENCOUNTERS: EMBODIED OTHERS IN POST-COLONIALITY* 132 (2000) (emphasis in original); see also Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y* 1, 13-14 (2012) (“The easy absorption, adoption, and transposing of decolonization is yet another form of settler appropriation. When we write about decolonization, we are not offering it as a metaphor; it is not an approximation of other experiences of oppression. Decolonization is not a swappable term for other things we want to do to improve our societies and schools.”). It therefore makes life with an impairment not understood as a lived reality or a valid perspective. See May & Ferri, *Fixated on Ability*, *supra* note 40, at 121.

²¹³ Dorfman, *The Universal View of Disability and Its Danger to the Civil Rights Model*, *supra* note 11, at 38.

a move resembles the claim that “we are all disabled.”²¹⁴ The “we are all disabled” claim is an often-used tool to garner sympathy toward people with disabilities,²¹⁵ yet it serves “as a hollow attempt to claim solidarity” with them,²¹⁶ or is an effort to claim some protection for nondisabled people who think about eventual frailty and their “fear of your own potential exclusion.”²¹⁷ Although the “we are all disabled” claim is not exactly the same as the use of the disability frame advocacy, which aims to expand protections for other vulnerable and oppressed groups, both types of claims share significant common ground and have similar effects.

First, though both claims arise from good intentions, they end up marginalizing the experience of living with impairments. Other than eroding the unique nature of the lived experience, those claims also insinuate that disability law has been successful in eliminating discrimination and barriers for people with disabilities and now should be carried over to help solve other societal problems. In reality, however, disability law has not been a panacea.

214 As Licia Carlson and Matthew Murray argue,

In considering various definitions of disability, it is crucial to understand how, why, whether, and by whom the lines are drawn between the “disabled” and the “non-disabled.” This book takes up these questions through the lens of the specific claim, “we are all disabled.” Variations of this idea can be found in a broad range of settings and, in many ways, it can be read as a response to the recognition that disability is not simply a “natural kind,” but rather a socially and historically constructed category.

Licia Carlson & Matthew C. Murray, *Introduction: What Does It Mean to Claim “We Are All Disabled”?*, in *DEFINING THE BOUNDARIES OF DISABILITY: CRITICAL PERSPECTIVES* 1, 1 (Licia Carlson & Matthew C. Murray eds., 2021).

215 The organizations that use the universal view to garner sympathy for people with disabilities are usually run by nondisabled individuals who view people with disabilities as an object of pity. See MICHELLE R. NARIO-REDMOND, *ABLEISM: THE CAUSES AND CONSEQUENCES OF DISABILITY PREJUDICE* 330-31 (2020). Those who teach antidiscrimination law have also evoked the “we are all disabled” argument. As one professor, borrowing from older conceptions of the social model, suggested: “We are united in our difference and variation, we are all both dependent and interdependent, we all experience barriers to full workplace and societal integration, and we are all ‘disabled by injustice and oppression.’” Ramona L. Paetzold, *Why Incorporate Disability Studies into Teaching Discrimination Laws?*, 27 *J. LEGAL STUD. EDUC.* 61, 76 (2010); see also *id.* at 79 (“There is often greater sharing of the various ways students may consider themselves to be ‘disabled,’ whether it be by virtue of medical diagnosis, educational or social constraints, stereotypes and stigmas, or other mechanisms or categorizations.”).

216 Carlson & Murray, *Introduction: What Does It Mean to Claim “We Are All Disabled”?*, *supra* note 214, at 2.

217 The idea is that “we are all [going to become physically] disabled” at some time in our lives. See Matthew C. Murray, *Power, Disability, and the Academic Production of Knowledge*, in *DEFINING THE BOUNDARIES OF DISABILITY: CRITICAL PERSPECTIVES* 13, 18 (Licia Carlson & Matthew C. Murray eds., 2021) (“The appeal to community of ‘we are all disabled’ is not to the value of those with disabilities but to the potential frailties of those who lack them. The concern is that they might become alienated from their current ‘we’ and become part of this new group in need of social triage.”). Indeed, it was disability theorist Robert McRuer who came up with the term “temporary able-bodied” to refer to those who are currently nondisabled but who are likely to become disabled in the future. See MCRUER, *supra* note 162, at 46.

As Rabia Belt and I pointed out, disability law seems to have a seductive yet misleading allure among those invoking the disability frame.²¹⁸ This is “despite the fact that the ADA was put in place three decades ago,” that “Americans with disabilities remain undereducated and underemployed,” and that “[p]overty rates are higher among Americans with disabilities than among their nondisabled peers.”²¹⁹

Second, both claims erode the legitimacy of disability rights law by allowing a much larger group to enjoy “positive rights” in the form of accommodations.²²⁰ In previous work, I pointed out the unique nature of disability law in American jurisprudence as incorporating a strong positive rights element, one that compels the state and private actors to affirmatively provide accommodations for disabled people. Juxtaposed with the traditional negative rights tradition prohibiting interference with private behavior, accommodations as positive rights for disabled individuals create suspicion and envy among other groups.²²¹

A universal view of disability can cause backlash against disability rights by reaffirming the already prevalent position that disability rights are “special treatment” or “special rights.”²²² Some scholars have argued that policies

²¹⁸ Belt & Dorfman, *Reweighting Medical Civil Rights*, *supra* note 130, at 176.

²¹⁹ *Id.* at 182.

²²⁰ See Dorfman, *[Un]Usual Suspects*, *supra* note 127, at 561 (“The ADA broke new ground in American legal tradition, not only by prohibiting disability discrimination in all areas of public life but also by further combining a distributive element of ‘positive rights’ that compels the state and private actors to affirmatively provide accommodations for disabled people.”).

²²¹ See *id.* at 567 (“[Positive rights are] foreign to the American legal tradition of only providing ‘negative rights,’ which prohibit interference with private behavior Therefore, the positive right to receive disability accommodations has been criticized by economists because of the preferable treatment given to disabled persons.”) One example that clarifies this point is the disability policy at Disney parks that allowed disabled visitors to go in front of lines for attractions. As I have explained: “Lines are arenas for both civility and potential chaos. They are also the one central experience all visitors to Disney parks share, and disability is the celebrity status that could potentially cut all the others but not without evoking strong emotions of anger and envy.” *Id.* at 583 (citation omitted); see also Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 L. & SOC’Y REV. 1051, 1060 (2019) (“Special rights arguments state that minority groups gain an unfair advantage by ‘disguising’ their demands as striving to achieve ‘equal rights’ and an ‘even playing field’ when they are actually seeking extra benefits. The special rights discourse . . . builds on ideas of ‘reverse discrimination’ against dominant groups”).

²²² As I show in other work, this type of “special rights discourse” around disability accommodations is still prevalent among the public today. See Dorfman, *[Un]Usual Suspects*, *supra* note 127, at 560-61; Dorfman, *Fear of the Disability Con*, *supra* note 221, at 1061. Other scholars have made similar arguments. See, e.g., Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 234 (2016) (discussing what Buonocore coins “special treatment stigma” that “manifests itself in the resentment of other employees over the perceived special treatment given to caregivers” or to people with disabilities); Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 708 (2014) (“Impaired individuals’ reluctance to request an accommodation may be driven by questions regarding whether they have a legally defined ‘disability,’ the desire to avoid the perception they are getting ‘special’ treatment,

accommodating everyone, specifically in the workplace context, would work to dismantle stigma around disability accommodations as “special rights.”²²³ Those proposals borrow from the movement toward Universal Design.²²⁴ Such a theoretical move, however, does not equate to the use of a universal view of disability. While Universal Design responds to the fact that all people have some limitations, it “is not to say that we are all disabled.”²²⁵ Until we achieve a universally-designed society, in which disability accommodations are no longer needed, civil rights in the American tradition are given to those recognized discrete and insular minority groups. While the enactment of the ADA completed the process of recognizing people with disabilities as a minority group deserving of civil rights, expanding the boundary of disability through the use of metaphors and the disability frame can lead to concerning results. The idea that everyone is somehow disabled would have unintended consequences, such as perpetuating the notion that no one deserves the legal protection the law provides.²²⁶

C. *Ignoring the History of Disability Rights*

The use of disability as metaphor through disability frame advocacy also undermines the long struggle for disability rights. Disability studies scholar Lennard Davis famously articulated the history of oppression suffered by those living with a disability:

For centuries, people with disabilities have been an oppressed and repressed group. People with disabilities have been isolated, incarcerated, observed, written about, operated on, instructed, implanted, regulated, treated, institutionalized, and controlled to a degree probably unequal to that experienced by any other minority group.²²⁷

For years, the law was complicit with such mistreatment. The infamous case of *Buck v. Bell*, where the Supreme Court upheld the Virginia sterilization

an inhospitable workplace culture, fears of retaliation, and/or the incentive to pursue SSDI benefits instead of pursuing work.”).

²²³ See, e.g., Stein et al., *Accommodating Every Body*, *supra* note 222, at 746; Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 128 (2016).

²²⁴ Universal Design is a design ideology pushing for the creation of environments that are accessible for many people, whether disabled or nondisabled, which is different than designing specifically for people with disabilities. See AIMI HAMRAIE, BUILDING ACCESS: UNIVERSAL DESIGN AND THE POLITICS OF DISABILITY 5-6 (2017).

²²⁵ DOLMAGE, *supra* note 204, at 117.

²²⁶ See Dorfman, *The Universal View of Disability and Its Danger to the Civil Rights Model*, *supra* note 11, at 40 (arguing that the universal view of disability may cause a “backlash,” as “the idea that everyone is somehow disabled inevitably suggests that no one really deserves special treatment”).

²²⁷ Lennard Davis, *Introduction* to THE DISABILITY STUDIES READER, at xv, xv (Lennard J. Davis ed., 2d ed. 2006).

law that was aimed “to prevent our [society] being swamped with incompetence,” is a shameful hallmark of this eugenic history.²²⁸

Disabled people fought long and hard to achieve the legal recognition of section 504 of the Rehabilitation Act and then of the ADA. Beginning in the late 1960s, the independent living and disability rights movements started the process of challenging the persistent views of disabled people as worthy of pity and charity and promoted a rights model supported by civil rights legislation. It was not an easy road; it was paved with historical struggles that took place on university campuses, the streets, and in government buildings. A noncomprehensive list of such events includes the advocacy to create the first Independent Living Center in Berkeley, California, led by Ed Roberts and “the Rolling Quads,”²²⁹ the twenty-five-day sit-in at the San Francisco offices of the Department of Health, Education and Welfare in 1977,²³⁰ the 1988 “Deaf president now” protests at Gallaudet University,²³¹ the “capitol crawl” of 1990,²³² and the 2017 protests against the attempts to repeal the Affordable Care Act in multiple cities around the country.²³³

Notably, the early manifestation of the disability rights movement has been criticized for centering on physical and sensory disabilities and being

228 See *Buck v. Bell*, 274 U.S. 200, 207 (1927); see generally PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL 174-84 (2008). Years later, the Supreme Court later did acknowledge the mistreatment of disabled people by society and the legal system in *Tennessee v. Lane* where Justice Stevens famously acknowledged the “sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services.” *Tennessee v. Lane*, 541 U.S. 509, 528 (2004).

229 SHAPIRO, *supra* note 170, at 48-50 (describing the movement of Ed Roberts and the Rolling Quads that fought to establish an independent living center on campus, as the stigma of residing in a hospital made them “students by day and patients by night”).

230 See *id.* at 66-70 (describing the twenty-five-day sit-in and noting that it “marked the political coming of age of the disability rights movement”); see also PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 111 (2003) (“On April 28, 1977, Secretary Califano signed the implementing regulations, making Section 504 an enforceable law. Two days later, the protestors in San Francisco triumphantly paraded out singing ‘We Have Overcome.’ Their twenty-five-day sit-in remains the longest occupation of a federal building by political protestors in U.S. history.”); KIM E. NIELSEN, A DISABILITY HISTORY OF THE UNITED STATES 168-69 (2012) (describing the events leading up to the sit-in).

231 See SHAPIRO, *supra* note 170, at 76-85 (describing the student protests that led to Gallaudet University’s first Deaf president).

232 See LENNARD J. DAVIS, ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST U.S. MINORITY ITS RIGHTS 191-98 (2015) (detailing the Capital Crawl and the rotunda arrests, noting that the advocacy was vital in pushing for the passage of the ADA, as describing the events “two of the three most iconic movements in disability history”).

233 See Belt & Dorfman, *Disability, Law, and the Humanities*, *supra* note 163, at 159 (“In June 2017, over forty ADAPT protesters were arrested after they gathered and chanted outside Senate Majority Leader Mitch McConnell’s office on Capitol Hill over the GOP’s failed attempt to repeal the Affordable Care Act.”).

less focused on people with intellectual and mental disabilities and on those living with chronic illnesses.²³⁴ The early movement also did not pay attention to the intersection of disability with race, ethnicity, sexual orientation, and gender identity.²³⁵ Yet, as with other social movements, the disability rights movement has evolved into its “second wave,” known as disability justice. Disability justice is a collective led by “disabled queers and activists of color”²³⁶ and is indeed much more inclusive and indicative of the disability experience and more radical.²³⁷ It is important to emphasize, however, that disability justice, as well as scholars of Disability and Critical Race Theory (DisCrit),²³⁸ aim to protect people with a wide range of

²³⁴ *Id.* at 152.

²³⁵ *Id.* at 153; see also Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 684, 705-713 (2021) (arguing that the antidiscrimination principle created a “system that marginalized disabled people who are ‘intersectionally targeted’” (citation omitted)). Some legal scholars have explored the intersection of race and disability. See Jamelia Morgan, *Toward a DisCrit Approach to American Law*, in DISCRIT EXPANDED: REVERBERATIONS, RUPTURES, AND INQUIRIES 13, 19 (Subini A. Annamma, Beth A. Ferri & David J. Connor eds., 2022) (“An intersectional approach to disability strengthens these arguments by demonstrating how disability and historically marginalized identities and statuses interact to render some disabled persons even more vulnerable to disability discrimination . . .”); Harris, *Reckoning with Race and Disability*, *supra* note 136, at 928 (“Notably, much of the work on intersectionality in the context of race and disability has taken place in the realm of disability studies and not disability law. Yet disability legal scholars have begun to embrace intersectionality and, in doing so, apply it selectively to discrete issues disproportionately affecting disabled people of color such as special education, policing, and prison abolition work.”); Kelly K. Dineen & Elizabeth Pendo, *Engaging Disability Rights Law to Address the Distinct Harms at the Intersection of Race and Disability for People with Substance Use Disorder*, 50 J. L. MED. & ETHICS 38, 39 (2022) (“A growing number of legal scholars have explored race and disability discrimination using different approaches. An intersectional scholarly approach focuses on the unique and compounded harms of oppression experienced by people who are members of two or more marginalized groups (e.g., a Black woman with a disability).”); see generally Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO STATE L.J. 391 (2001); Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, *supra* note 69; Belt, *The Fat Prisoners’ Dilemma*, *supra* note 88.

²³⁶ Chin, *Centering Disability Justice*, *supra* note 235, at 215; see also Mia Mingus, *Changing the Framework: Disability Justice*, LEAVING EVIDENCE (Feb. 12, 2011, 1:56 PM), <https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice> [<https://perma.cc/5MN4-57RD>] (“Disability justice activists are engaged in building an understanding of disability that is more complex, whole and interconnected than what we have previously found. We are disabled people who are people of color; women, genderqueer and transgender; poor and working class; youth; immigrants; lesbian, gay, bisexual and queer; and more.”); see generally SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE (2d ed. 2019).

²³⁷ See LEAH LAKSHMI PIEPZNA-SAMARASINHA, CARE WORK: DREAMING DISABILITY JUSTICE 28 (2018) (“This [disability justice] is radical. It is a radical rewriting of what care means, of what disability means, taking anarchist ideas of mutual aid and crip-femming them out.”).

²³⁸ See Subini Ancy Annamma, David Connor & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 1 (2013) (describing DisCrit as “a new theoretical framework that incorporates a dual analysis of race and ability”). For further discussion of DisCrit and ways to apply its principals to legal analysis, see Morgan, *Toward a DisCrit Approach to American Law*, *supra* note 235, at 13-19.

impairments and therefore both reject a universal view of disability or the use of disability as a metaphor.²³⁹ As DisCrit scholars Subini Ancy Annamma, David Connor, and Beth Ferri wrote: “DisCrit emphasizes the social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms.”²⁴⁰

The rich history behind the struggle for disability rights is often overlooked when discussing the history of social movements in the United States. Using disability as a metaphor further undermines and marginalizes the history that led to the disability rights legislation. In doing so, disability frame advocacy disregards the community the law is meant to protect, that of people living with impairments. When using a disability rights framework, one therefore needs to acknowledge the contribution of the disability rights movement to the development of legal protections under antidiscrimination law.

D. *Contradicting Disability Pride*

Using disability as a metaphor to denote inability, disadvantage, and lack of power also stands in contrast to one of the major tenets of the disability rights movement, that of disability pride. Many people with disabilities take pride in their life experiences and claim disability as a life-enriching experience, a part of a positive cultural heritage, and a defining aspect of a fierce political identity.²⁴¹ This concept of disability pride is perhaps hard to grasp for those outside the disability community due to the entrenched view

²³⁹ See SINS INVALID, *supra* note 236, at 25 (“We are building a movement that breaks down isolation between people with physical impairments, people who are sick or chronically ill, psych survivors and people with mental health disabilities, neurodiverse people, people with intellectual or developmental disabilities, Deaf people, Blind people, people with environmental injuries and chemical sensitivities, and all others who experience ableism and isolation that undermines our collective liberation.”); see also Belt, *The Fat Prisoners’ Dilemma*, *supra* note 88, at 826 (“Like with DisCrit scholars, rather than adding disability to the pantheon of identity factors that we use to talk about inequality (although that is also necessary), the intent here is to discuss how other types of injustice, such as racism, factor into producing disability in the first place.”).

²⁴⁰ Annamma et al., *Dis/ability Critical Race Studies (DisCrit)*, *supra* note 238, at 11.

²⁴¹ See Marjorie F. Olney & Karin F. Brockelman, *Out of the Disability Closet: Strategic Use of Perception Management By Select University Students with Disabilities*, 18 DISABILITY & SOC’Y 35, 40-41 (2003) (describing how university students “students saw the disability as a positive attribute”); see also NARIO-REDMOND, *supra* note 215, at 238 (“Generally, people who score high on measures of disability identification report that disability is an important part of who they are, that they don’t regret having their disability, and a that they even feel pride about their disability.”); Dorfman, *Re-Claiming Disability*, *supra* note 60, at 201 (“The de-medicalization of disability through ideas derived from the social model has played a part in liberating large numbers of people with disabilities and helped them create an empowered disability identity.”). For a discussion of LGBTQ+ pride and disability pride, see CLARE, *supra* note 171, at 103-11, and Sherry, *Overlaps and Contradictions Between Queer Theory and Disability Studies*, *supra* note 165, at 180-82.

of disability as tragedy²⁴² and the “ableist conflation” of disability with suffering.²⁴³ Nevertheless, the concept of disability pride is gaining momentum.²⁴⁴ Psychologists such as Michele Nario-Redmond have even empirically shown a connection between adopting a positive, proud, disability identity and increased well-being.²⁴⁵

Using disability as a metaphor for undesirable disadvantage stands in direct contrast to the concept of disability pride. It undermines the idea that life with a disability can be an equally good life.²⁴⁶ Therefore, holding on and pushing the idea that disability is a negative trait thus has the potential to undermine disability pride and halt the progress of the movement for disability justice.²⁴⁷ Ceasing to use disability as metaphor is therefore another step in realizing the complexity of the human experience and moving toward a more just society for disabled individuals.

VI. CONCLUSION: MOVING BEYOND DISABILITY AS METAPHOR

Although it might seem tempting to turn to disability rights law to seek redress for other marginalized and oppressed communities, specifically relying on an outdated version of the social model of disability, this Article argues that this approach is misguided. It ignores the role of impairment and the bodymind in the creation of disability, disregards the lived experiences of people with impairments, and overlooks the rich history of the independent living and disability rights movements. It therefore has the effect of further marginalizing the status of people with disabilities.

²⁴² See *supra* note 53 and accompanying text.

²⁴³ See REYNOLDS, *supra* note 173, at 115 (2022) (“Across the history of philosophy, conceptions of what we today call ‘disability’ are shaped by the ableist conflation: the assumption that disability is a harmful lack and coincident with pain and suffering.”).

²⁴⁴ For a description of contemporary manifestations of disability pride on social media and within the neurodiversity movement, see Eyer, *Claiming Disability*, *supra* note 171, at 577–78.

²⁴⁵ See NARIO-REDMOND, *supra* note 215, at 246. (“[T]he more people expressed value in the disability experience, the more personal and collective self-esteem increased. That is, the more people indicated that they appraised their disability as a strength, an experience that enriched their lives and made them better people, the more they felt a personal sense of self-worth and a collective sense of worth derived from the broader disability community.”)

²⁴⁶ See REYNOLDS, *supra* note 173, at 157 (discussing life with a disability as “life worth living”). As Elizabeth Emens has observed, there is a tension between how society perceives disability (i.e., an outside view) and the way people living with disabilities and their close ones view it (i.e., an inside view). See Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1389 (2012). While the outside view sees disability as an “unhappy place,” the inside view simply looks at it as “a mundane feature of a no-less-happy life, rendered inconvenient or disabling largely by interactions with the surrounding environment, which legal accommodations alter in ways that sometimes provide benefits to many.” See *id.* at 1386; see also PAUL K. LONGMORE, TELEPHONS: SPECTACLE, DISABILITY, AND THE BUSINESS OF CHARITY 98–101 (2015); DANA S. DUNN, THE SOCIAL PSYCHOLOGY OF DISABILITY 20–22 (2014).

²⁴⁷ I thank Adi Goldiner for this excellent point.

This Article also points to a possible explanation for the application of disability rights law to other social issues: the use of disability as a metaphor for disadvantage and inability in legal texts. This Article has illustrated that the word disability is used in legislation and court decisions to refer, in various ways, to the inability to file a claim, the inability to fulfill a legal role, and the disadvantage caused by legislation or state action in the equal protection context. This loose use of the term disability, I argue, makes it acceptable or natural for scholars or advocates to invoke strategies of disability frame advocacy.

A solution to this problem would require moving away from the use of disability as metaphor in legislation and litigation. One could simply amend the law to use the word inability or the term lack of qualification and thus avoid the lexical ambiguity associated with disability. Such a move was made in the sports arena, where, as mentioned previously, disability metaphors are omnipresent. In 2019, Major League Baseball decided to rename the “disabled list” as the “injured list.”²⁴⁸ This change was made at the suggestion of disability rights groups, and the league explained that it “will make the change out of concern that the term ‘disabled’ for injured players falsely conflates disabilities with injuries and an inability to participate in sports.”²⁴⁹

A similar move to avoid the use of disability as metaphor has been done in legislation. For example, in 1991, Rule 63 of the Federal Rules of Civil Procedure was amended to remove the term disability. This Rule is similar in meaning to Rule 25 of the Federal Rules of Criminal Procedure; it used disability as a metaphor for not being able to continue in a judicial role. It is now titled “Judge’s Inability to Proceed.”²⁵⁰ As the explanation to the Rule states, that the “former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings.”²⁵¹

This Article calls for legislators, judges, advocates, and scholars with and without disabilities to take into consideration, and be conscious of, the use of disability as metaphor in law. One needs to remember that disability is first and foremost a unique lived experience and that people with disabilities are a historically (and currently) oppressed group with a rich history and culture. I take the same position as Simi Linton, who wrote 25 years ago that she was “not willing or interested in erasing the line between disabled and nondisabled people, as long as disabled people are devalued and discriminated

²⁴⁸ Jeff Passan, *Major League Baseball to Rename Disabled List as ‘Injured List’*, ESPN (Feb. 7, 2019), https://www.espn.com/mlb/story/_/id/25947020/major-league-baseball-rename-disabled-list-injured-list [https://perma.cc/KW3H-RM26].

²⁴⁹ *Id.*

²⁵⁰ FED. R. CIV. P. 63.

²⁵¹ FED. R. CIV. P. 60 advisory committee’s note to 1991 amendment.

against, and as long as naming the category serves to call attention to that treatment.”²⁵²

Doctrinally, instead of trying to fit other identities under the umbrella of disability, I would argue a better solution could be pushing for the adoption of reasonable accommodation mandates in other areas of law pertaining to other historically marginalized groups. Legal scholars have emphasized the reasonable accommodations mandate are not substantially different from antidiscrimination measures available in other laws.²⁵³ Based on their work, which is beyond the scope of this Article, one could argue for a push toward expanding accommodation mandates to other areas of law.

However, I do not intend to discourage those who dedicate their careers and lives to research and advocate against sexism, racism, antisemitism, homophobia, xenophobia, classism, or other types of oppression from thinking of disability and from building coalitions across communities. Often, disability law and disability studies are relegated to those who have a personal relationship to people with disabilities.²⁵⁴ But a better understanding and knowledge of disability law “should not be limited to a certain group of people; it is everyone’s business.”²⁵⁵ Disability and disability law are ubiquitous in our everyday life.²⁵⁶ An estimated one in four Americans has a disability,²⁵⁷ and an increasing number of individuals are newly disabled in light of the COVID-19 pandemic.²⁵⁸ It is often up to laypeople to enforce

²⁵² LINTON, *supra* note 32, at 13.

²⁵³ See, e.g., Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643-46 (2001); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 581, 582-53 (2004); Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 830-36 (2003); Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates—Aren’t They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 123-28 (2003); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 915 (2004); David Wasserman, *Is Disability Discrimination Different?*, in PHILOSOPHICAL FOUNDATIONS OF ANTI-DISCRIMINATION LAW 269 (Deborah Hellman & Sophia Moreau eds., 2013).

²⁵⁴ Dorfman, *Fear of the Disability Con*, *supra* note 221, at 1082-83.

²⁵⁵ *Id.* at 1083.

²⁵⁶ *Id.*

²⁵⁷ The Centers for Disease Control and Prevention reports that sixty one million Americans are living with disabilities in 2018. See CATHERINE A. OKORO ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT: PREVALENCE OF DISABILITIES AND HEALTH CARE ACCESS BY DISABILITY STATUS AND TYPE AMONG ADULTS—UNITED STATES, 2016, at 882 (2018), <https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6732a3-H.pdf> [<https://perma.cc/BE3B-VSHT>]; CTRS. FOR DISEASE CONTROL & PREVENTION, DISABILITY IMPACTS US ALL (2020), https://www.cdc.gov/ncbddd/disabilityandhealth/documents/disabilities_impacts_all_of_us.pdf [<https://perma.cc/W85L-PK3N>].

²⁵⁸ This is due to “long COVID” debilitating symptoms that linger after they were infected with coronavirus and its variants. See, e.g., Laura Mauldin, *Long COVID Leaves Newly Disabled People Facing Old Barriers—A Sociologist Explains*, THE CONVERSATION (Mar. 10, 2022, 8:25 AM), <https://theconversation.com/long-covid-leaves-newly-disabled-people-facing-old-barriers-a>

disability laws, whether it is in the workplace, in primary and higher education, in public spaces such as parking lots, or in private businesses.²⁵⁹

This Article presents an opportunity to think critically about disability and its boundaries, and to consider an approach toward a more inclusive society. The use of disability as metaphor, which discounts the lived experiences of disabled people and disregards the concept of impairment, can be an obstacle to the implementation of disability law in a world that is far from welcoming and accommodating to people in need of these protections. Disability as a metaphor can water down the fight for disability justice that started decades ago and is still well underway.

sociologist-explains-175424 [https://perma.cc/7CZ7-2BQD] (“The American Academy of Physical Medicine and Rehabilitation estimates that long COVID will add as many as 22 million individuals to the U.S. population of disabled people.”); Doron Dorfman, *Pandemic “Disability Cons”*, 49 J. L. MED. & ETHICS 401, 406 (2021) (“COVID ‘long-haulers’ may increase the number of disabled persons in the population, and this challenges Social Security disability benefits policy as well as the number of people utilizing disability rights law.”); Amanda Morris, *Another Struggle for Long Covid Patients: Disability Benefits*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/27/us/long-covid-disability-benefits.html> [https://perma.cc/B993-QJG6] (explaining how individuals suffering with “long Covid” may have difficulty obtaining disability benefits).

²⁵⁹ See Dorfman, *Fear of the Disability Con*, *supra* note 221, at 1053 (“Inclusion depends not only on the signs, symbols, and policies of inclusion but also on how laypeople experience rights and their legal consciousness. This is specifically true in the disability law context, as its regulations and policies primarily depend on private enforcement via society’s members, specifically in everyday situations wherein formal law is absent.”); Dorfman, *[Un]Usual Suspects*, *supra* note 127, at 563, 600 (discussing enforcement of disability laws and policies in parking lots and in Disney parks); Dorfman, *Suspicious Species*, *supra* note 150, at 1413-14 (discussing enforcement of rules regarding service animals by private business owners).