

Why Disability Studies in Criminal Law and Procedure?

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Graham v. Connor is a Fourth Amendment case taught in many criminal procedure courses. Here's a brief summary of the facts of the case: Dethorne Graham was a thirty-something Black man who had diabetes.¹ On the day of his encounter with police, Graham experienced the onset of an adverse insulin reaction, so he asked a friend to drive him to a convenience store nearby to purchase some orange juice.² There, he grabbed a bottle of orange juice and went to stand in line, but soon decided that there were too many people in line, so he rushed out of the store and headed back to his friend's car.³ He later asked his friend to drive him to another friend's house.⁴ Officer Connor observed what took place in the convenience store, and it provoked his suspicion so much so that he decided to make an investigatory stop.⁵ During the stop, Graham's friend told Officer Connor that Graham was having a "sugar reaction."⁶ Unconvinced, Officer Connor decided to verify this account, so he returned to his car to call the convenience store.⁷ He also called for additional police backup.⁸ In the meantime, Graham got out of the car, circled it a couple times and passed out briefly on or near the curb.⁹ Responding officers arrived. During this time, Graham was in and out of consciousness.¹⁰ Nevertheless, officers still forcibly handcuffed him and, at some point during the ordeal,

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1 *Graham v. Connor*, 490 U.S. 386, 388 (1989).

2 *Id.*

3 *Id.* at 388-89.

4 *Id.* at 389.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

“Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder . . . [and] a loud ringing in his right ear[.]”¹¹

Graham v. Connor is a watershed Fourth Amendment case that establishes the objective reasonableness standard governing police use of force. The focus of the opinion is on the use-of-force standard and less so on the reasons justifying the stop in the first place. Perhaps this is why there is not an in-depth discussion of disability in *Graham*. Graham’s disability is noted, but there is little interrogation of how disability mediated the police encounter. More specifically, there is not much discussion on the role Dethorne Graham’s race (Black) and disability (diabetes) played in both providing the basis for reasonable suspicion justifying the stop and creating a pathway to police use of force, the central legal issue in the case.¹²

There are many more cases like *Graham*, in which disability is hiding in plain sight yet is not discussed extensively in criminal law and procedure textbooks.¹³ Of course, individual professors may discuss disability generally and may even draw from disability studies specifically, but by and large criminal law and criminal procedure casebooks tend not to include substantial discussions of disability discrimination, disability-based subordination, and ableism.¹⁴ This omission should be addressed for several reasons.

First, disability is a source of what can be viewed as group-based subordination vis-à-vis the carceral state.¹⁵ As I discuss below, individuals with disabilities are overrepresented in incidents involving police violence and

¹¹ *Id.* at 390.

¹² See Jamelia N. Morgan, *Disability’s Fourth Amendment* (forthcoming paper) (online file with author) (examining the role of disability in police encounters); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 143 (2017) (discussing how police stops create conduits to police violence).

¹³ This is not to suggest that scholars have not written critically on disability and criminal law, criminal procedure, or criminal law policy. Michael Perlin’s work on sanism, and Lea Johnston’s work disrupting traditional accounts of mental illness and crime, are notable in their extensive and critical engagement with issues relating to disability. See, e.g., E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515 (2019); Michael L. Perlin, *On “Sanism”*, 46 SMU L. REV. 373 (1992).

¹⁴ In this essay, I rely on the definition of ableism provided by Talila A. Lewis and Dustin Gibson, who both define ableism as

[a] system that places value on people’s bodies and minds based on societally constructed ideas of normalcy, intelligence, excellence and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, colonialism and capitalism. This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person’s appearance and/or their ability to satisfactorily [re]produce, excel and “behave.” You do not have to be disabled to experience ableism.

Talila A. Lewis, *Working Definition of Ableism - January 2022 Update*, <https://www.talilalewis.com/blog/working-definition-of-ableism-january-2022-update> (Jan. 2022).

¹⁵ See generally LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* (2020) (discussing disability-based subordination in carceral spaces, including prisons, jails, and psychiatric hospitals, among others).

are incarcerated at disproportionately high rates. As with other marginalized identities, whether identities related to race, gender, sexual orientation, or class, students should have exposure to the ways in which disabled people as a group are vulnerable to policing, criminalization, and incarceration. Discussing disability in criminal law and criminal procedure courses also provides a space to incorporate an intersectional analysis to examine the ways in which negatively racialized and historically marginalized individuals with disabilities are rendered more vulnerable to policing, criminalization, and incarceration, and how their experiences differ from those of disabled people who do not have these negatively racialized and historically marginalized identities. Second, centering disability allows opportunities for students in criminal law and criminal procedure courses to analyze and critique legal doctrine, concepts, and theories. For example, in substantive criminal law courses, students have a basis to discuss how criminal laws target (what may be) disability-related behaviors and what that means for Eighth Amendment protections against punishment for status crimes.¹⁶ Similarly, in criminal procedure courses, students have an entry point into analyzing whether and how areas of Fourth and Fifth Amendment doctrine can fail to adequately protect the rights of disabled people.¹⁷ Finally, students who plan to practice criminal law or work within the criminal legal system—whether as prosecutors, defense attorneys, policymakers, etc.—should be exposed to discussions of disability because they will almost certainly encounter individuals charged with crimes who have disabilities. Students should be exposed to frameworks for understanding how disabled people are rendered vulnerable to policing, criminalization, and incarceration and how ableism operates within the criminal legal system.

In this essay, I argue that professors should include critical discussions of disability in their courses on criminal law and procedure. In the next section, I situate the problem and discuss why the overrepresentation of disabled people in incidents of police violence and in prisons and jails makes it important to discuss disability in criminal law and procedure courses. Then, I explain some of the key concepts in disability studies and how central insights from disability studies can be incorporated into criminal law and procedure courses. The essay concludes with some sample discussion questions that can both further a critical engagement with disability and offer an entry point to critique mass criminalization and incarceration and the harms they pose to disabled people.

Disability, Criminality, and Policing

In recent years, police violence against disabled people has been a source of increased public attention and alarm. Data compiled since 2015 by *The Washington Post* indicates that anywhere from twenty percent to over half of the

16 See *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962).

17 Morgan, *Disability's Fourth Amendment*, *supra* note 12.

people killed each year by law enforcement have a disability.¹⁸ People with psychiatric disabilities,¹⁹ particularly those persons who lack treatment and support, are more than sixteen times more likely to be killed in encounters with law enforcement than nondisabled persons.²⁰ A review of the data also shows disparities based on race and gender. According to data compiled by *The Washington Post*, African Americans showing signs of “serious mental illness” were killed by the police at a rate of 10:1 when compared with African Americans in the general population.²¹ Though the researchers acknowledged the need for more complete data and risks of discrepancy in data, they also noted that while comparatively fewer women are killed by police, approximately thirty-seven percent of police killings involved women showing “signs of mental illness.”²²

Individuals with psychiatric disabilities are not the only group disproportionately impacted by police violence. Individuals with intellectual and developmental disabilities, including autistic individuals and individuals with cognitive disabilities, are also vulnerable to police violence. For example, in December 2019, the Chicago Police Board voted to suspend Sgt. Khalil Muhammad for the August 2017 shooting of then-18-year-old Ricardo Hayes, a Black teenager with intellectual and developmental disabilities in the predominantly Black neighborhood of Fernwood in South Side, Chicago.²³ On the night of the shooting, Hayes had wandered off from the group home where he lived, as he had done on a number of prior occasions. Officer Muhammad said that Hayes was “acting suspiciously” when he first spotted

18 *Fatal Force: People Who Have Been Shot and Killed by Police in 2019*, WASH. POST (last visited Aug. 29, 2019), <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/>; see also Deborah Danner, *Living with Schizophrenia*, at 4 (Jan. 28, 2012), <https://assets.documentcloud.org/documents/3146953/Living-With-Schizophrenia-by-Deborah-Danner.pdf>.

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

20 DORIS A. FULLER ET AL., *OVERLOOKED IN THE UNDERCOUNTED THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS I* (2015), <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf>.

21 *Id.*

22 *Id.*

23 Charlie De Mar, *New Video Shows Off-Duty Chicago Police Sergeant Shooting Teenager Ricardo Hayes*, CBS CHICAGO (Oct. 16, 2018), <https://chicago.cbslocal.com/2018/10/16/video-shows-off-duty-chicago-police-sergeant-khalil-muhammad-shooting-unarmed-teenager-ricardo-hayes/>.

him and that when he asked Hayes questions, he was “elusive,” and took off running.²⁴ Officer Muhammad then shot Hayes several times in the arm. In the 911 call made by Officer Muhammad at the scene, he stated that he shot Hayes because “[t]he guy pulled like he was about to pull a gun on me, walked up to the car, and I had to shoot.”²⁵ However, a video released by the Civilian Office of Police Accountability contradicted Sgt. Muhammad’s account.²⁶ Hayes did not at all appear to be reaching for anything at the time he was shot. Hayes later filed a civil suit, and in May 2020 the city of Chicago agreed to settle the suit for \$2.25 million.

Disabled people are also rendered vulnerable to police violence through order-maintenance policing across a variety of public and private spaces.²⁷ In response to the affordable housing crisis and the growth in houseless people in public space, local jurisdictions have ramped up quality-of-life policing efforts in public spaces.²⁸ These quality-of-life offenses disproportionately target unsheltered communities²⁹—a significant portion of which include persons with disabilities.³⁰ Order-maintenance policing also takes the form of aggressive

24 *Id.* Reviewing Hayes’ actions through the lens of disability shows that his actions are consistent with an individual with I/DD—running away may suggest fear, confusion, or lack of comprehension of what the officer is requesting. Jamie Kalven, *Chicago Finally Releases Video of Police Officer Shooting Unarmed and Disabled Ricky Hayes*, INTERCEPT (OCT. 16, 2018), <https://theintercept.com/2018/10/16/chicago-police-shooting-video-ricky-hayes/>; see also *Arc Nat’l Ctr. on Criminal Justice & Disability*, 12 ADVANCING PUB. SAFETY OFFICERS & INDIVIDUALS WITH INTELL. AND DEVELOPMENTAL DISABILITIES (2019).

25 Kalven, *supra* note 24.

26 *Id.*

27 As Professor Lua Yuille explains, “Order-maintenance policing” or “quality-of-life policing” refers to a number of offenses that provide police with a “broad delegation of discretionary power to local police to ‘keep the peace’ (read: enforce community norms of decency and aesthetics) through a constellation of tools that include the informal exercise of authority, as well as the power to arrest individuals for relatively minor offenses (e.g. “breaching the peace”, “suspicion,” loitering, and vagrancy) that exist at least primarily to provide the police with tools to remove undesirable persons from public spaces.” Lua Kamál Yuille, *Manufacturing Resilience on the Margins: Street Gangs, Property, & Vulnerability Theory*, 123 PENN ST. L. REV. 463, 498 n.123 (2019).

28 See Sarah Gillespie et al., *Addressing Chronic Homelessness through Policing Isn’t Working. Housing First Strategies Are a Better Way*, URBAN INSTITUTE (June 29, 2020), <https://www.urban.org/urban-wire/addressing-chronic-homelessness-through-policing-isnt-working-housing-first-strategies-are-better-way>.

29 See, e.g., “Quality of Life” Policing, INCITE!, <https://incite-national.org/wp-content/uploads/2018/08/toolkitrev-qualitylife.pdf> (discussing homeless people as one of the groups targeted by quality-of-life policing in New York City).

30 See, e.g., *Homelessness in America: Focus on Chronic Homelessness Among People With Disabilities*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Aug. 2018), https://www.usich.gov/resources/uploads/asset_library/Homelessness-in-America-Focus-on-chronic.pdf (“People with disabilities are disproportionately represented among all people experiencing homelessness and, according to point-in-time (PIT) counts conducted in January 2017 by communities across the country, it is estimated that on any given day nearly one-quarter (24%) of

policing of access to private spaces, which may sweep up disabled individuals into the carceral state for minor property crimes. For instance, in one case, police in Huntsville, Alabama, arrested Tanner Caldwell for trespassing on a neighbor's property.³¹ According to statements made to the media by Tanner's family, Tanner, a then-twenty-five-year-old white man with Down syndrome, did not understand the nature of his conduct leading to the trespass arrest, likely because of his intellectual disability.³² Following arrest, Tanner was then taken to a local jail only to be released from Madison County Jail around 11:30 p.m. without any assistance or transportation home.³³ Tanner was released from jail after signing paperwork for an unsecured bond, paperwork which Tanner's family stated he did not understand given his limited reading ability.³⁴

When police killed Ethan Saylor, a twenty-six-year-old white man with Down syndrome, during the course of an arrest, the incident spurred widespread condemnation from disability rights advocates and organizations.³⁵ Saylor was at a Maryland movie theater watching a film.³⁶ When the film ended, Saylor went outside to wait for his caregiver to arrive. Saylor returned to the theater to watch the film again. The theater manager told Saylor that he would have to pay to watch the film again, but Saylor did not understand and did not know how to handle money. When Saylor returned to the theater, the theater manager called mall security, a group that included three off-duty police officers, who attempted to arrest Saylor as he sat in the theater. Saylor allegedly resisted, and officers responded with force, pinning Saylor to the floor as they attempted to handcuff him. Witnesses reported that one officer had his knee in Saylor's back, and that at some point Saylor screamed, "Mommy, it hurt!" Saylor died at the hospital later that day of asphyxiation.

Janice Dotson-Stephens was arrested for misdemeanor trespassing charges in July 2018.³⁷ Dotson-Stephens was arrested at the Mount Zion Sheltering Arms, in San Antonio, Texas, which is "an affordable housing complex for

individuals experiencing homelessness (86,962 of 369,081 individuals) are people with disabilities who met the federal definition of experiencing chronic homelessness").

31 Sarah Singletery, *Officials Investigating After Huntsville Man with Down Syndrome Released From Jail, Found Wandering the Streets*, WAAY31 ABC (May 20, 2019).

32 *Id.*

33 *Id.*

34 *Id.*

35 See *Estate of Saylor v. Regal Cinemas, Inc.*, 54 F. Supp. 3d 409, 424 (D. Md. 2014); David M. Perry & Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability*, THE RUDERMAN FAMILY FOUND. (March 2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf.

36 *A Brief Summary of the Story*, THE ROAD WE'VE SHARED, <http://theroadweveshared.com/justice-for-ethan/a-brief-summary-of-the-story> (last visited Mar. 20, 2020).

37 *Dotson v. Bexar County Hospital Dist.*, 2019 WL 6311375, Civ. Action No. 19-CV-00083-XR, *1 (W.D.Tex. Nov. 25, 2019).

elderly and disabled persons,” and where her “estranged husband” lived.³⁸ Dotson-Stephens, a sixty-one-year-old Black grandmother, had an extensive mental health history and a number of hospitalizations and involuntary commitments.³⁹ She also had repeated interactions with the San Antonio Police Department during a period from about July 1996 to July 2018. According to facts adduced from the district court opinion in the civil case brought by the Dotson family, “Dotson-Stephens had at least three documented ‘mental health disturbance’ situations involving SAPD, two of which required ‘emergency mental health detentions’ occurring on March 18, 2014 and September 1, 2017.”⁴⁰ By the time of her death from “atherosclerotic cardiovascular disease. . . with schizoaffective disorder as a contributing factor,” Dotson-Stephens had spent 150 days in Bexar County Jail.⁴¹

That aggressive order-maintenance enforcement policies disproportionately target disabled persons is also apparent in calls from hospital staff to law enforcement for removal of so-called “unwanted persons.”⁴² In such cases, disabled people are vulnerable to arrests and removal in places where they seek access to medical and mental health care—indeed, the very sites tasked with providing these services. For example, police officers in Portland, Oregon, arrested a woman wandering in the waiting area of the Legacy Good Samaritan Hospital. Officers arrived at the scene at approximately midnight. When they arrived, hospital staff informed them that there was an unwanted woman in the waiting area with no medical need who refused to leave. The police report describing the incident notes that the unwanted woman was “seventy-six years old, partially blind, and experiencing pain due to ‘lingering injuries’ sustained during an assault at a homeless shelter, hardly able to walk, and ‘most likely suffering from the onset of Dementia.’ ”⁴³ Earlier that day, the woman had been admitted at the emergency department of another area hospital. After attempts to call Adult Protective Services and engage mental health professionals failed, police arrested the disabled woman and then booked her into the Multnomah County jail.⁴⁴

38 *Id.*

39 *Id.* (“[Dotson-Stephens] had been involuntarily committed at the San Antonio State Hospital numerous times when she experienced ‘crisis episodes,’ which were characterized by her inability to think clearly and by hallucinations, disorientation, and confusion. During those commitments, doctors at the State Hospital were able to stabilize Ms. Dotson-Stephens through medication.”); Michael Barajas, *‘Ignored to Death’ in Bexar County Jail*, TEXAS OBSERVER (Jan. 4, 2019), <https://www.texasobserver.org/ignored-to-death-in-the-bexar-county-jail/>.

40 *Id.*

41 *Id.*

42 See *The “Unwanted’s”: Looking for Help, Landing in Jail*, DISABILITY RIGHTS OREGON (2019), <https://news.streetroots.org/sites/default/files/Report-The-Unwanted’s-Looking-for-Help-Landing-in-Jail-2019-June18.pdf>.

43 *Id.* at 4.

44 *Id.*

Vulnerabilities to criminalization and policing for disabled people are reflected in the disproportionately high rates of incarcerated people who have disabilities. When compared with society at large, prisoners are almost three times more likely and detainees in jails are more than four times more likely to report having a disability.⁴⁵ Recent data by the Department of Justice's Bureau of Justice Statistics (BJS) estimated that approximately thirty percent of people who are incarcerated in state and federal prison and forty percent of people detained in jail have at least one cognitive or physical disability.⁴⁶ BJS also reported the following data with respect to race and disability:

Among prisoners, 37% of non-Hispanic whites and 42% of persons of two or more races reported at least one disability, compared to 26% of non-Hispanic [B]lacks.

Among jail inmates, 40% of whites and 55% of persons of two or more races reported having at least one disability, compared to 35% of [B]lacks.

Hispanic prisoners (28%) and jail inmates (38%) were as likely as [B]lacks to report having at least one disability.

A larger percentage of prisoners of two or more races (27%) and white prisoners (23%) reported cognitive disabilities than [B]lack (17%) or Hispanic prisoners (15%).

Among jail inmates, nearly the same percentage (about 30%) of white, [B]lack, and Hispanic offenders reported a cognitive disability.⁴⁷

Despite these vulnerabilities to criminalization and police violence, classroom discussions on disability are relatively limited in law school courses on criminal law and criminal procedure. For example, in criminal law, beyond the insanity defense or other defenses based on mental illness, disability may not be discussed. Even so, discussing disability only in this part of the curriculum risks aligning disability predominantly with notions of criminality. Indeed, leaving students with one narrow—often pathologized—view of disability prevents critical engagement with *why* certain behaviors linked with disabilities are policed in the first place. Lack of engagement with disability as

45 Jennifer Bronson et al., *Disabilities Among Prison and Jail Inmates, 2011-12*, U.S. DEP'T OF JUSTICE, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/dpji1112.pdf>.

46 *Id.* The report defines disability types to include "hearing, vision, cognitive, ambulatory, self-care, and independent living, which refers to the ability to navigate daily life schedules, activities, and events without assistance." *Id.*; see also Rebecca Vallas, *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons*, CTR. FOR AM. PROGRESS, AT 1 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf>.

47 BRONSON ET AL., *supra* note 45, at 5.

a subordinated status depicts disabled people as the “aggressors” rather than victims of, for example, police violence or sexual violence.⁴⁸

Large disparities in policing and incarceration call for critical engagement with disability, and such disparities provide a starting point for inquiry into how disabled people are rendered particularly vulnerable to becoming entangled with the carceral state. The disparities also invite critical discussions on the role of the carceral state in reproducing disability-based subordination. These critical analyses and policy debates are appropriate fodder for discussion in criminal law and procedure courses. The timeliness of such interventions cannot be overstated. Over the past few years, there has been a growing recognition among criminal law and criminal procedure professors that issues pertaining to racial, gender, and class inequality should feature in classroom discussions right alongside discussions of legal doctrine and criminal justice policy.⁴⁹ These scholars have emphasized how race, gender, and class can offer a lens for examining the harms to communities stemming from the criminal legal system and offer a set of racial, gender, and class critiques of the carceral state. As I discuss below, disability studies provides a framework for engaging in similar critical analysis and policy debates.

Defining Disability Studies

Disability studies provides an entry point for recognizing disability and incorporating an in-depth discussion of ableism in substantive criminal law and criminal procedure courses. Disability Studies is a multidisciplinary field of study that “seeks to understand and expose the continued history of oppression and marginalization of people who experience disability.”⁵⁰ Critical disability theory subscribes to the following view:

[D]isability is not fundamentally a question of medicine or health, nor is it just an issue of sensitivity or compassion; rather, it is a question of politics and power(lessness), power over, and power to. [B]ecause of the particular needs of the disabled, critical disability theory gives rise to its own particular set of challenges to the core assumptions of liberalism. . . . [L]iberalism’s approach to disability incorporates embedded

48 See, e.g., *Position Statements: Criminal Justice System*, THE ARC, <https://thearc.org/position-statements/criminal-justice-system/> (last visited Dec. 18, 2020) (“Individuals with I/DD are significantly more likely to be victimized (at least two times more likely for violent crimes and four to ten times for abuse and other crimes), yet their cases are rarely investigated or prosecuted because of discrimination, devaluation, prejudice that they are not worthy of protection, and mistaken stereotypes that none can be competent witnesses. Their victimization comes in many forms including violence, oppression, financial exploitation, sexual exploitation, and human trafficking[.]”).

49 See, e.g., Alice Ristorph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020); Cynthia Lee, *Making Black and Brown Lives Matter: Incorporating Race into the Criminal Procedure Curriculum*, 60 ST. LOUIS U. L.J. 481 (2016); Amna Akbar & Jocelyn Simonson, *Rethinking Criminal Law*, LPE PROJECT (Oct. 24, 2018), <https://lpeproject.org/blog/rethinking-criminal-law/>.

50 Ramona L. Paetzold, *Why Incorporate Disability Studies into Teaching Discrimination Law?*, 27 J. LEGAL STUDIES EDUC. 61, 64–65 (2010).

assumptions that conceptualize disability as misfortune, and privilege normalcy over the abnormal. The corollaries are presumptions that the structures for societal organization based on able-bodied norms are inevitable, and that productivity is essential to personhood. The goal of critical disability theory is to challenge these assumptions and presumptions so that persons with disabilities can more fully participate in contemporary society.⁵¹

Both disability studies and critical disability theory scholars provide methods for analyzing disability as a category of subordination, along with race, gender, sexual orientation, and class.⁵² Both disciplines define disability as a social construct and reject medical and biological models of disability.⁵³ Engaging in the methodology of disability studies and critical disability theory “involves scrutinizing not bodily or mental impairments but the social norms that define particular attributes as impairments, as well as the social conditions that concentrate stigmatized attributes in particular populations.”⁵⁴ Both emphasize that disabled people are not defective persons or victims but rather are limited by social and environmental barriers. Along those lines, legal scholars Doron Dorfman and Rabia Belt explain that “a social model of disability” contrasts with a biological one in that the former focuses not just on “impairment” but the social meanings that attach to impairments.⁵⁵

A social model of disability ensures the focus of legal interventions and social programs are on the societal barriers to access and inclusion, as well as the institutions, organizations, policies, and practices that perpetuate ableism. Such a view of disability shifts the focus from solely medical and rehabilitative to structural barriers. As Arlene Kanter contends, “[w]hen disability is defined as a social category rather than as an individual characteristic, it is no longer the exclusive domain of medicine, rehabilitation, special education, physical or occupational therapy, and other professions oriented toward the cure, prevention, or treatment of disease, injury, or physical or mental impairment.”⁵⁶

51 CRITICAL DISABILITY THEORY 2 (Dianne Pothier & Richard Devlin eds., 2006).

52 See, e.g., Subini Ancy Annamma et al., *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 4 (2013) (discussing intersectional approaches to disability, race, gender, and class).

53 There are real distinctions between disability studies and critical disability theory that I will not be able to address fully here. For more information, see Helen Meekosha & Russell Shuttleworth, *What’s so ‘Critical’ about Critical Disability Studies?*, 15 AUSTRALIAN J. HUMAN RIGHTS 47, 47–75 (2009) (discussing distinctions).

54 Sami Schalk, *Critical Disability Studies as Methodology*, 6.1 LATERAL (2017), <http://csalateral.org/issue/6-1/forum-alt-humanities-critical-disability-studies-methodology-schalk/>.

55 Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. 176, 186–87 (2020).

56 See Arlene Kanter, *The Relationship Between Disability Studies and Law*, in RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION 2 (Arlene Kanter & Beth Ferri eds., 2013).

Thus, the social model of disability affirms an approach to legal protections for disabled people that focuses on social barriers and not individual deficiencies.⁵⁷

Disability studies and critical disability theory also reject binary notions of disability—the disabled vs. the “able-bodied”—in favor of a dynamic and fluid approach to disability.⁵⁸ As Richard Devlin and Dianne Pothier argue, “[d]isability . . . has no essential nature. Rather, depending on what is valued (perhaps overvalued) at certain socio-political conjunctures, specific personal characteristics are understood as defects and, as a result, persons are manufactured as disabled.”⁵⁹ Moreover, as they explain, “whether a person is ‘disabled’ is highly dependent on the social organization of society—not only in the way we construct our buildings and our transportation systems, but also in the performance benchmarks we utilize to assess people and the ways in which people are expected to engage in the daily activities of work, leisure, and living.”⁶⁰ In a similar vein, scholar Sami Schalk writes:

By designating (dis)ability as a system of social norms which categorizes, ranks, and values bodyminds and disability as a historically and culturally variable category within this larger system, critical disability studies can better engage in conversations about the ways both ability and disability operate in representations, language, medicine, the law, history, and other cultural arenas.

Schalk provides both a cogent definition of disability and how its socially constructed nature should inform its study in fields including American law. In the next section, I discuss how key insights from disability studies and critical disability theory can inform how criminal law and procedure are taught in American law schools.

Why Disability Studies in Criminal Law and Criminal Procedure?

Scholars have stressed the importance of discussions of race and gender, as well as racism and gender subordination in the law school curriculum,⁶¹ and in particular in the criminal law course.⁶² Critical race scholars, race scholars,

57 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, 185 (2008); Laura Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1051-52 (2004); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 600 (2004).

58 Sharon Barnartt, *Disability as a Fluid State: Introduction*, in DISABILITY AS A FLUID STATE 1-3 (2011).

59 Dianne Pothier & Richard Devlin, *Introduction: Toward a Critical Theory of Dis-Citizenship in CRITICAL DISABILITY THEORY: ESSAYS*, in CRITICAL DISABILITY THEORY: PHILOSOPHY, POLITICS, POLICY, AND LAW 5 (Dianne Pothier & Richard Devlin eds., 2011).

60 *Id.* at 5-6.

61 *Id.* at 2.

62 Cynthia Lee, *Race and the Criminal Law Curriculum* (2020), <https://deliverypdf.ssrn.com/delivery.php?ID=958073117127105002014097094098124069125005091051065087123097016010087009031118083103030041056026022014118075109085011068091114108051086036081>

and criminal law scholars have done the work of offering critiques of policing and the carceral state more broadly.⁶³ Criminal law and feminist legal theorists have offered critiques of provocation defense, self-defense, rape law, and the so-called battered woman's defense.⁶⁴ Similar critiques that center disability can be incorporated into the criminal law and criminal procedure curriculum.

Incorporating disability studies into criminal law and procedure provides a way to engage with causes and consequences of disability-based disparities that exist throughout the criminal legal system and that are currently reflected in data on police violence and incarceration in jail and prisons. For example, centering disability contextualizes existing data on disparities in disabled people's exposure to police killings and offers a starting point for scrutinizing police investigative and arrest powers under Fourth Amendment doctrine and discussing how such broad authority may create pathways to such violence.⁶⁵ Beyond disparities, disability studies provides a framework for structural analysis, which in turn allows for engagement with questions of power, subordination, and marginalization.⁶⁶

Disability studies also provides an opportunity to push back against "perspectivelessness" in both legal discourse and legal analysis. As Kimberlé Crenshaw explains, perspectivelessness refers to "[d]ominant beliefs in the objectivity of legal discourse [that] serve to suppress the conflict by discounting the relevance of any particular perspective in legal analysis and by positing an analytical stance that has no specific cultural, political, or class characteristics."⁶⁷ By teaching courses "as though it is possible to create, weigh, and evaluate rules and arguments in ways that neither reflect nor privilege any particular

0740791270240001180690390180351210920820111240670830700820861040940
94113026122096108085075024125107002120092&EXT=pdf&INDEX=TRUE;
Shaun Ossei-Owusu, *For minority law students, learning the law can be intellectually violent*,
ABA JOURNAL (Oct. 15, 2020), [https://www.abajournal.com/voice/article/
for_minority_law_students_learning_the_law_can_be_intellectually_violent](https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent).

- 63 See Carbado, (E)racing the Fourth Amendment, *supra* note 12; Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Cynthia Lee, 'But I Thought He Had a Gun': Race and Police Use of Deadly Force, 2 HASTINGS RACE & POVERTY L.J. 1, 1-51 (2004).
- 64 Cynthia Lee, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 77-132 (2014); Aya Gruber, *A "Neo-feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. RACE, GENDER & JUST. 583 (2012); Cynthia Lee, *The Gay Panic Defense*, 42 UC DAVIS L. REV. 471-566 (2008); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 367-500 (1996).
- 65 In his work, Devon Carbado has adopted similar critical approaches to examining the role of Fourth Amendment doctrine in constructing pathways to police violence. See Carbado, *supra* note 12, at 128-31.
- 66 Paetzold, *supra* note 50, at 61-80 ("It [disability studies] provides a broad philosophical perspective through which to understand not only disability but constructs such as social relations and power.").
- 67 Kimberlé W. Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L. J. 1 (1998).

perspective or world view,” law schools reinforce the idea that legal reasoning is truly objective and neutral, and devoid of personal identity, perspectives, and experiences. In law, objectivity and neutrality often mask racialized, gendered, and classed perspectives.⁶⁸ Further, including these perspectives educates students in not only the nature and extent of disability discrimination and ableism, but also provides an opportunity for disabled students to incorporate aspects of their experiences into classroom discussion. In this way, bringing disability into the classroom may help students activate, understand, and draw from their own personal experiences in order to understand and evaluate legal doctrine. Such efforts at inclusion are not about creating spokespersons, or objectifying disabled students, but rather are focused on providing students with the opportunity to discuss legal doctrine from the vantage point of individuals who may have experiences aligned with, or perspectives informed by, being a part of a historically subordinated group.⁶⁹

How to Incorporate Disabilities Studies in Criminal Law & Criminal Procedure

How can law professors incorporate critical discussions of disability into the substantive criminal law and criminal procedure courses? To begin with, law professors can use disability studies and critical disability theory to provide students with a methodology for informed critiques of the carceral state—from policing to prosecution to sentencing. For example, critical approaches to disability informed by disability studies provide a lens for understanding the effects of harmful policing strategies, like order-maintenance or quality-of-life policing. Take, for example, order-maintenance policing targeted at managing access to and conditions in public space. In my research into disorderly conduct laws, I note the ways in which ongoing policing of people with disabilities in public spaces are rooted in practices that aim at managing, removing, or excluding the presence of people with disabilities in public spaces.⁷⁰ As Susan Schweik writes in her book *Ugly Laws: Disability in Public*, prohibiting people with so-called physical deformities—blind people, people with deformed limbs, and paralysis—from accessing public spaces was achieved through a series of laws that effectively criminalized the presence of particular disabilities in public spaces.⁷¹ The so-called “ugly laws” criminalized persons for exposing disabilities in public while begging and so reflected deep-seated animosity and suspicion toward disabled individuals deemed “unsightly,” dangerous, and

68 *Id.* at 3 (“When this expectation is combined with the fact that what is understood as objective or neutral is often the embodiment of a white middle-class world view, minority students are placed in a difficult situation. To assume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts.”).

69 Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397 (2000) (discussing disabled people as a subordinated group).

70 See Jamelia Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2021).

71 SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 1–2, 31–32 (2009).

dependent.⁷² Building on this framework, law professors may seek to situate modern-day aggressive order-maintenance policing policies in a historical context, as efforts to regulate disability in public have been a component of how localities have regulated physical and social disorder since at least the nineteenth century.

These analyses above are, of course, just examples of the kind of discussions that can be had. Below, I offer a few suggestions for the sorts of thought-provoking questions that may invite more of a critical engagement with disability in criminal law and/or criminal procedure courses. This is by no means a comprehensive list, but a starting point for incorporating critical and in-depth discussions of disability and ableism in these courses.

Substantive Criminal Law

- Topic: Status crimes and order-maintenance offenses
 - Sample Discussion Question(s):
 - In what ways is disability criminalized through order-maintenance policing that target offenses like disorderly conduct, public intoxication, and sleeping, sitting, living, or otherwise residing in a public place?
 - In what ways does order-maintenance policing risk punishing public manifestations of disability labeled as disorderly or threatening?⁷³
 - Does the prohibition against status crimes fully protect against punishment for disability-related conduct?
 - In what ways may order-maintenance policing reinforce disability-based subordination and social stigma?
 - How does criminal law intersect with civil commitment standards? How might more stringent commitment standards create incentives for law enforcement to use citations and arrests to respond to individual in mental crisis? How might this lead to overcriminalization, unnecessary jail admissions, or other interactions with the criminal legal system?
 - What are the limits of the criminalization of mental illness frame in criminal justice reform movements?⁷⁴

- Topic: Duress defense

72 *Id.* at 31-32; see also Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 945 (2019) (noting that law enforcement and civilians “perceive people with particular markers or engaged in non-normative behaviors to be engaged in ‘suspicious,’ potentially criminal behavior”).

73 See Morgan, *Rethinking Disorderly Conduct*, *supra* note 70, at 1645-54.

74 See, e.g., E. Lea Johnston, *supra* note 13 (arguing that the criminalization theory rests on unverified and false assumptions).

- Sample Discussion Question(s):
 - Does the duress defense sufficiently account for vulnerabilities to coercion based on psychological disabilities?⁷⁵

- Topic: Extreme mental or emotional disturbance
 - Sample Discussion Question(s):
 - How do mitigation doctrines/defenses define disability? Do these definitions align with a medical or social model of disability?
 - Most jurisdictions require that there be an external provoking event for heat of passion defenses. Should this defense be expanded to include disabled people who experience delusions due to mental disabilities? Should there be a separate defense for diminished rationality due to mental disability?⁷⁶ How should generic partial excuses for partial responsibility be defined?

- Topic: Self-defense
 - Sample Discussion Question(s):
 - Does the battered spousal defense further disability stigma and subordination? How does this compare with arguments made by some feminist legal theorists contending that the defense may have furthered the subordination of women?⁷⁷

- Topic: Competency and insanity defenses
 - Sample Discussion Question(s):
 - How do the concepts of capacity and insanity relate to/conflict with concepts like universal legal capacity as reflected in Article 12 of the Convention on the Rights of Persons with Disabilities?

75 See, e.g., Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 194–203 (2006).

76 See generally E. Lea Johnston & Vincent Leahey, *Psychosis, Heat of Passion, and Diminished Responsibility*, 63 B.C. L. REV. 1227 (2022) (arguing “for the creation of a generic partial excuse for diminished rationality from mental disability”).

77 See, e.g., Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman*, 81 N.C. L. REV. 211, 305 (2002) (“In this respect, the rampant use of the battered woman syndrome defense and its frequent characterization as an incapacity undermines what Elizabeth Schneider has identified as the original goal of feminist lawmaking—‘to be included within the traditional framework of the criminal law in order to guarantee their equal rights to trial.’ An alternative approach that treats battered women as rational actors operating under their individual circumstances permits battered women not to apologize for seemingly irrational conduct, but instead to explain to the jury the reasonableness of their behavior and to argue that their conduct was justified.”).

- What are the constitutional dimensions of mandatory detention during the competency restoration period?⁷⁸ Does mandatory detention during the competency restoration period violate the integration mandate under *Olmstead v. L.C.*, 527 U.S. 581 (1999)?
- Topic: Sentencing and post-conviction relief
 - Sample Discussion Question(s):
 - How can defenders pursue Atkins claims while avoiding ableist notions of disability?
 - How can defenders pursue diminished capacity defenses without reinforcing stereotypes about disability?
 - Is it possible to advocate in ways that promote more of a social model of disability and less of a medicalized one?

Criminal Procedure—Investigations

- Topic: Stop and frisk
 - Sample Discussion Question(s):
 - What role can disability play in constructing reasonable suspicion sufficient to justify a *Terry* stop?⁷⁹
 - How do race, gender, class, and disability inform perceptions of what behaviors are considered suspicious?
- Topic: Seizure doctrine
 - Sample Discussion Question(s):
 - Under current Fourth Amendment doctrine, a seizure occurs “if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”⁸⁰ How

78 See, e.g., Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 BERKELEY J. CRIM. L. 1, 3 (2017).

79 Here, I propose that professors pose questions and engage in critical analysis similar to race critiques of Fourth Amendment doctrine. Critical race theorists and criminal law scholars have written on the role of race in constructing reasonable suspicion and how *Terry* doctrine led to racial disparities in police stops. Devon Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1527–31 (2017) (discussing how “stop-and-frisk jurisprudence . . . facilitates police violence against African Americans”); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 32–33 (2011) (“All of this suggests that the Warren Court, aware that permitting stops based on reasonable suspicion would have a disparate impact on racial minorities, and hence the notion of equal citizenship, nonetheless chose the compromise of reasonable suspicion.”).

80 *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (footnote omitted); see also *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984); *Fla. v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion).

could disability inform whether a seizure has occurred for Fourth Amendment purposes?⁸¹

- Should the reasonable person standard be modified to incorporate a “reasonable disabled person” standard to account for whether individuals with intellectual and developmental disabilities would have believed they were free to leave?⁸²
- Topic: Consent searches
 - Sample Discussion Question(s):
 - How can disability (for example, in cases involving individuals with intellectual and developmental disabilities) inform assessments as to whether consent to search has been freely given?⁸³
- Topic: Interrogations
 - Sample Discussion Question(s):
 - In what ways are individuals with intellectual disabilities vulnerable to false confessions during custodial interrogations? In what ways do the primary constitutional protections—*Miranda* warnings and due process requirements that confessions are voluntary—fail to adequately protect individuals with intellectual disabilities?

The vulnerabilities to policing and harms facing disabled people who are swept into the carceral state call for more engagement with ways of thinking about disability and ableism in criminal law and criminal procedure courses. Of course, these discussion questions are just a start toward incorporating disability studies into criminal law and procedure courses. Greater attention to disability and disability-based subordination in these courses can better prepare law students to work against ableism and its numerous manifestations in the carceral state. It can also ensure that the perspectives and experiences of yet another group historically marginalized in American society are centered in discussions of discrimination and subordination and the American criminal legal system.

81 See, e.g., Morgan, *Disability's Fourth Amendment*, *supra* note 12.

82 Desiree Phair, *Comment: Searching for the Appropriate Standard: Stops, Seizure, and the Reasonable Person's Willingness to Walk Away from the Police*, 92 WASH. L. REV. 425 (2017).

83 See, e.g., Morgan, *Disability's Fourth Amendment*, *supra* note 12.