

# The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future

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*America is having a reckoning on mass incarceration. Events such as George Floyd's killing, COVID behind bars, and Black Lives Matter have punctured our collective consciousness. Advocates and scholars alike are pushing U.S. society to examine the costs—financial, psychic, social—of putting millions of people behind bars. Despite this investigation, some of the day-to-day difficulties of mass incarceration may escape appraisal. This Article reveals one of these problems, charts the difficulties in solving it, and offers a new way forward for thinking about mass incarceration, disability, intersectionality, and violence.*

*The mass-incarceration crisis exacerbates obesity at the hands of the state and fails to accommodate the consequences of the problem that it created. Incarcerated people are at risk for weight gain based on several factors. As an initial matter, various overlapping social factors such as inadequate access to nutritious food and socioeconomic deprivation increase the risks of both incarceration and obesity. Once a person is incarcerated, prisons and jails then govern two of the largest inputs to control weight gain—access to food and physical activity—and strongly influence several other elements that contribute to obesity. Not all fat people experience debilitating effects from their bodies and mass incarceration does not cause all weight gain. However, the carceral space bears some responsibility for producing negative effects for incarcerated people, and this assemblage of negative effects can include bodily changes such as weight gain.*

*Law has ignored the problems of fatness in prisons and jails and regularly fails to address much-needed accommodations for fat incarcerated*

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*people due to flaws in incarceration law and applications of disability law.*

*The dilemma of fat incarcerated people extends beyond litigation difficulties, however. It is a heuristic that illustrates the depth of the harm of mass incarceration and the need to take disability seriously—and how complicated taking disability seriously is. Attention to the social inequities that produce and maintain the population of fat people in prisons exposes a profound tension in disability scholarship and activism. Typically, disability scholarship and advocacy seek to unite a disability community of people with varying bodily impairments by focusing on stigma and stereotyping. While people's bodies are different, all disabled people experience ableism. This Article contends that disability scholars and advocates can and should augment their focus on stigma and stereotyping to emphasize the social inequities such as environmental poisoning, racism, poverty, and violence that produce many debilitating impairments. This proposal is an uncomfortable proposition for disability scholarship and advocacy wary of eugenic treatment and "cures." Reducing social inequities would reduce the population of disabled people, and advocacy to improve the environmental predecessors to impairment could be viewed as a condemnation of the state of disability itself.*

*However, proper attention to intersectional injustice in conjunction with respect for disabled people requires thoughtful consideration of the production of impairments. Although not all disabilities are the result of social injustice, knitting together social inequality and disability would reorient the field on those who are most marginalized, redirect it toward a greater reliance on intersectional principles, and link it to other political and legal campaigns that challenge injustice.*

*Fundamentally, this Article offers a new disability paradigm to think about intersectionality and slow violence. Law and politics are at a crossroads where scholars and advocates alike are searching for new frameworks to address the longstanding and troubling matters of social injustice revealed in the wake of protest and reflection. Disability scholarship can help but only if disability thought leaders are willing to reexamine and reorient their current approach and classifications. With respect to intersectionality, I argue that, in addition to examining the simultaneous, overlapping identities of multiply marginalized people, incorporating disability into intersectionality would also require investigation of how injustice produces impairment, which in turn creates people who are multiply marginalized. With respect to slow violence, carceral harms are ripe for incorporation into the pantheon of slow violence—situations where harm is accrued slowly, difficult to trace, and susceptible to being overlooked. The bodily changes of incarcerated people, such as weight gain, exemplify how this slow violence occurs.*

*Disability is also a grammar that structures what slow violence is across domains.*

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## INTRODUCTION

People can ask Reddit or Quora about practically anything. On both Internet spaces, inquiring minds want to know: what is prison like if you are fat? The answers? Terrible. Jim Christmas recounted the experience of a fellow incarcerated man who could not fit on his designated bunk.<sup>1</sup> “Every single night, he slept sitting up with a sheet covering his head like a bird cage.”<sup>2</sup> This man also had trouble making it to the bathroom on time and wiping himself after using the toilet.<sup>3</sup> Shelby McCort noted that being fat in prison was not a rare occurrence: “The common thing in prison, it seems, is to gain weight. . .and gain a lot of it.”<sup>4</sup> Reddit commenters shared the sentiment that prison contributed to weight gain. One commented: “Most of the food available for purchase in the commissary is junk food, the stuff of corner stores. . .Doritos, candy. The daily meal-ration will also usually be largely be [sic] comprised of some sort of cheap carb (white bread, stuff like that).”<sup>5</sup>

These responses are probably not surprising. Incarcerated people are at risk for fatness and weight gain based on several factors, including but not limited to gender, sexuality, race, sedentary lifestyles, lack of access to exercise, substance withdrawal, poor diets, stress, depression, side effects of psychotropic medication, and age. Prisons and jails control two of the largest variables affecting weight gain—access to food and access to physical activity—and strongly influence several of these other inputs.

Although mass incarceration and obesity, respectively, are significant areas of controversy, research, and advocacy, fat incarcerated people have been comparatively neglected by scholars. Prison reform and abolition advocates highlighting poor prison conditions have noted many of the factors that pose risks for obesity and weight gain for incarcerated people without discussing the plight of fat incarcerated people. Disability scholars have addressed whether disability legislation can (and should) cover obesity. This conversation, however, has mainly focused on employment and travel. Fat advocates and women’s studies scholars have also discussed fatness. This conversation has also centered upon employment, as well as body policing and appearance.

This Article illuminates the difficulties that fat incarcerated people face, the factors that produce fat incarcerated people, and potential remedies through law and politics. It addresses fatness and prison in multiple ways. First, it analyzes the problem of accommodation—carceral institutions do not adequately accommodate

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1. Jim Christmas, Comment to *What Is Prison Like if You Are Very Fat?*, QUORA (Sept. 24, 2018), <https://www.quora.com/What-is-prison-like-if-you-are-very-fat>.

2. *Id.*

3. *Id.*

4. Shelby McCort, Comment to *What Is It Like to Be Fat in Prison?*, QUORA (July 9, 2017), <https://www.quora.com/What-is-it-like-to-be-fat-in-prison> [<https://perma.cc/YQ46-XVPW>].

5. Uglyontheinside9, Comment to *ELI5: How Do Fat People in Jail/Prison Stay Fat?*, REDDIT (July 8, 2015, 10:27 PM), [https://www.reddit.com/r/explainlikeimfive/comments/3cmmyx/eli5\\_how\\_do\\_fat\\_people\\_in\\_jailprison\\_stay\\_fat/](https://www.reddit.com/r/explainlikeimfive/comments/3cmmyx/eli5_how_do_fat_people_in_jailprison_stay_fat/) [<https://perma.cc/NHM3-8PXG>].

the needs of fat incarcerated people and their bodies. Current prison jurisprudence does not provide sufficient redress for conditions that are merely terrible rather than “deliberately discriminatory” or “cruel and unusual.” Current disability jurisprudence does not offer a robust avenue for obese claimants to demand reasonable modifications during incarceration due to uneven treatment of obesity as a legal disability and poor redress for disability modifications for incarcerated people.

Second, and more fundamentally, this Article’s discussion of the social inequities that produce and maintain the population of fat people in prison reveals a larger tension in disability scholarship. Ameliorating fat incarcerated people’s problems exposes other uncomfortable aspects of current disability scholarship, law, and advocacy. Rather than an almost-universal focus on how stigma unifies people with disabilities together, I contend that disability scholars and advocates should also emphasize the socially inequitable factors that produce many disabling conditions. Although not all disabilities result from social injustice, knitting together social inequality and disability would realign the disability field’s focus on those who are most marginalized and reorient it more toward intersectional principles. At the same time, though, redressing debilitating social conditions through treating and healing impairments would herald a reduction in the disabled population. This proposal is an uncomfortable prospect for disability politics and a fraught subject for a community with a historical legacy of ableist treatment and attempted eugenic-based elimination.

Fat prisoner dilemmas are not unique on their own. Nevertheless, they are revealing because they sit at the center of many interlocking issues. They display the power of the state, as carceral spaces control so much of an incarcerated person’s life. They showcase the importance of addressing impairment and not just stigma for disability law. We think of both fat people and incarcerated people as blameworthy and deserving of their fates when in fact social conditions contribute to the production of both communities. At the same time, though, we encounter similar issues in other guises—poor people outside of prison who live in food deserts and swamps, Flint residents poisoned by lead in their water, people who are hurt by trauma, and other people who suffer bodily forms of injustice.

This Article proceeds as follows. The beginning introduces the dilemmas that fat incarcerated people face as a case study. Part I gives an overview of fat incarcerated people—who they are, what factors contribute to weight gain in carceral spaces, and what the consequences are.

Part II looks at the possible legal remedies for reducing factors that promote weight gain and providing accommodations for fat incarcerated people. It shows how obesity is not properly addressed by disability law and also how incarcerated people have little legal recourse in ameliorating conditions that are merely harmful instead of significantly terrible or deliberately discriminatory.

The remainder of this Article offers a new model for disability informed by the difficulties raised by the case study of the first two Parts. Part III sets out a new model for disability that incorporates new notions of intersectionality and slow

violence. It points to the plight of fat incarcerated people as an emblematic case of “slow violence,” making it difficult to remedy and link this plight to other conditions of impairment and inequity. This Article concludes by pointing the way to possible next steps for research and political collaboration.

## I. THE STATE OF THE PROBLEM

### A. WHAT ARE WE TALKING ABOUT WHEN WE TALK ABOUT FAT?

Discussing fatness can be tricky. The lack of uniform terminology and two clashing models to describe weight, as discussed below, complicate the discussion. This Article will vary the descriptors “fat” or “obese” depending on the respective underlying sources and, when there is not an indicator, use “fat” as a way to reach beyond the medical definition of obesity.

#### 1. Obesity and the Disease Model

Medical professionals use the labels of “obesity” and “overweight” to describe what they categorize as the disease of having excessive body fat.<sup>6</sup> Both are determined according to one’s body mass index (BMI): a person’s weight in pounds multiplied by 703 and divided by her height in inches squared.<sup>7</sup> A normal BMI is 18.5–24.9, while a BMI of 25.0–29.9 is overweight and 30.0 or higher is obese.<sup>8</sup> The American Medical Association, the World Health Organization, the Food and Drug Administration, and the National Institutes of Health all define obesity as a disease.<sup>9</sup> Nearly half of all Americans, 42.5%, were obese in 2017–

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6. See *Obesity*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/obesity/symptoms-causes/syc-20375742> [<https://perma.cc/7RCQ-QGZN>] (last visited Jan. 19, 2022).

7. *Id.* Using BMI as a metric, especially for individuals, has been abundantly criticized. See, e.g., Kiera Butler, *Why BMI Is a Big Fat Scam*, MOTHER JONES, Sept.–Oct. 2014, <https://www.motherjones.com/politics/2014/08/why-bmi-big-fat-scam/> [<https://perma.cc/3MKG-W2VY>]. See generally Iliya Gutin, *Body Mass Index Is Just a Number: Conflating Riskiness and Unhealthiness in Discourse on Body Size*, 43 SOCIO. HEALTH & ILLNESS 1437, 1448 (2021) (arguing that the ease of determining BMI has led to its overuse, and calling for a more nuanced use of BMI that is “less declarative” in labelling obese individuals as abnormal or unhealthy); Philip B. Maffetone, Ivan Rivera-Dominguez & Paul B. Laursen, *Overfat and Underfat: New Terms and Definitions Long Overdue*, FRONTIERS PUB. HEALTH (Jan. 3, 2017), <https://www.frontiersin.org/articles/10.3389/fpubh.2016.00279/full> [<https://perma.cc/J4SU-NEDR>] (contending that “overfat” and “underfat” are better terms than BMI for describing body composition (emphasis omitted)); Manfred James Müller, Wiebke Braun, Janna Enderle & Anja Bosy-Westphal, *Beyond BMI: Conceptual Issues Related to Overweight and Obese Patients*, 9 OBESITY FACTS 193 (2016) (asserting that BMI is of little value in studying obesity and related conditions because it is not scientifically sound). *But see* Peymane Adab, Miranda Pallan & Peter H. Whincup, Editorial, *Is BMI the Best Measure of Obesity?*, BMJ (Mar. 29, 2018), <https://www.bmj.com/content/360/bmj.k1274> [<https://perma.cc/XVV5-XGG6>] (concluding that BMI is a useful measure in the majority of cases).

8. *Obesity*, *supra* note 6.

9. Maura Flaherty McCoy, Note, *Classifying Obesity as a Disability Under the Americans with Disabilities Act: How Seff v. Broward County Is Incongruent with Recent ADA Litigation*, 64 CATH. U. L. REV. 539, 540 (2015). See generally WHO CONSULTATION ON OBESITY, WORLD HEALTH ORG., OBESITY: PREVENTING AND MANAGING THE GLOBAL EPIDEMIC 1, 4, 6 (2000), <https://apps.who.int/iris/handle/10665/42330> [<https://perma.cc/M7ZT-GEE2>] (describing obesity as “a complex and incompletely understood disease”). The Department of Veterans Affairs does not recognize obesity as a disease, even though veterans are disproportionately fat. Grace C. Brier, *How to Shrink a Growing*

2018.<sup>10</sup> An additional 31.1% of Americans were overweight.<sup>11</sup> Black people, Latino people, and Native Americans are more likely to be obese than white Americans.<sup>12</sup> Obese Americans are disproportionately poor and disproportionately poor women.<sup>13</sup>

The medical causes and repercussions of obesity are not entirely understood. Scholars recognize that environmental conditions such as food availability, transportation, and other social conditions influence obesity rates.<sup>14</sup> Research strongly suggests that obesity is connected to several health risks such as “developing coronary heart disease, type 2 diabetes, high blood pressure, high cholesterol, osteoarthritis, gynecological problems, sleep apnea, and other respiratory problems.”<sup>15</sup> Importantly, though, obesity and poor health are not complete synonyms—people can be obese and have good health, and thin people can be in poor health.<sup>16</sup> Obesity prevention research aims to identify the causes of obesity and overweight in order to reduce the prevalence of both.<sup>17</sup>

## 2. Fatness and the Advocacy Model

“Fat” is a more familiar term than “obese.” Popular media saturates the culture with images and messages about fat people and the crisis of fatness.<sup>18</sup> These messages are almost entirely negative. Fat Studies scholar Cat Pausé defines “fat stigma” as “the negative stereotypes, associations, and characteristics associated with fatness.”<sup>19</sup> She continues: “Fatness is discrediting; it is a visible signal to others that the bearer is different, and deviant, and probably dangerous. In the

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*Problem: Improving the System of Benefits for Obese Veterans, in Light of the American Medical Association's Recent Classification of Obesity as a Disease*, 26 FED. CIR. BAR J. 67, 67–68 (2016).

10. *Obesity and Overweight*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/fastats/obesity-overweight.htm> [<https://perma.cc/F6P6-EBNT>] (last visited Jan. 19, 2022).

11. *Id.* These thresholds have changed over time. See, e.g., CHRISTY HARRISON, ANTI-DIET: RECLAIM YOUR TIME, MONEY, WELL-BEING, AND HAPPINESS THROUGH INTUITIVE EATING 43–47 (2019). For example, until 1998, a BMI up to twenty-eight was in the “normal” range. See Sally Squires, *About Your BMI (Body Mass Index): Optimal Weight Threshold Lowered*, WASH. POST, June 4, 1998, at A01.

12. Bette Jacobs, Meghan Gallagher & Nicole Heydt, *At the Intersection of Health and Justice: How the Health of American Indians and Alaska Natives Is Disproportionately Affected by Disparities in the Criminal Justice System*, 6 BELMONT L. REV. 41, 60 (2018); *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/data/adult.html> [<https://perma.cc/9AA9-XNAG>] (last visited Jan. 19, 2022).

13. Michael Correll, *Getting Fat on Government Cheese: The Connection Between Social Welfare Participation, Gender, and Obesity in America*, 18 DUKE J. GENDER L. & POL'Y 45, 46 (2010).

14. Roberta F. Mann, *Controlling the Environmental Costs of Obesity*, 47 ENV'T L. 695, 702, 732–33 (2017).

15. Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101, 123 (2016). It is not clear at this point, however, whether these are causal or correlational associations. See *id.* at 123–24.

16. Doe Gutin, *supra* note 7, at 1440 (“[L]abelling individuals with obesity as diseased on basis of BMI does not reflect practitioners’ knowledge of a person’s overall health . . .”).

17. See Christine Fry, Sara Zimmerman & Manel Kappagoda, *Healthy Reform, Healthy Cities: Using Law and Policy to Reduce Obesity Rates in Underserved Communities*, 40 FORDHAM URB. L.J. 1265, 1274 (2013).

18. See generally *infra* note 34 and accompanying text.

19. Cat Pausé, *Borderline: The Ethics of Fat Stigma in Public Health*, 45 J.L. MED. & ETHICS 510, 510 (2017).

case of fatness, that danger is often presented as the economic risk/burden to society. It is also discreditable, as fatness is a visible stigma.”<sup>20</sup> She argues that there is a longstanding idea that fat people are lazy and undisciplined.<sup>21</sup> Combined with healthism,<sup>22</sup> fatness is believed to be the “result of poor individual choices, made by individuals who then become a burden on the rest of society.”<sup>23</sup>

Fat activists also use the term “fat,” but they use it as a neutral descriptor as well as a challenge to the medical term “obesity” and the popular negative assumptions about being fat. Fat activists formed the National Association to Advance Fat Acceptance (NAAFA) to combat size discrimination in 1969,<sup>24</sup> have worked to include weight discrimination in antidiscrimination laws,<sup>25</sup> and continue to publish scholarship in journals such as *Fat Studies*.

Fat studies has different threads; that said, most fat people probably do not think of fatness as a key part of their identity.<sup>26</sup> A social construction thread argues that the thin body is a socially constructed ideal and that fatness is a component of body diversity: “[P]eople are supposed to come in all sizes, so it’s not okay to mistreat the fat ones . . . .”<sup>27</sup> Yofi Tirosh argues in stronger terms that law should recognize and protect “the right to be of any body size.”<sup>28</sup> Scholars and advocates that focus on fat as a biological or health issue include the Health at Every Size movement. They challenge the assumption that fatness is unhealthy and contend that “health is possible at every size.”<sup>29</sup> They emphasize the difficulties that fat people have at maintaining weight loss through dieting.<sup>30</sup> Moreover, they note that the assumption that fat people are always unhealthy can have negative repercussions for how fat people are treated, along with discrimination based on appearance and size.<sup>31</sup>

20. *Id.*

21. *See id.*

22. Jessica Roberts and Elizabeth Weeks Leonard define “healthism” as “discrimination on the basis of health status.” Jessica L. Roberts & Elizabeth Weeks Leonard, *What Is (and Isn't) Healthism?*, 50 GA. L. REV. 833, 835 (2016). They note that, given that people of color, disabled people, and poor people are more likely to engage in unhealthy activities such as smoking or have health statuses such as obesity, policies targeting unhealthy practices would end up compounding inequality rather than alleviating it. *Id.* at 852. *See generally* JESSICA L. ROBERTS & ELIZABETH WEEKS, HEALTHISM: HEALTH-STATUS DISCRIMINATION AND THE LAW (2018) (evaluating the law’s regulation of health, and contextualizing healthism alongside other “isms”).

23. Pausé, *supra* note 19, at 511.

24. Lauren E. Jones, Note, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation*, 87 N.Y.U. L. REV. 1996, 2006 (2012).

25. *See infra* Section II.D.2.

26. *See, e.g.*, Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 11 (2015).

27. MARILYN WANN, FAT! SO? BECAUSE YOU DON’T HAVE TO APOLOGIZE FOR YOUR SIZE! 12 (1998) (emphasis omitted).

28. Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL’Y L. & ETHICS 264, 288 (2012).

29. Jones, *supra* note 24, at 2008.

30. *Id.* at 2008–09.

31. *See id.*



Furthermore, fat studies are nestled within gender and women's studies as a key site to understand the body and what it means.<sup>32</sup> Scholars of this discipline discuss how fatness has been equated negatively with femininity and Black and brown bodies and positioned against whiteness and masculinity.<sup>33</sup> They write about how the dieting and fashion industries construct the idea of the perfect thin body that is honed through diligent eating and exercising discipline—and its counterpart, the fat body that is lazy, disgusting, and excessive.<sup>34</sup>

The relationship between fat activism and disability activism is complicated.<sup>35</sup> Some fat activists, and indeed, some fat discrimination plaintiffs, distinguish themselves from poor health and disability in their advocacy and litigation.<sup>36</sup> They voice concern that treating obesity as a disability would mark fat people as medicalized outsiders and increase, rather than decrease, anti-fat bias.<sup>37</sup> For example, NAAFA board member Peggy Howell observed: “‘There is a lot of conflict in the size acceptance community’ [with respect to obesity and the Americans with Disabilities Act]. . . . ‘I don’t consider myself disabled, and some people don’t like ‘fat’ being considered a disability.’”<sup>38</sup> Other fat activists believe that the fat acceptance movement and the disability rights movement can act in tandem: “Both groups fight against the normalization and medicalization of

32. See Patricia Boling, *On Learning to Teach Fat Feminism*, 21 FEMINIST TCHR. 110, 121 (2011) (arguing that “feminist considerations of fat bodies . . . make important contributions to . . . philosophical treatments of embodied experience”); Susan Bordo, *Reading the Slender Body*, in MEDIA STUDIES: A READER 330, 337 (Sue Thornham et al. eds., 3d ed. 2009) (“It has been amply documented that women in our culture are . . . tyrannized by the contemporary slenderness ideal . . .”); Samantha Kwan, *Navigating Public Spaces: Gender, Race, and Body Privilege in Everyday Life*, 22 FEMINIST FORMATIONS 144, 146 (2010) (exploring the ways that fatness “intersects with other signifiers, such as gender and race, to influence everyday interactions”); AMY ERDMAN FARRELL, FAT SHAME: STIGMA AND THE FAT BODY IN AMERICAN CULTURE 58 (2011) (chronicling the processes by which fat bodies gradually “became seen as unable to manage the modern world” because of their association with inferiority); Patricia Vincent Roehling, *Fat Is a Feminist Issue, but It Is Complicated: Commentary on Fikkan and Rothblum*, 66 SEX ROLES 593, 596 (2012) (characterizing the denigration of fat women as a feminist issue because it “expresses a distaste for a feminine attribute—body fat”). Fatness is also heavily racialized. See Anna Mollow, *Unvictimized: Toward a Fat Black Disability Studies*, 50 AFR. AM. REV. 105, 117 (2017) (“Fatphobia reinforces . . . tropes of black bodies as inherently dangerous.”); Kimberly R. Jacob Arriola, Christina P. C. Borba & Winifred Wilkins Thompson, *The Health Status of Black Women: Breaking Through the Glass Ceiling*, 1 BLACK WOMEN GENDER & FAMS. 1, 11–12 (2007) (discussing the causes and consequences of the prevalence of obesity among Black women); see also DA’SHAUN L. HARRISON, BELLY OF THE BEAST: THE POLITICS OF ANTI-FATNESS AS ANTI-BLACKNESS (2021) (illuminating the mistreatment of fat Black people in the United States by the state and other actors).

33. See, e.g., Breanne Fahs, *A Tale of Three Classrooms: Fat Studies and Its Intellectual Allies*, in THE FAT PEDAGOGY READER: CHALLENGING WEIGHT-BASED OPPRESSION THROUGH CRITICAL EDUCATION 221, 222–23 (Erin Cameron & Constance Russell eds., 2016).

34. See, e.g., Bordo, *supra* note 32, at 332; Kwan, *supra* note 32, at 147; Esther D. Rothblum, *The Stigma of Women’s Weight: Social and Economic Realities*, 2 FEMINISM & PSYCH. 61, 68 (1992); Fahs, *supra* note 33, at 225.

35. See *infra* Part III.

36. See, e.g., Jones, *supra* note 24, at 2026–27 (discussing *Cassista v. Cmty. Foods*, 10 Cal. Rptr. 2d 98 (Cal. Ct. App. 1992), *rev’d sub nom. Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143 (Cal. 1993)).

37. Shinall, *supra* note 15, at 137.

38. *Id.* (footnote omitted).

bodies, standards of beauty, the medical model, and subordination more generally.”<sup>39</sup>

#### B. WHO ARE FAT INCARCERATED PEOPLE?

The vast majority of incarcerated people<sup>40</sup> in this country are fat.<sup>41</sup> According to the Department of Justice’s Bureau of Justice Statistics, about three-quarters of the over two million people incarcerated in the United States are overweight or obese.<sup>42</sup> Many people are overweight or obese when they enter prison or jail and

39. Jones, *supra* note 24, at 2014–15.

40. Terminology for people in prisons and jails is changing. This Article uses “incarcerated people” to avoid the dehumanizing language of “prisoners,” “convicts,” or “felons.” See Wilbert L. Cooper, *People-First Language Matters. So Does the Rest of the Story*, MARSHALL PROJECT, <https://www.themarshallproject.org/2021/04/13/people-first-language-matters-so-does-the-rest-of-the-story> [https://perma.cc/D5TD-4YZ2] (last visited Jan. 20, 2022). Thank you to Alexis Hoag, Reginald Dwayne Betts, and Talila “TL” Lewis for insightful conversation on this point.

41. Correctional officers are also disproportionately overweight or obese as compared to the national population. See Jennifer C. Buden, Alicia G. Dugan, Pauran D. Faghri, Tania B. Huedo-Medina, Sara Namazi & Martin G. Cherniack, *Associations Among Work and Family Health Climate, Health Behaviors, Work Schedule and Body Weight*, 59 J. OCCUPATIONAL & ENV’T MED. 588, 589 (2017); Tim Morse, Jeffrey Dussetschleger, Nicholas Warren & Martin Cherniack, *Talking About Health: Correction Employees’ Assessments of Obstacles to Healthy Living*, 53 J. OCCUPATIONAL & ENV’T MED. 1037, 1038 (2011); Pauran D. Faghri, Christina Mignano, Tania B. Huedo-Medina & Martin Cherniack, *Psychological Health and Overweight and Obesity Among High Stressed Work Environments*, NAT’L CTR. FOR BIOTECH. INFO. (Feb. 27, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4990460/> [https://perma.cc/LE9K-L8HR]; Lindsay Ferraro, Pauran D. Faghri, Robert Henning & Martin Cherniack, *Workplace-Based Participatory Approach to Weight Loss for Correctional Employees*, 55 J. OCCUPATIONAL & ENV’T MED. 147, 154 (2013). Although correctional officers are not nearly as restricted in their activities as incarcerated people, researchers suggest that the nature of their high-stress and low-control work contributes to their weight. See Robert G. Lockie, Karly A. Rodas, J. Jay Dawes, Joseph M. Dulla, Robin M. Orr & Matthew R. Moreno, *How Does Time Spent Working in Custody Influence Health and Fitness Characteristics of Law Enforcement Officers?*, INT’L J. ENV’T RSCH. & PUB. HEALTH 1, 2–3 (Sept. 3 2021), <https://www.mdpi.com/1660-4601/18/17/9297> [https://perma.cc/KB9G-VC9Y]; Ja K Gu, Luenda E Charles, Cecil M Burchfiel, Michael E Andrew, Claudia Ma, Ki Moon Bang & John M Violanti, *Associations Between Psychological Distress and Body Mass Index Among Law Enforcement Officers: The National Health Interview Survey 2004-2010*, NAT’L CTR. FOR BIOTECHNOLOGY INFO. (Mar. 11, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3601297/> [https://perma.cc/YNR9-J6CC]; see also Paul A. Schulte, Gregory R. Wagner, Aleck Ostry, Laura A. Blanciforti, Robert G. Cutlip, Kristine M. Krajnak, Michael Luster, Albert E. Munson, James P. O’Callaghan, Christine G. Parks, Petia P. Simeonova & Diane B. Miller, *Work, Obesity, and Occupational Safety and Health*, 97 AM. J. PUB. HEALTH 428, 433 (2007) (“Research is warranted to explore how the work environment and work practices promote or discourage the development of obesity (and overweight in general) and to define the extent to which obesity acts to modify the risk of occupational diseases and injuries.”). Thank you to Margo Schlanger and Sophie Allen for their insights on this issue.

42. LAURA M. MARUSCHAK, MARCUS BERZOFSKY & JENNIFER UNANGST, DOJ, MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–12, at 17 (2015), <https://www.bjs.gov/content/pub/pdf/mpsfjji1112.pdf>; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), [https://www.prisonpolicy.org/reports/pie2020.html?c=pie&gclid=CjwKCAjwq9mLBhB2EiwAuYdMta-dpTwPgB13ZrxUQ9iCxqXF3PXybr5zXS05jdy7-bwDmOLp-W3bmRoCaZUQAvD\\_BwE](https://www.prisonpolicy.org/reports/pie2020.html?c=pie&gclid=CjwKCAjwq9mLBhB2EiwAuYdMta-dpTwPgB13ZrxUQ9iCxqXF3PXybr5zXS05jdy7-bwDmOLp-W3bmRoCaZUQAvD_BwE).

also gain weight while incarcerated.<sup>43</sup> A meta-study concluded that a year of incarceration yielded an average weight gain of thirty-one pounds.<sup>44</sup>

Gender is a significant differential for fatness in prison. A greater percentage of women entering correctional facilities are obese than men, and then once inside, women gain more weight than men.<sup>45</sup> There are several possible reasons for this difference. Prisons and jails were not built with female incarcerated people in mind and neither were their programming or resources. For instance, women are less likely to be able to participate in physically active programming such as recreational activities or work release.<sup>46</sup> Women are more likely to see mental health services and use psychotropic medication that contributes to weight gain.<sup>47</sup>

By contrast, incarcerated men have a much smaller average change in their BMI during incarceration than incarcerated women.<sup>48</sup> Hypermasculine carceral environments, where physical strength and size contribute to power and influence, may incentivize men to put on weight and muscle for survival.<sup>49</sup>

43. See Madison L. Gates & Robert K. Bradford, *The Impact of Incarceration on Obesity: Are Prisoners with Chronic Diseases Becoming Overweight and Obese During Their Confinement?*, 2015 J. OBESITY 1, 3–4, <https://downloads.hindawi.com/journals/job/2015/532468.pdf>.

44. M. K. Gebremariam, R. A. Nianogo & O. A. Arah, *Weight Gain During Incarceration: Systematic Review and Meta-Analysis*, 19 OBESITY REVS. 98, 107 (2018). Further research is needed on the relationship between the length of sentence and the rate of weight gain.

45. See Madison L. Gates, Nancy C. Webb, Rebecca Stone, Darra Ballance & Wonsuk Yoo, *Gender Disparities in Weight Gain Among Offenders Who Are Obese upon Entering Correctional Facilities*, 5 J. GA. PUB. HEALTH ASS'N 233, 233 (2016).

46. See Gates & Bradford, *supra* note 43, at 5.

47. Gates et al., *supra* note 45, at 237.

48. Gates & Bradford, *supra* note 43, at 4.

49. See John L. Oliffe, Debra Hanberg, Madeline N. Hannan-Leith, Cara Bergen & Ruth Elwood Martin, “Do You Want to Go Forward or Do You Want to Go Under?” *Men’s Mental Health in and Out of Prison*, 12 AM. J. MEN’S HEALTH 1235, 1235 (2018) (“Male prisons are typically hypermasculine environments . . .” (citations omitted)); *id.* at 1236 (“Within this milieu, idealized prison masculinities typically include stoicism, strength, physical dominance, pride, violence, and aggression.” (citation omitted)). In the 1990s, over the objections of correctional officers and scholars, a series of states removed exercise equipment from their prisons due to the specter of muscled men released from custody. See Brian Palmer, *Do Prisoners Really Spend All Their Time Lifting Weights?*, SLATE (May 24, 2011, 6:02 PM), <https://slate.com/news-and-politics/2011/05/do-prison-inmates-spend-all-their-time-lifting-weights.html> [<https://perma.cc/54DT-5K26>]; Daniel Genis, *An Ex-Con’s Guide to Prison Weightlifting*, DEADSPIN (May 6, 2014, 3:43 PM), <https://deadspin.com/an-ex-cons-guide-to-prison-weightlifting-1571930353> [<https://perma.cc/R523-QW7J>]; Jon D. Hull, *Building a Better Thug?*, TIME (Apr. 11, 1994), <http://content.time.com/time/subscriber/article/0,33009,980476,00.html> [<https://perma.cc/HJG8-Z8WL>]; Jonathan Saltzman, *A Clash over Pumping Iron*, PROVIDENCE J., June 8, 1998, at A01; see also *Brown v. Plata*, 563 U.S. 493, 554 (2011) (Scalia, J., dissenting) (disagreeing that the plaintiff class had suffered an Eighth Amendment violation because “[m]ost of them will not be prisoners with medical conditions . . . and many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym”). Current research on exercise and weightlifting in prison is limited. See Mateja Vuk & Dalibor Doležal, *Idleness and Inmate Misconduct: A New Perspective on Time Use and Behavior in Local Jails*, 41 DEVIANT BEHAV. 1347, 1348 (2020); Mallory A. Ambrose & Jeffrey W. Rosky, *Prisoners’ Round: Examining the Literature on Recreation and Exercise in Correctional Facilities*, 2 INT’L J. CRIMINOLOGY & SOCIO. 362, 362–63, 368 tbl. 3 (2013). Federal surveys asked incarcerated people about physical exercise in 2004 and 2016. See BUREAU OF JUST. STAT., THE SURVEY OF INMATES IN STATE CORRECTIONAL FACILITIES AND THE SURVEY OF INMATES IN FEDERAL

Incarcerated men may bulk up to stave off sexual violence: underweight and morbidly obese incarcerated people “have nearly double the rate of inmate-on-inmate sexual victimization than inmates in other categories.”<sup>50</sup>

Despite the vulnerability of this population and the abundant risk factors that they face, data and research on obesity and weight gain during incarceration have been insufficient. Much of the data studied so far is self-reported, and people often underreport their weight (and may overreport their height as well).<sup>51</sup> Additionally, most studies calculate incarcerated peoples’ diets based on provided menus rather than actual food intake.<sup>52</sup> More research is needed on the actual amount of food incarcerated people eat, including food from commissary and family visits. Further research requires an investigation into whether incarcerated men may be “skinny-fat”; that is, whether they still experience many of the comorbidities associated with obesity because of their poor diet, but their weight is lower because of weight training.<sup>53</sup> In addition, more research is warranted on the effects of fat stigma and weight cycling in carceral spaces. Fat stigma increases cortisol and decreases the quality of medical care.<sup>54</sup> Weight cycling—that is, the phenomenon of cyclical weight gain and loss as people attempt to lose weight—also causes negative health outcomes.<sup>55</sup>

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CORRECTIONAL FACILITIES QUESTIONNAIRE (2004), [https://www.bjs.gov/content/pub/pdf/sisfcf04\\_q.pdf](https://www.bjs.gov/content/pub/pdf/sisfcf04_q.pdf) [<https://perma.cc/4HF3-J8V5>]; BUREAU OF JUST. STAT., 2016 SURVEY OF PRISON INMATES (SPI) QUESTIONNAIRE 134 (2016), [https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/survey/spi16q\\_2.pdf](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/survey/spi16q_2.pdf) [<https://perma.cc/SRB4-JNBN>].

50. ALLEN J. BECK, MARCUS BERZOFKY, RACHEL CASPAR & CHRISTOPHER KREBS, DOJ, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 18 (2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<https://perma.cc/JZ9B-KE5U>].

51. See Ray M. Merrill & John S. Richardson, *Validity of Self-Reported Height, Weight, and Body Mass Index: Findings from the National Health and Nutrition Examination Survey, 2001-2006*, 6 PREVENTING CHRONIC DISEASE 1, 1 (2009); James M. Hodge, Roma Shah, Marjorie L. McCullough, Susan M. Gapstur & Alpa V. Patel, *Validation of Self-Reported Height and Weight in a Large, Nationwide Cohort of U.S. Adults*, PLOS ONE (Apr. 13, 2020), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0231229> [<https://perma.cc/D4AW-PPKQ>].

52. See ERIKA CAMPLIN, PRISON FOOD IN AMERICA 43 (2017) (explaining the discrepancy between meals listed on prisons’ menus and the food they actually serve).

53. See generally Korin Miller, *What Does It Mean to Be Skinny Fat, and How Do I Tell If That’s Me?*, WOMEN’S HEALTH (Dec. 27, 2019), <https://www.womenshealthmag.com/health/a30212264/what-is-skinny-fat/> (“People who might be described as ‘skinny fat’ are often at risk of developing the same health issues as if they were medically grouped in the overweight or obese categories—they just don’t necessarily look it from the outside. . . . It’s a colloquial phrase usually used to describe people who appear to be thin but are actually carrying more fat than is healthful for their body type.”); Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 15 (2011) (discussing weightlifting as an activity of the archetypal incarcerated man in the context of “claims to masculinity” in prison); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1405 (2011) (observing that a gay or bisexual man in prison might secure his safety by performing masculinity and becoming physically strong).

54. See Mary S. Himmelstein, Angela C. Incollingo Belsky & A. Janet Tomiyama, *The Weight of Stigma: Cortisol Reactivity to Manipulated Weight Stigma*, 23 OBESITY 368, 368 (2015); S. M. Phelan, D. J. Burgess, M. W. Yeazel, W. L. Hellerstedt, J. M. Griffin & M. van Ryn, *Impact of Weight Bias and Stigma on Quality of Care and Outcomes for Patients with Obesity*, 16 OBESITY REVS. 319, 323 (2015).

55. J.-P. Montani, Y. Schutz & A. G. Dulloo, *Dieting and Weight Cycling as Risk Factors for Cardiometabolic Diseases: Who Is Really at Risk?*, 16 OBESITY REVS. (SUPPL. 1) 7, 11–12 (2015); M. Schulz, AD Liese, H Boeing, JE Cunningham, CG Moore & A Kroke, *Associations of Short-Term*

While thin incarcerated people were the symbol of the past, fat incarcerated people signify the present and possibly the future. The present conditions of incarceration and those susceptible to incarceration make incarcerated people particularly vulnerable to the elements that cause and maintain fatness. They lack options for exercise and movement.<sup>56</sup> Their food is of low quality and high in calories and carbohydrates.<sup>57</sup> They are under a lot of stress.<sup>58</sup> They often take medications where the side effects include weight gain.<sup>59</sup> They draw from U.S. populations—people of color, poor people, disabled people, trauma survivors—that are already disproportionately fat.<sup>60</sup> So too, fatness can cause many difficulties in prison, including health problems, inadequate uniforms or cots, and increased risk of violence.<sup>61</sup>

Thin incarcerated people have a longer and more notorious cultural history than fat ones. Wars are punctuated with the images of malnourished and skeletal bodies emerging from prisoner-of-war camps. Early prison activism over food was about scarcity, not abundance.<sup>62</sup> The implementation of food stamps and caloric standards in the 1960s shifted the conversation.<sup>63</sup> Incarcerated people pushed to receive a similar number of calories as an analogous food stamp household.<sup>64</sup> In 1971, incarcerated people at Attica Prison rioted in part for better food.<sup>65</sup>

Current carceral food problems stem from industrialization, budget-cutting, and ideological sentiments that deem nutritious food too decadent for incarcerated people.<sup>66</sup> Notorious examples include prisons that serve rulebreakers deliberately noxious food, such as the nutraloaf, a blended and baked lump of food that resembles an unappetizing meatloaf but worse, that is designed to send a message to incarcerated people (and the public) that food in carceral spaces is part of the

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*Weight Changes and Weight Cycling with Incidence of Essential Hypertension in the EPIC-Potsdam Study*, 19 J. HUM. HYPERTENSION 61, 62 (2005).

56. See *infra* notes 77–80 and accompanying text.

57. See *infra* notes 66–71 and accompanying text.

58. See *infra* notes 81–82 and accompanying text.

59. See *infra* note 85 and accompanying text.

60. See *supra* notes 12–13 and accompanying text.

61. See *supra* notes 1–2, 4, 50 and accompanying text.

62. Kaleigh Rogers, *When Prison Food Is a Punishment*, VICE (Sept. 23, 2015, 2:20 PM), [https://www.vice.com/en\\_us/article/539n3d/when-prison-food-is-a-punishment](https://www.vice.com/en_us/article/539n3d/when-prison-food-is-a-punishment) [<https://perma.cc/UT3Z-RTHH>].

63. *Id.*

64. See *id.*

65. Baylen Linnekin, *Prison Food Is a National Tragedy*, REASON (Dec. 22, 2018, 8:30 AM), <https://reason.com/2018/12/22/prison-food-is-a-national-tragedy/> [<https://perma.cc/2EPR-RRQJ>].

66. See Matt Rocheleau, *How Do People Gain Weight in Prison?*, BOS. GLOBE (Mar. 3, 2016, 5:38 PM), <https://www.bostonglobe.com/metro/2016/03/03/how-did-subway-spokesman-jared-fogle-gain-pounds-prison/BEiiFJ2K6lvVnLbk0mgPVN/story.html>; Wendy Sawyer, *Food for Thought: Prison Food Is a Public Health Problem*, PRISON POL'Y INITIATIVE (Mar. 3, 2017), <https://www.prisonpolicy.org/blog/2017/03/03/prison-food/> [<https://perma.cc/H2XR-Y34T>].

punishment.<sup>67</sup> What is far more prevalent and troublesome is the standard daily diet for incarcerated people.

While the quality of prison food has never been enviable, it is on the decline: cheap processed food has become the norm.<sup>68</sup> Institutions may outsource their food preparation to private contractors to cut costs or serve inexpensive foods prepared in-house.<sup>69</sup> They may lean on processed foods laden with fat, sodium, and carbohydrates that only require reheating rather than fresh food prepared from scratch.<sup>70</sup> Fresh fruits or vegetables may be scarce or nonexistent. As one newspaper account summarized: incarcerated people “are looking at a sea of beige: potatoes about six days a week, rice about five days a week, and two slices of untoasted wheat bread at nearly every lunch and dinner.”<sup>71</sup>

While it may be hard for incarcerated people to obtain fresh and nourishing food, they have access to pricey consignment food that is calorically dense and nutritionally lacking.<sup>72</sup> Commissary fills the gaps (and then some) in the poor quality of carceral meals and acts as a revenue source for prisons and jails. If meal access is cut due to punishment or safety, incarcerated people may use commissary food in compensation.<sup>73</sup> Moreover, family members may bring them food.<sup>74</sup>

Incarcerated people may also use food as a substitute for absent therapeutic or rehabilitative services, as a coping mechanism, or as a way to alleviate boredom.<sup>75</sup> They may also use it to cope with withdrawing from substances such as drugs, tobacco, and alcohol.<sup>76</sup>

67. See Rogers, *supra* note 62. The prevalence of these practices is probably overblown and their use is likely waning. See Christopher Zoukis, *Use of Nutraloaf on the Decline in U.S. Prisons*, PRISON LEGAL NEWS (Mar. 31, 2016), <https://www.prisonlegalnews.org/news/2016/mar/31/use-nutraloaf-decline-us-prisons/>. Successful litigation has also limited use of noxious food. See, e.g., *Vermont Supreme Court: “Nutraloaf” Diet Is Punishment That Requires Hearing*, PRISON LEGAL NEWS (Aug. 15, 2009), <https://www.prisonlegalnews.org/news/2009/aug/15/vermont-supreme-court-nutraloaf-diet-is-punishment-that-requires-hearing/>; see also *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978) (opining on the cruelty of providing a diet of “grue” for more than “a few days”).

68. See LESLIE SOBLE, KATHRYN STROUD & MARIKA WEINSTEIN, IMPACT JUST., *EATING BEHIND BARS: ENDING THE HIDDEN PUNISHMENT OF FOOD IN PRISON* 16 (2020) (“There is no bygone golden age of prison food, but with a skyrocketing number of people to feed . . . the quality of the food has sunk to new lows.”); Sawyer, *supra* note 66 (discussing “[t]he downturn in prison food quality”).

69. See, e.g., Jennette Barnes & Michael Bonner, *Crime and Nourishment: An Inside Look at Jail Food in Bristol County*, S. COAST TODAY (Dec. 21, 2018, 10:09 AM), <https://perma.cc/DL75-28TB>.

70. See Sawyer, *supra* note 66.

71. Barnes & Bonner, *supra* note 69.

72. See Amy B. Smoyer & Kim M. Blankenship, *Dealing Food: Female Drug Users’ Narratives About Food in a Prison Place and Implications for Their Health*, 25 INT’L J. DRUG POL’Y 562, 565 (2014) (listing common commissary offerings: “candy, cakes, chips, crackers, pre-cooked rice and pastas, condiments (e.g. peanut butter, jelly, mayonnaise), and processed meats, cheese and fish”).

73. See *id.* (describing a prison’s regulations allowing commissary food, but not other items, in housing units).

74. See Johnna Christian, Jeff Mellow & Shenique Thomas, *Social and Economic Implications of Family Connections to Prisoners*, 34 J. CRIM. JUST. 443, 449 (2006).

75. Gebremariam et al., *supra* note 44.

76. See *id.* at 106–07. This may be why weight gain is front-loaded and then tapers off during incarceration. See *id.* at 107.

Policymakers can make deliberate choices to impose sedentary lifestyles upon incarcerated people.<sup>77</sup> In the 1990s, for example, some states curtailed access to weight rooms or even banned weightlifting altogether out of fear it was making incarcerated people too strong.<sup>78</sup> Also, incarcerated people in solitary confinement or other restricted spaces face limitations on their ability to exercise. A significant minority of incarcerated people are in restricted housing or confinement at any given time.<sup>79</sup> Carceral spaces choked to the brim with people due to overcrowding also make it tough to exercise.<sup>80</sup>

Stress, a known contributor to weight gain, can exacerbate preexisting psychological conditions or create new ones.<sup>81</sup> The carceral system itself can produce stress.<sup>82</sup> Lack of sleep may also contribute to weight gain.<sup>83</sup> Approximately

77. Systematic data on physical activity in prison is frustratingly lacking. Scholarship on incarcerated people's physical activity note the dearth of research. See Vuk & Doležal, *supra* note 49; Ambrose & Rosky, *supra* note 49.

78. See Paul Wright, *Prison Weight Lifting Is a Nonsense Issue*, PRISON LEGAL NEWS (Mar. 15, 1995), <https://www.prisonlegalnews.org/news/1995/mar/15/prison-weight-lifting-is-a-nonsense-issue/> (documenting Mississippi and Wisconsin's weightlifting bans and California's efforts to prevent incarcerated people from bulking up); Peter Finn, *No-Frills Prisons and Jails: A Movement in Flux*, 60 FED. PROB. 35, 35 (1996) ("In recent years, a number of state legislatures, governors, commissioners of corrections, and sheriffs have eliminated or reduced the availability of . . . weightlifting equipment . . ."); see also Robert Schermer, *How to Develop an Inmate Physical Fitness Program*, CORRECTIONS 1 (Feb. 1, 2019), <https://www.correctionsone.com/correctional-healthcare/articles/how-to-develop-an-inmate-physical-fitness-program-zGufaJkZEdvqSZBw/> [<https://perma.cc/C4QZ-ZX8J>] (discussing how to create a prison health program that does not involve weightlifting); Alexander Tepperman, *Prison Weights for No Man: Interpreting a Modern Moral Panic*, 7 CRITICAL ISSUES JUST. & POL. 1, 11 (2014) (studying mass media's contribution to the moral panic over prison weightlifting in the mid-1990s); Robert D. Lee, Jr., *Prisoners' Rights to Recreation: Quantity, Quality, and Other Aspects*, 24 J. CRIM. JUST. 167, 168, 170 (1996) (surveying court rulings on the right to recreation in prison, and noting the lack of a "coherent and comprehensive policy").

79. See, e.g., Benjamin C. Hattem, Note, *Carceral Trauma and Disability Law*, 72 STAN. L. REV. 995, 997 (2020).

In 2015, at any given time, roughly one out of every fifteen U.S. prisoners was being held in some form of restrictive housing lasting fifteen days or longer. . . . The Bureau of Justice Statistics's National Inmate Survey for 2011-2012 found that "[n]early 20% of prison inmates and 18% of jail inmates had spent time in restrictive housing . . . in the past 12 months . . ." And "a substantial body of work has established that solitary confinement can have damaging psychological effects, particularly when that confinement involves near complete isolation and sensory deprivation, or when the term of such confinement is extended."

*Id.* (second, third, and fourth alterations in original) (footnotes omitted) (first quoting ALLEN J. BECK, DOJ, *USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011-12*, at 1 (2015); and then quoting NATASHA A. FROST & CARLOS E. MONTEIRO, DOJ, *ADMINISTRATIVE SEGREGATION IN U.S. PRISONS 17* (2016)).

80. See Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1156 (2013) ("[O]vercrowding affects nearly all aspects of incarceration . . .").

81. See A. Janet Tomiyama, *Stress and Obesity*, 70 ANN. REV. PSYCH. 703, 706 (2019).

82. See Hattem, *supra* note 79, at 999 ("[P]sychological harm inheres in the current experience of incarceration.").

83. See, e.g., Sanjay R. Patel, Atul Malhotra, David P. White, Daniel J. Gottlieb & Frank B. Hu, *Association Between Reduced Sleep and Weight Gain in Women*, 164 AM. J. EPIDEMIOLOGY 947, 953 (2006); Sanjay R. Patel & Frank B. Hu, *Short Sleep Duration and Weight Gain: A Systematic Review*, 16

fifteen percent of people incarcerated in state prisons have psychotic symptoms.<sup>84</sup> Many psychotropic medications have weight gain as a side effect.<sup>85</sup>

Moreover, incarcerated people have disproportionately endured trauma, both outside and inside incarceration. This trauma history is particularly the case with women: “Incarcerated women are disproportionately survivors of sexual abuse and assault—and the traumas they experience as a result of these acts of sexual violence produce disabilities, including post-traumatic stress disorder (PTSD), depression, and anxiety.”<sup>86</sup> The 2011–2012 National Inmate Survey reported that 4% of people in prisons and 3.2% of people in jails experienced sexual victimization in the previous twelve months.<sup>87</sup> According to multiple studies, “between 32% and 66% of inmates experience physical victimization”<sup>88</sup> directly and in

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OBESEITY 643, 651 (2008); Lorrie Magee & Lauren Hale, *Longitudinal Associations Between Sleep Duration and Subsequent Weight Gain: A Systematic Review*, 16 SLEEP MED. REVS. 231, 239 (2012); M.-P. St-Onge, *Sleep–Obesity Relation: Underlying Mechanisms and Consequences for Treatment*, 18 OBESEITY REVS. (SUPPL. 1) 34, 34 (2017). There are few sources providing robust data on how incarcerated people sleep. See Lindsay H. Dewa, Lamiece Hassan, Jenny J. Shaw & Jane Senior, *Trouble Sleeping Inside: A Cross-Sectional Study of the Prevalence and Associated Risk Factors of Insomnia in Adult Prison Populations in England*, 32 SLEEP MED. 129, 134 (2017) (finding that 61.6% of people imprisoned in a prison in England had insomnia disorder); Lindsay H. Dewa, Simon D. Kyle, Lamiece Hassan, Jenny Shaw & Jane Senior, *Prevalence, Associated Factors and Management of Insomnia in Prison Populations: An Integrative Review*, 24 SLEEP MED. REVS. 13, 25 (2015) (finding that incarcerated people tend to have sleep problems). But see Claire Johnson, Jean-Philippe Chaput, Maikol Diasparra, Catherine Richard & Lise Dubois, *Influence of Physical Activity, Screen Time and Sleep on Inmates’ Body Weight During Incarceration in Canadian Federal Penitentiaries: A Retrospective Cohort Study*, 110 CANADIAN J. PUB. HEALTH 198, 204, 208 (2019) (finding that sleep was not associated with weight gain for people incarcerated in a Canadian prison but that physical inactivity was).

84. Margo Schlanger, *Prisoners with Disabilities*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 296 tbl.1 (Erik Luna ed., 2017); see also KONRAD FRANCO, DAVID PANUSH & DAVID-MAXWELL-JOLLY, CAL. HEALTH POL’Y STRATEGIES, L.L.C., POLICY BRIEF: HOW MANY INCARCERATED INDIVIDUALS RECEIVED PSYCHOTROPIC MEDICATION IN CALIFORNIA JAILS: 2012–2017, at 0 (2018) (using “receipt of psychotropic medications as an indicator of serious mental illness,” and reporting that one-fifth of incarcerated people in California receive such medications and that the number is increasing); Anthony C. Tamburello, Archana Kathpal & Rusty Reeves, *Characteristics of Inmates Who Misuse Prescription Medication*, 23 J. CORR. HEALTH CARE 449, 449 (2017) (“The baseline prevalence of substance abuse disorders is well-known to be high in the prison population.” (citation omitted)); JENNIFER BRONSON & MARCUS BERZOFSKY, DOJ, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, at 1 (2017) (reporting that thirty-seven percent of people in prisons and forty-four percent of people in jails had been diagnosed with mental disorders at some point); Douglas Del Paggio, *Psychotropic Medication Abuse by Inmates in Correctional Facilities*, 1 MENTAL HEALTH CLINICIAN 187, 187 (2012) (“As state hospitals have all but disappeared, a greater proportion of the chronically mentally ill now reside in our correctional facilities. . . . [T]he available mental health services in these facilities have been slow to meet that need.”).

85. Amresh Shrivastava & Megan E. Johnston, *Weight-Gain in Psychiatric Treatment: Risks, Implications, and Strategies for Prevention and Management*, 8 MENS SANA MONOGRAPHS 53, 57 (2010).

86. Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 980 (2019).

87. Hattem, *supra* note 79, at 997–98.

88. *Id.* at 998 (quoting Jane C. Daquin, Leah E. Daigle & Shelley Johnson Listwan, *Vicarious Victimization in Prison: Examining the Effects of Witnessing Victimization While Incarcerated on Offender Reentry*, 43 CRIM. JUST. & BEHAV. 1018, 1018 (2016)).



some prisons nearly all report witnessing violence while they are incarcerated.<sup>89</sup> People with severe developmental disabilities and lesbian, gay, bisexual, and transgender people are especially vulnerable to victimization.<sup>90</sup> One factor compounding carceral trauma is that incarcerated people are vulnerable to repeated victimization once they are harmed for the first time.<sup>91</sup>

Incarcerated people draw from communities vulnerable to poor health due to social marginalization, insufficient healthcare, and stressors such as racism, unstable food supplies, and housing. Poverty and malnutrition have shifted from producing emaciated people to producing fat people.<sup>92</sup> Nearly thirty million people, a group that is disproportionately people of color, lack consistent access to healthy and affordable foods.<sup>93</sup> Instead, they rely on subsidized, highly processed foods that are cheap but unhealthy.<sup>94</sup> Communities of color and poor people often exist in either food deserts, food swamps, or both.<sup>95</sup> “[F]ood deserts” refer to places with diminished access to healthy food.<sup>96</sup> “[F]ood swamps” are places populated by nonnutritious food purveyors, such as fast-food restaurants and corner stores that meet people’s caloric needs in the absence of nutritious options.<sup>97</sup> Prisons and jails have elements of both phenomena—regular meals can be scanty and unhealthy while commissary food is fattening and unhealthy.

Incarcerated people are often multiply marginalized. Poor Black, Latino, and Native people are disproportionately incarcerated.<sup>98</sup> Over sixty percent of people in prison are people of color.<sup>99</sup> Black men are six times as likely to be imprisoned as white men, and Latino men are 2.5 times as likely as white men.<sup>100</sup> Four in ten incarcerated people in the United States are Black, even though Black Americans are only thirteen percent of the U.S. population overall.<sup>101</sup> Latinos are nearly

89. *See id.*

90. *Id.* at 1004.

91. *Id.* at 1007–08.

92. Julie Foster, Comment, *Subsidizing Fat: How the 2012 Farm Bill Can Address America's Obesity Epidemic*, 160 U. PA. L. REV. 235, 237 (2011).

93. Deborah L. Rhode, *Obesity and Public Policy: A Roadmap for Reform*, 22 VA. J. SOC. POL'Y & L. 491, 497 (2015).

94. *See Foster, supra* note 92, at 236.

95. *See* Brandi Franklin, Ashley Jones, Dejuan Love, Stephane Puckett, Justin Macklin & Shelley White-Means, *Exploring Mediators of Food Insecurity and Obesity: A Review of Recent Literature*, 37 J. CMTY. HEALTH 253, 253–54 (2012).

96. Katherine D. Morris, *An Analysis of the Relationship Between Food Deserts and Obesity Rates in the United States*, 19 GEO. PUB. POL'Y REV. 65, 66 (2013). Research is mixed as to the impact on weight of living in a food desert. *See id.* at 82.

97. Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 986 (2013).

98. *See* Allison C. Carey, Liat Ben-Moshe & Chris Chapman, *Preface: An Overview of Disability Incarcerated*, in *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA*, at ix, xi (Liat Ben-Moshe et al. eds., 2014).

99. SENT'G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf> [<https://perma.cc/3M8Q-9WZC>].

100. *Id.*

101. Sawyer & Wagner, *supra* note 42.

twice as likely to be incarcerated as non-Hispanic white Americans.<sup>102</sup> Native people are also disproportionately incarcerated.<sup>103</sup> Though the carceral population is overwhelmingly male, the rate of growth of women in prison has been double that of men since 1980.<sup>104</sup> Lengthy sentences have also led to an aging carceral population with the accompanying chronic conditions of old age.<sup>105</sup>

The absence of research and journalistic investigation makes it difficult to account for the problems that fat incarcerated people face systematically.<sup>106</sup> Cases provide glimpses. Obie Lee Crisp, an obese man proceeding pro se, claimed that the California facility where he was incarcerated failed to provide him with adequate shower facilities.<sup>107</sup> He was forced to bathe himself using a water pitcher and the inadequate hygiene gave him painful and embarrassing skin infections.<sup>108</sup> Despite weighing 330 pounds and having a knee injury and a continuous positive airway pressure machine, Timothy Hatfield was assigned a top bunk.<sup>109</sup> Newspapers also report of notorious sites and notorious incarcerated people gaining weight. A spokesman for Guantanamo detention facilities reported that a detainee doubled in weight to 410 pounds.<sup>110</sup> Human rights groups blamed weight gain on restricted exercise, small cells, and unhealthy food.<sup>111</sup> Former Subway restaurant spokesman Jared Fogle gained thirty pounds in his first three months of incarceration.<sup>112</sup> Singer Chris Brown gained about thirty-five

102. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/3G5R-RQJB>].

103. Jacobs et al., *supra* note 12, at 44.

104. SENT'G PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS 1 (2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [<https://perma.cc/M4X3-4RCU>].

105. *See Old Behind Bars: The Aging Prison Population in the United States*, HUM. RTS. WATCH (Jan. 27, 2012), <https://www.hrw.org/report/2012/01/27/old-behind-bars/aging-prison-population-united-states> [<https://perma.cc/R4GH-RB4T>] (noting that one in ten people in state prisons is serving a life sentence, and observing that the “number of sentenced federal and state prisoners who are age 65 or older grew . . . 94 times faster than the total sentenced prisoner population between 2007 and 2010”).

106. And fat incarcerated people may be particularly vulnerable to issues that all incarcerated people experience, such as overheating in non-air-conditioned facilities. *See* Anna Terwiel, *What Is the Problem with High Prison Temperatures? From the Threat to Health to the Right to Comfort*, 40 NEW POL. SCI. 70, 75 (2018).

107. *See* Complaint by a Prisoner Under the Civil Rights Act, 42 U.S.C. § 1983, at 5–6, 9, *Crisp v. Cal. Health Care Facility*, No. 5:14-cv-01762 (N.D. Cal. Apr. 16, 2014). The United States District Court for the Northern District of California transferred Crisp’s case to the Eastern District as the proper venue. Order of Transfer, *Crisp v. Cal. Health Care Facility*, No. 5:14-cv-01762 (N.D. Cal. June 2, 2014). Crisp’s repeated handwritten complaints, “contain[ing] lengthy narratives,” were dismissed because, in the court’s view, it was too difficult to discern what causes of action Crisp’s allegations implicated: “Figuring out . . . what claims plaintiff is making . . . would be excessively time-consuming. . . .” *Crisp*, No. 2:14-cv-01345, 2018 WL 2441590, at \*2 (E.D. Cal. May 31, 2018).

108. *See* Complaint by a Prisoner Under the Civil Rights Act, 42 U.S.C. § 1983, *supra* note 107.

109. Prisoner Civil Rights Complaint at 4, *Hatfield v. Or. Dep’t of Corr.*, No. 3:12-cv-00883 (D. Or. May 17, 2012); Notice of “Tort Claim” at 1, *Hatfield v. Or. Dep’t of Corr.*, No. 3:12-cv-00883 (D. Or. May 17, 2012).

110. Michael Melia, *High-Calorie Diet Fattens Gitmo Inmates*, WASH. POST (Oct. 3, 2006, 11:08 PM), <https://www.washingtonpost.com/wp-dyn/content/article/2006/10/03/AR2006100300665.html>.

111. *See id.*

112. Rocheleau, *supra* note 66.

pounds during a similar period of incarceration.<sup>113</sup> Serial killer Gary Lee Sampson gained 150 pounds in over eleven years in prison.<sup>114</sup>

Incarceration is bad for people's health: "the overall mortality rate in local jails increased from 128 per 100,000 jail inmates in 2012 to 135 per 100,000 in 2013."<sup>115</sup> "On average, each year in prison takes two years off of a person's life expectancy,"<sup>116</sup> especially for Black men.<sup>117</sup> Unless carceral medical professionals treat incarcerated people for a disorder that warrants comprehensive and regular physical examinations, they may not notice or treat comorbid conditions such as high blood pressure.<sup>118</sup>

Compounding these general issues, medical problems that fat incarcerated people have could be dismissed and attributed to obesity because of fatphobia.<sup>119</sup> Evie Litwok, a woman who recounted her experience in prison, observed that

[o]ne Physician's Assistant (PA) [at a Florida prison] was notorious for telling every woman he examined that aches and pains were due to fat. He told me the same thing he told the others, "You are fat. You need to walk on the track and drink water." Once, one Latina woman went to him complaining of severe stomach pains. He gave her the fat speech and several weeks later she died when her gallbladder burst.<sup>120</sup>

Reginald Bedford attempted multiple times to obtain treatment for knee pain in his Texas facility. Each time he was told to lose weight instead.<sup>121</sup> Derwin

113. *Id.*

114. *Id.*

115. MARGARET NOONAN, HARLEY ROHLOFF & SCOTT GINDER, DOJ, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013 - STATISTICAL TABLES, at 1 (2015).

116. Jacobs et al., *supra* note 12, at 63.

117. Sawyer, *supra* note 66.

118. See Christopher Beam, *Jailhouse Doc: What's the Health Care System Like in Prison?*, SLATE (Mar. 25, 2009, 5:28 PM), <https://slate.com/news-and-politics/2009/03/what-s-the-health-care-system-like-in-prison.html> [<https://perma.cc/Q4US-DWKF>] (noting that incarcerated people see doctors for checkups less often than the nonincarcerated); Nancy Wolff, Jing Shi, Nicole Fabrikant & Brooke E. Schumann, *Obesity and Weight-Related Medical Problems of Incarcerated Persons with and Without Mental Disorders*, 18 J. CORR. HEALTH CARE 219, 224 (2012) (reporting that among obese incarcerated men, those requiring treatment for a serious mental disorder were more likely to also obtain treatment for pain and cardiovascular issues); Montina Befus, Franklin D. Lowy, Benjamin A. Miko, Dhritiman V. Mukherjee, Carolyn T. A. Herzig & Elaine L. Larson, *Obesity as a Determinant of Staphylococcus Aureus Colonization Among Inmates in Maximum-Security Prisons in New York State*, 182 AM. J. EPIDEMIOLOGY 494, 499 (2015) (finding higher rates of Staphylococcus aureus colonization, which can lead to fatal staph infections, in incarcerated women with high BMIs, and also finding higher rates in incarcerated men who were obese but not overweight or severely obese).

119. See, e.g., Evie Litwok, *I Went to Prison at Age 60. Here's What I Learned.*, TALK POVERTY (Oct. 16, 2015), <https://talkpoverty.org/2015/10/16/went-prison-60-years-old-heres-learned/> [<https://perma.cc/T65S-AJ3C>]; see also Tony Thompson, *Poor Food and Stress 'Responsible for Rising Number of Deaths in UK Prisons'*, GUARDIAN (Aug. 7, 2010, 7:05 PM), <https://www.theguardian.com/society/2010/aug/08/prison-natural-deaths-inquiry-call> [<https://perma.cc/T477-FMLY>] (reporting heart attack death of incarcerated man after prison staff gave antacids for chest pain and postmortem that found he had been suffering from heart disease and high blood pressure).

120. Litwok, *supra* note 119.

121. See *Bedford v. Nagel*, No. 4:06-cv-01478, 2006 WL 3813769, at \*4 (S.D. Tex. Dec. 26, 2006).

Wynn reported pain in his lower back from a fall.<sup>122</sup> He claimed that his Texas prison doctor concluded instead that his injuries were due to obesity and refused to grant Wynn a temporary work unassignment, stating, “You’ll just lay around[.] [Y]ou’re obese [sic] enough.”<sup>123</sup>

Some problems of fat incarcerated people may continue once people are released. Certain disempowered communities churn people in and out of incarceration, so health conditions created or exacerbated by incarceration travel outside the prison walls as well.<sup>124</sup> The Supplemental Security Income and Social Security Disability Insurance, both of which provide income and benefits to disabled people, have tightened eligibility for fat people to qualify.<sup>125</sup> This in turn has restricted Medicaid eligibility because the Social Security Administration’s definition is used for disability benefits under Medicaid.<sup>126</sup> Fat people who rely on the Affordable Care Act may face barriers to accessing medical weight-loss treatment.<sup>127</sup> Scholars such as Jennifer Shinall analyze the “obesity penalty,” the lower wages that obese people, especially obese women, receive as compared to nonobese workers.<sup>128</sup> Prospective fat jurors can be struck by peremptory challenges due to fatness.<sup>129</sup> Fat defendants may also face fat bias in other parts of the criminal justice system such as with police, attorneys, or fact finders.<sup>130</sup> Thus, the fat bias in society at large may spur the disproportionate incarceration of fat people.

## II. CURRENT AVENUES FOR LEGAL REDRESS

The law provides multiple legal avenues for incarcerated people to challenge the conditions of their confinement. Most of them, however, structure the odds against incarcerated people—not just fat incarcerated people—winning their claims. Incarcerated people face procedural obstacles to litigation and limitations on damages. Moreover, it is difficult to receive redress for prison conditions that are merely terrible rather than intentionally discriminatory or cruel and

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122. Wynn v. Pittman, No. H-11-0991, 2012 WL 4468494, at \*1 (S.D. Tex. Sept. 25, 2012).

123. *Id.* at \*4 (alterations in original).

124. See Peter Wagner & Emily Widra, *No Need to Wait for Pandemics: The Public Health Case for Criminal Justice Reform*, PRISON POL’Y INITIATIVE (Mar. 6, 2020), <https://www.prisonpolicy.org/blog/2020/03/06/pandemic/> [<https://perma.cc/N2EC-6YGH>] (framing mass incarceration as a public-health issue, and describing the phenomenon of “jail churn”).

125. See Jasmine N. Little, Comment, *The Weighting Game: Do Government Agencies Consider Obesity a Disability?*, 6 WAKE FOREST J.L. & POL’Y 567, 573–74 (2016).

126. See *id.* at 577.

127. See Jennifer Bennett Shinall, *Unfulfilled Promises: Discrimination and the Denial of Essential Health Benefits Under the Affordable Care Act*, 65 DEPAUL L. REV. 1235, 1237–38 (2016).

128. Shinall, *supra* note 15, at 102–03.

129. See Dargan Ware, Note, *Against the Weight of Authority: Can Courts Solve the Problem of Size Discrimination?*, 64 ALA. L. REV. 1175, 1198 (2013); Maggie Elise O’Grady, *A Jury of Your Skinny Peers: Weight-Based Peremptory Challenges and the Culture of Fat Bias*, 7 STAN. J.C.R. & C.L. 47, 49 (2011).

130. See Ware, *supra* note 129, at 1199; Mollow, *supra* note 32.

unusual.<sup>131</sup> Finally, the treatment of obesity as an Americans with Disabilities Act (ADA) claim is still unsettled and currently skewed against obese claimants.<sup>132</sup>

#### A. PROCEDURAL BARRIERS

As a threshold matter, most incarcerated people cannot afford a lawyer and thus file *pro se*; this makes it much harder for them to navigate procedural obstacles in litigation.<sup>133</sup> It is also difficult for incarcerated people to cluster their grievances in a class action. *Lewis v. Casey*<sup>134</sup> eviscerated standing for prison class actions.<sup>135</sup> It would be difficult for a potential class to create the requisite statistical evidence due to the lack of research on fatness in prison. The more recent decision in *Wal-Mart Stores, Inc. v. Dukes* also created a considerable hurdle for prospective class-action plaintiffs.<sup>136</sup> Given the multiple factors that may cause and maintain incarcerated people's fatness, a potential class action would be vulnerable to a charge of undue variability of the potential class.<sup>137</sup>

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131. See Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365, 397 (2020).

132. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213). During the current COVID-19 pandemic many incarcerated people and organizations representing them have filed habeas corpus petitions attempting to gain release due to increased risk of infection. Obesity is one of the risk factors for COVID-19 complications and death listed in several petitions. See, e.g., Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 & Class Action Complaint for Injunctive & Declaratory Relief at 13, *Hallinan v. Scarantino*, 466 F. Supp. 3d 587 (E.D.N.C. 2020) (No. 5:20-he-02088); Complaint—Class Action for Declaratory & Injunctive Relief & Petition for Writ of Habeas Corpus at 12, *Wilson v. Ponce*, 465 F. Supp. 3d 1037 (C.D. Cal. 2020) (No. 2:20-cv-04451); Declaration of Susan E. Hassig, Exhibit 1 to Motion for Leave to File in Excess of 25 Pages at 4, *Belton v. Gautreaux*, No. 3:20-cv-00278 (M.D. La. Aug. 18, 2020); Petition for Writ of Habeas Corpus & Complaint for Injunctive & Declaratory Relief at 18, *Russell v. Wayne County*, No. 2:20-cv-11094 (E.D. Mich. May 4, 2020); Complaint—Class Action for Declaratory & Injunctive Relief & Petition for Writ of Habeas Corpus at 11, 49–50, *Wragg v. Ortiz*, 462 F. Supp. 3d 476 (D.N.J. 2020) (No. 1:20-cv-05496). Filing for release based on increased risk of infection has been unsuccessful in part because courts construe the complaint as a conditions-of-confinement issue which is not cognizable as a habeas petition. See, e.g., *Hallinan*, 466 F. Supp. 3d at 601–02 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)); *Wragg*, 462 F. Supp. 3d at 504–05. Additionally, class-based petitions seeking injunctions requiring that prisons and jails implement adequate COVID-19 testing, prevention, and care include obese people in the class of incarcerated people at increased risk of infection. See, e.g., Complaint at 19, *Smith v. DeWine*, 476 F. Supp. 3d 635 (S.D. Ohio 2020) (No. 2:20-cv-02471); Class Action Complaint for Declaratory & Injunctive Relief & Petition for Writ of Habeas Corpus at 13, 40–44, *J.H. v. Edwards*, No. 3:20-cv-00293 (M.D. La. May 14, 2020) (complaining on behalf of children in juvenile detention). Injunctions seeking COVID-19 prevention policies have been slightly more successful. See *Maevae Allsup, Fifth Circuit Stays Injunction of Texas Prisons in Covid-19 Suit*, BLOOMBERG L. NEWS (Apr. 22, 2020, 8:16 PM).

133. See Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 273 (2010); Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1226–27 (2011).

134. 518 U.S. 343 (1996).

135. See *id.* at 355.

136. See 564 U.S. 338, 356–57 (2011).

137. See *id.* at 359.

### 1. Too Fat to Jail, Too Fat to Execute

Accounts of fat incarcerated people released to house arrest or parole due to their weight are anecdotal and mostly from outside the United States.<sup>138</sup> Within the United States, too-fat-to-jail cases have foundered on procedural grounds that did not reach the merits of the weight-related claim.<sup>139</sup> In *Miller v. Parker*, for example, David Earl Miller challenged the methods of his execution.<sup>140</sup> The Sixth Circuit denied his constitutional challenges.<sup>141</sup> Neither the Sixth Circuit nor the district court reached the merits of Miller's obesity-related claim.<sup>142</sup> In federal court, Stephen Michael West argued his obesity rendered Tennessee's death by lethal injection cruel and unusual as applied to him.<sup>143</sup> The federal court denied his motion because his claim was barred by res judicata based on his state court case; neither the federal nor state court decisions mention obesity.<sup>144</sup> In another case, Richard Cooley argued that his weight created a vein-access issue. In 2003, when he first faced execution, medical staff determined that he had one good vein in his right hand.<sup>145</sup> Cooley stated that by 2007 he had gained weight and that the single good vein might be obscured.<sup>146</sup> The court found that his weight gain did not restart the clock for the statute of limitations and thus, his § 1983 claim was time-barred.<sup>147</sup> It did not reach the merits of the weight-based challenge.<sup>148</sup> In another example, after the district court rejected Ronald Post's challenge to the death penalty as a second and successive petition, Governor John Kasich granted

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138. See, e.g., *Too Fat to Lock Up: Bedridden Man Weighing 43-Stone Avoids Jail for Food Scam*, DAILY MAIL (Apr. 2, 2010, 12:29 PM), <https://www.dailymail.co.uk/news/article-1262992/George-Jolicur-The-43-stone-man-fat-lock-up.html> [<https://perma.cc/SZ6X-K4PJ>]; *Trickster Too Fat for Prison*, SUN, Nov. 6, 1997, at 29; *Man Too Fat for Prison Is Released Early*, VANCOUVER SUN, Nov. 13, 2008, at B4; Sam Sherwood, *Rapist Too Fat for Prison Costs \$1250 Each Day in Hospital*, STUFF (July 31, 2018, 5:08 PM), <https://www.stuff.co.nz/national/crime/105881776/rapist-too-fat-for-prison-costs-1250-each-day-in-hospital> [<https://perma.cc/5P3W-TK46>]; Ingrid Peritz & Siri Agrell, *Too Fat for Prison, Criminal Is Free to Go*, GLOBE & MAIL (Nov. 13, 2008), <https://www.theglobeandmail.com/news/national/too-fat-for-prison-criminal-is-free-to-go/article17974332/>.

139. See, e.g., *Miller v. Parker*, 909 F.3d 827, 830 (6th Cir. 2018).

140. Complaint for Injunctive Relief at 1, *Miller v. Parker*, No. 3:18-cv-00781 (M.D. Tenn. Aug. 21, 2018).

141. *Miller*, 909 F.3d at 830.

142. See *id.*; *Miller v. Parker*, No. 3:18-cv-01234, 2018 WL 6003123, at \*4–5 (M.D. Tenn. Nov. 15, 2018); Complaint for Injunctive Relief, *supra* note 140, at 55 (arguing BMI above thirty-five put plaintiff at risk of complications in administering death penalty).

143. *West v. Parker*, No. 3:19-CV-00006, 2019 WL 2341406, at \*17 (M.D. Tenn. June 3, 2019).

144. See *id.* at \*14; *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 625 (Tenn. 2018).

145. See *Cooley v. Strickland*, 544 F.3d 588, 589 (6th Cir. 2008).

146. See *Cooley v. Strickland*, No. 2:08-cv-747, 2008 WL 4449536, at \*2 (S.D. Ohio Sept. 30, 2008), *aff'd*, 544 F.3d 588 (6th Cir. 2008).

147. *Id.*

148. See *id.*; Karl Turner, *Richard Cooley's Not Too Fat to Be Executed, Federal Judge Says*, CLEVELAND.COM (Mar. 28, 2019, 4:27 AM), [https://www.cleveland.com/metro/2008/10/judge\\_rejects\\_killer\\_cooleys\\_ob.html](https://www.cleveland.com/metro/2008/10/judge_rejects_killer_cooleys_ob.html) [<https://perma.cc/LD2F-TFJ4>]

Mr. Post clemency based on issues with his defense counsel and did not discuss his weight-related claim.<sup>149</sup>

Mitchell Rupe evaded death by hanging because of his weight. At the time of Rupe's initial sentence, hanging was the default method of execution in Washington state.<sup>150</sup> Rupe refused to select the way he would die and so had to be executed through hanging.<sup>151</sup> He contended that he was at risk of decapitation if he was hanged because he weighed 400 pounds.<sup>152</sup> The district court upheld his death sentence but agreed that he was too fat to hang.<sup>153</sup> Rupe received weight-loss surgery in prison, which reduced his weight to 275 pounds.<sup>154</sup> The Ninth Circuit had vacated as moot the hanging issue because Washington law changed the presumption in favor of hanging to a presumption in favor of lethal injection.<sup>155</sup> Prosecutors did not obtain the unanimous verdict necessary for capital punishment, and as a result, Rupe received a life sentence by default.<sup>156</sup> He died of a long illness in prison after a jury deadlocked during his third trial in 2000.<sup>157</sup>

Marcel Williams gained 200 pounds while in solitary confinement on death row.<sup>158</sup> He sought a preliminary injunction to stay his execution.<sup>159</sup> The court denied his motion in part because it found that "Mr. Williams failed to establish that there is a significant possibility that he could show that there is an alternative method of execution that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'"<sup>160</sup> The court also did not believe medical testimony that Arkansas's execution method demonstrated an unacceptable risk of pain for Mr. Williams.<sup>161</sup>

## 2. Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA), passed in 1996, enacted significant procedural hurdles to litigation brought by incarcerated people.<sup>162</sup> It substantially

149. See *Post v. Bradshaw*, No. 1:97-cv-01640, 2012 WL 5906802, at \*5–6 (N.D. Ohio Nov. 26, 2012); *Ronald Post, Condemned Obese Ohio Killer, Granted Clemency*, CBS NEWS (Dec. 17, 2012, 5:21 PM), <https://www.cbsnews.com/news/ronald-post-condemned-obese-ohio-killer-granted-clemency/> [<https://perma.cc/QKN3-DUCB>].

150. *Rupe v. Wood*, 93 F.3d 1434, 1438 (9th Cir. 1996).

151. *Id.*

152. *See id.* at 1437.

153. *See id.*

154. *Inmate Takes Too-Fat-to-Execute Argument to Supreme Court*, CNN (Oct. 8, 2008), <https://www.cnn.com/2008/CRIME/10/10/toofat.execute.appeal/index.html> [<https://perma.cc/2KFT-EG8A>].

155. *Rupe*, 93 F.3d at 1438–39.

156. *See id.* at 1443.

157. *Inmate Takes Too-Fat-to-Execute Argument to Supreme Court*, *supra* note 154.

158. Phil McCausland, *Arkansas Executions: What's Next for the State's Push to Execute a Record Number of Inmates*, NBC NEWS (Apr. 18, 2017, 4:17 PM), <https://www.nbcnews.com/storyline/lethal-injection/arkansas-executions-what-s-next-state-s-push-execute-record-n747936> [<https://perma.cc/2ZJF-8RJS>]. Williams suffered from diabetes, hypertension, and sleep apnea. Lindsey Millar, *The Jack Jones, Marcel Williams Execution Thread*, ARK. TIMES (Apr. 24, 2017, 11:53 PM), <https://arktimes.com/arkansas-blog/2017/04/24/the-jack-jones-marcel-williams-execution-thread>.

159. *Williams v. Kelley*, No. 5:17-cv-00103, 2017 WL 1437964, at \*1 (E.D. Ark. Apr. 21, 2017).

160. *Id.* at \*4 (alteration in original) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)).

161. *See id.*

limited access to the courts by incarcerated people and the remedies they can receive.<sup>163</sup> It acts as a one-way ratchet that forces incarcerated people through arduous prison exhaustion requirements before they can pursue their cases.<sup>164</sup> Indigent incarcerated people are unable to waive filing fees.<sup>165</sup> Additionally, it reduces the remedies and attorneys' fees available to incarcerated people.<sup>166</sup> As Margo Schlanger has shown, the PLRA also makes it more difficult for incarcerated people to win their cases because they are often dismissed for failure to complete the onerous grievance procedures or for failure to allege physical injury.<sup>167</sup> Courts typically defer to carceral institution claims of "legitimate penological interests" for their actions,<sup>168</sup> and officers are usually shielded from liability from civil damages due to qualified immunity.<sup>169</sup> The PLRA generally applies to all federal lawsuits brought by incarcerated people.<sup>170</sup> This includes both the ADA and the Rehabilitation Act of 1973.<sup>171</sup> Thus, incarcerated people who seek possible redress under the principal federal disability laws must also contend with the PLRA.

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162. See 42 U.S.C. § 1997e.

163. See *id.* For an empirical analysis of the impact of the PLRA, see generally Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015). *Brown v. Plata* is an illustrative case where a plaintiff class was able to clear the PLRA's limits on injunctive relief. 563 U.S. 493 (2011). There, the majority opinion indicated that the Eighth Amendment right to adequate health care should be interpreted with respect to systemic risk—not just to individual showings of imminent harm. See *id.* at 531–32. However, it will be challenging for a class of fat incarcerated people to follow in the footsteps of the *Plata* class. The *Plata* majority is no longer on the Supreme Court. Additionally, that case featured an extensive record of actual harm, including regular death from inadequate health care, that may be difficult to muster in a fatness case. See *id.* at 505.

164. See 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); see also *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (holding that the PLRA requires "proper exhaustion" as the term is used in administrative law).

165. See 28 U.S.C. § 1915(a)(1), (b)(1).

166. 42 U.S.C. § 1997e(d)(3), (e).

167. See Schlanger, *supra* note 163, at 162–64; see also Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1644–64 (2003) (documenting the "[d]eclining [s]uccess" of incarcerated plaintiffs).

168. See, e.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests").

169. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (first citing *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); and then citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975)) (holding that government officials are protected from liability for constitutional violations if qualified immunity requirements are fulfilled).

170. Betsy Ginsberg, *Out with the New, in with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities*, 36 FORDHAM URB. L.J. 713, 725 (2009).

171. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701–796(l)); Ginsberg, *supra* note 170. The exception is that attorneys' fees may not be restricted cases under for Title II of the ADA or Section 504 of the Rehabilitation Act. Ginsberg, *supra* note 170, at 726.



### 3. Qualified Immunity

Qualified immunity typically acts as a barrier in civil rights cases against government officials.<sup>172</sup> It shields these officers performing discretionary functions from liability for damages if their conduct is objectively reasonable in light of clearly established federal law.<sup>173</sup>

#### B. DISABILITY-BASED FEDERAL CLAIMS

The Rehabilitation Act and the ADA serve to cover all federal, state, and local carceral spaces in the United States. Claimants may seek reasonable modifications or access to programs or services against public entities.<sup>174</sup> The Rehabilitation Act encompasses all prisons and jails that receive federal financial assistance.<sup>175</sup> The federal government is not included as a public entity under Title II of the ADA.<sup>176</sup> Nor has the United States waived sovereign immunity for ADA claims.<sup>177</sup> Thus, people incarcerated in federal facilities who experience disability discrimination must proceed under Section 504 of the Rehabilitation Act, the Federal Tort Claims Act (FTCA), or a *Bivens* claim against the individual officers.<sup>178</sup>

Title II prohibits disability discrimination by any “public entity.”<sup>179</sup> Public entities encompass “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”<sup>180</sup> In *Pennsylvania Department of Corrections v. Yeskey*, a unanimous Supreme Court held that “Title II of the ADA unambiguously extends to state prison inmates.”<sup>181</sup> State

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172. Incarcerated people and others bring § 1983 claims for violation of constitutional and other rights. 42 U.S.C. § 1983.

173. See, e.g., *Harlow*, 457 U.S. at 818.

174. See 42 U.S.C. § 12112(b)(5)(A); 29 U.S.C. § 701(a)(4).

175. See, e.g., *Onishea v. Hopper*, 171 F.3d 1289, 1296 n.11 (11th Cir. 1999); *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988).

176. See 42 U.S.C. § 12131(1); see also *Cellular Phone Taskforce v. FCC*, 217 F.3d 72, 73 (2d Cir. 2000) (per curiam) (“Title II of the ADA is not applicable to the federal government.”).

177. See *Agee v. United States*, 72 Fed. Cl. 284, 289 (2006) (“Congress has not waived the Federal Government’s sovereign immunity with regard to ADA claims.”); *Gray v. United States*, 69 Fed. Cl. 95, 102 (2005) (concluding that the court had “no alternative but to dismiss plaintiff’s ADA claim” because of the federal government’s failure to waive sovereign immunity); see also Florence M. Johnson, *When the Government Is a Party in Litigation: Anticipating Roadblocks*, AM. BAR ASS’N (Feb. 28, 2017), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/when-the-government-is-a-party-in-litigation-anticipating-roadblocks/> [https://perma.cc/HY43-DLCE] (noting that in the ADA context, the federal government has “exempted itself from suit entirely”).

178. See, e.g., *Whooten v. Bussanich*, No. 4:CV-04-223, 2005 U.S. Dist. LEXIS 37995, at \*16, \*21–22 (M.D. Pa. Sept. 2, 2005) (dismissing constitutional, Section 504, and ADA claims, but allowing a FTCA claim regarding medical care to proceed).

179. 42 U.S.C. § 12132.

180. *Id.* § 12131(1)(B).

181. 524 U.S. 206, 213 (1998).

incarcerated people can also bring Section 504 claims.<sup>182</sup> To avoid dismissal based on sovereign immunity, plaintiffs bringing Title II claims against state jails and prisons must allege either that their claim involves a “fundamental right[]”<sup>183</sup> or a constitutional violation.<sup>184</sup> In most cases, an incarcerated person’s relevant constitutional violation is likely to be based on the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>185</sup>

In order for an incarcerated person to bring a successful ADA claim, they would have to prove that they: (1) have a disability as defined by the ADA; (2) are an otherwise “qualified individual”; (3) were excluded from or denied the benefits of their institution’s services, programs, or activities, or were otherwise discriminated against; and (4) were excluded, denied, or discriminated against on the basis of a disability.<sup>186</sup>

An otherwise qualified individual is someone who fulfills the “essential eligibility requirements” of the service, program, or activity.<sup>187</sup> Incarcerated people are not excluded from meeting this requirement. Justice Scalia broadly interpreted the meaning of services, programs, and activities in *Yeskey* to include most of carceral life: “Modern prisons provide inmates with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the prisoners (and any of which disabled prisoners could be ‘excluded from participation in’).”<sup>188</sup>

Title II of the ADA requires reasonable modifications by public entities in order to avoid disability discrimination.<sup>189</sup> While it is true that in *United States v. Georgia*, the Court recognized that denial of medical care accommodations could be a Title II violation,<sup>190</sup> subsequent cases have found that only discriminatory treatment of disabled incarcerated people, rather than negligent treatment, is

182. See Ginsberg, *supra* note 170, at 734 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985)) (arguing that given sovereign immunity roadblocks to ADA suits, there are some circumstances where plaintiffs should sue only under Section 504).

183. See *Tennessee v. Lane*, 541 U.S. 509, 524 (2004).

184. See *United States v. Georgia*, 546 U.S. 151, 159 (2006) (“[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”).

185. U.S. CONST. amend. VIII.

186. Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1099 (1995). An incarcerated person bringing a Section 504 claim would have to jump through similar hurdles with a few differences. A Section 504 claimant would also have to prove that the institution received federal funding. See *id.* at 1110. There may also be a difference in how the court interprets causation: Section 504 prohibits discrimination “solely by reason of” disability, while Title II prohibits discrimination “by reason of such disability.” 29 U.S.C. § 794(a) (emphasis added); 42 U.S.C. § 12132. As a result, some courts have applied a more stringent causation standards for Section 504 cases. See Weber, *supra*, at 1110–11; see also Ginsberg, *supra* note 170, at 737 (“Although there is evidence that Congress did not intend for these phrases to result in a difference in the causation standards . . . some courts have held that they must.” (footnote omitted)).

187. 42 U.S.C. § 12131(2).

188. Pa. Dep’t of Corr. v. *Yeskey*, 524 U.S. 206, 210 (1998).

189. See Schlanger, *supra* note 84, at 304.

190. See 546 U.S. 151, 157 (2006).

covered by the ADA.<sup>191</sup> Proving discrimination would be a high bar for incarcerated people wishing to remedy fat-based claims.<sup>192</sup> Moreover, despite the mandate of the ADA that requires particularization, carceral spaces are notoriously inflexible.<sup>193</sup> This would make it difficult for fat plaintiffs to prove that the modifications they need are reasonable. Additionally, even if plaintiffs manage to win their case that they are entitled to a specific modification, the prison or jail may be unlikely to faithfully implement the modification.<sup>194</sup>

Another significant roadblock to vindicating claims would come early—whether obesity is a disability under the definition of the ADA or Section 504. Under the ADA, disability is defined as a “physical or mental impairment that substantially limits one or more major life activities.”<sup>195</sup> Impairments are broadly defined as including “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.”<sup>196</sup> Before the passage of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA),<sup>197</sup> Equal Employment Opportunity Commission (EEOC) regulations stated that covered impairments did not “include physical characteristics such as . . . *weight* . . . that are within ‘normal’ range and are not the result of a physiological disorder.”<sup>198</sup> And, “except in rare circumstances, obesity is not considered a disabling impairment.”<sup>199</sup> Thus, being overweight “in and of itself, generally is not an impairment”<sup>200</sup> whereas “severe obesity,” defined as “body weight more than 100% over the norm,” is “clearly an impairment.”<sup>201</sup> The EEOC has indicated that the guidance quoted above—implying that all but the most extreme cases of obesity are outside the scope of impairment—may no longer be relevant;<sup>202</sup> but the disputed definition

191. See generally Jamelia Morgan, *Prisoners with Physical Disabilities Are Forgotten and Neglected in America*, ACLU (Jan. 12, 2017, 9:30 AM), <https://www.aclu.org/blog/prisoners-rights/solitary-confinement/prisoners-physical-disabilities-are-forgotten-and> [<https://perma.cc/4EXH-H5WT>] (characterizing the ADA as a prohibition of “discrimination”).

192. See Schlanger, *supra* note 167, at 1621 (“In recent years, inmates have won only fifteen percent or fewer of their federal civil rights trials, a very low rate even by comparison to the other underdogs of the federal litigation docket, employment discrimination plaintiffs . . .”).

193. See Schlanger, *supra* note 84, at 304.

194. See, e.g., *id.* at 298 (mentioning a settlement agreement in Kentucky governing the treatment of deaf and hard-of-hearing incarcerated people that required outside monitors to ensure the prisons complied).

195. 42 U.S.C. § 12102(1)(A).

196. Clarke, *supra* note 26, at 55 (quoting regulations currently codified at 29 C.F.R. § 1630.2(h)(1) (2022)).

197. Pub. L. No. 110-325, 122 Stat. 3553.

198. 29 C.F.R. pt. 1630 app. § 1630.2(h) (2022) (emphasis added).

199. Clarke, *supra* note 26, at 56 n.298 (quoting 29 C.F.R. pt. 1630 app. § 1630.2(j) (2015)).

200. EEOC, EEOC COMPLIANCE MANUAL § 902.2(c)(5)(ii) (1995).

201. *Id.* § 902.2(c)(5) (quoting THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (Robert Berkow ed., 16th ed. 1992)).

202. See Section 902 Definition of the Term Disability, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/section-902-definition-term-disability> [<https://perma.cc/5LUH-WT6D>] (last

still appears in the official regulations.<sup>203</sup> “In litigation, the EEOC has taken the position that obesity is an impairment when either (1) the plaintiff’s weight falls outside the ‘normal range’ or (2) the plaintiff has proof that her weight has a physiological basis.”<sup>204</sup>

What counts as obesity that is covered by the ADA is still in dispute. Like the EEOC, the Second, Sixth, Seventh, and Eighth Circuits understand obesity as an actual or perceived ADA impairment only if it falls outside the “normal” range and is caused by an underlying physiological disorder or condition.<sup>205</sup> For example, in 2019, the Seventh Circuit reiterated this understanding of obesity when it affirmed a lower court’s summary judgment in favor of an employer for a disability employment discrimination case, because the employee had failed to provide evidence that his “extreme obesity” was caused by such an underlying disorder or condition, and instead posited that obesity alone was insufficient to be a disability.<sup>206</sup>

In a “regarded as” ADA claim, the claimant does not have an impairment that is recognized by the ADA but is treated by an entity as having an impairment. In a regarded as case, the First Circuit did not require an underlying physiological condition.<sup>207</sup> Instead, it considered whether the employer regarded the plaintiff’s obesity as “substantially limiting one or more of her major life activities.”<sup>208</sup> Extrapolating from the regarded as context, it is possible that obesity *itself* could be a disability in the First Circuit because the court did not erect additional analytical barriers (the existence of an underlying physiological condition) to covering obesity under the ADA.<sup>209</sup>

The scope of ADA obesity coverage is still not clear in the Third, Fifth, and Ninth Circuits. In 2018, the Ninth Circuit certified the following question to the Washington State Supreme Court: “Under what circumstances, if any, does obesity qualify as an ‘impairment’ under the Washington Law against Discrimination (WLAD), Wash. Rev. Code § 49.60.040?”<sup>210</sup> The Washington Supreme Court held that “obesity always qualifies as an impairment under the plain language of RCW 49.60.040(7)(c)(i) because it is a ‘physiological disorder, or condition’ that affects many of the listed body systems.”<sup>211</sup> Although the

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visited Feb. 2, 2022) (explaining that the “analysis” from the EEOC’s compliance manual defining “disability” had “been superseded by the ADA Amendments Act of 2008”).

203. See 29 C.F.R. pt. 1630 app. § 1630.2(h) (2022).

204. Clarke, *supra* note 26, at 56 (citing EEOC v. Res. for Hum. Dev., Inc., 827 F. Supp. 2d 688, 693–94 (E.D. La. 2011)).

205. See Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997); EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 443 (6th Cir. 2006); Richardson v. Chi. Transit Auth., 926 F.3d 881, 887–88 (7th Cir. 2019); Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1108 (8th Cir. 2016).

206. Richardson, 926 F.3d at 887.

207. See Cook v. R.I. Dep’t of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993).

208. *Id.* at 25.

209. See *id.* at 23 (“[T]he jury could have found that plaintiff, although not handicapped, was treated by [the state] as if she had a physical impairment.”).

210. Taylor v. Burlington N. R.R. Holdings Inc., 904 F.3d 846, 853 (9th Cir. 2018).

211. Taylor v. Burlington N. R.R. Holdings, Inc., 444 P.3d 606, 617 (Wash. 2019).

statute in question was WLAD rather than the ADA, this insight could extend to cases brought under the ADA. Notably, on a separate question in the case, as to whether the employer's withdrawal of its employment offer on account of the prospective employee's failure to pay for additional medical testing constituted actionable discrimination under the WLAD, the Ninth Circuit used its jurisprudence under Title I of the ADA to frame the question.<sup>212</sup> It cited a recent holding that an employer engages in prohibited discrimination under the ADA when it "withdraws a conditional offer of employment based on a prospective employee's failure to pay for medical testing that the employer has required solely because of the prospective employee's perceived disability or impairment."<sup>213</sup> Thus, the Ninth Circuit recognized that obesity could be a perceived disability under the WLAD, a statute it analogized to the ADA.<sup>214</sup> In 2012, the Third Circuit, in an appeal from a summary judgment order, declined to reach "a position regarding whether obesity is a disability under the ADA that limits a major life activity"; however, the Third Circuit did not find that the individual plaintiff's obesity counted as a disability.<sup>215</sup>

There is medical consensus that obesity is a disorder, and obesity may affect multiple body systems covered under the ADA.<sup>216</sup> Nonetheless, the majority of federal courts hold that obesity does not qualify for ADA coverage unless it is caused by an underlying physiological condition. This causation requirement may be difficult for individual plaintiffs to meet in terms of directly linking their weight to their physical condition.<sup>217</sup>

Scholars have speculated that there are unstated assumptions that drive the reluctance to cover obesity under the ADA. These include beliefs that obesity is mutable; thus, obese individuals should not be incentivized to stay obese and that entities such as employers should not bear the costs and potential liability exposure of obesity.<sup>218</sup> Similarly, others contend that discrimination against fat people is rational, or least does not rise to the level of egregiousness of other types of discrimination such as racism or sexism.<sup>219</sup> Still others argue that weight gain can be attributed to people's activities, so it should be seen as similar to aesthetic practices such as tattoos or personal activities such as drinking, and therefore should

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212. See *Taylor*, 904 F.3d at 848 ("Washington courts still look to federal case law interpreting [the ADA] to guide [their] interpretation of the WLAD." (quoting *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193, 197 (Wash. 2014) (en banc))).

213. *Id.* (citing *EEOC v. BNSF Ry. Co.*, 902 F.3d 916, 925–27 (9th Cir. 2018)).

214. After the Washington Supreme Court declared that obesity was an impairment under WLAD, the Ninth Circuit held that the district court had erred by granting an employer summary judgment as to a plaintiff's "claim of disability discrimination on account of [his] perceived obesity." *Taylor v. Burlington N. R.R. Holdings Inc.*, 801 F. App'x 477, 479 (9th Cir. 2020).

215. *Lescoc v. Pa. Dep't of Corr.-SCI Frackville*, 464 F. App'x 50, 53 (3d Cir. 2012).

216. See *supra* notes 6, 15 and accompanying text.

217. See *Clarke*, *supra* note 26, at 57 & n.303.

218. See *id.* at 10.

219. See, e.g., RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 128–34 (2008).

not be covered by antidiscrimination law.<sup>220</sup> Finally, some advocates and scholars both within and outside the fat advocacy community contend that weight is not a fundamental part of one’s identity, and thus obesity does not qualify for antidiscrimination coverage because it is not foundational enough.<sup>221</sup>

Courts may also hesitate to cover obesity due to a long-standing preoccupation with a “floodgate” of disability litigation. This concern has restricted disability coverage in the past.<sup>222</sup> The most notorious incidents include judicial backlash against Section 504 of the Rehabilitation Act,<sup>223</sup> the *Sutton* trilogy of 1999,<sup>224</sup> and three years later, Justice O’Connor’s statement in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that the ADA’s definition of disability should “be interpreted strictly to create a demanding standard for qualifying as disabled.”<sup>225</sup> Though Congress’ invocation of “43 million Americans with disabilities” in the original ADA language suggested an intent to provide a floor of disability coverage, the Court has interpreted this statement as a ceiling to restrict litigation.<sup>226</sup> The Seventh Circuit explicitly voiced this concern in its treatment of obesity:

[I]f we agreed that obesity is itself a physiological disorder, then *all* obesity would be an ADA impairment. While Richardson does not ask us to hold that all obese individuals—found to be as high as 39.8% of the American adult population—automatically have an ADA impairment, adopting amici’s position leads to this unavoidable, nonrealistic result.<sup>227</sup>

Thus, though neither impairment prevalence nor blameworthiness are part of the formal law, assumptions about both may block adoption of disability coverage.

### C. NON-DISABILITY-BASED FEDERAL CLAIMS

#### 1. Eighth Amendment

The Eighth Amendment to the U.S. Constitution mandates that prisons provide incarcerated people with “adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of [incarcerated

220. See Clarke, *supra* note 26, at 60.

221. See *id.* at 59–60; Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 LAW & SOC’Y REV. 397, 403 (2008).

222. See Rabia Belt & Doron Dorfman, *Reweighting Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 179 (2020) (“[T]here is . . . concern that ‘too many’ people claim medical rights. Thus, increased medical claiming causes gatekeeping, surveillance, and parsimoniousness.”).

223. See *id.* (citing LENNARD J. DAVIS, ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS 52 (2016)).

224. See *id.* (first citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999); then citing *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 518–19 (1999); and then citing *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999)).

225. 534 U.S. 184, 197 (2002).

226. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 18, 33 (2007).

227. *Richardson v. Chi. Transit Auth.*, 926 F.3d 881, 891 (7th Cir. 2019) (footnote omitted).

people].”<sup>228</sup> The legal requirements to qualify for redress under this Amendment, though, set a bar that most prison-condition claims cannot reach. Incarcerated people raise multiple challenges related to fatness: challenges to food quality or quantity, challenges to lack of exercise space, and challenges to the adequacy of medical care for obesity-related illness.

Incarcerated people bringing Eighth Amendment claims must prove “an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind.”<sup>229</sup> The objective component requires an “extreme deprivation” denying a “minimal civilized measure of life’s necessities.”<sup>230</sup> As to the subjective component, in order to be held liable, the defendant official must act with deliberate indifference to the incarcerated person’s health or safety.<sup>231</sup> Thus, many complaints are funneled through the categories of health or safety.

Carceral institutions completely control food access, which can cause or exacerbate fatness. Yet food-related challenges often fail because of the objective prong requirement. Prisons and jails are charged with providing adequate food meeting “sufficient nutritional value”; that is, the food must have enough calories for a person to survive.<sup>232</sup> Prisons and jails are not typically required to provide food that is “wholesome” or healthy.<sup>233</sup> Some incarcerated people have attempted to challenge prison menus, though courts have mostly rejected these claims where prison officials have shown that the incarcerated person “could achieve a proper diet through selectively choosing proper foods from the menu choices with dietary teaching.”<sup>234</sup> Despite this, incarcerated people do not seem to be entitled to

228. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)).

229. *Mitchell v. Maynard*, 80 F.3d 1433, 1444 (10th Cir. 1996) (quoting *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991)).

230. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

231. *See Farmer*, 511 U.S. at 837.

232. *Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985) (quoting *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977)); *see Green v. Ferrell*, 801 F.2d 765, 770–71 (5th Cir. 1986).

233. *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 154–55 (S.D.N.Y. 1977) (dismissing a claim when incarcerated people asked for “more wholesome and attractive” meals), *aff’d in part, rev’d in part on other grounds sub nom. Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978), *rev’d on other grounds sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979); *see Bennett v. Misner*, No. 3:02-cv-01662-HA, 2004 WL 2091473, at \*20 (D. Or. Sept. 17, 2004) (rejecting plaintiffs’ claim even while acknowledging food served was “less than ideal”).

234. *Nave v. Fuhrman*, No. 4:12-cv-00225, 2014 WL 5822672, at \*13 (N.D. Fla. Nov. 10, 2014); *see, e.g., Smith v. Masenburge*, No. 6:11cv415, 2012 WL 527570, at \*6 (E.D. Tex. Jan. 18, 2012); *Mejia v. Goord*, No. Civ.A.903CV124, 2005 WL 2179422, at \*7 (N.D.N.Y. Aug. 16, 2005) (upholding the prison’s decision to “educate inmates with [weight-related] diseases on making healthy menu choices [rather] than . . . afford[ing] them particularized, limited diets”); *Rivera v. Dyett*, Nos. 88 Civ. 4707, 90 Civ. 3783, 1994 WL 116025, at \*8 (S.D.N.Y. Mar. 28, 1994) (“The plaintiff has failed to demonstrate, however, that dietary teaching was not merely a less desirable alternative, but was in fact objectively inadequate as a form of treatment.”).

access nutritional information about food served to them.<sup>235</sup> The condition that incarcerated people supply evidence that they suffered harm limits these claims because incarcerated people have a hard time establishing both that the food quality falls below the constitutional minimum and also that incarcerated people suffered a harm due to the low food quality. Compounding this difficulty, incarcerated people may not rely on evidence of weight gain for a malnutrition claim.<sup>236</sup> Courts have stated that weight gain is actually evidence that food is nutritionally adequate because it satisfies daily caloric needs.<sup>237</sup>

Furthermore, incarcerated people who claim that they received poor medical care for obesity-related concerns have difficulty fulfilling the subjective requirement because they have to prove that the prison officials were not just negligent but deliberately indifferent.<sup>238</sup> Though prisons are required to provide medical care to incarcerated people under the Eighth Amendment, medical malpractice constituting mere negligence ordinarily does not rise to the level of a constitutional violation.<sup>239</sup>

Fat plaintiffs seeking redress for lack of access to exercise have firmer constitutional grounding for their claims. Exercise-related claims have been more successful than food or medical-related claims. Courts have accepted that depriving incarcerated people of exercise can violate the Eighth Amendment because exercise is considered “one of the basic human necessities protected by the Eighth Amendment.”<sup>240</sup> Because courts have recognized that incarcerated people must

235. See *Taylor v. Cochran*, 1:15-cv-00448, 2015 WL 9825073, at \*3 (S.D. Ala. Dec. 16, 2015) (“[T]he failure to receive the nutritional information does not pose an unreasonable risk of serious damage to Taylor’s health.”).

236. See *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993) (“[Plaintiff] LeMaire . . . has actually gained some sixty pounds in confinement. [He] is not being starved. He is being fed, and he is being fed adequately.”).

237. See *id.*; see, e.g., *Williams v. Shah*, 927 F.3d 476, 478 (7th Cir. 2019) (upholding a brunch program that consolidated breakfast and lunch because the daily brunch and dinner service provided 2200–2400 calories per day).

238. See, e.g., *Lyons v. Peters*, No. 3:17-cv-00730, 2019 WL 3291529, at \*8 (D. Or. July 22, 2019) (“Other than alleging that Whitney and Bowser are responsible for managing the food service program, Plaintiff fails to articulate any evidence that Whitney and Bowser would have had knowledge of the specific issues that Plaintiffs complain of . . . .”); *Ferris v. Jefferson County*, No. 07-cv-02215, 2008 WL 5101240, at \*6 (D. Colo. Nov. 26, 2008) (“At most, plaintiffs’ claims of food poisoning are based on negligence . . . .”); *But see Varrichio v. County of Nassau*, 702 F. Supp. 2d 40, 56 (E.D.N.Y. 2010) (denying defendants’ motion to dismiss in part because the sheriffs involved took bets on when the plaintiff would end his hunger strike, plausibly displaying deliberate indifference).

239. See *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) (“[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind [as required by the Eighth Amendment].’” (first quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); and then quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947))).

240. *Turner v. Ahern*, No. 12-cv-6174, 2013 WL 2950835, at \*2 (N.D. Cal. June 14, 2013); see *Allen v. Sakai*, 40 F.3d 1001, 1004 (9th Cir. 1994) (“[I]t should have been apparent to defendants that they were required to provide regular outdoor exercise . . . .”); *Davenport v. DeRobertis*, 844 F.2d 1310, 1314 (7th Cir. 1988) (affirming the district court’s decision that only one hour of exercise per week and two other hours outside of a cell creates a constitutional deprivation); *Ruiz v. Estelle*, 679 F.2d 1115, 1151–52 (5th Cir.), *vacated in part as moot*, 688 F.2d 266 (5th Cir. 1982) (*per curiam*); *Haggy v. Solem*, 547



have at least some time to exercise outside of their cell, it is easier for plaintiffs to succeed on Eighth Amendment claims because they do not need to gather as much evidence to show that they have been objectively harmed (like they do when challenging prison food). For example, a plaintiff could succeed in their challenge by showing that a more generous exercise policy had previously been struck down.<sup>241</sup> Regardless, lawsuits ordinarily protect only against egregious violations and thus do not offer much in terms of significantly improving conditions.<sup>242</sup>

Incarcerated people who claim that conditions give rise to an overall substantial risk of an Eighth Amendment violation<sup>243</sup> also often fail.<sup>244</sup> Incarcerated people must provide substantial evidence that conditions such as a lack of exercise space or food quality are so poor as to create objectively extreme deprivation, and such evidentiary requirements are typically beyond the reach of incarcerated plaintiffs.<sup>245</sup>

## 2. Federal Tort Claims Act

Incarcerated people may bring tort claims against federal prisons under the FTCA,<sup>246</sup> against state prisons under state analogues to the FTCA,<sup>247</sup> or against private prisons (state or federal) under state common law.<sup>248</sup> Federal prisons must

F.2d 1363, 1364 (8th Cir. 1977) (per curiam); *Rhem v. Malcolm*, 507 F.2d 333, 337 (2d Cir. 1974); *Conklin v. Hancock*, 334 F. Supp. 1119, 1121–22 (D.N.H. 1971).

241. See, e.g., *Lopez v. Smith*, 203 F.3d 1122, 1132–33 (9th Cir. 2000).

242. See, e.g., *id.* (holding that denying the plaintiff all access to outdoor exercise for six and a half weeks violated the plaintiff's Eighth Amendment rights); *Thomas v. Leslie*, Nos. 97-3346, 97-3361, 1999 WL 281416, at \*2 (10th Cir. Apr. 21, 1999) (citing circuit precedent that required prisons to provide at least five hours of out-of-cell exercise per week); *Allen*, 40 F.3d at 1004 (denying summary judgment because plaintiff was indefinitely deprived of opportunity to exercise).

243. See *Brown v. Plata*, 563 U.S. 493, 502–03 (2011) (affirming a court order to remedy violations where California prisons created a “substantial risk” of constitutional deprivation).

244. See Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1826, 1857–58 (2012).

245. See, e.g., *id.* at 1849–50.

246. 28 U.S.C. § 1346(b). Prior to 1963, courts barred suits brought by incarcerated people under the FTCA against prisons. See, e.g., *Jones v. United States*, 249 F.2d 864, 866 (7th Cir. 1957) (“We decline to extend the provisions of the [Federal Tort Claims] Act to federal prisoners absent express Congressional command.”); *Van Zuch v. United States*, 118 F. Supp. 468, 472 (E.D.N.Y. 1954) (“[T]here is no right of action against the United States [by a prisoner] under the Federal Tort Claims Act.”); *Shew v. United States*, 116 F. Supp. 1, 2–3 (M.D.N.C. 1953); *Sigmon v. United States*, 110 F. Supp. 906, 911 (W.D. Va. 1953) (“To permit federal prisoners to avail themselves of the provisions of the Federal Tort Claims Act, would establish a new and novel procedure, and to paraphrase, I cannot impute to Congress such a radical departure from established law in the absence of express congressional command.”). The Supreme Court reversed course in *United States v. Muniz*, holding that incarcerated people may sue under the FTCA. 374 U.S. 150, 159 (1963) (“[T]he Government’s liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The [FTCA] extends to novel and unprecedented forms of liability as well.”).

247. E.g., CONN. GEN. STAT. § 4-165b(a) (2021) (“Any inmate . . . who suffers an injury may file a claim against the state.”).

248. See *Minneci v. Pollard*, 565 U.S. 118, 131 (2012) (“[W]here, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind

“provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons” in prison.<sup>249</sup> In practice, this is a negligible expectation.<sup>250</sup> Moreover, the scope of FTCA liability is governed by “the law of the state where the event giving rise to liability occurred.”<sup>251</sup> Because there is not a uniform standard for imposing liability under the FTCA, plaintiffs may have difficulty complying with different legal requirements. For example, in *Estate of Rodriguez v. United States*, the Sixth Circuit affirmed the district court’s decision to sustain a motion for summary judgment against the plaintiffs because the plaintiff had not produced an expert medical report as required by Ohio tort law.<sup>252</sup>

Incarcerated people face multiple barriers to bringing tort claims against prisons: the PLRA,<sup>253</sup> exceptions to liability within the FTCA and state analogues,<sup>254</sup> and general bias against incarcerated people.<sup>255</sup> Thus, although incarcerated people may sue prisons for committing torts, these claims are rarely successful.<sup>256</sup>

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that typically falls within the scope of traditional state tort law . . . the prisoner must seek a remedy under state tort law.”)

249. 18 U.S.C. § 4042(a)(2).

250. See David M. Shapiro, *How Terror Transformed Federal Prison: Communication Management Units*, 44 COLUM. HUM. RTS. L. REV. 47, 72 (2012) (noting that the vague requirement to provide for incarcerated people’s care “does not require [the Bureau of Prisons] to establish any particular type of unit”).

251. *Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012) (quoting *Young v. United States*, 71 F.3d 1238, 1242 (6th Cir. 1995)).

252. 722 F. App’x 409, 414 (6th Cir. 2018).

253. See DAVID FATHI, HUM. RTS. WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 3 (2009), <https://www.hrw.org/sites/default/files/reports/us0609web.pdf> [<https://perma.cc/87T5-P8ZV>] (“By 2006 the number of prisoner lawsuits filed per thousand prisoners had fallen 60 percent since 1995.”). Barriers imposed by the PLRA include exhaustion requirements, the physical injury requirement, restrictions on equitable relief, and limited availability of attorney fees. *Id.* at 2.

254. See Danielle C. Jefferis, *Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons*, 80 LA. L. REV. 37, 42–43 (2019). *But see* Harvey v. United States, No. 14 Civ. 1787, 2017 WL 2954399, at \*6 (S.D.N.Y. July 10, 2017) (“Defendant is quite incorrect in asserting that the [independent contractor] exception alone bars all claims against it.”); *Rodriguez v. United States*, No. 1:13 CV 01559, 2015 WL 3645716, at \*3–4 (N.D. Ohio June 10, 2015) (upholding plaintiff’s FTCA claim on a motion to dismiss even though the claim was brought against a private prison).

255. See, e.g., *Williams v. Berge*, 102 F. App’x 506, 507 (7th Cir. 2004) (“[R]outine discomfort is part of the penalty prisoners pay for their offenses, and prisoners cannot expect the ‘amenities, conveniences, and services of a good hotel.’” (quoting *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988))); *Carey v. Settle*, 351 F.2d 483, 484 (8th Cir. 1965) (“[In *forma pauperis*] actions are too frequently mere outlets for general discontent in having to undergo penal restraint or of personal satisfaction in attempting to harass prison officials.”); *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) (“[An incarcerated person] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.”). One example of this bias in Congress was the failed “No Frills Prison Act,” which would have withheld federal money from state correctional systems that “coddle[d] criminals by giving them ‘luxurious’ digs” and “let[ting] them work less than 40 hours [per] week.” Al Kamen, *Cunningham’s Hard Cell*, WASH. POST (Nov. 30, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/11/29/AR2005112901284.html>.

256. See Jefferis, *supra* note 254, at 40–41 (“As current precedent stands, however, the availability of [FTCA] claims [by incarcerated people] is exceedingly narrow.”).

Moreover, incarcerated people seldom bring tort claims specifically targeting problems related to obesity.

#### D. STATE AND LOCAL CLAIMS

##### 1. Torts

While incarcerated people can bring state tort claims to directly challenge obesity-related issues in prison, these lawsuits appear to be rare or nonexistent.<sup>257</sup> Most states allow incarcerated people to bring lawsuits against prison officials or sheriffs for negligence.<sup>258</sup> But because prison officials' duty of care extends mainly to protecting the health and safety of incarcerated people, these lawsuits were mostly related to wrongful death connected to medical negligence or injuries from assaults.<sup>259</sup> Part of the difficulty here may be the inconsistent nature of state tort law,<sup>260</sup> as well as the various limits that states place on tort suits against prisons, either through outright bars on liability or sovereign immunity limitations.<sup>261</sup>

257. Research did not uncover any claims. Further investigation is needed.

258. *See, e.g.*, IND. CODE § 11-12-4-1(a) (2021) (requiring the government to create binding minimum standards for county jails); *Matthews v. District of Columbia*, 387 A.2d 731, 734 (D.C. 1978) (adopting an "ordinary negligence standard" to govern prison officials); *Thomas v. Williams*, 124 S.E.2d 409, 412–13 (Ga. Ct. App. 1962) (recognizing that sheriffs in Georgia may be sued for negligence when violating their duty "to keep the prisoner safely and free from harm, to render him medical aid when necessary, and to treat him humanely and refrain from oppressing him"); *Smith v. Miller*, 40 N.W.2d 597, 598 (Iowa 1950) (recognizing a common law duty of care that sheriffs owe to incarcerated people); *Farmer v. State ex rel. Russell*, 79 So. 2d 528, 531 (Miss. 1955) (same); *Doe v. City of Albuquerque*, 631 P.2d 728, 733 (N.M. Ct. App. 1981) ("[I]t is the law in New Mexico that when a governmental entity through its agents, by virtue of its law enforcement powers, has arrested and imprisoned a human being, it is bound to exercise ordinary and reasonable care, under the circumstances, for the preservation of his life and health."); *Multiple Claimants v. N.C. Dep't of Health & Hum. Servs.*, 626 S.E.2d 666, 668 (N.C. Ct. App. 2006) ("For 100 years, North Carolina's courts have recognized that governments owe a private duty to inmates to maintain their health and safety."); *Clemets v. Heston*, 485 N.E.2d 287, 291 (Ohio Ct. App. 1985) (holding that a "law enforcement officer having custody of an arrestee or prisoner" owes that person "a duty of reasonable care and protection"). *But see* MISS. CODE ANN. § 11-46-9(1)(m) (2021) (barring liability for claims brought by "an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution"); N.Y. CORRECT. LAW § 24(1) (McKinney 2021) (barring any claim against any officer or employee of the New York Department of Corrections), *invalidated in part by Haywood v. Drown*, 556 U.S. 729, 740–42 (2009) (holding that New York may not discriminate against § 1983 claims by stripping state courts of jurisdiction).

259. *See, e.g.*, *Strothers v. Ohio Dep't of Rehab. & Corr.*, No. 2000-08354, 2002 WL 31948020, at \*1, \*6 (Ohio Ct. Cl. Oct. 17, 2002) (recommending judgment in favor of defendant despite allegation of assault by a corrections officer and of negligence for placing plaintiff in a cell with ants which bit her); *California County Jail Subjected to Another Medical Malpractice/Wrongful Death Lawsuit*, MEDICALMALPRACTICELAWYERS.COM (Jan. 3, 2015), <https://medicalmalpracticelawyers.com/california-jail-subject-another-medical-malpractice-lawsuit/> [<https://perma.cc/4EFT-YG8T>] (describing a wrongful death lawsuit filed on behalf of a man who allegedly was refused medical treatment while incarcerated and died of acute pneumonia at age thirty-three).

260. *See, e.g.*, *Holt v. Nw. Pa. Training P'ship Consortium, Inc.*, 694 A.2d 1134, 1139–40 (Pa. Commw. Ct. 1997) (holding that Pennsylvania state employees are immune from liability for intentional infliction of emotional distress).

261. *See, e.g.*, *Pearce v. Tucker*, 787 S.E.2d 749, 750 (Ga. 2016) (declining to reach the merits of plaintiff's negligence claim against a police officer because of qualified immunity); *Bush v. Babb*, 162

## 2. Weight-Based Discrimination Statutes

The State of Michigan,<sup>262</sup> Washington, D.C.,<sup>263</sup> three counties in Maryland,<sup>264</sup> and five other cities (San Francisco and Santa Cruz, California; Binghamton, New York; Madison, Wisconsin; and Urbana, Illinois)<sup>265</sup> ban discrimination on the basis of weight. Most of these bans were passed in the 1970s.<sup>266</sup> Activists secured the addition of weight and sexual orientation to the Santa Cruz, California, antidiscrimination ordinance in 1992.<sup>267</sup> San Francisco activists held a fat activist demonstration in 1999, which led to a hearing and a vote by the San Francisco Human Rights Commission to add weight to their antidiscrimination law.<sup>268</sup> Massachusetts, Nevada, and Oregon legislators deliberated on but did not pass weight-based discrimination provisions.<sup>269</sup> These statutes have had limited success in reducing discrimination, including weight discrimination. Only a handful of claims have been litigated using these statutes.<sup>270</sup> As currently construed, incarcerated people cannot use these statutes to bring weight-related claims. Weight-<sup>271</sup> and appearance-discrimination<sup>272</sup> statutes tend to focus on employment.<sup>273</sup>

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N.E.2d 594, 597 (Ill. App. Ct. 1959) (“The sheriff’s duty is to the public, under the aspect of the state, and not to the individuals who are the inmates of the County Jail. If he fails in his duty, he may be subjected to the statutory penalty, section 23, but not to a private suit.”).

262. MICH. COMP. LAWS § 37.2202(1)(a) (2021).

263. See Jennifer Bennett Shinall, *Less Is More: Procedural Efficacy in Vindicating Civil Rights*, 68 ALA. L. REV. 49, 108 (2016) (discussing D.C. CODE § 2-1401.02(22) (2001), which prohibits discrimination on the basis of “bodily condition or characteristics”).

264. See *id.* at 56, 69 (listing the counties as Harford, Howard, and Prince George’s).

265. *Id.* at 56.

266. *Id.* at 69 (noting that besides Michigan’s “visionary” statute, these laws were passed in part to prevent appearance discrimination as a pretext for other types of discrimination, such as racial discrimination).

267. See SANTA CRUZ, CAL., MUN. CODE § 9.83.020(5), (12) (2021), <https://www.codepublishing.com/CA/SantaCruz/html/SantaCruz09/SantaCruz0983.html#9.83.020> [<https://perma.cc/MJ68-YF3M>]; Jones, *supra* note 24, at 2036.

268. Jones, *supra* note 24, at 2036.

269. *Id.*

270. Deborah L. Rhode, *Why Looks Are the Last Bastion of Discrimination*, WASH. POST (May 23, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/05/20/AR2010052002298.html>; see also DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 123 (2010) (reporting that “[i]n a recent survey of weight-related cases in which the complainant received some relief” only four percent of those plaintiffs proceeded under state disability law).

271. The State of Michigan; San Francisco, California; Santa Cruz, California; and Binghamton, New York, specifically prohibit weight-based employment discrimination. See Shinall, *supra* note 263, at 104, 112, 116–17.

272. Washington, D.C.; Madison, Wisconsin; and Urbana, Illinois, prohibit discrimination based on appearance. In all three cities, that prohibition includes (or has been construed to include) weight-based discrimination. See *id.* at 103, 108–09.

273. See, e.g., MICH. COMP. LAWS § 37.2202(1)(a) (2009). There is limited room for incarcerated people to bring employment-related claims. See Jackson Taylor Kirklin, Note, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 COLUM. L. REV. 1048–49 (2011) (noting a significant circuit split regarding Title VII’s reach within prisons and jails).

Thus, though it may seem at first glance that disability statutes or companion laws could provide redress for fat incarcerated people to pursue claims, procedural hurdles, judicial interpretations, and inapplicable laws actually render legal success unlikely. The next Part turns to new possibilities for disability law that offer a way forward for the people affected by societal injustice.

### III. DISABILITY'S POTENTIAL

#### A. A NEW WAY FORWARD FOR INTERSECTIONALITY

Like any other identity, such as race or gender, the disability category encompasses many different types of people. The Deaf person who proudly participates in Deaf culture, the person paralyzed after a snowboarding crash, the person who develops heart disease after a lifetime of smoking, the war veteran with PTSD—all of them are potential members of the disability community.<sup>274</sup> These individuals have different impairments or bodily conditions. Many scholars agree that what links together disparate disabilities across impairments is the stigma and subordination that disabled people face from society. As disability law scholar Samuel Bagenstos famously wrote: “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.”<sup>275</sup> Though impairments may differ, disabled people experience negative treatment due to belittling assumptions about their bodies and minds.<sup>276</sup> This shared stigma unites people together; the social model of disability, which centers the meaning made of bodily conditions, hinges upon this idea.<sup>277</sup>

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274. They may not identify as such, however. See Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 551–52 (2021) (“Large numbers of people with physical or mental health conditions, including many who qualify as disabled under federal civil rights law, do not self-identify as disabled.” (footnote omitted)).

275. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 401 (2000).

276. The formulation of this argument varies. For an analysis encompassing the breadth of the disability justice movement, see generally SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER (2d ed. 2019). The canonical formulation of the unifying feature of disability refers to its social dimension. Here, impairments—the condition of the body—are transformed into disabilities through social expectations, attitudes, and structures. See, e.g., Tom Shakespeare, *The Social Model of Disability*, in THE DISABILITY STUDIES READER 214, 215 (Lennard J. Davis ed., 4th ed. 2013). The rigidity of the social model has softened over time; now, proponents also focus on functional limitations of the body in addition to social interactions. 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, 146 (Simon Stern et al. eds., 2020) (“Disability studies concerns itself with human difference . . .”).

277. See Belt & Dorfman, *supra* note 276, at 149 (“The social model of disability linked together the disparate threads of disability activism and consciousness . . . . Focusing on social attitudes and stereotypes toward people with disabilities created a common ground for people experiencing discrimination and exclusion based on a variety of impairments. Activists and scholars labeled this phenomenon ‘ableism[]’ . . . . A key component of ableism is stigma.” (footnotes omitted)).

Some scholars discuss fatness in this vein. For example, they point to sizeist discrimination against fat people seeking employment, especially fat women.<sup>278</sup> Or, they discuss needed but denied accommodations in public places such as planes.<sup>279</sup> Asking for more attention to modifications that incarcerated people need for their bodies—such as larger cots or uniforms—can be easily linked to this preexisting conversation. Disability law may provide redress for these requests.

More complicated is addressing negative aspects of impairments; irrespective of social conditions, some people's bodies hurt or may have disorders or conditions that could lead to pain. While this is not the case for all fat people, it may describe the situation of some fat people and how they experience their bodies. For some, conceptualizing fatness as an unhealthy or painful condition tugs against the Health at Every Size movement; it also creates friction with the focus on stigma for the disability rights movement.

Focusing on the socially unequal conditions that produce fatness in the first place is also fraught. Reducing the factors that produce fat incarcerated people requires more responsibility from government operatives and is an open-ended request for more state resources. This dynamic is in contrast to a stronger appeal by disability advocates that is grounded in muted libertarianism; there, disabled advocates ask for state resources in the short term so that they can ultimately receive resources through paid work as opposed to government benefits.<sup>280</sup> Even if scholars have pointed out flaws in these libertarian-style claims, they are easier to make under Title I of the ADA: disabled people could move into paid employment and thus avoid dependency-based welfare programs.<sup>281</sup> By contrast, Title II charges state and local governments with the obligation to incorporate disability in its programs, facilities, and services.<sup>282</sup> While greater disability incorporation would ameliorate the second-class status of disabled people, the governments' obligations to address disability would remain.

A refocus on socially unequal conditions also centers *ex ante* inequality rather than *ex post* inequality. Most stigma discussion is focused on *ex post* inequality—the discrimination disabled people face *because of* their disabled bodies and identities, in other words, the subordination that occurs due to the negative treatment of disabled people. By contrast, I want to redirect our attention to the inequities that *produce* disabled people in the first place.

Supplementing the already-prevalent *ex post* analysis with a focus on the *ex ante* creators of inequality would emphasize the urgent need to eliminate the subordination that negatively affects the life chances of disabled people. However, it would also reduce the population of the disability community because of a

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278. See Shinall, *supra* note 15, at 102–03.

279. See Tirosh, *supra* note 28, at 318.

280. See SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 29 (2009).

281. See, e.g., Bagenstos, *supra* note 275.

282. See 42 U.S.C. § 12132.

decrease in the unequal conditions that produce some disabled people in the first place. This reduction may nestle uncomfortably with other aspects of disability advocacy that challenge the problem of “cure.”<sup>283</sup> Activist Eli Clare contends that the idea of cure speaks to locating “the problem, or damage, of disability within individual disabled bodies and minds.”<sup>284</sup> Clare writes: “In response, disability activists have for decades said loudly and clearly, ‘Leave our bodies and [sic] alone. Stop treating us as broken.’”<sup>285</sup> Scholars and activists like Clare want to center our attention on the social conditions that make living with a disability difficult, rather than ameliorating disabilities through body modification. To bolster their case, they detail the accumulated historical record of ableist efforts to eliminate or warehouse disabled people found lacking, from eugenics to state hospitals.<sup>286</sup> Moreover, ableist stereotyping exaggerates the problems of disability rather than providing accurate portrayals of living as a disabled person.<sup>287</sup>

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283. See generally ELI CLARE, *BRILLIANT IMPERFECTION: GRAPPLING WITH CURE* (2017) (problematizing “cure,” the ubiquitous notion that conditions of physical and mental impairment can or should be remedied).

284. Eli Clare, Notes on Cure, Disability, and Natural Worlds, Lecture at the University of New Hampshire (April 2015) (excerpted transcript available at <https://eliclare.com/what-eli-offers/lectures/cure> [<https://perma.cc/6N2E-V3GY>]).

285. *Id.*

286. The history of ableism is extensive, as noted by Justice Thurgood Marshall in *City of Cleburne v. Cleburne Living Center*. See 473 U.S. 432, 461–64 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (recounting that people with disabilities have experienced a history of “segregation and discrimination that can only be called grotesque”). See generally DOUGLAS C. BAYNTON, *DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS 2* (2016) (characterizing the history of immigration as a history of “[t]he exclusion of individuals seen as defective” with a focus on the experience of immigrants with disabilities); Rabia Belt, *Ballots for Bullets?: Disabled Veterans and the Right to Vote*, 69 STAN. L. REV. 435, 440 (2017) (challenging the notion that disabled veterans have always occupied a position of honor by telling the story of the “systematic disenfranchisement of disabled Civil War veterans living in soldiers’ homes”); DEA H. BOSTER, *AFRICAN AMERICAN SLAVERY AND DISABILITY: BODIES, PROPERTY, AND POWER IN THE ANTEBELLUM SOUTH, 1800–1860* (2013) (elucidating the dual stigma of Blackness and disability in the pre-Civil War United States); NATE HOLDREN, *INJURY IMPOVERISHED: WORKPLACE ACCIDENTS, CAPITALISM, AND LAW IN THE PROGRESSIVE ERA* (2020) (offering a history of workers left disabled by workplace accidents in the late nineteenth and early twentieth centuries, and critiquing the legal response to this widespread harm); PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (2008) (telling the story of Carrie Buck’s sterilization and analyzing the Supreme Court case that bears her name as a symbol of the state’s power over people it deems defective); SARAH F. ROSE, *NO RIGHT TO BE IDLE: THE INVENTION OF DISABILITY, 1840S–1930S*, at 223 (2017) (explaining the process by which people with disabilities were “pushed out of the paid labor market and, thereby, edged out from ‘good citizenship’”); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1994) (documenting the disability community’s long political struggle against exclusion, ostracism, and prejudice).

287. See Laurie Block, *Stereotypes About People with Disabilities*, DISABILITY HIST. MUSEUM, <https://www.disabilitymuseum.org/dhm/edu/essay.html?id=24> [<https://perma.cc/V8KU-4NP8>] (last visited Feb. 5, 2022) (identifying the stereotype that people with disabilities lead lives of “constant sorrow” in which “the able-bodied stand under a continual obligation to help them”); Ronald J. Berger, *Disability and the Dedicated Wheelchair Athlete: Beyond the “Supercrip” Critique*, 37 J. CONTEMP. ETHNOGRAPHY 647, 673 (2008) (arguing that wheelchair basketball players “engage in oppositional identity work” by challenging hegemonic stereotypes about disabled bodies).

However, other disability scholars, including Susan Wendell, have pointed out that shifting focus away from cure and speaking only in positive registers about disability produces a lopsided impression of the disability community, skewed toward physical disability and those who are deemed “healthy disabled” and away from the impairments, social conditions, and people that make these positive sentiments more difficult to convey.<sup>288</sup> This latter group includes conditions such as chronic pain and some psychiatric disorders, and includes factors such as environmental harm or medical negligence.<sup>289</sup>

Thus, 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. This older model of disability privileged the diagnoses of medical professionals and other allied workers to describe the lives of disabled people.<sup>290</sup> This model foregrounded the body but drained any social meaning of disability; instead, it focused on treating and curing individual disabled people’s impairments. This model has been justly criticized for centering nondisabled medical professionals and ignoring the ableism that negatively impacted disabled people’s lives.<sup>291</sup> What I propose instead is to keep the attention of the social model to social inequity, yet not just use it to shed light upon the social stigma of disability but also use it to reflect the social injustices that give rise to some impairments in the first place.<sup>292</sup>

Talking about the negative aspects of impairments and how injustice produces some disabilities may make disability scholarship and activism more

288. Susan Wendell, *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, HYPATIA, Fall 2001, at 17, 18–19; see also ALISON KAUFER, FEMINIST, QUEER, CRIP 3–4 (2013) (“As much joy as I find in communities of disabled people, and as much as I value my experiences as a disabled person, I am not interested in becoming more disabled than I already am. I realize that position is itself marked by an ableist failure of imagination, but I can’t deny holding it.”).

289. See generally JASBIR K. PUAR, THE RIGHT TO MAIM: DEBILITY, CAPACITY, DISABILITY (2017) (demonstrating how states inflict and utilize conditions of impairment as a means of exercising power and control over people); Erica L. Green, *Flint’s Children Suffer in Class After Years of Drinking the Lead-Poisoned Water*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/us/politics/flint-michigan-schools.html> (“Five years after Michigan switched Flint’s water supply to the contaminated Flint River from Lake Huron, the city’s lead crisis has migrated from its homes to its schools, where neurological and behavioral problems — real or feared — among students are threatening to overwhelm the education system.”).

290. See Belt & Dorfman, *supra* note 222, at 183 (“Medical diagnosis is a way for society to assert control over those who are diagnosed as sick or disabled.”).

291. See Clare, *supra* note 284 (“How would . . . the medical establishment, go about restoring my body? The vision of me without trembling hands and slurred speech, with more balance and coordination, doesn’t originate from my body’s history. Rather it arises from an imagination of what my body should be like, some definition of normal and natural.”).

292. Indeed, some areas of disability history have noted the importance of social injustice to producing impairment. Two key areas are work and war. See, e.g., ROSE, *supra* note 286; HOLDREN, *supra* note 286, at 1–2; Belt, *supra* note 286, at 444–45; LARRY M. LOGUE & PETER BLANCK, HEAVY LADEN: UNION VETERANS, PSYCHOLOGICAL ILLNESS, AND SUICIDE 68 (2018); SARAH HANDLEY-COUSINS, BODIES IN BLUE: DISABILITY IN THE CIVIL WAR NORTH 12 (2019).



intersectional. The canonical work in intersectionality did not incorporate disability.<sup>293</sup> Newer work that does discuss intersectionality and disability typically examines the mutual subordination of ableism and racism that flow together for disabled people of color.<sup>294</sup> Others have written about race *as* disability and disability as marked with inferiority.<sup>295</sup> Disability and Critical Race Theory (DisCrit) activists such as the Sins Invalid collective and scholars such as Nirmala Erevelles, Jasbir Puar, Subini Annamma, Jina Kim, and Sami Schalk have charged the disability community to incorporate intersectional thinking into disability activism. They argue that disability justice will not be achieved without also addressing racial inequality, homophobia, transphobia, and the like.<sup>296</sup> Jina Kim, for example, discusses Audre Lorde's *The Cancer Journals* and how Lorde linked cancer to depleted funding for healthcare for people of color.<sup>297</sup> Nirmala Erevelles asks, "How is disability celebrated if its very existence is inextricably linked to the violence of social/economic conditions of capitalism?"<sup>298</sup> In particular, legal scholar Beth Ribet has done significant work in weaving disability with critical race theory. She notes how physical or psychological disablement (as well as social and political subordination) can also be a process that results in disability imposed through racial power relations.<sup>299</sup> She also points out that disabled people of color face a perilous set of choices: given the potentially stigmatizing and disempowering nature of the label disabled, people and communities facing multiple barriers may not want to utilize it or recognize it as a possibly positive signifier.<sup>300</sup> This representation problem is compounded in a disability politics that does not comprehend racism, so disabled people of color do not see their experiences and realities adequately reflected.<sup>301</sup> Other scholars discuss how Black disability "becomes concealed under the blanket of homelessness, substance abuse, violence, and poverty" rather than being labeled as

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293. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in FEMINIST LEGAL THEORY: FOUNDATIONS 383, 385 (D. Kelly Weisberg ed., 1993).

294. See Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 397 (2001); Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender, and Disability*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 159, 161–62 (Francisco Valdes et al. eds., 2002); Kaaryn Gustafson, *Disability, Fluidity, and Measuring Without Baselines*, 75 MISS. L.J. 1007, 1025–26 (2006).

295. See Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 295 (2018); Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1207 (2020); Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J. L. & MOD. CRITICAL RACE PERSPS. 209, 217 (2011).

296. See *10 Principles of Disability Justice*, SINS INVALID (Sept. 17, 2015), <https://www.sinsinvalid.org/blog/10-principles-of-disability-justice> [<https://perma.cc/V8SW-7236>] ("Ableism, coupled with white supremacy, supported by capitalism, underscored by heteropatriarchy, has rendered the vast majority of the world 'invalid.'").

297. Jina B. Kim, *Disability in an Age of Fascism*, 72 AM. Q. 265, 266 (2020).

298. NIRMALA EREVELLES, *DISABILITY AND DIFFERENCE IN GLOBAL CONTEXTS: ENABLING A TRANSFORMATIVE BODY POLITIC* 17 (2011).

299. Ribet, *supra* note 295.

300. See *id.* at 219.

301. See *id.* at 240.

disability, and how racist violence such as environmental injustice or war leads to injury and disability.<sup>302</sup>

DisCrit pushes back against a poststructuralist notion of disability that uses the liberatory potential of challenging bodily hegemonies without sufficient attention to the material consequences and lived experiences of disabled people.<sup>303</sup> It is a liberatory politics that moves away from present-day ideas of law and statecraft. Disability law is criticized for the misleading hope that legal claims will provide positive benefits for disabled people and move away from the tyranny of medical dictates.<sup>304</sup> Jina Kim argues that such identitarian interventions have multiple problems: “the implicit centering of whiteness, the commitment to a liberal politics of recognition and visibility, the enshrining of the agentic individual as political subject, and a rigid codification of the meaning and definition of disability, to name but a few.”<sup>305</sup>

This Article speaks to a different idea of intersectional work. 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. Thus, concerning fat people in prison, we would discuss mass incarceration and how the carceral state impacts poor people of color; violence and trauma in and out of carceral spaces; food deserts and swamps in and outside of incarceration; inadequate health care; and other contributors to the problem—in addition to problems with reasonable modifications and accommodations for fat incarcerated people and their bodies.

The Article diverges to address the consequences if this new model succeeds: if we center people who become disabled at least in part because of a marginalized identity such as poverty or race within the disability community, then this is a subcommunity that we actually would want to shrink over time. Thus, strikingly, disability progress would lead to a whiter and less multiply marginalized disability community. Moreover, remedying disabling social injustice requires grappling with the pitfalls of treatment and cure. Differentiating between disabilities to reduce versus disabilities to celebrate will 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. That said, discomfort with acknowledging the ways that oppression can cause disability is probably part of the reason why the disability movement and disability scholarship have difficulties with

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302. Jane Dunhamn, Jerome Harris, Shancia Jarrett, Leroy Moore, Akemi Nishida, Margaret Price, Britney Robinson & Sami Schalk, *Developing and Reflecting on a Black Disability Studies Pedagogy: Work from the National Black Disability Coalition*, *DISABILITY STUD. Q.* (2015), <https://dsq-sds.org/article/view/4637/3933> [<https://perma.cc/D4TQ-VTNX>].

303. See Kim, *supra* note 297, at 269; EREVELLES, *supra* note 298, at 18; SUBINI ANCY ANNAMMA, *THE PEDAGOGY OF PATHOLOGIZATION: DIS/ABLED GIRLS OF COLOR IN THE SCHOOL-PRISON NEXUS* 6 (2018) (explaining how the carceral state uniquely harms girls of color who are considered disabled, for example, by removing them from school).

304. See Kim, *supra* note 297, at 267.

305. *Id.*

intersectionality in the first place. Other strong identity claims are produced out of inequality, yet disability shies away from this type of formulation.

Furthermore, rather than the entirely liberatory politics of DisCrit, this Article aims to think of a path forward that would engage with, rather than avoid, present-day law and statecraft. While some health scholars have proposed using disability law as an avenue for redressing social ills, the previous Part illustrates how, in some circumstances, this proposal is illusory without significant legal and political change. Centering the most disadvantaged members of the disability community may also help strengthen against the fragility of the buy-in of disability politics.<sup>306</sup> Scholars such as Samuel Bagenstos, Michael Waterstone, and Jasmine Harris have spoken of the fragility of disability acceptance because it was not a movement fully metabolized by the public.<sup>307</sup> Highlighting the social inequities that produce impairment could help connect disability justice with other social movements that do not speak in the register of disability scholarship but have strong resonances.<sup>308</sup>

#### B. SLOW VIOLENCE

The plight of fat incarcerated people, and indeed, incarcerated people in general, is the embodiment of “slow violence.” Currently, though, the intersection of slow violence and disability scholarship is strikingly muted.<sup>309</sup> As defined by environmental scholar Rob Nixon, slow violence is “a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at

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306. See Jasmine E. Harris, Essay, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 32–33 (2020); Belt & Dorfman, *supra* note 222, at 180.

307. See BAGENSTOS, *supra* note 280, at 28; Michael Waterstone, *Could We Pass the ADA Today?: Disability Rights in an Age of Partisan Polarization*, 12 ST. LOUIS U. J. HEALTH L. & POL’Y 261, 262 (2019); Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 593–94 (2015); Harris, *supra* note 306.

308. See, e.g., Linda Villarosa, *Pollution Is Killing Black Americans. This Community Fought Back.*, N.Y. TIMES MAG. (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html> (recalling the “first stirrings of the Black-led environmental-justice movement” in the 1970s).

309. For existing scholarship in this area, see, for example, Julie Sadler, *War Contaminants and Environmental Justice: The Case of Congenital Heart Defects in Iraq*, in *DISABILITY STUDIES AND THE ENVIRONMENTAL HUMANITIES: TOWARD AN ECO-CRIP THEORY* 338, 338 (Sarah Jaquette Ray & Jay Sibara eds., 2017) (arguing that the colonial violence in Iraq “is both the outright violence of war and the slow violence of environmental destruction and economic impoverishment, which work together to create transgenerational disablement of children”); Jina B. Kim, *Crippling East Los Angeles: Enabling Environmental Justice in Helena Maria Viramontes’s Their Dogs Came with Them*, in *DISABILITY STUDIES AND THE ENVIRONMENTAL HUMANITIES*, *supra*, at 502, 502 (discussing the disabling slow violence explored in a “Chicana coming-of-age narrative set in the age of freeway expansion” that “employs images of bodily mutilation to dramatize the effects of urban displacement”); Sarah Gibbons, *Neurological Diversity and Environmental (In)Justice: The Ecological Other in Popular and Journalist Representations of Autism*, in *DISABILITY STUDIES AND THE ENVIRONMENTAL HUMANITIES*, *supra*, at 531, 535–36 (discussing slow violence as it relates to commercial chemicals, genetically modified organisms, and rising autism rates); and see also Lisa Nichols Hickman, *Lead Me Beside Still Waters: Toxic Water, Trisomy 21 and a Theology of Eco-Social Disability*, 19 WORLDVIEWS 34, 36 (2015) (discussing the relationship between water toxicity and elevated rates of Down syndrome).

all.”<sup>310</sup> Slow violence is hard to see because it is not spectacular—it is not contained in a single visible moment. Thus, the victims of slow violence may not receive recognition, especially legal recognition, “because their narratives of injury are deemed to fail the prevailing politico-scientific logic of causation.”<sup>311</sup> Scholars and advocates such as Ruth Wilson Gilmore, who defines racism as “group-differentiated vulnerability to premature death,”<sup>312</sup> speak in similar registers as slow violence scholars.<sup>313</sup>

Legal scholar Stephen Lee groups slow violence scholarship into two broad categories.<sup>314</sup> The first category emanates from environmentalists such as Rob Nixon, who focus on the difficulty of preventing environmental disaster and compensating for the damage.<sup>315</sup> They discuss examples such as dumping toxic waste in the Global South<sup>316</sup> and environmental crises concentrated in communities of color.<sup>317</sup> The concept has reached other fields such as criminal law<sup>318</sup> and immigration law.<sup>319</sup> Criminal law scholar Aya Gruber, for example, states: “Fast violence occurs when racist police officers kill unarmed black civilians, and slow violence occurs when the cumulative conditions of racialized inequality and disenfranchisement leave an island vulnerable to a hurricane.”<sup>320</sup> This category addresses the problem of nonspectacular harm that tends to injure people within disempowered communities.

The second slow violence category grows from cultural theorist Lauren Berlant and includes scholars in queer theory and literary criticism.<sup>321</sup> This

310. ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* 2 (2011).

311. *Id.* at 47.

312. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007).

313. See Sarah Burgess & Stuart J. Murray, *Carceral Biocitizenship: The Rhetorics of Sovereignty in Incarceration*, in *BIOCITIZENSHIP: THE POLITICS OF BODIES, GOVERNANCE, AND POWER* 51, 53 (Kelly E. Happe et al. eds., 2018) (“[Carceral institutions] affirm the citizenship rights of those incarcerated, claiming to safeguard the conditions under which life can continue. In this cover-up, incarcerated subjects . . . have no place from which to make a claim to the very rights law claims to guarantee.”).

314. See Stephen Lee, *Essay, Family Separation as Slow Death*, 119 *COLUM. L. REV.* 2319, 2327 (2019).

315. See, e.g., Chloe Ahmann, “*It’s Exhausting to Create an Event Out of Nothing*”: *Slow Violence and the Manipulation of Time*, 33 *CULTURAL ANTHROPOLOGY* 142, 145–46 (2018); Shannon O’Lear, *Climate Science and Slow Violence: A View from Political Geography and STS on Mobilizing Technoscientific Ontologies of Climate Change*, 52 *POL. GEOGRAPHY* 4, 4–5 (2016); Matiangai V.S. Sirleaf, *Not Your Dumping Ground: Criminalization of Trafficking in Hazardous Waste in Africa*, 35 *WIS. INT’L L.J.* 326, 329–30 (2018).

316. See Sirleaf, *supra* note 315.

317. See Sarah L. Swan, *Plaintiff Cities*, 71 *VAND. L. REV.* 1227, 1249–50 (2018).

318. See, e.g., Aya Gruber, *Equal Protection Under the Carceral State*, 112 *NW. U. L. REV.* 1337, 1365 (2018); Geoff Ward, *The Slow Violence of State Organized Race Crime*, 19 *THEORETICAL CRIMINOLOGY* 299, 300 (2015).

319. Lee, *supra* note 314, at 2322.

320. Gruber, *supra* note 318.

321. See Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 *CRITICAL INQUIRY* 754, 758 (2007); see also LAUREN BERLANT, *CRUEL OPTIMISM* 7 (2011) (arguing, in the context of the so-called obesity epidemic, that “the genre of crisis can distort something structural and ongoing within ordinariness into something that seems shocking and exceptional”); Susan Greenhalgh & Megan A.

category focuses upon harms that accrue to those unable to accomplish “the good life.” In *Slow Death (Sovereignty, Obesity, Lateral Agency)*, Lauren Berlant contends that though socially unequal conditions often cause obesity, individual obese people are blamed for the state of their bodies.<sup>322</sup> Formulating obesity as a moral failing of individual choice rather than a product of structural injustice then obscures social inequities that allow some people to access the good life, which also includes a thin body. Moreover, disempowered people are blamed for their own inadequate circumstances.<sup>323</sup> This misattribution of blame also contributes to the persistence of the good life ideal rather than a reexamination of whether it is possible and why it is not for so many people. Lee links this second category to work in critical race theory that addresses what Patricia Williams calls “spirit-murder”:<sup>324</sup> “the real human cost of society’s refusal to recognize anti-Black racism as a legitimate form of suffering.”<sup>325</sup>

The new disability paradigm advanced in this Article incorporates both models of slow violence. Bodies are important for both formulations—they are injured in the first model, and people with injured bodies are blameworthy in the second model. In other words, disempowered people accrue impairments because they live in particular communities targeted for unjust treatment, because they are subject to harm due to their identities, and because they cannot obtain healing resources from a drained welfare state. Then, an ableist society interprets these impairments as the fault of those who are “unlucky” enough to have them. Some people can receive legal accommodations for their disabilities but not collective redress for the conditions that created them. For others, their impairments do not qualify them for disability law, or they do not view disability as a relevant paradigm.

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Carney, *Bad Biocitizens?: Latinos and the US “Obesity Epidemic,”* 73 HUM. ORG. 267, 274 (2014) (“[W]e have sought to disrupt the spotlighting of Latinos in America’s ‘obesity epidemic.’ This spotlighting itself constitutes a form of structural violence, one that furthers the ‘slow death’ of structurally vulnerable populations.”).

322. See Berlant, *supra* note 321, at 755.

323. See *id.* at 776.

324. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIA. L. REV. 127, 129 (1987).

325. Lee, *supra* note 314, at 2329; see also Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 777 (2006) (diagnosing Muslim women forbidden from veiling with “spirit injury”); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 228 (2008) (describing the suffering of Black men in California, where four times as many Black men are in prison as are attending universities); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004) (discussing mass incarceration as an institution that serves to inflict suffering on Black people through confinement and control); Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WIS. L. REV. 443, 454 (discussing empirical methods and critical race theory, or “e-CRT,” which “call[s] for a type of mutually respectful engagement that produces a more searching consideration of race”); Ward, *supra* note 318 (describing the “long and mainly unresolved history” of governmental actors “employing violence . . . to establish and maintain relations of racial domination and subordination”).

It should be, however. People have coined different words for this process of bodily harm. Jasbir Puar speaks of “debility.”<sup>326</sup> She characterizes debility as the product of “injury and bodily exclusion” that accrues to disempowered communities; it lingers underneath the claims that disability law recognizes as disabilities.<sup>327</sup> Beth Ribet reframes “disablement,” a term created by disability advocates Marta Russell and Jean Stewart.<sup>328</sup> With disablement, Russell and Stewart wanted to focus our attention on the antisubordination aspect of disability. Ribet further contends that disablement also includes “the process by which some disabilities are socially produced, and more specifically are produced by violence, inequity and subordination.”<sup>329</sup> I do not want to create another word. I accept both Puar’s and Ribet’s glosses on disability. However, I argue we should retain disability as a term because what they are talking about should not be separate from disability but should be incorporated within it. The pressures of current disability rights failure create opportunities for new politics. Disability is the connecting point between the body and society, where social injustice becomes material. Thus, a discussion about fatness in prison and slow violence is not just about current doctrinal outcomes; it is also about the gradual whittling away of resources in poor and Black and brown communities, the rise of mass incarceration, and the shifting of resources from the welfare state to the carceral state. It is also linked to conversations happening in other realms about Black Lives Matter, prison reform and abolition, food deserts, gentrification, trauma, and other areas of injustice.

#### CONCLUSION

Formulating the next steps is quite hard. At the current moment, there is more focus than usual on the negative aspects of mass incarceration.<sup>330</sup> Protest on behalf of those affected by the carceral state, however, is still catalyzed by spectacular instances of violence<sup>331</sup> that the issue of fat incarcerated people does not

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326. PUAR, *supra* note 289, at xvii.

327. *Id.*

328. See Jean Stewart & Marta Russell, *Disablement, Prison, and Historical Segregation*, MONTHLY REV. (July 1, 2001), <https://monthlyreview.org/2001/07/01/disablement-prison-and-historical-segregation/> [<https://perma.cc/HBH2-4VY6>]; Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL’Y & L. 281, 281 (2010).

329. Ribet, *supra* note 328, at 285.

330. See generally Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 14 (2019) (describing prisons as “part of a larger system of carceral punishment that legitimizes state violence against the nation’s most disempowered people to maintain a racial capitalist order for the benefit of a wealthy white elite” (footnote omitted)).

331. See, e.g., Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/> (“[T]he timing and cruelty of [George] Floyd’s death, captured in a horrific video that shows the white Minneapolis police officer Derek Chauvin casually kneeling on the victim’s neck, has spurred a national uprising. . . . The protests have . . . triggered civic unrest in America at a scale not seen since the assassination of Martin Luther King Jr. in 1968.”); Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905> [<https://>

encompass. The modifications that fat incarcerated people need, and the factors that go into producing the population of fat incarcerated people, cannot be characterized as the actions of an unjust army (the police) intent on harming and killing innocent people. Instead, they are a component of the overall management practices of an unjust society.

There are some barriers to incorporating social harm into disability law. EEOC regulations explain that “[e]nvironmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments” under the ADA,<sup>332</sup> and the Individuals with Disabilities Education Act (IDEA)’s regulatory definition of a “[s]pecific learning disability” excludes “economic disadvantage.”<sup>333</sup> That said, though, people can still claim impairments created from socioeconomic deprivation, such as metabolic disorders stemming from malnutrition and hunger or psychiatric disorders following exposure to trauma, as disabilities under the ADA.<sup>334</sup>

Carceral institutions can change their food practices to provide healthier food. Pennsylvania and Massachusetts have implemented healthier menus.<sup>335</sup> New York City and Philadelphia have created nutritional standards that apply within carceral spaces.<sup>336</sup> Some states have recognized the shortsighted nature of providing cheap and unhealthy food given the long-term and costly consequences. Florida and Minnesota transitioned to prison-created food: “An audit of Florida’s Aramark contract found that its food costs were lower, quality was better, and more [incarcerated people] actually ate the food when the Department operated its own food services program.”<sup>337</sup> And after struggling with a private contractor, Minnesota decided to return food services to in-house control in 2015, “providing

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perma.cc/9JQX-35TY] (quoting an activist who described Floyd’s murder as “the last straw for many communities,” and describing a “number of different factors” that led a racially diverse group of protesters, including many first-time protesters, to rebellion in all fifty states).

332. 29 C.F.R. pt. 1630 app. § 1630.2(h) (2021).

333. 34 C.F.R. § 300.8(c)(10)(ii) (2021) (“Specific learning disability does not include learning problems that are primarily the result . . . of environmental, cultural, or economic disadvantage.”); *see also* 34 C.F.R. § 300.309(a)(3)(v) (2021) (excluding inability to meet grade level standards due to “economic disadvantage” from the definition of specific learning disability).

334. Multiple scholars discuss the correlation between poverty and disability, arguing for expansions in disability based on that correlation. *See, e.g.*, Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 425 (2001) (examining “the nature of the association between poverty and disability with the goal of encouraging more comprehensive forms of social provision that confront the inequitable distribution of illness and disability as well as the economic and social structures that generate these patterns” (emphasis omitted)); Nicholas Freudenberg, *Adverse Effects of US Jail and Prison Policies on the Health and Well-Being of Women of Color*, 92 AM. J. PUB. HEALTH 1895, 1895–96 (2002); Sagit Mor, *Disability and the Persistence of Poverty: Reconstructing Disability Allowances*, 6 NW. J.L. & SOC. POL’Y 178, 183, 186 (2011); *see also* James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455, 1470 (2013) (discussing the socioeconomic exclusion in the IDEA).

335. Sawyer, *supra* note 66.

336. *Id.*

337. *Id.*; *see* Paul C. Decker & Donald L. Miller, FLA. DEP’T OF CORR., COST-VALUE ANALYSIS: ARAMARK FOOD SERVICE CONTRACT C1927 (2007), [https://www.prisonlegalnews.org/media/publications/fl\\_fdod\\_audit\\_of\\_aramark\\_contract\\_2007.pdf](https://www.prisonlegalnews.org/media/publications/fl_fdod_audit_of_aramark_contract_2007.pdf) [<https://perma.cc/62K3-7RMV>].

real food for [incarcerated people] even if it costs more money.”<sup>338</sup> Carceral institutions can also provide activities, mandated by regulation and backed up by robust oversight, to help incarcerated people stave off weight gain and manage stress.<sup>339</sup>

Above all, more data is needed to measure prison conditions, the factors that produce and maintain fatness, and to link conditions within and outside the prison walls. For the most part, incarcerated people are not included in public health surveys.<sup>340</sup> The main source of health information about incarcerated people is compiled by the Bureau of Justice Statistics, which is years out of date. As the Prison Policy Initiative notes: “The [Survey of Prison Inmates] was conducted every 5-7 years from 1974-2004, and was finally conducted again in 2016.”<sup>341</sup> “The next Survey of Inmates in Local Jails is slated for release in 2022; at that point, it will be 15 years off-schedule.”<sup>342</sup> The infrequency of reports, and the steady reduction of information contained in these reports is troublesome and could be attributed to “[i]nsufficient funding, recent changes in leadership, [or] staff attrition.”<sup>343</sup> As for research where incarcerated people are included, much of the data about weight is self-reported, which raises questions about its accuracy. Moreover, research about fatness needs to incorporate multiple avenues of attention, from chronic illness prevalence, to the impact of stigma and sizeism, to the significance of trauma and violence. Finally, research should disaggregate prisons and jails, which could have vastly different obesogenic factors.<sup>344</sup>

There are numerous pitfalls ahead when pursuing this work. If we provide incarcerated people with an array of foods and physical activity, does obesity become their fault because they chose wrong? It is probably more likely for us to think about “blaming” them for inputs such as poor eating instead of thinking of poor eating as caused by stress, trauma, and other troubling factors. What about allowing people who are in abject circumstances the pleasure of unhealthy food? Commissary food is the only break that incarcerated people receive from bland

338. Rupert Neate, *Prison Food Politics: The Economics of an Industry Feeding 2.2 Million*, GUARDIAN (Sept. 30, 2016, 7:00 AM), <https://www.theguardian.com/us-news/2016/sep/30/prison-food-spending-budget-cuts-minnesota> [<https://perma.cc/3NUL-9QX3>].

339. See, e.g., Stephen White & Stian Alexander, *Prisoners Offered Yoga Sessions and Fat Fighters Club at Maximum Security ‘Monster Mansion’ HMP Wakefield*, MIRROR (Oct. 2, 2016, 5:32 PM), <https://www.mirror.co.uk/news/uk-news/prisoners-offered-yoga-sessions-fat-8965053> [<https://perma.cc/CP42-ANC8>].

340. See Brian Houle, *Obesity Disparities Among Disadvantaged Men: National Adult Male Inmate Prevalence Pooled with Non-Incarcerated Estimates, United States, 2002–2004*, 72 SOC. SCI. & MED. 1667, 1667 (2011).

341. Wendy Sawyer, *Since You Asked: Is It Me, or Is the Government Releasing Less Data About the Criminal Justice System?*, PRISON POL’Y INITIATIVE (Nov. 14, 2019), <https://www.prisonpolicy.org/blog/2019/11/14/criminal-justice-data/> [<https://perma.cc/84YR-2PZW>]

342. *Id.*

343. *Id.*

344. It is also important to examine fat children and children in juvenile detention settings. See, e.g., Kelly M. Robinson, Debbie Haupt-Hoffman, Barbara Stewart, Faye Schneider, Nancy Hamm & Vicki Garrison, *Is Obesity a Problem in a Juvenile Correctional Facility?*, 12 J. CORR. HEALTH CARE 175, 179 (2006) (answering the question in the article’s title in the affirmative).



prison food. Perhaps the first move that carceral institutions would make is restricting the type of food that incarcerated people could receive from their loved ones.

Finally, there is a significant tension between wanting to provide disabled people the ability to determine the type of lives they would like to lead and providing a social structure that would lend itself to certain outcomes for people. It can be easier for society to blame disabled people for their continued impairments in a masked ploy to accommodate individual wishes than redistribute resources and attention to redress broad social inequities that produce impairments. Also, because of ableism and sizeism, it is not as simple as leaving choices up to the individual because those choices are contaminated by the social messages that assign negatively stereotyped attributes to fat and disabled bodies.

Moving forward with an intersectionality paradigm that incorporates attention to social injustice and disability is complicated and fraught but also offers the potential for significant overlapping opportunities for scholarship and advocacy. This Article offers a provocation of one such area, fatness and incarceration. It also points the way to the myriad possibilities of disability—as the lexicon of slow violence; as an axis of intersectional and interlocking axes of oppression; as a consequence of social injustice; as a subject of history, community, politics, and law.