



NOTE

Carceral Trauma and Disability Law

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Abstract. Traumatized people have claimed the benefits of federal disability law with increasing success in recent years. Trauma undermines mental health and cognitive functioning, and disability laws entitle individuals with such impairments to robust accommodations and government support.

But this application of disability law has so far overlooked a key site of trauma: America's sprawling carceral system. Psychology research has shown that certain experiences that are prevalent during periods of confinement—particularly sexual victimization, nonsexual violence, and long-term isolation—routinely traumatize people who are exposed to them. This Note argues that the prevalence of such traumatic events in carceral spaces may allow many incarcerated and formerly incarcerated people to qualify as individuals with a disability for the purpose of federal disability laws. Put another way, this Note asserts that mass incarceration leads to mass trauma, and it suggests that recognizing this trauma would open new avenues of litigation to address the social and individual harms of imprisonment.

Drawing on recent precedent that articulates the relationship between childhood trauma and disability law, this Note proposes that advocates should start litigating these claims on behalf of juvenile plaintiffs. But ultimately, this Note argues that traumatic experiences during both juvenile and adult incarceration can give rise to disability claims. Millions of people are currently incarcerated in the United States; understanding carceral trauma and its connection to disability law has the potential to affect the conditions of confinement and postrelease outcomes of an extraordinary number of incarcerated and formerly incarcerated people.

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Introduction

Incarceration can be traumatic. Certain experiences that are prevalent in jails and prisons have long been recognized as psychologically destructive. Prolonged isolation is such an experience. 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.¹ Of those prisoners, nearly 37% had been in restrictive housing for six months or more.² 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 . . ."³ 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."⁴

Rape in prison also creates an extreme risk of trauma.⁵ A landmark 1974 study found that only 14% of women who had been victims of rape showed no symptoms of trauma in the aftermath.⁶ Indeed, no traumatic event bears a greater likelihood of producing post-traumatic stress for either women or men.⁷ And rape occurs with disturbing frequency in jails and prisons. In the 2011-2012 National Inmate Survey, about 4% of prison inmates and 3.2% of jail inmates

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1. ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE LAW SCH., AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS 25 tbl.3 (2016), <https://perma.cc/WG7Z-PLLV> [hereinafter ASCA, AIMING TO REDUCE TIME-IN-CELL]. This includes all state and federal prison inmates who are confined to their cells for sixteen hours or more per day. The same study found that about 4% of prisoners are confined to their cells for twenty-two hours or more per day. *Id.* The U.S. Department of Justice has defined "restrictive housing" as any detention involving "[r]emoval from the general inmate population, whether voluntary or involuntary; [p]lacement in a locked room or cell, whether alone or with another inmate; and [i]nability to leave the room or cell for the vast majority of the day, typically 22 hours or more." U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 3 (2016), <https://perma.cc/YCW2-G5X4>.
 2. See ASCA, AIMING TO REDUCE TIME-IN-CELL, *supra* note 1, at 28 chart 3.
 3. ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 249209, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011-12, at 1 (2015), <https://perma.cc/A7EM-Q4YD>.
 4. NATASHA A. FROST & CARLOS E. MONTEIRO, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, ADMINISTRATIVE SEGREGATION IN U.S. PRISONS 17 (2016), <https://perma.cc/N5RA-HTZ4>.
 5. See JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 57 (1997).
 6. See Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 981-82, 983 tbl.2 (1974).
 7. See Ronald C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES GEN. PSYCHIATRY 1048, 1052-53 (1995).

reported experiencing sexual victimization—including staff sexual misconduct and nonconsensual sex acts between inmates—within the prior twelve months (or since admission to the facility if the inmate had been there less than twelve months).⁸ Nearly 40% of transgender prison inmates and 27% of transgender jail inmates reported sexual victimization in the same time period.⁹

Similarly, studies suggest that “between 32% and 66% of inmates experience physical victimization,” which can also be traumatic.¹⁰ Moreover, direct victimization is not the only way that an event can traumatize—exposure to violence can be equally destructive: “In combat, witnessing the death of a buddy places the soldier at particularly high risk for developing post-traumatic stress disorder.”¹¹ Not much research has been done on exposure to violence in jails and prisons, but what research exists suggests that the rates are very high. One study of 134 black male prisoners at “one of the largest maximum-security male correctional institutions” in the United States found that 43% reported having heard a sexual assault during their incarceration and 16% reported having directly witnessed a fellow inmate being sexually assaulted.¹² Another study of recently released adult male inmates in Ohio found that almost all reported witnessing violence while they were incarcerated.¹³

This Note proposes a new framing for the traumatic effects of incarceration. It argues that they are a central part of the carceral experience, and it asserts that advocates should start to understand the carceral system as a whole through its impacts on the mental health of people who interact with it. Put more simply, this Note proposes that mass incarceration leads to mass trauma. It suggests that for some of the damaging events common during incarceration, as with other forms of psychological trauma, “[t]he core experiences . . . are disempowerment and disconnection from others.”¹⁴ And it argues that the prevalence of this trauma may allow many incarcerated and formerly incarcerated people to qualify as

8. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12: NATIONAL INMATE SURVEY, 2011-12, at 6 (2013), <https://perma.cc/DYA2-9Y7S>.

9. ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12: SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES 2 tbl.1 (2014), <https://perma.cc/3V96-98KN>.

10. Jane C. Daquin et al., *Vicarious Victimization in Prison: Examining the Effects of Witnessing Victimization While Incarcerated on Offender Reentry*, 43 CRIM. JUST. & BEHAV. 1018, 1018-19 (2016).

11. HERMAN, *supra* note 5, at 54.

12. Tawandra L. Rowell-Cunsolo et al., *Exposure to Prison Sexual Assault Among Incarcerated Black Men*, 18 J. AFR. AM. STUD. 54, 56, 58 (2014).

13. Daquin et al., *supra* note 10, at 1022-23.

14. HERMAN, *supra* note 5, at 133.

individuals with a disability for the purpose of federal disability laws, opening new possibilities for legal claims based on the harms of incarceration.¹⁵

Disability law provides a promising means to address the psychological harms of incarceration. The mandates of disability law are sweeping, and the standards of proof are more attainable than those of the Eighth Amendment claims that have historically been the principal approach to litigating conditions of confinement.¹⁶ Title II of the Americans with Disabilities Act (ADA), for example, provides that no “qualified individual with a disability” may be discriminated against in the provision of public services if “reasonable modifications” would alleviate the discrimination.¹⁷ Eighth Amendment claims, by contrast, require incarcerated plaintiffs to uncover subjective evidence of “deliberate indifference” on the part of their jailers.¹⁸ Following the Supreme Court’s decision in *Farmer v. Brennan*, “a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety”¹⁹ Eighth Amendment litigation on behalf of inmates with mental health disabilities has achieved extraordinary reforms of prison systems despite this difficult standard of proof.²⁰ But pursuing such reforms through disability law substantially lowers the bar that plaintiffs must hurdle; disability law responds to the objective conditions of the prison rather than the subjective awareness of prison officials.

Framing claims about conditions of confinement through narratives of trauma and disability also forces courts to grapple with the ways that psychological harm inheres in the current experience of incarceration. This

15. This Note uses “trauma” to encompass both traumatic events, like “[e]xposure to actual or threatened death, serious injury, or sexual violence,” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013) [hereinafter DSM-5], and the mental health consequences that can follow such events.

16. See *Wilson v. Seiter*, 501 U.S. 294, 297-99 (1991) (reviewing Eighth Amendment case law challenging prison conditions).

17. See Americans with Disabilities Act of 1990 §§ 201-202, 42 U.S.C. §§ 12131-12132 (2018); see also *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004). Other major disability laws use similar standards. See, e.g., Rehabilitation Act of 1973 § 7(9)(B), 29 U.S.C. § 705(9)(B) (2018) (incorporating the ADA’s definition of “disability” into the Rehabilitation Act); see also *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749-50 (2017) (discussing similarities between the mandates of ADA Title II and section 504 of the Rehabilitation Act).

18. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

19. *Id.*

20. See, e.g., *Brown v. Plata*, 563 U.S. 493, 501-02 (2011) (affirming the order of a three-judge district court panel requiring California to reduce its prison population by as many as 46,000 people, in part because of systemic deficiencies in mental health care in the prison system); *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1192-93 (M.D. Ala. 2017) (finding Eighth Amendment liability for multiple areas of inadequate mental health care in Alabama’s prison system).

Note's argument that grappling with such harm is important rests on the implicit premise that confinement so traumatic that it causes mental health impairments is an unacceptable social response when a person is convicted of a crime. As the Supreme Court has instructed, "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"²¹ Nor, this Note argues, is the resulting trauma.

Part I of this Note surveys the extant literature on the mental health impacts of incarceration, connecting these psychological effects to trauma scholarship. This Part focuses particular attention on three areas: sexual violence, nonsexual violence, and solitary confinement. It also discusses modes of indirect trauma, such as witnessing or overhearing violence or sexual assault. Most importantly, it brings those often-siloed discussions together in a broader discourse on carceral trauma. The sum of the research suggests that nearly every person incarcerated for a significant period of time encounters events during their confinement that create a serious risk of trauma.

Part II draws the connections between these traumatic experiences and disability law. It explicates the Adverse Childhood Experiences (ACEs) framework for connecting childhood trauma to disability law, and it analyzes two pieces of recent litigation—*P.P. v. Compton Unified School District*²² and *Stephen C. v. Bureau of Indian Education*²³—that have successfully advanced theories of complex childhood trauma to state claims for relief under federal disability laws.²⁴ It also explains the approach to trauma taken by the Diagnostic and Statistical Manual of Mental Disorders (DSM), discussing the relationships articulated by the DSM between adult trauma and psychiatric diagnoses and considering the applicability of disability law to these diagnoses.

Finally, Part III argues that advocates should first pursue carceral trauma claims on behalf of minors who suffer trauma during juvenile incarceration, laying the legal groundwork to make such claims available to adult plaintiffs down the road. It proposes ways that complaints might state those claims and some remedies that claimants might seek. This Note argues that juvenile litigation is the low-hanging fruit of carceral trauma advocacy. It is a promising place to start both because of the clarity of the academic research on the effects of childhood trauma and because the recent successes of *P.P.* and *Stephen C.* have established important precedent from which to build these claims. This Part considers the applicability of each of the three most significant federal disability

21. *Farmer*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

22. 135 F. Supp. 3d 1098 (C.D. Cal. 2015).

23. No. 3:17-cv-08004, 2018 WL 1871457 (D. Ariz. Mar. 29, 2018).

24. *See id.* at *3-5; *P.P.*, 135 F. Supp. 3d at 1102-03.

rights laws: the Individuals with Disabilities Education Act (IDEA),²⁵ section 504 of the Rehabilitation Act of 1973,²⁶ and the ADA,²⁷ of which Title II, which bars discrimination by “public entit[ies],”²⁸ is the most relevant provision for this Note.²⁹ It also considers the viability of two kinds of actions: litigation to obtain educational accommodations for students with disabilities either inside or outside of juvenile justice facilities, and litigation to improve the conditions of juvenile confinement.

Importantly, drawing on the narratives of carceral trauma proposed in this Note can help plaintiffs obtain the class certification that is often essential to large-scale institutional reform. Because carceral spaces are spaces of endemic trauma, class actions seeking these remedies can demonstrate compliance with the commonality requirement of class certification³⁰ by showing that most or all incarcerated people in a particular facility or prison system face a significant likelihood of experiencing trauma. The remedies and reforms sought by such litigation could proceed from that presumption as well.

This Note eschews the Eighth Amendment claims that are most commonly raised to address the mental health effects of incarceration. It does so partly because of the difficulties of proof discussed above, and partly in the interest of advancing an alternative set of possible remedies and a different view of carceral experiences. Eighth Amendment claims seek redress for damage done to incarcerated people—such claims assess these traumas through the lens of punishment, asking whether the harm borne is valid as a penal action, and they concern themselves essentially with responding to the moment of violence.³¹ This Note instead advances a view of carceral trauma through a disability frame,

25. Individuals with Disabilities Education Act § 601(c)(3), 20 U.S.C. § 1400(c)(3) (2018) (guaranteeing a “free appropriate public education” to “children with disabilities and the families of such children”).

26. Rehabilitation Act of 1973 § 504(a), 29 U.S.C. § 794(a) (2018) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).

27. Americans with Disabilities Act of 1990 § 2, 42 U.S.C. § 12101 (2018) (expressing Congress’s intent to “eliminat[e] . . . discrimination against individuals with disabilities” in “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services”).

28. *See id.* § 202, 42 U.S.C. § 12132.

29. Parts II and III of this Note also touch on the “early and periodic screening, diagnostic, and treatment services” mandate of the Medicaid Act, which ensures a wide range of services to Medicaid-eligible youth. *See* 42 U.S.C. § 1396d(r).

30. FED. R. CIV. P. 23(a)(2).

31. *See, e.g.,* *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (noting that the Eighth Amendment “bans only cruel and unusual *punishment*,” so courts must inquire into the state of mind of the “inflicting officer” when “the pain inflicted is not formally meted out *as punishment*”).

concerning itself with the lasting effects of the harm and asking what the obligations of the state are to respond to the ongoing needs of people who have experienced trauma during incarceration.

This Note also does not consider claims on behalf of incarcerated people who have underlying, antecedent psychiatric or physical disabilities, which are the disability law claims that most often appear in prison litigation now. The pervasiveness of psychiatric disabilities behind bars is widely known and well-reported in both academic scholarship and the popular press,³² and advocates have long advanced claims about inadequate mental health care and the inappropriateness of solitary confinement for inmates with mental health disabilities unrelated to trauma.³³ This Note instead specifically considers the traumas and subsequent mental health disabilities *caused* by incarceration, not other psychiatric disabilities or trauma-related impairments arising outside of incarceration.³⁴

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32. See, e.g., Anthony C. Tamburello et al., *The Prevalence of Delusional Disorder in Prison*, 43 J. AM. ACAD. PSYCHIATRY & L. 82, 85-86 (2015); Sarah Varney, *By the Numbers: Mental Illness Behind Bars*, PBS NEWSHOUR (May 15, 2014, 6:39 PM EST), <https://perma.cc/TY9Y-SUNM>.
33. See, e.g., *Brown v. Plata*, 563 U.S. 493, 503-06 (2011); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995).
34. In this way, this Note is distinct from the comparatively robust literature proposing claims under the Americans with Disabilities Act arising from the effects of solitary confinement on inmates with predicate psychiatric or physical disabilities. See, e.g., Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DENV. U.L. REV. 55, 59 (2012) (discussing “an alternative legal approach . . . to address the overuse of long-term solitary confinement for people with mental illness”); Jamelia N. Morgan, *Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 85 (2017-2018); Ariel A. Simms, *Solitary Confinement in America: Time for Change and a Proposed Model of Reform*, 19 U. PA. J.L. & SOC. CHANGE 239, 254-55 (2016) (discussing the use of the ADA to challenge solitary confinement of prisoners with disabilities); Derek Warden, *A Worsened Discrimination: How Exacerbation of Disabilities Constitutes Discrimination by Reason of Disability Under Title II of the ADA and §504 of the Rehabilitation Act*, 46 S.U. L. REV. 14, 48-50 (2018) (“Solitary confinement of persons with disabilities—whether physical, mental, or developmental—has disastrous and often inhumane consequences.”); John F. Cockrell, Student Article, *Solitary Confinement: The Law Today and the Way Forward*, 37 LAW & PSYCHOL. REV. 211, 211, 213-15 (2013) (discussing solitary confinement’s “impact on the mentally ill”); Ashley Halvorsen, Note, *Solitary Confinement of Mentally Ill Prisoners: A National Overview & How the ADA Can Be Leveraged to Encourage Best Practices*, 27 S. CAL. INTERDISC. L.J. 205, 206 (2017) (same); Jessica Knowles, Note, *“The Shameful Wall of Exclusion”: How Solitary Confinement for Inmates with Mental Illness Violates the Americans with Disabilities Act*, 90 WASH. L. REV. 893, 898, 925 (2015) (proposing ADA litigation “to challenge the solitary confinement of prisoners with mental illness”); Lauren Koster, Note, *Who Will Educate Me? Using the Americans with Disabilities Act to Improve Educational Access for Incarcerated Juveniles with Disabilities*, 60 B.C. L. REV. 673, 675, 705-06 (2019). The aim of this Note is to demonstrate that many more incarcerated people than those who enter their term of imprisonment with underlying disabilities could benefit from disability law because of the effects of trauma experienced during their incarceration.

I. Sources of Carceral Trauma

This Part will discuss three ways that incarceration traumatizes: sexual violence; nonsexual violence; and isolation, especially prolonged segregation. It will also discuss the indirect traumas of witnessing or overhearing violence. This Part's discussion of research on carceral experiences is intended to provide a literature review for advocates seeking academic support to demonstrate the lasting effects of trauma that occurred during the incarceration of their clients. By recognizing these experiences not only as moments of violence but also as traumatic events, we can see their potential to cause long-term psychological damage and the possible benefits that disability law could provide to people who have suffered such trauma.

Considerable research has pointed out the frequency and psychological harm of each of these experiences in carceral settings, but little of it has discussed these effects as instances of trauma. This is true even though psychology literature has long connected at least sexual and other physical violence to trauma and post-traumatic stress when they take place outside of carceral settings.³⁵ This Note proposes that these experiences should be seen as comparably traumatic when they take place inside jails and prisons. It seeks to show that the incidents and reported symptoms are similar enough that advocates should be able to draw on academic insights about trauma in noncarceral settings to support claims on behalf of incarcerated people.

Each of these modes of trauma operates in both adult and juvenile facilities. Similar percentages of adult and juvenile prisoners experience sexual victimization. In 2011-2012, according to the Bureau of Justice Statistics, 4% of adult prisoners and 4.5% of juvenile prisoners were victims of sexual violence.³⁶ About one-third of youths in juvenile detention facilities report having spent time in solitary confinement, and more than half of that group reports spending more than twenty-four hours in solitary confinement.³⁷ Although the Bureau of Justice Statistics has reported that older inmates are isolated less often, the Bureau still found in its 2011-2012 survey that nearly 20% of prison inmates ages 30-39 had spent time in isolation in the prior year, or since their admission if they had been recently incarcerated.³⁸

More robust research exists on the lasting psychological effects of childhood trauma than adult trauma, and advocates have been more successful at applying disability law to those experiences. In particular, research on the Adverse

35. *See infra* text accompanying notes 48-56, 106-08.

36. BECK ET AL., *supra* note 8, at 21.

37. *See* ANDREA J. SEDLAK, WESTAT, SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT: CONDITIONS OF CONFINEMENT 49 (2016), <https://perma.cc/3AWN-GFYL>.

38. BECK, *supra* note 3, at 4 tbl.3.

Childhood Experiences (ACEs) framework links trauma with disability by articulating the connections between traumatic childhood experiences and long-term psychological, neurological, and physiological impediments.³⁹ This research has recently been used to support school reform litigation in *P.P. v. Compton Unified School District*⁴⁰ and *Stephen C. v. Bureau of Indian Education*.⁴¹

But the more extensive research and precedent on childhood trauma's relationship to disability should not prevent advocates from raising disability law claims based on traumatic experiences suffered by adults. While claims about juvenile carceral trauma may be the right place to start because they represent a straightforward extension of existing litigation, they are the wrong place to stop. The remainder of this Part will address various potentially traumatic experiences that arise in both juvenile and adult carceral spaces.

A. Sexual Violence

For the period from 2011 to 2012, the Bureau of Justice Statistics reported that about 4% of prison inmates and 3.2% of jail inmates had experienced sexual victimization during the previous year of their incarceration.⁴² A handful of specific prison facilities reported overall rates of sexual victimization closer to 10% and, in one female-only prison, 15%.⁴³ The rates were higher for certain populations. People with severe developmental disabilities bear a particularly high risk.⁴⁴ Nonheterosexual inmates also face heightened risks of victimization: Among inmates who reported their sexual orientation as gay, lesbian, bisexual, or other, up to 17.6% of prisoners and 12.8% of jail inmates reported that they had been sexually victimized by other inmates or staff.⁴⁵ Among transgender inmates, nearly 40% of prisoners and 27% of jail inmates reported sexual victimization.⁴⁶ These numbers may underestimate the true rates, considering

39. For more information about the ACEs model, see generally *Adverse Childhood Experiences (ACEs)*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/M46Z-G4YG> (last updated Apr. 2, 2019).

40. 135 F. Supp. 3d 1098 (C.D. Cal. 2015); see *infra* Part II.A.1.

41. *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-cv-08004, 2018 WL 1871457 (D. Ariz. Mar. 29, 2018); see *infra* Part II.A.2.

42. BECK ET AL., *supra* note 8, at 6. The Bureau of Justice Statistics defines "sexual victimization" to include any nonconsensual sexual activity, "abusive sexual contacts," and any sexual contact with staff members. See *id.* at 9.

43. See *id.* at 11 fig.1.

44. NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 72 (2009), <https://perma.cc/XFR7-DWHR>.

45. BECK ET AL., *supra* note 8, at 7.

46. BECK, *supra* note 9, at 2 tbl.1.

the widespread underreporting of rape and other kinds of sexual violence in carceral environments.⁴⁷

Rape has long been known to be a traumatizing event, and the body of literature tying sexual violence to acute and protracted psychological harm is extensive. In 1974, Ann Burgess and Lynda Holmstrom documented the traumatic symptoms of rape survivors in a study of ninety-two women at Boston City Hospital and proposed recognizing a new syndrome, rape trauma syndrome, to describe the constellation of traumatic responses frequently experienced by victims.⁴⁸ These include difficulty sleeping, humiliation and self-blame, powerful nightmares, and paralyzing phobias.⁴⁹

The specific group of symptoms described by rape trauma syndrome never became a diagnosis in the Diagnostic and Statistical Manual. But rape has been closely linked to the DSM diagnosis of post-traumatic stress disorder (PTSD). Researchers have found rates of PTSD symptoms approaching 100% in the immediate aftermath of rape or attempted rape.⁵⁰ A large-scale study found a lifetime rate of PTSD of 32% for women who had been victims of rape.⁵¹ For victims who are otherwise in stressful environments caused by major life changes, the rate of post-traumatic stress may be even higher.⁵²

The traumatic impacts of sexual violence on children are also well researched and documented. Sexual abuse is one of the seven categories of adverse childhood experiences tested in the original ACE study; exposure to even one of these categories increases a child's risk of later developing depression, drug or alcohol abuse, and other physical and mental health problems.⁵³ And as with other forms of trauma, the effects of rape may linger for years. "Long after the event, many traumatized people feel that a part of

47. See, e.g., Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 199-200 (1999).

48. See Burgess & Holmstrom, *supra* note 6, at 981-82.

49. See *id.* at 982-84.

50. See, e.g., Barbara Olasov Rothbaum et al., *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 J. TRAUMATIC STRESS 455, 457, 462-63 (1992) (finding that 94% of women showed PTSD symptoms in interviews conducted an average of 12.64 days after they were victims of rape or attempted rape).

51. Heidi S. Resnick et al., *Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of Women*, 61 J. CONSULTING & CLINICAL PSYCHOL. 984, 985, 988 tbl.2 (1993).

52. See Libby O. Ruch et al., *Life Change and Rape Impact*, 21 J. HEALTH & SOC. BEHAV. 248, 256 (1980).

53. See Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 248-54, 252 tbl.4, 253 tbl.5 (1998); see also *infra* Part II.A (discussing the ACE measures and their relationship to certain traumatic events that are prevalent in juvenile incarceration).

themselves has died.”⁵⁴ Seventeen years after being raped, 16.5% of victims still show symptoms of PTSD.⁵⁵ The consequences of this trauma can be deadly: In a study involving 100 women who had been victims of rape an average of nine years prior, 19 had attempted suicide, compared with 2.2% of respondents who had not been victims of rape or other violent crimes.⁵⁶

“[T]he mental health correlates of being a victim of prison rape are not well understood and lack diagnostic specificity.”⁵⁷ But the research that does exist suggests that sexual violence during incarceration is no less traumatizing than similar assaults outside of prison. For instance, one of the very few studies of the mental health impacts of prison rape found that 56% of male victims experienced depression, 37% experienced flashbacks, and 36% experienced suicidal ideation as a result of the attack.⁵⁸ A study ten years later by two of the same researchers found that 17% of survivors of sexual coercion in prison reported attempting suicide because of their victimization, 58% reported depression, and 34% reported that the experience caused them to be violent toward others.⁵⁹

These data are supported by widespread anecdotal reports and testimonials of the experience of sexual victimization in prison. Many of these testimonials emerged during the passage of the Prison Rape Elimination Act of 2003 and through the work of the National Prison Rape Elimination Commission, which was created by the 2003 Act and ended after releasing a report of findings and recommendations in 2009.⁶⁰ The stories told by sufferers of sexual victimization during incarceration are harrowing and suggest the absolute helplessness that characterizes moments of trauma.⁶¹

T.J. Parsell testified about his experience before the National Prison Rape Elimination Commission in 2005. In 1978, at age seventeen, Parsell was incarcerated

54. HERMAN, *supra* note 5, at 49.

55. See Heidi Resnick et al., *Prevention of Post-Rape Psychopathology: Preliminary Findings of a Controlled Acute Rape Treatment Study*, 13 J. ANXIETY DISORDERS 359, 360 (1999) (citing studies).

56. See Dean G. Kilpatrick et al., *Mental Health Correlates of Criminal Victimization: A Random Community Survey*, 53 J. CONSULTING & CLINICAL PSYCHOL. 866, 867, 869-71 (1985).

57. Tess M.S. Neal & Carl B. Clements, *Prison Rape and Psychological Sequelae: A Call for Research*, 16 PSYCHOL. PUB. POL’Y & L. 284, 290 (2010).

58. See Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 74 tbl.7 (1996).

59. See Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. INTERPERSONAL VIOLENCE 1591, 1607 tbl.7 (2006).

60. See NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at v-vi; *Report & Standards*, NAT’L PRISON RAPE ELIMINATION COMMISSION, <https://perma.cc/257W-6YW5> (last updated Aug. 17, 2009).

61. *Cf.* HERMAN, *supra* note 5, at 42 (describing responses to trauma).

at Riverside Correctional Facility in Ionia, Michigan.⁶² Within his first day of confinement, Parsell told the Commission, “an inmate spiked my drink with Thorazine and then ordered me down to his dorm. . . . One of them grabbed my hair . . . and pulled my head down while the others took turns sodomizing me. . . . They were unmoved by my crying.”⁶³ Echoing the narratives of other traumatized people, Parsell said the experience “scarred me in ways that can’t be seen or imagined. . . . I still don’t sleep well at night. I start up at the slightest noise. And as a gay man, I blamed myself for many years.”⁶⁴ Research on the post-traumatic stress of rape survivors has found that feelings of self-blame can exacerbate traumatic symptoms and prolong recovery.⁶⁵

Rodney Hulin was sixteen years old when he entered Clemens Unit, a prison in Brazoria County, Texas, in 1995.⁶⁶ His mother testified before the U.S. Senate Committee on the Judiciary in 2002 about her son’s experience.⁶⁷ Hulin was repeatedly beaten and raped by other prisoners while incarcerated.⁶⁸ He wrote to prison officials for help: “I am afraid to go to sleep, to shower, and just about anything else. I am afraid that when I am doing these things, I would die at any minute.”⁶⁹ Hulin was eventually moved to a segregated unit, but ultimately he hanged himself in his cell.⁷⁰

Incarceration may also be particularly likely to produce repeated victimization, as happened to both Hulin and Parsell.⁷¹ “Once an inmate is raped, he becomes an immediate target for other potential aggressors because he is perceived as weak and vulnerable.”⁷² Men who have been victims of male-on-male sexual assault may be “subsequently framed as gay and thereby become targets for further violence.”⁷³ “If it gets out and then people know you have been raped, that opens the door for a lot of other predators.”⁷⁴ Such repeated

62. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at 33, 71.

63. *Id.* at 33 (third alteration in original).

64. *Id.* at 34.

65. *See, e.g.*, HERMAN, *supra* note 5, at 63, 67-68.

66. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at 69.

67. Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79—The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 142, 153 (2006).

68. *Id.*

69. *Id.*

70. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at 69.

71. *See* Struckman-Johnson et al., *supra* note 58, at 75 (noting that “targets reported an average of nine incidents”).

72. Neal & Clements, *supra* note 57, at 292.

73. JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 99 (2011).

74. *Id.* (quoting STOP PRISONER RAPE, *STORIES FROM INSIDE: PRISONER RAPE AND THE WAR ON DRUGS* 5 (2007), <https://perma.cc/2SSX-MQQL>).

victimization can be especially traumatizing. In one study looking at rates of sexual victimization and trauma among a sample of more than 6,000 women, researchers found that “[r]evictimized [study] participants were 4.3 to 8.2 times more likely than nonvictims to develop lifetime PTSD whereas single-assault victims were only 2.4 to 3.5 times more likely.”⁷⁵ People who undergo “prolonged, repeated trauma” may experience even deeper psychological damage than do victims of a single trauma.⁷⁶ Because “[t]he worst fear of any traumatized person is that the moment of horror will recur,” a victim of repeated trauma “may feel herself to be changed irrevocably.”⁷⁷

In considering the effects of revictimization, it is important to remember that many people, especially women, begin their confinement having previously experienced sexual violence.⁷⁸ People who are incarcerated in the United States are more likely than the general population to have been sexually abused as children: In studies of jail inmates, 65.7% of incarcerated women⁷⁹ and 59% of incarcerated men⁸⁰ reported experiencing childhood sexual abuse, substantially higher than estimates of the prevalence of childhood sexual abuse in the general population.⁸¹ For them, and for all other inmates who experienced sexual assault before their confinement, the first victimization during their incarceration is already an instance of revictimization.

Other forms of sexual victimization besides violent rape are also common in carceral environments. Many gay and transgender inmates are forced into sexual relationships precisely to avoid the mass and multiple assaults that queer prisoners so often undergo.⁸² As one transgender woman incarcerated at a male prison in New York told advocates, “[i]f you’re not fucking somebody, you’re

75. Kate Walsh et al., *National Prevalence of Posttraumatic Stress Disorder Among Sexually Revictimized Adolescent, College, and Adult Household-Residing Women*, 69 ARCHIVES GEN. PSYCHIATRY 935, 935, 940 (2012).

76. See HERMAN, *supra* note 5, at 86.

77. See *id.*

78. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 172879, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), <https://perma.cc/7MP7-7JKT>.

79. Kia Asberg & Kimberly Renk, *Comparing Incarcerated and College Student Women with Histories of Childhood Sexual Abuse: The Roles of Abuse Severity, Support, and Substance Use*, 5 PSYCHOL. TRAUMA 167, 169-70 (2013).

80. Regina J. Johnson et al., *Prevalence of Childhood Sexual Abuse Among Incarcerated Males in County Jail*, 30 CHILD ABUSE & NEGLECT 75, 82 (2006).

81. See, e.g., Kevin M. Gorey & Donald R. Leslie, *The Prevalence of Child Sexual Abuse: Integrative Review Adjustment for Potential Response and Measurement Biases*, 21 CHILD ABUSE & NEGLECT 391, 395 (1997) (estimating adjusted childhood sexual abuse rates of 14.5% among women and 7.2% among men).

82. See MOGUL ET AL., *supra* note 73, at 102.

gonna get fucked by everybody.”⁸³ While the traumatic effects of this type of coerced sex may differ from the effects of violent rape and have not been widely studied, what evidence exists suggests that both experiences carry a significant risk of trauma.⁸⁴

The traumatic effects associated with rape both in and outside of carceral settings have been extensively documented and studied.⁸⁵ But most of the litigation about sexual violence in prison has relied on Eighth Amendment claims.⁸⁶ For male plaintiffs in particular, such litigation has generally been unsuccessful.⁸⁷ This Note proposes that survivors of prison rape in either adult or juvenile facilities may instead consider claims in disability law arising from the traumatic effects of sexual victimization.

B. Nonsexual Violence and Witnessing Violence

This Subpart considers the traumatic effects of nonsexual violence and indirect exposure to violence. The harms described in this Subpart are underresearched relative to the risk of trauma following sexual violence, but what studies exist have found traumatic impacts.⁸⁸ These harms are also experienced by considerably greater percentages of incarcerated populations. Research suggests that exposure to certain forms of nonsexual violence, for example, is nearly ubiquitous for people incarcerated for more than very brief periods.⁸⁹ As such, claims arising from these experiences may open the benefits of disability law to larger groups of incarcerated and formerly incarcerated people than claims arising from the harms discussed elsewhere in this Part.

83. *Id.*

84. *See, e.g.,* Struckman-Johnson & Struckman-Johnson, *supra* note 59, at 1611 (finding similar emotional symptoms among people who experience sexual victimization in prison across groups with different rates of associated physical violence).

85. *See, e.g.,* Burgess & Holmstrom, *supra* note 6, at 982-84 (examining the traumatic effects of rape outside of prison); Neal & Clements, *supra* note 57, at 288-90 (discussing the relationship between prison rape and PTSD).

86. *See* Bell et al., *supra* note 47, at 211-14.

87. *See id.* at 215-16.

88. *See, e.g.,* D. Freeman et al., *Paranoia and Post-Traumatic Stress Disorder in the Months After a Physical Assault: A Longitudinal Study Examining Shared and Differential Predictors*, 43 PSYCHOL. MED. 2673, 2673 (2013) (noting that “a significant minority of people develop post-traumatic stress disorder” following a physical assault).

89. *See, e.g.,* Daquin et al., *supra* note 10, at 1026 (finding that 92% of parolees in the study’s sample had witnessed fighting during their incarceration).

1. Nonsexual violence and victimization

“[T]raumatic events generally involve threats to life or bodily integrity, or a close personal encounter with violence and death.”⁹⁰ Nonsexual violence, including homicide, is often presumed to be a pervasive feature of incarceration, but “very little is known about the epidemiology and context of physical violence inside prisons.”⁹¹ Violence is generally underreported both inside and outside of prison, but it may be particularly underreported in carceral spaces because of the threat of retaliation against those who report staff misconduct or violence by fellow inmates.⁹²

The extant research suggests that these presumptions of prevalence are not misplaced. Studies have found that between 32% and 66% of prisoners experience nonsexual violence while incarcerated.⁹³ One survey of 7,785 adult inmates found that 25.2% of male prisoners reported being victims of inmate-on-inmate physical assault during their current prison term, and 29.2% reported being victims of staff-on-inmate assault.⁹⁴ The reported numbers were lower for women: 20.4% reported being assaulted by another inmate, and 8.2% reported being assaulted by staff.⁹⁵ Being young,⁹⁶ having a mental illness,⁹⁷ and being housed in a maximum-security facility⁹⁸ all increase the risk of victimization. And for men who are sexually victimized while incarcerated, more than half of all sexual assaults also involve physical injury.⁹⁹

Nonsexual violent victimization can cause traumatic responses. “[A]s a result of a violent victimization, individuals may experience flashbacks, vivid memories, or nightmares of the event; they may experience avoidance or numbing; and they may suffer from heightened arousal or hypervigilance.”¹⁰⁰ As the formerly incarcerated writer and advocate Mika’il DeVeaux put it,

90. HERMAN, *supra* note 5, at 33.

91. Cynthia L. Blitz et al., *Physical Victimization in Prison: The Role of Mental Illness*, 31 INT’L J.L. & PSYCHIATRY 385, 385 (2008).

92. *Id.* at 386.

93. Daquin et al., *supra* note 10, at 1018.

94. Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 592 (2007).

95. *Id.*

96. *Id.*

97. Blitz et al., *supra* note 91, at 391.

98. See Deanna M. Pérez et al., *Individual and Institutional Characteristics Related to Inmate Victimization*, 54 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 378, 386 (2010).

99. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at 129.

100. BENJAMIN STEINER & BENJAMIN MEADE, ASSESSING THE RELATIONSHIP BETWEEN EXPOSURE TO VIOLENCE AND INMATE MALADJUSTMENT WITHIN AND ACROSS STATE CORRECTIONAL FACILITIES 5 (2013), <https://perma.cc/RHB4-A5U6>.

reflecting on his twenty-five-year confinement in various New York state prisons:

I remain haunted by the memories and images of violence—violence I experienced, violence I witnessed, and violence that I heard or learned about. I can still see the murders I witnessed. I still see the image of a person being hit at the base of his skull with a baseball bat on a warm, sunny afternoon during recreation hours. . . . I can still see the rapid hammering motions of a hand plunging an ice pick-like object into the back of another person standing with his hands in his pockets.¹⁰¹

Some of the research on violence in prisons has focused on the reactive behaviors of prisoners, finding that many inmates remain “constantly on guard,” carry protective weapons, or engage in strategies of self-isolation or avoidance of certain areas to evade victimization.¹⁰² Interviews with formerly incarcerated people often indicate that it can be hard to shake the anxiety and hypervigilance caused by the violence they experienced during incarceration. Describing the difficulty of leaving behind the “mentality” of prison life, one recently released former inmate told researchers: “I’m real like edgy, like one little thing, like you bump into me, you don’t say excuse me, I wanna freakin’ flip out, you know? I wanna punch your head in.”¹⁰³

Nonsexual violence in juvenile facilities is not as well studied, but it appears to be widespread too. Incarcerated juveniles reported 13,000 claims of physical abuse by staff members from 2004 to 2007 nationwide.¹⁰⁴ A study of the effects of victimization in juvenile facilities found that abuse during incarceration predicted symptoms of both PTSD and depression.¹⁰⁵ As a general matter, many people who experience nonsexual violence develop post-traumatic symptoms.¹⁰⁶ Some evidence suggests that rates may be higher for people living in spaces where traumatic stressors, including violence, are particularly common and likely to be recurrent.¹⁰⁷ And for children, physical abuse is one of the basic categories of adverse childhood experiences, exposure to which is known to carry a host of attendant psychological harms.¹⁰⁸ These findings indicate that

101. Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 257, 265 (2013).

102. Wolff et al., *supra* note 94, at 589-90.

103. Bruce Western, *Lifetimes of Violence in a Sample of Released Prisoners*, RSF: RUSSELL SAGE FOUND. J. SOC. SCI., Nov. 2015, at 14, 25-26.

104. Carly B. Dierkhising et al., *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 PSYCHOL. PUB. POL'Y & L. 181, 181 (2014).

105. *Id.* at 187 tbl.2.

106. See Freeman et al., *supra* note 88, at 2673; Kessler et al., *supra* note 7, at 1053 tbl.4.

107. See Charles F. Gillespie et al., *Trauma Exposure and Stress-Related Disorders in Inner City Primary Care Patients*, 31 GEN. HOSP. PSYCHIATRY 505, 511-12 (2009).

108. See Felitti et al., *supra* note 53, at 248-49.

nonsexual violence during incarceration, like sexual violence, tends to cause sufficiently significant mental health impairments that at least some victims may be entitled to the rights guaranteed by disability law in the aftermath.

2. Indirect exposure to violence

As DeVeaux's reflections suggest, witnessing violence may have traumatic effects akin to direct victimization. "Exposure to violence has been linked to depression and substance abuse, PTSD, anxiety, violence perpetration, and future victimization."¹⁰⁹ Most of the research on this subject has assessed the effects of children's exposure to violence,¹¹⁰ and has found that children who witness violence are considerably more likely than their peers to develop PTSD, behavioral problems, dissociation, and substance use disorders, among other deleterious mental health consequences.¹¹¹ The studies considering adult exposure have also found traumatic impacts.¹¹²

The experience of witnessing violence affects many more incarcerated people than the other traumas discussed above. One of the few studies of people who witness various forms of violence and victimization while incarcerated found that 92% of respondents witnessed nonsexual violence and 23% witnessed sexual victimization during their confinement.¹¹³ Although the study did not directly consider post-traumatic symptoms resulting from these experiences, it found that witnessing sexual victimization was linked to higher odds of re-arrest and parole violations.¹¹⁴

Similarly, a study of 124 formerly incarcerated men who had been out of jail or prison for an average of about thirty months found that witnessing violence while incarcerated was significantly related to antisocial behavior and emotional distress indicators following release.¹¹⁵ The results suggested that "these experiences can have sustained harmful psychological effect well beyond release from prison or jail."¹¹⁶

Another study looking specifically at exposure to sexual violence in prison among incarcerated black men found that 43% reported hearing a sexual assault

109. Daquin et al., *supra* note 10, at 1020 (citations omitted).

110. *See id.*

111. Stephen L. Buka et al., *Youth Exposure to Violence: Prevalence, Risks, and Consequences*, 71 AM. J. ORTHOPSYCHIATRY 298, 302-05 (2001).

112. *See* Daquin et al., *supra* note 10, at 1020-21.

113. *Id.* at 1026.

114. *See id.* at 1025, 1026 tbl.2, 1027 tbl.3.

115. Paul Boxer et al., *Exposure to Violent Crime During Incarceration: Effects on Psychological Adjustment Following Release*, 36 CRIM. JUST. & BEHAV. 793, 797, 801 tbl.2, 802 tbl.3 (2009).

116. *Id.* at 804.

take place during their incarceration and 16% reported witnessing a sexual assault.¹¹⁷ These exposures may increase fear of sexual assault, which has been shown to be a common source of anxiety in prisons.¹¹⁸ Fear has been found to shape the actions and lifestyles of many incarcerated people, leading to hypervigilance, paranoia, and self-imposed isolation—symptoms similar to those that follow direct victimization.¹¹⁹

C. Solitary Confinement

Among the first major works to find psychologically destructive effects of solitary confinement was Hans Toch's 1975 book *Men in Crisis*, a large-scale study based on hundreds of interviews with prisoners in New York.¹²⁰ Toch used the term "isolation panic" to describe the "surges of panic, despair, or rage" that segregation causes for some confined people.¹²¹ Drawing on the "pains of imprisonment" discourse, a once-prominent feature of the sociology literature on prisons,¹²² Toch found that "[i]solation can dramatize the pains of imprisonment per se and also make those pains more acute."¹²³

This can lead to psychological breakdown, "a back-to-the-wall, dead-end desperation, an intolerable emptiness, helplessness, tension."¹²⁴ Foreshadowing later research that would suggest that the deterioration caused by isolation may be limited to certain inmates or certain carceral environments, Toch noted that the likelihood of isolation panic was greater for inmates who had "an acute sense of victimization or injustice" and was most often precipitated by arbitrary or indefinite segregation, rather than by clearly defined periods of segregation tied to acknowledged misconduct.¹²⁵ Toch's descriptions of isolation panic closely track characterizations of traumatic events. In the 1992 landmark text *Trauma and Recovery*, Judith Herman described trauma as occurring when a person is

117. Rowell-Cunsolo et al., *supra* note 12, at 58.

118. See Richard Tewksbury, *Fear of Sexual Assault in Prison Inmates*, PRISON J., Apr. 1989, at 62, 67 tbl.3.

119. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, in PAPERS PREPARED FOR THE "FROM PRISON TO HOME" CONFERENCE 77, 81-82 (U.S. Dep't of Health & Human Servs. ed., 2002), <https://perma.cc/LL47-98BB>; Richard C. McCorkle, *Personal Precautions to Violence in Prison*, 19 CRIM. JUST. & BEHAV. 160, 161 (1992).

120. See HANS TOCH, *MEN IN CRISIS: HUMAN BREAKDOWNS IN PRISON 21* (1975).

121. See *id.* at 38.

122. See Victor L. Shammass, *Pains of Imprisonment*, in 2 THE ENCYCLOPEDIA OF CORRECTIONS 679, 679 (Kent R. Kerley ed., 2017).

123. TOCH, *supra* note 120, at 39.

124. See *id.* at 41.

125. See *id.* at 40.

confronted by circumstances that have the “power to inspire helplessness and terror” and is unable to overcome or escape those circumstances.¹²⁶ Herman observed: “Traumatic reactions occur when action is of no avail. When neither resistance nor escape is possible, the human system of self-defense becomes overwhelmed and disorganized.”¹²⁷

Isolation panic can lead to self-harm. Toch relates interviews with men who said they had “started going to wall to wall banging myself, you know, my body into the walls”¹²⁸ and who cut their arms in the hope that “they might let me out.”¹²⁹ On the latter point, multiyear reviews of completed suicides in the New Jersey and California prison systems have found that suicide rates increase dramatically in administrative segregation and other forms of isolated housing,¹³⁰ and a national study of jail suicides found that approximately two-thirds of suicides involved victims who had spent time in isolation.¹³¹ Responses to trauma similarly can turn to self-directed violence. Suicide attempts by political prisoners have been described as acts that create “something that is on a par with the violence around [them]. . . . It’s like living on an equal footing with one’s jailers.”¹³² In line with research finding lower rates of suicide among inmates housed with a cellmate than among inmates in isolation,¹³³ Herman cites a study of prisoner relationships among concentration camp survivors for the proposition that “the pair, rather than the individual, was the ‘basic unit of survival.’”¹³⁴

Since *Men in Crisis* was published, many more studies have described the testimonials of people held in isolation. For example, a 1983 study reported the results of interviews with fourteen plaintiffs involved in Eighth Amendment

126. HERMAN, *supra* note 5, at 34.

127. *Id.*

128. TOCH, *supra* note 120, at 41.

129. *Id.* at 42.

130. See Raymond F. Patterson & Kerry Hughes, *Review of Completed Suicides in the California Department of Corrections and Rehabilitation, 1999 to 2004*, 59 *PSYCHIATRIC SERVICES* 676, 676, 678 (2008); Rusty Reeves & Anthony Tamburello, *Single Cells, Segregated Housing, and Suicide in the New Jersey Department of Corrections*, 42 *J. AM. ACAD. PSYCHIATRY & L.* 484, 485 (2014).

131. See LINDSAY M. HAYES & JOSEPH R. ROWAN, *NATIONAL STUDY OF JAIL SUICIDES: SEVEN YEARS LATER* 32-33 (1988), <https://perma.cc/9GZT-RWUB>.

132. See HERMAN, *supra* note 5, at 85 (quoting JACOBO TIMERMAN, *PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER* 90 (Toby Talbot trans., 1988)).

133. See, e.g., Reeves & Tamburello, *supra* note 130, at 486 tbl.1.

134. HERMAN, *supra* note 5, at 91-92 (quoting Elmer Luchterhand, *Social Behavior of Concentration Camp Prisoners: Continuities and Discontinuities with Pre- and Postcamp Life*, in *SURVIVORS, VICTIMS, AND PERPETRATORS: ESSAYS ON THE NAZI HOLOCAUST* 259, 268 (Joel E. Dimsdale ed., 1980)).

litigation against the Massachusetts Department of Corrections.¹³⁵ Their statements “suggest[ed] that rigidly imposed solitary confinement may have substantial psychopathological effects and that these effects may form a clinically distinguishable syndrome.”¹³⁶ One inmate had slashed his wrists and was “unable to describe the events of the several days surrounding his wrist slashing.”¹³⁷ Another’s experience “suggested dissociative features with mutism: ‘I went to a standstill psychologically once—lapse of memory. I didn’t talk for 15 days.’”¹³⁸ Others described visual hallucinations: “‘The cell walls start wavering,’ and [m]elting, everything in the cell starts moving”¹³⁹

In general, such studies have found isolation to cause a host of psychological harms, including

an impaired sense of identity; hypersensitivity to stimuli; cognitive dysfunction (confusion, memory loss, ruminations); irritability, anger, aggression, and/or rage; other-directed violence, such as stabbings, attacks on staff, property destruction, and collective violence; lethargy, helplessness and hopelessness; chronic depression; self-mutilation and/or suicidal ideation, impulses, and behavior; anxiety and panic attacks; emotional breakdowns; and/or loss of control; hallucinations, psychosis and/or paranoia; [and] overall deterioration of mental and physical health.¹⁴⁰

Likewise, in preparation for *Ashker v. Governor of the State of California*,¹⁴¹ Stanford University’s Human Rights in Trauma Mental Health Laboratory interviewed twenty-nine prisoners held in long-term isolation at the Pelican Bay Security Housing Units.¹⁴² *Ashker* was filed in 2012 to oppose long-term solitary confinement under the Eighth and Fourteenth Amendments.¹⁴³ The plaintiffs described extreme feelings of hopelessness and depression. “I’m going to die here. . . . I can wake up tomorrow dead,” said one prisoner.¹⁴⁴ “It’s like being buried

135. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1451 (1983).

136. *Id.* at 1453.

137. *Id.* at 1452.

138. *Id.* at 1453 (quoting an inmate).

139. *Id.* at 1452 (quoting inmates).

140. Haney, *supra* note 119, at 85-86 (citing Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997)).

141. No. 4:09-cv-05796, 2014 WL 2465191 (N.D. Cal. June 2, 2014).

142. HUMAN RIGHTS IN TRAUMA MENTAL HEALTH LAB, STANFORD UNIV., MENTAL HEALTH CONSEQUENCES FOLLOWING RELEASE FROM LONG-TERM SOLITARY CONFINEMENT IN CALIFORNIA 4-5 (2017), <https://perma.cc/Z58T-TV4P>.

143. 2014 WL 2465191, at *1. *Ashker* settled after the plaintiffs successfully obtained class certification in 2014. *See id.* at *9 (certifying class); *see also* Ctr. for Constitutional Rights, Summary of *Ashker v. Governor of California Settlement Terms 1* (2015), <https://perma.cc/3VRD-PM8J>.

144. HUMAN RIGHTS IN TRAUMA MENTAL HEALTH LAB, *supra* note 142, at 7.

alive under cement and steel.”¹⁴⁵ Some plaintiffs described “feeling compelled to engage in repetitive behaviors in order to reduce their anxiety” and “feeling highly distressed when their routine was interrupted or their belongings were disturbed.”¹⁴⁶ As the Stanford researchers noted, several of the reported symptoms mirror those characteristic of post-traumatic stress, including “hyperarousal,” “paranoia,” and “emotional numbing.”¹⁴⁷ Studies prepared for litigation may suffer from researcher bias.¹⁴⁸ But on the whole, the interview data collected in these studies have tended to resemble data gathered by Toch and others in settings less prone to bias, as well as testimonials and memoirs of people held in segregation.¹⁴⁹

Not all research has found traumatic effects of solitary confinement. Another significant body of literature, which relies mainly on a small set of longitudinal and meta-studies, has found minimal or no psychological harm unique to people in administrative segregation.¹⁵⁰ Many of these studies have focused on segregation outside the United States;¹⁵¹ relied on volunteer participants, who may have a different experience of isolation than people compelled into a segregated environment;¹⁵² or looked only at brief stays in segregation.¹⁵³

145. *Id.*

146. *Id.* at 9.

147. *See id.* at 8-9. In *Trauma and Recovery*, Herman writes that “[h]yperarousal reflects the persistent expectation of danger; . . . constriction reflects the numbing response of surrender.” HERMAN, *supra* note 5, at 35.

148. *See* *Daubert v. Merrill Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). Some effort has been made by researchers to address this concern—Craig Haney’s study of Pelican Bay Security Housing Units prisoners, for example, included a question about a symptom unrelated to trauma (a “[t]ingling sensation”) to provide a baseline against which to measure the trauma-related symptoms. *See* Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 133 tbl.1 (2003). Note also that this concern may be counterbalanced by research suggesting that prisoners generally underreport symptoms. *See, e.g.*, Niki A. Miller & Lisa M. Najavits, *Creating Trauma-Informed Correctional Care: A Balance of Goals and Environment*, EUR. J. PSYCHOTRAUMATOLOGY 3 (Mar. 30, 2012), <https://perma.cc/9X7B-8VKS>.

149. *See, e.g.*, DeVeaux, *supra* note 101, at 267, 272-74.

150. For a summary of the results of the most prominent recent study of this type, see MAUREEN L. O’KEEFE ET AL., ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION 78 (2010), <https://perma.cc/54DS-PH8V>.

151. *See, e.g.*, IVAN ZINGER & CHERAMI WICHMANN, CORR. SERV. OF CAN., THE PSYCHOLOGICAL EFFECTS OF 60 DAYS IN ADMINISTRATIVE SEGREGATION 58-59 (1999).

152. *See, e.g.*, P.E. Gendreau et al., *Stimulation Seeking After Seven Days of Perceptual Deprivation*, 26 PERCEPTUAL & MOTOR SKILLS 547, 547, 549 (1968).

153. *See, e.g.*, Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. ABNORMAL PSYCHOL. 54, 55 (1972) (examining seven-day isolation periods).

In recent years, the bedrock of this research has been the Colorado Study, a longitudinal study that evaluated 270 prisoners in administrative segregation at Colorado State Penitentiary over the course of one year.¹⁵⁴ The study compiled results from a group of standardized self-reporting tests to assess symptoms of psychological distress among the inmates.¹⁵⁵ Remarkably, it found a decrease in most measures of distress—including anxiety, depression, hypersensitivity, and psychosis—in the first few months of isolation, with little change for the rest of the year.¹⁵⁶ Only the withdrawal measure worsened over time, and even that measure did not worsen for all of the groups of inmates studied.¹⁵⁷

The Colorado Study has been subject to a firestorm of criticism since its publication in 2010.¹⁵⁸ Some of the criticism has raised valuable concerns about the depth and accuracy of self-reported data on pencil-and-paper assessments in the prison context, the purity of the studied groups (some segregated prisoners may have been released and some general population prisoners placed into segregation during the study), and whether the results are generalizable or specific to the environment of Colorado State Penitentiary.¹⁵⁹ The Colorado Study raised important questions about the research showing psychological deterioration of inmates in isolation, but there nevertheless remains substantial evidence that isolation can cause mental health effects that mirror the known effects of trauma. The total body of literature can support advocacy operating from the premise that the effects of isolation can properly be viewed through the lens of trauma.

A final note: One striking finding of the Colorado Study was that both the segregation and general prison population groups, “regardless of their mental health status, reported [mental health] symptoms that were significantly elevated over normative community samples.”¹⁶⁰ The fight over the study’s finding that the isolation group did not show substantially greater psychological distress than the group housed in the general prison population has somewhat obscured the fact that *both* groups showed meaningfully greater degrees of traumatic

154. O’KEEFE ET AL., *supra* note 150, at 15, 34.

155. *See id.* at 22-26.

156. *See id.* at 19, 78.

157. *See id.* at 78 (noting that withdrawal only worsened for inmates without mental illness).

158. *See* Paul Gendreau & Ryan M. Labrecque, *The Effects of Administrative Segregation: A Lesson in Knowledge Cumulation*, in *THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT* 340, 346, 348 (John Wooldredge & Paula Smith eds., 2018); Craig Haney, *Restricting the Use of Solitary Confinement*, 1 *ANN. REV. CRIMINOLOGY* 285, 295 (2018).

159. *See* Maureen O’Keefe, *Reflections on Colorado’s Administrative Segregation Study*, *NAT’L INST. JUST. J.*, May 2017, at 22, 24-26.

160. Maureen L. O’Keefe et al., *A Longitudinal Study of Administrative Segregation*, 41 *J. AM. ACAD. PSYCHIATRY & L.* 49, 56-57 (2013) (discussing findings from one of the self-reporting measures used in the Colorado Study).

symptoms than did non-prison populations.¹⁶¹ For the purposes of assessing the breadth of carceral trauma, that may be the study's most significant result.

II. How Carceral Trauma Disables

Trauma does not itself create entitlements in disability law. Major disability rights statutes—like the ADA¹⁶² and section 504 of the Rehabilitation Act¹⁶³—require plaintiffs to demonstrate physical or mental impairments that substantially limit major life activities to access the benefits of those laws.¹⁶⁴ This Part discusses approaches that advocates might take to show that carceral trauma causes such impairments. Part II.A describes ACEs and similar frameworks that have been used to state disability law claims on behalf of children who have experienced complex trauma in their homes and communities. It takes a deeper look at two recent pieces of litigation involving childhood adversity and complex trauma—sustained, repetitive traumatic experiences—that have successfully raised disability law claims in the education context. This Note proposes that carceral trauma could provide the basis for similarly successful claims.

Part II.B describes the relationship between adult traumatic experiences and certain psychiatric diagnoses in the current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). These diagnoses presumptively establish the impairment criteria for the ADA and section 504 under the applicable regulations,¹⁶⁵ so linking carceral trauma to them can help state disability law claims for adult inmates who experience trauma while confined.

161. Note, however, that this finding does not indicate whether the traumatic symptoms were related to prior experiences of people entering the prison or experiences during their confinement; one of the difficulties of assessing the traumatic effects of incarceration is disentangling the two.

162. See Americans with Disabilities Act of 1990 § 3(2), 42 U.S.C. § 12102(1) (2018) (“The term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . .”).

163. See Rehabilitation Act of 1973 § 7(9), 29 U.S.C. § 705(9) (2018) (“The term ‘disability’ means . . . the meaning given it in section 12102 of title 42.”); see also *supra* note 162. Because both the definitions of disability in the two Acts and the statutes’ remedial provisions have been harmonized, see 42 U.S.C. § 12133, this Note largely discusses the two laws interchangeably. Where differences are relevant, it will so indicate.

164. The third major federal disability rights law—the Individuals with Disabilities Education Act (IDEA)—has more narrowly defined requirements than do the ADA and section 504. See Individuals with Disabilities Education Act § 602(3), 20 U.S.C. § 1401(3) (2018). For discussion of those requirements, see text accompanying notes 280-84 below.

165. See 29 C.F.R. § 1630.2(j)(3)(iii) (2019) (indicating that “it should easily be concluded” that, *inter alia*, PTSD “substantially limit[s] brain function”). But see *infra* note 266 and accompanying text (noting that some courts have nevertheless found plaintiffs with PTSD not to qualify as individuals with disabilities under the ADA).

A. Childhood Trauma and the ACEs Framework

The original study of the prevalence and effects of ACEs was run by Kaiser Permanente and the first findings were published in 1998.¹⁶⁶ The study assessed the responses of 9,508 participants to a questionnaire about their exposure to childhood abuse or household dysfunction and compared these responses to the rates of various health problems, like addiction, depression, and heart disease, later in the participants' lives.¹⁶⁷ The researchers found striking correlations between the adversity that children faced in their youth and health outcomes later in life. At the most extreme, people who had experienced four or more of the measured categories of ACEs had more than twelve times the risk for attempting suicide than people who had experienced no ACEs.¹⁶⁸

The framework established by the 1998 study has been the basis for much subsequent research on the psychological and physiological effects of childhood trauma and exposure to violence.¹⁶⁹ Many states are now gathering ACE data from adults about their childhood experiences through an annual survey called the Behavioral Risk Factor Surveillance System,¹⁷⁰ and the Health Resources and Services Administration collects similar data on children at a national level through the National Survey of Children's Health.¹⁷¹

It is not a straightforward matter to apply the questionnaire of the 1998 study to traumatic experiences during juvenile incarceration. Of the ACE categories in the study, all but one (sexual abuse) were tied to the activities of other members of the child's household—asking, for example, whether an adult in the house was alcoholic or made the child feel afraid that they would be physically hurt.¹⁷² And the sexual abuse category only asked about abuse by adults or older children,¹⁷³ which would not always capture sexual victimization of juvenile prisoners by their peers.

Subsequent research, however, has illustrated that the set of childhood experiences reported through the 1998 questionnaire are not the only modes

166. See Felitti et al., *supra* note 53, at 246.

167. See *id.* at 246-47.

168. See *id.* at 252 tbl.4.

169. For examples of this research, see *Adverse Childhood Experiences Journal Articles by Topic Area*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/9LVD-QGJU> (last updated Apr. 15, 2019).

170. See *Behavioral Risk Factor Surveillance System ACE Data*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/PVN3-UTY2> (last updated Apr. 9, 2019).

171. See The Child & Adolescent Health Measurement Initiative, 2017 National Survey of Children's Health (NSCH): Guide to Topics & Questions Asked 3-15 (2018), <https://perma.cc/2GRN-UKZW>.

172. See Felitti et al., *supra* note 53, at 248 tbl.1.

173. *Id.*

of childhood adversity that correlate with negative health outcomes.¹⁷⁴ The Community Experiences Questionnaire (CEQ), a device that similarly assesses exposure to traumatizing events or circumstances in a child's life,¹⁷⁵ provides a possible approach to bridging the gap between the childhood psychology research and the actual experiences of incarcerated juveniles. That questionnaire includes questions about violence that are more likely to be salient in spaces of juvenile incarceration because, unlike the 1998 ACE questionnaire, they are not tied to a perpetrator with a specific relationship to the child. For example, the questionnaire asks whether "[s]omebody tried to use violence or threats to get you to do something you didn't want to do" or whether "[s]omebody hit, punched, or slapped you."¹⁷⁶

The Survey of Exposure to Community Violence (SECV), another commonly used assessment, also measures children's proximity to potentially traumatizing events and translates well to the context of incarceration.¹⁷⁷ Items measured by the survey include whether the child has seen a person chased or beaten up, threatened with physical violence, targeted based on ethnicity, or attacked with a knife.¹⁷⁸ Many of the experiences of violence that occur frequently during juvenile incarceration—discussed in Part I—would yield affirmative responses to questions on the CEQ and the SECV.¹⁷⁹ Because of the known relationship between these metrics and worsened physical and mental health outcomes, they can help demonstrate the lasting impacts of juvenile carceral trauma. And while the ACE questionnaire does not directly reflect many traumatic events encountered during juvenile incarceration, the relationship between ACE data and those gathered by the CEQ and SECV is close enough that research on the mental health effects of ACEs may nevertheless be salient. Exposure to community violence correlates with exposure to ACEs;¹⁸⁰

174. See, e.g., Roy Wade Jr. et al., *Development and Evaluation of a Short Adverse Childhood Experiences Measure*, 52 AM. J. PREVENTATIVE MED. 163, 165-66 (2017) (discussing the development of a two-question ACE survey from the questions used in the Behavioral Risk Factor Surveillance System).

175. See David Schwartz & Andrea Hopmeyer Gorman, *Community Violence Exposure and Children's Academic Functioning*, 95 J. EDUC. PSYCHOL. 163, 165-66 (2003).

176. *Id.* at 166 tbl.1.

177. See Christopher C. Henrich et al., *The Association of Community Violence Exposure with Middle-School Achievement: A Prospective Study*, 25 J. APPLIED DEVELOPMENTAL PSYCHOL. 327, 332-33 (2004).

178. See *id.*

179. See *supra* text accompanying notes 104-08.

180. See Eunju Lee et al., *Exposure to Community Violence as a New Adverse Childhood Experience Category: Promising Results and Future Considerations*, 98 FAMILIES IN SOC'Y 69, 74 (2017).

adding measures of community violence to the ACEs framework improves the power of the questionnaire to predict negative health outcomes.¹⁸¹

In addition to health problems, ACEs have been linked to grade repetition,¹⁸² school attendance problems and behavioral issues,¹⁸³ and trouble mastering academic subjects in high school.¹⁸⁴ Exposure to violence assessed through the CEQ has similarly been linked to academic difficulties.¹⁸⁵ These connections to educational outcomes have created opportunities for advocates to argue that children who have experienced ACEs or exposure to community violence are entitled to special education benefits responsive to their resulting trauma.¹⁸⁶ These cases show paths that advocates could follow to raise similar claims linking juvenile carceral trauma to mental and physical health impediments that constitute disabilities under federal disability law. The following Subparts illustrate two major lawsuits that have advanced claims to educational accommodations based on childhood trauma.

1. *P.P. v. Compton Unified School District*

In May 2015, five current and former students of the Compton Unified School District filed a class action complaint alleging violations of section 504 of the Rehabilitation Act and Title II of the ADA, among other claims, on behalf of all current and future students of the district who had experienced complex trauma that limited major life activities—such as “learning, reading, concentrating, thinking, and/or communicating”—and who had not received accommodations.¹⁸⁷ The class “include[d], but [was] not limited to, students with trauma-related conditions recognized by . . . DSM-5”;¹⁸⁸ as with most groups that might pursue the claims proposed in this Note, the *P.P.* class included plaintiffs who had never received a psychiatric diagnosis based on their trauma. The students argued that they had been “denied meaningful access to public education”

181. *See id.*; *see also* David Finkelhor et al., *A Revised Inventory of Adverse Childhood Experiences*, 48 CHILD ABUSE & NEGLECT 13, 17 (2015).

182. Christina D. Bethell et al., *Adverse Childhood Experiences: Assessing the Impact on Health and School Engagement and the Mitigating Role of Resilience*, 33 HEALTH AFF. 2106, 2111 (2014).

183. Christopher Blodgett, *Adopting ACEs Screening and Assessment in Child Serving Systems* 8 (July 30, 2012) (unpublished working paper), <https://perma.cc/8K5M-8RJM>.

184. *See id.* at 16.

185. *See* Schwartz & Gorman, *supra* note 175, at 168-70.

186. *See, e.g.*, Stephen C. v. Bureau of Indian Educ., No. 3:17-cv-08004, 2018 WL 1871457, at *4 (D. Ariz. Mar. 29, 2018); Second Amended Complaint for Declaratory & Injunctive Relief ¶¶ 161-164, *Stephen C.*, No. 3:17-cv-08004 (D. Ariz. July 14, 2017), ECF No. 60.

187. *See* Class Action Complaint ¶¶ 1-3, 55, *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098 (C.D. Cal. 2015) (No. 2:15-cv-03726), 2015 WL 2393294, ECF No. 1.

188. *Id.* ¶ 55.

because of the district's "practices and policies that fail to accommodate the effects of complex trauma."¹⁸⁹

Compton Unified School District covers the city of Compton, California, and portions of Carson and Los Angeles.¹⁹⁰ The complaint explained that "Compton is among the most socioeconomically distressed cities in Southern California Violence, poverty, and discrimination are so pervasive that in any Compton classroom, the only reasonable expectation is that a significant number of students are likely suffering from complex trauma."¹⁹¹ It alleged that the student plaintiffs had "experienced and witnessed violence" leading to repeated trauma.¹⁹²

Lead plaintiff Peter P., age seventeen, alleged that he had experienced multiple incidents of physical abuse, including sexual abuse, by his mother's boyfriends during his childhood.¹⁹³ He had seen more than twenty people shot, including his best friend, who was killed while Peter was in middle school.¹⁹⁴ He had also been the victim of a stabbing.¹⁹⁵ Other plaintiffs alleged that they had been sexually assaulted,¹⁹⁶ had been shot at and had witnessed killings when they were as young as eight years old,¹⁹⁷ had traumatic memories of domestic violence from a very young age,¹⁹⁸ and had been both assaulted and arrested at gunpoint on or near school grounds.¹⁹⁹

Both Title II of the ADA and section 504 of the Rehabilitation Act provide that no "qualified individual with a disability" shall be excluded from or denied the benefits of a government program because of their disability.²⁰⁰ The same standards apply to both claims: As the court in *P.P.* recognized, the enforcement section of Title II declares that the "remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims]."²⁰¹ To qualify as having a disability, people raising claims under

189. *Id.* ¶ 13.

190. *Id.* ¶ 48.

191. *Id.* ¶ 74.

192. *See id.* ¶¶ 75-76.

193. *Id.* ¶ 14.

194. *Id.* ¶ 16.

195. *Id.*

196. *Id.* ¶ 24.

197. *Id.* ¶ 27.

198. *Id.* ¶ 32.

199. *Id.* ¶¶ 34-35.

200. *See* 29 U.S.C. § 794(a) (2018); 42 U.S.C. § 12132 (2018).

201. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1107 (C.D. Cal. 2015) (alteration in original) (quoting 42 U.S.C. § 12133).

either Act must show an impairment that “substantially limits one or more major life activities.”²⁰²

Although they had never been diagnosed with a learning disability or psychiatric disorder, the *P.P.* plaintiffs argued that their unaddressed trauma “impair[ed][their] capacity to perform daily activities all children engage in such as learning and participating in the classroom.”²⁰³ The complaint described ways that trauma affected the plaintiffs’ behavior at school and their ability to learn—Peter had “flashbacks” and “often experience[d] uncontrollable anger” at school because of his traumatic childhood experiences,²⁰⁴ plaintiff Kimberly C.’s sexual assault on a bus on her way to school left her “terrified of traveling to and from” her school,²⁰⁵ and plaintiff Phillip W. “joke[d] around during school to distract himself from thinking about” the violence he had witnessed.²⁰⁶ The plaintiffs argued that the hyperarousal that traumatized people often experience can degrade their ability to process verbal information and communicate, making it difficult or impossible to learn and participate in school.²⁰⁷

Denying the school district’s motion to dismiss, the district court found that the plaintiffs had “adequately alleged, at least, that complex trauma can result in neurobiological effects constituting a physical impairment.”²⁰⁸ Notably, the court rejected the school district’s argument that the alleged trauma amounted only to “environmental, cultural, and economic disadvantages” not covered by Title II or section 504,²⁰⁹ noting that the complaint “alleges the impact of trauma, not the impact of economic disadvantages.”²¹⁰

Further, the court found that the complaint had adequately alleged that the students “experienced particular limitations in their abilities to perform tasks such as learning, reading, concentrating, thinking, and communicating”—substantial limitations to major life activities that allowed their claims to

202. 42 U.S.C. § 12102(1)(A) (2018).

203. Class Action Complaint, *supra* note 187, ¶ 123.

204. *Id.* ¶¶ 14, 19.

205. *Id.* ¶ 24.

206. *Id.* ¶ 29.

207. *See id.* ¶ 129.

208. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1110-11 (C.D. Cal. 2015).

209. *Id.* at 1109 (quoting Memorandum of Points & Authorities in Support of Defendants’ Motion to Dismiss Plaintiffs’ Class Action Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) at 10, *P.P.*, 135 F. Supp. 3d 1098 (No. 2:15-cv-03726), 2015 WL 7687767, ECF No. 41).

210. *Id.*

survive the motion to dismiss.²¹¹ After the motion was denied, the parties began settlement negotiations.²¹²

2. *Stephen C. v. Bureau of Indian Education*

Drawing on the success of *P.P.*, nine children who are members of the Havasupai Native American tribe brought a lawsuit in January 2017 against the Bureau of Indian Education for depriving students at Havasupai Elementary School of meaningful access to education.²¹³ Havasupai Elementary School is the only school on the Havasupai reservation, which lies on “the western corner of the Grand Canyon’s South Rim.”²¹⁴

The complaint in *Stephen C.* differs from *P.P.* in a few material ways. First, the complaint in *Stephen C.* is not a class action complaint, and it alleges claims under section 504 but not Title II²¹⁵—the latter of which does not apply to most federal agencies.²¹⁶ In addition, more so than in *P.P.*, the trauma cited by the plaintiffs in *Stephen C.* was tied to family experiences and “historical trauma,” including longstanding economic and social harms to the Havasupai community related to federal policies and programs.²¹⁷ Arguing that multiple ACEs—“inherently disruptive experiences in childhood that produce significant and potentially damaging level[s] of stress and associated physical changes”²¹⁸—produce complex trauma, the complaint frequently notes that the adversity the children experienced was “not limited to discrete incidents, but consist[ed] of long-term, repeated, ongoing, and overlapping stressors.”²¹⁹ These include “experiences of physical and sexual violence, involvement in the child welfare and juvenile justice systems, alcohol and substance abuse in the family and

211. *Id.* at 1112.

212. *See* Joint Stipulation to Continue Upcoming Deadlines at 1, *P.P. v. Compton Unified Sch. Dist.*, No. 2:15-cv-03726 (C.D. Cal. Jan. 25, 2016), ECF No. 103.

213. *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-cv-08004, 2018 WL 1871457 (D. Ariz. Mar. 29, 2018); *see* Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 186, ¶¶ 1-2.

214. *Id.* ¶ 27.

215. *Id.* ¶¶ 221-249.

216. Title II bars discrimination by a “public entity,” which is defined as “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority.” 42 U.S.C. §§ 12131(1), 12132 (2018).

217. *See* Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 186, ¶¶ 158-159.

218. *Id.* at 40 n.5 (alteration in original) (quoting Blodgett, *supra* note 183, at 1).

219. *See id.* ¶¶ 47, 68, 86, 94, 109, 117, 133.

community, extreme poverty, denial of access to education, and historical trauma.”²²⁰

This argument survived the defendants’ motion to dismiss. In stronger language than the *P.P.* order, which only expressed satisfaction that the complaint had “go[ne] beyond” allegations of “environmental and socioeconomic factors,”²²¹ the court in *Stephen C.* found that the plaintiffs had made “substantial reference to the historical, environmental, and socioeconomic factors contributing to the prevalence of trauma within the students’ community” and “adequately alleged that complex trauma and adversity can result in physiological effects constituting a physical impairment that substantially limits major life activities.”²²²

The *Stephen C.* court also found that the complaint sufficiently related each student’s “unique exposure to complex trauma and adverse childhood experiences” to their learning capacities.²²³ Although much of the language from the sections discussing each plaintiff’s traumatic experiences is redacted from the publicly available version of the complaint, it appears this relationship was largely established by detailing the facts of each student’s traumatic childhood experiences and then explaining in more general terms the connections between complex trauma and children’s learning abilities.²²⁴

In late 2019, the court granted the Bureau of Indian Education’s motion for partial summary judgment, eliminating all but one claim from the suit.²²⁵ Most importantly for the argument proposed in this Note, the court ruled that “Defendants, as members of the executive branch, are not subject to Section 504.”²²⁶ The court’s decision was thinly reasoned and out of step with the statutory text, which indicates that section 504 applies to “any program or activity conducted by any Executive agency.”²²⁷ Indeed, the Bureau itself moved the court to reconsider granting summary judgment on that basis “to ensure

220. Opposition to Defendants’ Second Partial Motion to Dismiss at 7, *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-cv-08004 (D. Ariz. Aug. 25, 2017), ECF No. 73.

221. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1109 (C.D. Cal. 2015).

222. *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-cv-08004, 2018 WL 1871457, at *4 (D. Ariz. Mar. 29, 2018).

223. *Id.*

224. See Opposition to Defendants’ Second Partial Motion to Dismiss, *supra* note 220, at 7; Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 186, ¶¶ 47-49, 68-74, 86-88, 94-97, 109-110, 117-120, 133-134, 158-164.

225. See *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-cv-08004, 2019 WL 6875496, at *7 (D. Ariz. Dec. 17, 2019), *modified*, Order, *Stephen C.*, No. 3:17-cv-08004 (D. Ariz. May 8, 2020), ECF No. 221.

226. *Id.* at *4.

227. 29 U.S.C. § 794(a) (2018).

consistency with existing authority.”²²⁸ In spring 2020, the court granted the Bureau’s reconsideration motion in part, retracting its ruling that section 504 does not apply to federal executive agencies.²²⁹ Moreover, the court granted summary judgment to the plaintiffs on liability for one of the suit’s section 504 claims, leaving the remaining issues of liability on the other section 504 claim and the scope of potential remedies to be resolved at trial.²³⁰

3. Applicability to carceral trauma claims

P.P. and *Stephen C.* present a plausible roadmap to stating certain disability law claims for people who have experienced trauma during confinement, particularly juvenile confinement. In particular, the few paragraphs in the *Stephen C.* complaint describing the neurological and psychological impacts of complex trauma are quoted at length in the court’s decision on the motion to dismiss²³¹ and are instructive for framing disability claims based on juvenile carceral trauma. The complaint explains that “exposure to traumatic stressors can cause developmental disruption and consequent educational loss for children.”²³² It then ties these disruptions to school performance—noting that the “inability to emotionally self-regulate” caused by trauma can “disrupt the learning environment” and lead to disciplinary measures, and that exposure to violence correlates with a range of lowered metrics of school performance.²³³

The same could be said of children who experience juvenile carceral trauma. The *Stephen C.* complaint cites a study of the effects of witnessing violence in children’s communities on their academic achievement, finding that “[s]tudents who have witnessed violence, in particular, meet state academic-performance standards only half as often as peers who have not.”²³⁴ That study assessed exactly the same kinds of violence as those experienced by incarcerated juveniles, using questions adapted from the SECV²³⁵ to measure children’s relationship to violence. Along with negative effects on academic achievement, the study

228. Defendants’ Motion for Partial Relief from the December 17, 2019 Order, & Accompanying Memorandum at 1-2, *Stephen C.*, No. 3:17-cv-08004 (D. Ariz. Jan. 6, 2020), ECF No. 216.

229. See Order, *supra* note 225, at 6-7.

230. See *id.* at 5-7.

231. See *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-cv-08004, 2018 WL 1871457, at *4 (D. Ariz. Mar. 29, 2018) (citing Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 186, ¶¶ 160, 162).

232. Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 186, ¶ 162.

233. *Id.* ¶¶ 163-164.

234. *Id.* ¶ 164 (citing Henrich et al., *supra* note 177, at 343).

235. See *supra* text accompanying notes 177-79.

found positive correlations between exposure to violence and both depressive symptoms and aggression.²³⁶

Understanding that aggression in particular is a symptom of trauma highlights the value of bringing carceral trauma within the realm of disability law. Consider a child who misbehaves at school: She yells at a teacher or threatens harm to a classmate. If the school understands these acts as symptoms of trauma—in other words, as connected to a disability—that changes its legal obligations in response. Mere misbehavior is likely to face school administrative punishment or, increasingly, referral to law enforcement, a step down the short path to further incarceration and retraumatization.²³⁷ But a student whose behaviors are recognized as sequelae of a disability is entitled to accommodation. Persistent behavioral difficulties should lead the child to be assessed for an individualized education program (IEP) to structure their in-school environment in a way that allows them to succeed. Or if the child already has an IEP, the program should be re-evaluated to make sure it is properly addressing the child's disability.²³⁸

An amicus brief filed in *Stephen C.* by the Society of Indian Psychologists goes into more detail than the complaint about the physiological and psychological harms associated with complex trauma and their effects on children's behavior.²³⁹ The brief explains, for example, that “[c]hildren with a prolonged trauma history often struggle with self-regulation and impulse control” and may “lack the ability to identify or modulate their feelings.”²⁴⁰ Similarly, people who have experienced sexual or nonsexual violence inside carceral spaces often engage in violence or struggle to control aggression after the event.²⁴¹

These impairments can grant access to the entitlements of disability law. For instance, the term “serious emotional disturbance” identifies behaviors like these as learning impediments that are sufficient to qualify children for benefits under

236. Henrich et al., *supra* note 177, at 336.

237. See Class Action Complaint, *supra* note 187, ¶ 141; see also Aaron J. Curtis, Note, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1258-60 (2014) (“[S]chools often respond to disruptive behavior by referring students to law enforcement.”).

238. See, e.g., *R.F. v. Cecil Cty. Pub. Schs.*, 919 F.3d 237, 241 (4th Cir.), *cert. denied*, 140 S. Ct. 156 (2019).

239. See Brief of Society of Indian Psychologists as Amicus Curiae in Support of Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss at 13-17, *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-cv-08004 (D. Ariz. Sept. 5, 2017), ECF No. 86 [hereinafter Brief of Society of Indian Psychologists as Amicus Curiae].

240. *Id.* at 16.

241. See, e.g., *supra* text accompanying notes 59 and 103 (discussing subsequent violence by people who have experienced traumatic events during incarceration).

the IDEA.²⁴² A child found to have a serious emotional disturbance may also qualify to receive all clinically necessary medical and mental health care under the expansive “early and periodic screening, diagnostic, and treatment services” mandate of the Medicaid Act, which requires states to “(a) identify promptly a child suffering from a serious emotional disturbance, (b) assess comprehensively the nature of the child’s disability, (c) develop an overarching treatment plan for the child, and (d) oversee implementation of this plan (typically by multiple medical providers) as the needs of the child evolve.”²⁴³

In the Society of Indian Psychologists’ brief, childhood cognitive development and brain plasticity played a significant role in explaining the impacts of complex trauma on young people.²⁴⁴ To some extent, this emphasis on physiology carried over into the court’s decision in *Stephen C.*; the court indicated, for example, that it was “important to note” that the plaintiffs’ allegations included discussion of the “palpable, physiological harm to a young person’s developing brain,” and how these physiological impacts manifest in the classroom.”²⁴⁵ Advocates should keep this connection to physiology in mind when framing their claims. The ADA and section 504 can be read to cover a narrower scope of psychological disabilities than physical ones, because the regulations implementing the statutes define “[p]hysical or mental impairment” as either a “physiological disorder or condition,” or a “mental or psychological disorder.”²⁴⁶ The school district in *P.P.* argued that this language exempted certain psychological impairments that could only be classified as a “condition,” including the plaintiffs’ responses to traumatic stress.²⁴⁷

Neither *Stephen C.* nor *P.P.* reached the question whether the *psychological* effects of trauma alone could constitute an impairment for the purposes of the ADA and section 504.²⁴⁸ Each found sufficient *physiological* harm to meet the standard established by the regulations. The court in *P.P.* rested its decision on

242. See Individuals with Disabilities Education Act § 602(3)(A)(i), 20 U.S.C. § 1401(3)(A)(i) (2018); see also *infra* text accompanying notes 281-84 (explaining how trauma can be linked to serious emotional disturbances).

243. See *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 21-25 (D. Mass. 2006) (quoting Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6403(a), 103 Stat. 2106, 2262-65 (codified as amended at 42 U.S.C. § 1396d(r) (2018))).

244. See Brief of Society of Indian Psychologists as Amicus Curiae, *supra* note 239, at 14.

245. *Stephen C. v. Bureau of Indian Educ.*, No. 3:17-cv-08004, 2018 WL 1871457, at *4 (D. Ariz. Mar. 29, 2018) (quoting Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 186, ¶ 162).

246. See 29 C.F.R. § 1630.2(h)(1)-(2) (2019) (emphasis added); 34 C.F.R. § 104.3(j)(2)(i) (2019) (emphasis added).

247. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1109 (C.D. Cal. 2015).

248. See *Stephen C.*, 2018 WL 1871457, at *4; *P.P.*, 135 F. Supp. 3d at 1110-11.

“neurobiological effects constituting a physical impairment,”²⁴⁹ and *Stephen C.* referred to “physiological effects.”²⁵⁰ But future courts may see the issue differently.

B. Adult Trauma and Disability Law

The potential need to link trauma with physiological outcomes is a concern in litigating adult carceral trauma, where brain plasticity is unlikely to be applicable.²⁵¹ But otherwise, the limitations on life activities recognized by the courts in *P.P.* and *Stephen C.* as “substantial,” and therefore cognizable under the ADA and section 504, are similar to those that could be raised in claims based on adult carceral trauma. The court in *P.P.* noted Peter’s “flashbacks” and “instinct to be aggressive,” Kimberly’s “break down[s],” Virgil’s “struggles with anger,” and Donte’s “intrusive thoughts”²⁵²—none of which are unique to childhood trauma.²⁵³

This Subpart briefly sets forth a possible approach to bringing such claims for adult plaintiffs, explaining how the DSM discusses adult traumatic experiences and their connections to mental health outcomes. This framework may be the best available means of linking adult carceral trauma to impairments cognizable as disabilities under federal law. This Note does not propose that litigation on behalf of adults should be the first focus of advocates; claims for children who experience trauma during juvenile incarceration are a more promising place to begin because of the successes of *P.P.* and *Stephen C.* and the neuroscience research that supported those suits. But many more adults than children are incarcerated in the United States.²⁵⁴ The ambition of this Note’s proposal is that juvenile plaintiffs could open the door and adult plaintiffs might follow.

DSM-5 created a new diagnostic category for “Trauma and Stressor-Related Disorders,” disorders requiring “exposure to a stressful event as a precondition.”²⁵⁵

249. 135 F. Supp. 3d at 1111.

250. 2018 WL 1871457, at *4.

251. *But see, e.g.,* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT’L ACAD. SCI. 8174, 8174, 8177 (2004) (mapping human brain development through a series of MRI scans of subjects ages four to twenty-one and finding continued development throughout the period).

252. 135 F. Supp. 3d at 1112 (quoting Class Action Complaint, *supra* note 187, ¶¶ 14, 24, 33, 36).

253. *See, e.g.,* Haney, *supra* note 119, at 85-86 (describing similar symptoms that have been associated with solitary confinement).

254. Youth comprise about 63,000 of the nearly 2.3 million incarcerated people in the United States. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://perma.cc/4DHQ-9WS4>.

255. Anushka Pai et al., *Posttraumatic Stress Disorder in the DSM-5: Controversy, Change, and Conceptual Considerations*, BEHAV. SCI. 2 (Feb. 13, 2017), <https://perma.cc/CE25-WANN>; *see also* DSM-5, *supra* note 15, at 265-90.

In addition to PTSD, this category includes two trauma-related disorders applicable specifically to children (Reactive Attachment Disorder and Disinhibited Social Engagement Disorder), as well as two disorders linked to the development of symptoms in the immediate aftermath of traumatic or stressful events (Acute Stress Disorder and Adjustment Disorders).²⁵⁶

Criterion A in the DSM-5's PTSD definition describes the set of traumatic events that can trigger a PTSD diagnosis. This definition has been "clarified and narrowed" from previous versions of the DSM.²⁵⁷ In the DSM-5, only three kinds of stressful events qualify as traumatic predicates for the diagnosis: "actual or threatened death, serious injury, or sexual violence."²⁵⁸ The person must be exposed to these events in one or more of four ways: "[d]irectly experiencing" the event; "[w]itnessing, in person," the event; "[l]earning that the traumatic event(s) occurred to a close family member or close friend"; or "[e]xperiencing repeated or extreme exposure to aversive details of the traumatic event(s)."²⁵⁹

The limitations of this set of potential traumatic stressors mean that, in the view of the DSM, carceral trauma may be something of a misnomer as applied to solitary confinement.²⁶⁰ But sexual and some extreme nonsexual violence experienced during incarceration, as well as direct exposure to either, can qualify as traumatic predicates for the diagnosis. As discussed above in Part I, these experiences are prevalent during incarceration.²⁶¹

Most of the other diagnostic criteria for PTSD describe symptoms that follow the traumatic event, like intrusive thoughts or flashbacks; avoidance of "stimuli associated with the traumatic event(s)"; emotional changes; and effects on reactivity.²⁶² The disorder must continue for more than one month, must not be attributable to a source other than the trauma, and—importantly for the purposes of disability law—must cause "distress or impairment" in "important areas of functioning."²⁶³

The inclusion of this last criterion in the definition suggests that all plaintiffs with a PTSD diagnosis under the DSM-5 should meet the ADA's definition of "disability," namely "a physical or mental impairment that substantially limits

256. See DSM-5, *supra* note 15, at 265-90.

257. Pai et al., *supra* note 255, at 2.

258. DSM-5, *supra* note 15, at 272-73.

259. *Id.* at 271. The exposure criteria are slightly different for children under the age of six. See *id.* at 272-73.

260. Isolation may be a better fit for Adjustment Disorders and will be discussed in that context below. See *infra* text accompanying notes 267-70.

261. See *supra* Parts I.A-.B.

262. See DSM-5, *supra* note 15, at 271-72.

263. *Id.* at 272.

one or more major life activities.”²⁶⁴ And indeed, the applicable regulations indicate that “it should easily be concluded that . . . post-traumatic stress disorder . . . substantially limit[s] brain function.”²⁶⁵ Nonetheless, advocates should be aware that courts deciding cases after the issuance of both the DSM-5 and the above regulations have sometimes found plaintiffs with PTSD not to qualify as having a disability for the purposes of the ADA.²⁶⁶ Regardless, such a diagnosis should not be a necessary condition for a plaintiff to qualify as an individual with a disability. People whose reactions to carceral trauma do not meet the full set of symptoms required for a PTSD diagnosis under the DSM-5, but whose symptoms otherwise do “substantially limit one or more major life activities,” should qualify as disabled even in the absence of the diagnosis.

The same is true for people whose traumatic experiences relate to solitary confinement rather than the modes of violence that can form the basis for a PTSD diagnosis, so long as the effects of the experience “substantially limit” a “major life activity.” For them, the most promising point of connection between the DSM and their experience may be the Adjustment Disorder diagnosis, which requires “an identifiable stressor(s)” rather than a traumatic event as its trigger.²⁶⁷ This criterion covers a much broader range of experiences than the trauma requirement of PTSD; the DSM explains that the stressors that cause Adjustment Disorders may be “a single event” or “multiple stressors,” and can be either “recurrent” or “continuous.”²⁶⁸ Adjustment Disorders involve “[m]arked distress that is out of proportion to the severity or intensity of the stressor” or “[s]ignificant impairment in social, occupational, or other important areas of functioning.”²⁶⁹ Because the latter criterion mirrors the requirements of the ADA and section 504, people who meet the diagnostic criteria for Adjustment Disorder because of experiences of isolation during confinement may be similarly situated to people with PTSD diagnoses in seeking to qualify as disabled. Although Adjustment Disorders definitionally last no more than six months beyond the end of the stressor, the DSM-5 also includes a possible diagnosis of “Other Specified Trauma- and Stressor-Related Disorder” for “[a]djustment-like disorders” lasting more than six months.²⁷⁰

264. See 42 U.S.C. § 12102 (2018).

265. 29 C.F.R. § 1630.2(h)(3)(iii) (2019).

266. See, e.g., *Sellers v. Deere & Co.*, 23 F. Supp. 3d 968, 985 (N.D. Iowa 2014) (“[N]ot all persons who suffer from depression, anxiety, or post-traumatic stress disorder are ‘disabled’ within the meaning of the ADA.”), *aff’d*, 791 F.3d 938 (8th Cir. 2015); *Evola v. City of Franklin*, 18 F. Supp. 3d 935, 945 (M.D. Tenn. 2014) (“Plaintiff’s proof does not address whether Plaintiff’s PTSD impairs or limits one or more of her major life activities . . .”).

267. See DSM-5, *supra* note 15, at 286.

268. *Id.* at 287.

269. *Id.* at 286.

270. *Id.* at 289.

III. Carceral Trauma Litigation with Juvenile Plaintiffs

As discussed above, this Note proposes that advocates start litigating these claims on behalf of children who experience carceral trauma during juvenile incarceration. This Part discusses the particular benefits and structural reforms that juvenile litigants may be able to access through disability law based on the consequences of their trauma. While this Part focuses on juvenile plaintiffs, the claims regarding conditions of confinement proposed in Part III.B are not limited to young people. The research presented in Part I suggests that adult carceral trauma—like childhood trauma both inside and outside of prisons—can create mental health impairments sufficient to constitute disabilities under federal law. So long as advocates can show that to be true, the conditions of confinement claims discussed here should apply equally to adult plaintiffs.

A. Education Accommodations for Juvenile Prisoners

Perhaps the most straightforward application of *Stephen C.* and *P.P.* to carceral trauma lies in claims for school accommodations either inside or outside of incarceration by people who suffer traumatic experiences during juvenile confinement. Such claims could proceed, like *P.P.* and *Stephen C.*, under Title II of the ADA and section 504 of the Rehabilitation Act. Alternatively, they could be framed as claims under the IDEA,²⁷¹ which uses a narrower definition of “disability” than those of the ADA and section 504 of the Rehabilitation Act.²⁷²

Just as proof of the claims of children seeking educational accommodations based on juvenile carceral trauma could mirror the proof offered by the *P.P.* and *Stephen C.* plaintiffs regarding complex community trauma, so could their requested remedies. The plaintiffs in those cases sought injunctive relief requiring their schools to develop trauma-sensitive policies, including the training of teachers and counselors about trauma-informed educational practices and the “implementation of restorative practices to prevent, address, and heal after conflict.”²⁷³ Juvenile plaintiffs raising claims based on carceral trauma could request similar investment in staffing, training, and policy development to help them learn and heal.²⁷⁴

271. 20 U.S.C. §§ 1400-1482 (2018).

272. Compare *supra* notes 162-63 and accompanying text (ADA and section 504), with *infra* notes 280-81 and accompanying text (IDEA).

273. See Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 186, at 63; Class Action First Amended Complaint at 78, *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098 (C.D. Cal. 2015) (No. 2:15-cv-03726), ECF No. 93 (requesting “[i]mplementation of restorative practices as described in this Complaint to prevent, address, and heal after conflict”).

274. For an expansive discussion of the potential of ADA litigation to secure educational rights for incarcerated children, see generally *Koster*, *supra* note 34.

In addition, juveniles might raise claims to a “free appropriate public education” under the IDEA.²⁷⁵ For children with disabilities, this generally includes the creation, review, and revision of an IEP to meet the child’s specific needs.²⁷⁶ Under Supreme Court precedent, the program must be “appropriately ambitious” because “every child should have the chance to meet challenging objectives.”²⁷⁷ The U.S. Department of Education has made clear that, absent a specific exception, the mandates of the IDEA apply to juvenile correctional facilities.²⁷⁸ Courts have similarly found that the education requirements of the IDEA, ADA, and section 504 apply at least to state juvenile facilities (the ADA has been held not to apply to some federal detention facilities).²⁷⁹ And importantly, these mandates would also allow children traumatized during incarceration to pursue claims for accommodations from public school districts after their release.

A “child with a disability” for the purposes of the IDEA must have one of ten defined categories of disability,²⁸⁰ most of which are unsuited to describing the effects of carceral trauma. Among the categories, the most likely candidate to be connected to trauma is “serious emotional disturbance,” defined by the regulations to include any of the following that persists “over a long period of time” and interferes with education:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.²⁸¹

The literature on the mental health effects of carceral trauma and the physiological research used by the *Stephen C.* and *P.P.* plaintiffs suggest that juveniles suffering from the traumatic effects of carceral experiences could potentially fit any of these criteria. For example, as discussed above, difficulty

275. See 20 U.S.C. § 1412(a)(1)(A).

276. *Id.* § 1412(a)(4).

277. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017).

278. U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., Dear Colleague Letter 1 (Dec. 5, 2014), <https://perma.cc/SV9B-4H8Q>.

279. See, e.g., *Hurtado v. Reno*, 34 F. Supp. 2d 1261, 1264 (D. Colo. 1999) (finding the ADA to be inapplicable to a federal immigration detention center); *Alexander S. v. Boyd*, 876 F. Supp. 773, 800-03 (D.S.C. 1995) (finding the ADA applicable to a state juvenile correctional facility).

280. See 20 U.S.C. § 1401(3)(A)(i).

281. 34 C.F.R. § 300.8(a)(4)(i) (2019).

controlling aggression is a common symptom following experiences of trauma, including carceral trauma.²⁸² Persistent struggles with regulating anger could lead to the finding that a child has a serious emotional disturbance under subsection B of the regulation.²⁸³ Furthermore, *Stephen C.* and *P.P.* have shown that children who experience trauma often come to have trouble learning, and that many develop fears and symptoms that could constitute a serious emotional disturbance under subsection E. Consider, for example, the allegation in *P.P.* that the sexual assault of one of the plaintiffs made her “terrified of traveling to and from” her school.²⁸⁴ A child assaulted during her confinement who becomes afraid to leave her cell to attend classes could state a similar claim.

Claims under the ADA, the IDEA, or section 504 all could obligate schools inside or outside of a juvenile correctional facility to make adjustments for children who have suffered carceral trauma.²⁸⁵ Although the adjustments would be different—IEPs under the IDEA, or reasonable accommodations like the “whole school trauma-sensitive practices” demand of *P.P.* under the ADA²⁸⁶—all of these claims could secure a better education for students traumatized during juvenile incarceration. A school district where many students have spent time in confinement could be required to hire trauma counselors and other mental health professionals, provide in-school group or individual therapy, or train teachers to develop classroom environments that accommodate the emotional and learning needs of children who struggle because of their trauma.²⁸⁷ This could involve, for example, training teachers to recognize the signs of trauma in their students and to understand how they are likely to act in high-stress moments, so that they can better avoid crises and respond in ways that de-escalate the situation.²⁸⁸ Alternatively, a child’s IEP could mandate that these services be directed to an individual student to address their learning needs and the specific nature of their underlying trauma. At the extreme, IDEA claims could obligate a school district to pay for a traumatized child’s placement in a private school that is more capable of accommodating their needs and providing them appropriately ambitious educational opportunities in spite of their trauma.²⁸⁹

282. See *supra* text accompanying notes 59, 103, 236.

283. See, e.g., *Hansen ex rel. J.H. v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 1026-27 (8th Cir. 2011).

284. See Class Action Complaint, *supra* note 187, ¶ 24.

285. Essentially all nonprivate schools are covered by one or more of Title II of the ADA (which applies to all “public entit[ies],” 42 U.S.C. §§ 12131(1), 12132 (2018)), section 504 of the Rehabilitation Act (which applies to all programs receiving federal funds, 29 U.S.C. § 794 (2018)), and the IDEA (which applies to all state and local educational agencies, 20 U.S.C. § 1414(a)(1)(A)).

286. See Class Action First Amended Complaint, *supra* note 273, ¶¶ 176-199.

287. See *id.* ¶ 180.

288. See *id.* ¶ 183.

289. See *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 996-97 (2017).

The possible claims could extend even more broadly than those discussed here. It may be the case that every child who has experienced juvenile incarceration should be presumptively entitled to the “expansive” early and periodic screening, diagnostic, and treatment services provision of the Medicaid Act, which requires states to provide “all of the twenty-eight types of care and services included as part of the definition of medical assistance in the Act” to Medicaid-eligible children who need them to achieve the “maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level.”²⁹⁰ This may involve, for example, “intensive care coordination” by a team of family members and service providers, “individualized therapeutic interventions provided on a frequent and consistent basis,” and “mobile, onsite, in-person response, available at any time or place to a child experiencing a crisis.”²⁹¹ The scope of possibilities is “wide-ranging.”²⁹²

B. Reforming Conditions of Juvenile Confinement

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”²⁹³ In *Pennsylvania Department of Corrections v. Yeskey*, a unanimous Supreme Court held that “Title II of the ADA unambiguously extends to state prison inmates.”²⁹⁴ The regulations implementing Title II include a “reasonable modifications” mandate, under which public entities must “make reasonable modifications . . . to avoid discrimination on the basis of disability, unless . . . making the modifications would fundamentally alter the nature of the service, program, or activity.”²⁹⁵ At minimum, the Court has held this requirement to apply to “recreational activities, medical services, and educational and vocational programs.”²⁹⁶ As one district court has explained, the obligations of prisons and jails under the ADA apply to “most everything provided to inmates,” which includes “sleeping, eating, showering, toileting, communicating with those outside the jail by mail and telephone, exercising,

290. *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 25-26 (D. Mass. 2006) (emphasis omitted) (quoting 42 U.S.C. § 1396d(a)(13)).

291. *See M.J. v. District of Columbia*, 401 F. Supp. 3d 1, 6 (D.D.C. 2019) (quoting Class Action Complaint for Injunctive and Declaratory Relief ¶ 39, *M.J.*, 401 F. Supp. 3d 1 (No. 1:18-cv-01901), ECF No. 3).

292. *Id.* at 14.

293. 42 U.S.C. § 12132 (2018).

294. 524 U.S. 206, 213 (1998).

295. 28 C.F.R. § 35.130(b)(7)(i) (2019); *see also* *Olmstead v. L.C.*, 527 U.S. 581, 592 (1999) (quoting 28 C.F.R. § 35.130(b)(7) (1998)).

296. *Yeskey*, 524 U.S. at 210 (internal quotation marks omitted).

entertainment, safety and security, the jail's administrative, disciplinary, and classification proceedings, medical, mental health and dental services, the library, educational, vocational, substance abuse and anger management classes and discharge services.”²⁹⁷

Under this broad mandate, prisons have been required to provide housing that adequately accommodates a disability—for example, by allowing inmates to remain in handicapped-accessible cells or having chairs installed to accommodate a joint disease.²⁹⁸ Additionally, housing an inmate in a placement that creates an “unnecessary and unwarranted risk of personal injury and does so for the sole reason of [their] disability” violates Title II.²⁹⁹ As to medical services, the Supreme Court recognized in *United States v. Georgia* that denial of accommodations in medical care can constitute a Title II violation.³⁰⁰ And ADA claims alleging inadequate medical care have forced significant changes to the operation of prison health systems.³⁰¹ For sufferers of carceral trauma, this suggests that some accommodations in both housing and health care may be obtainable, including mental health care.³⁰² For instance, a prison might be obligated to provide special counseling or psychiatry services to victims of trauma. Housing an individual without a cellmate may be a viable accommodation for carceral trauma connected to an experience of violence or sexual assault by a fellow inmate.

One theoretically promising approach to challenging conditions of confinement through the ADA and other disability laws may be to break apart individual elements of a general security or housing protocol and challenge whether those specific policies are necessary for safety or for other genuine penological interests.³⁰³ This approach could be applied to claims framed around carceral trauma as well. For example, the security conditions that accompany solitary confinement may bar inmates from accessing certain time credits,

297. *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 935-36 (N.D. Cal. 2015). The *Hernandez* court found the ADA's coverage to extend to the actions of a private health care provider contracting with the county's jail system. *See id.* at 936, 954 n.187.

298. *See Purcell v. Pa. Dep't of Corr.*, No. 2:95-cv-06720, 1998 WL 10236, at *9 (E.D. Pa. Jan. 9, 1998).

299. *See Carty v. Farrelly*, 957 F. Supp. 727, 741 (D.V.I. 1997).

300. *See* 546 U.S. 151, 157 (2006).

301. *See, e.g., Plata v. Schwarzenegger*, 603 F.3d 1088, 1090 (9th Cir. 2010) (upholding the power of the district court to impose a receivership on the California Department of Corrections and Rehabilitation to remedy constitutional deficiencies in medical care).

302. *Cf. Hughes v. Colo. Dep't of Corr.*, 594 F. Supp. 2d 1226, 1241-42 (D. Colo. 2009) (finding that an allegation that prisoner was intentionally denied mental health care was sufficient to state a Title II claim).

303. *See Glidden & Rovner, supra* note 34, at 69-70 (describing the use of this strategy in a case challenging conditions of solitary confinement).

educational programming, or opportunities to contact family and friends.³⁰⁴ People placed in solitary confinement because of a mental illness or other disability have challenged the validity of such policies as discriminatory, arguing that they deny people with disabilities access to these services.³⁰⁵ Seeing solitary confinement as traumatic and generative of disabilities raises the possibility of challenging the application of these policies to all prisoners in solitary confinement, not just those who entered isolation with underlying mental health needs.³⁰⁶

Given the research on the particular risks and harms of retraumatization, another potential remedy for people who experience trauma during solitary confinement would be to enjoin the prison from subsequently housing the traumatized inmate in isolation. Courts have at times required prisons to exclude people with serious mental illnesses from solitary confinement because of the risk of psychological harm.³⁰⁷ If prisons may already be required to accommodate some inmates who have mental health disabilities in this way, it follows that they could also be required to do so for people who have developed such disabilities as a result of segregation-based carceral trauma.

Recent successes in litigation demanding services for incarcerated juveniles with disabilities and seeking to prevent them from being placed into solitary confinement are hopeful signs for such claims.³⁰⁸ In *Wilburn ex rel. Z.W. v. Nelson*, for example, the court certified a class of all detainees subjected to solitary confinement at a juvenile detention facility, as well as subclasses of children with disabilities as defined by the ADA and IDEA.³⁰⁹ The named plaintiff, a child with a “serious emotional disability,” alleged that he had gone through “extended periods of solitary confinement,” during which he was “going crazy in his room”

304. *See id.*

305. *See, e.g., id.*

306. *Cf. Parsons v. Ryan*, 289 F.R.D. 513, 519-20 (D. Ariz. 2013) (noting expert testimony that the risk of harm to “even previously healthy individuals” in solitary confinement may require “careful mental health monitoring policies” for everyone held in isolation units (citing Declaration of Craig Haney, Ph.D., J.D., exhibit E ¶ 59, *Parsons*, 289 F.R.D. 513 (No. 2:12-cv-00601), ECF No. 240)). Arguments that most inmates in solitary may qualify as disabled also have far-reaching potential to roll back the use of isolation through the ADA’s broad prohibition on segregation of people with disabilities. *See Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). Arguments that most inmates *in general* may qualify as disabled could reach farther still.

307. *See Madrid v. Gomez*, 889 F. Supp. 1146, 1266 (N.D. Cal. 1995).

308. *See, e.g., Wilburn ex rel. Z.W. v. Nelson*, 329 F.R.D. 190, 193 (N.D. Ind. 2018) (certifying a class of juvenile plaintiffs facing solitary confinement); *A.T. v. Harder*, 298 F. Supp. 3d 391, 404-05, 411, 418 (N.D.N.Y. 2018) (certifying a similar class and preliminarily enjoining the use of isolation); *V.W. v. Conway*, 236 F. Supp. 3d 554, 564-65, 590 (N.D.N.Y. 2017) (same).

309. *Wilburn*, 329 F.R.D. at 193, 199.

and was “depressed and stressed.”³¹⁰ The suit challenged the “policy and practice of placing juvenile detainees in solitary confinement” and the denial of services and benefits mandated by the IDEA and the ADA for children with disabilities who are placed in solitary confinement.³¹¹

Although the disability of the named plaintiff in *Wilburn* predated his juvenile incarceration, nothing in the pleadings or the court’s decision suggests that the claims would be inapplicable to children who developed a serious emotional disability as a result of trauma experienced during their confinement. Indeed, disability law claims have occasionally been raised by plaintiffs who developed mental health disabilities during confinement,³¹² although not by discussing carceral trauma as the source of the plaintiffs’ disabilities and not yet by juvenile plaintiffs. Juvenile detainees raising such claims, like the children in *Wilburn*, could demand that their facilities stop placing them in isolation. Alternatively, by arguing that many or all incarcerated children have presumptively experienced trauma based on research like that presented in this Note, plaintiffs could demand that their facilities stop using isolation altogether. Because isolation is traumatic for adults as well as juveniles,³¹³ such litigation could readily extend to adult plaintiffs after establishing precedent in the juvenile context.

Plaintiffs raising class action disability law claims to address conditions of confinement have sometimes struggled at the critical step of class certification.³¹⁴ Meeting the commonality requirement of Federal Rule of Civil Procedure 23(a)(2)—under which plaintiffs must show the existence of “questions of law or fact common to the class”³¹⁵—has proven especially difficult since the Supreme Court’s 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.³¹⁶ Because the disability-related needs of individual plaintiffs are likely to vary, courts have sometimes

310. *Id.* at 194 (first quoting Answer and Affirmative Defenses ¶ 1, *Wilburn*, 329 F.R.D. 190 (No. 3:17-cv-00331), ECF No. 4; and then quoting Plaintiffs’ Brief Supporting Motion for Class Certification at 5, *Wilburn*, 329 F.R.D. 190 (No. 3:17-cv-00331), ECF No. 14).

311. *See id.* at 196, 199.

312. *See, e.g.*, *R.B. v. Hollibaugh*, No. 1:16-cv-01075, 2017 WL 663735, at *1, *14-15, *14 n.6 (M.D. Pa. Feb. 1, 2017) (allowing ADA and section 504 claims for denial of services to an adult inmate who “developed a mental disability during his incarceration”). The legal analysis of the court in *R.B.* was unaffected by the timing or circumstances of the onset of the plaintiff’s disability, *see id.* at *14-15, illustrating how claims by plaintiffs who have experienced carceral trauma could proceed just as they would if the plaintiff had antecedent mental health needs or a disability unrelated to trauma.

313. *See supra* Part I.C.

314. *See, e.g.*, *Hacker v. Dart*, No. 1:17-cv-04282, 2019 WL 1239706, at *6-7 (N.D. Ill. Mar. 18, 2019) (denying certification to a putative class of hearing-impaired inmates).

315. FED. R. CIV. P. 23(a)(2).

316. 564 U.S. 338 (2011); *see* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 792-93 (2016).

found that class members' injuries and remedies are too disparate to satisfy commonality.³¹⁷ One inmate may need more reliable delivery of psychiatric medication, while another may suffer from lack of access to prison programs because of security restrictions imposed in response to disability-related behaviors. A significant benefit of basing disability law claims on allegations of endemic trauma is that these allegations highlight the connections between the differing needs of class members to help satisfy the standards of Rule 23(a)(2). Different plaintiffs traumatized by sexual violence may need different accommodations in the aftermath, but their claims nonetheless raise common questions—for example, whether sexual victimization can cause children to develop mental health impairments that qualify as disabilities.³¹⁸

In addition to the immediate effects that claims based in carceral trauma may have on the conditions of confinement, the modifications required by these claims could help shift the cost-benefit analysis of carceral administration. Mismanagement and overcrowded institutions lead to violent prison environments and thereby increase the prevalence of trauma.³¹⁹ Requiring prison administrators to allocate resources to respond to the aftermath of this trauma would make it more expensive to fail to fix egregious conditions. And at the systemic level, creating long-term obligations for the state to provide incarcerated and formerly incarcerated people the accommodations guaranteed by disability law would increase the cost of maintaining an unnecessarily vast prison system.³²⁰

Conclusion

Extensive bodies of research indicate that certain experiences that occur frequently during incarceration can produce traumatic effects. This Note proposes that we see these experiences as traumatizing and—as with other traumas—that we assess their lasting impacts as a form of disability. This Note seeks to begin a dialogue about the kinds of claims that may be raised by considering carceral trauma through the lens of disability law.

317. See, e.g., *Hacker*, 2019 WL 1239706, at *6 (“[N]ot every deaf or hearing-impaired inmate needs the same accommodations, and not every accommodation is reasonable as to each inmate.”).

318. A question advocates can answer affirmatively using the research discussed in Part I.A.

319. See U.S. DEP’T OF JUSTICE, INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN 1-2 (2019) (finding that violence and sexual abuse are “exacerbated by serious deficiencies in staffing and supervision,” overcrowding, and other institutional management problems), <https://perma.cc/X5TD-UGZ8>.

320. Recent scholarship has argued that the social cost of incarceration is substantially higher than direct state expenditures. See Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 90-93 (2019).

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The potential breadth of these claims is dramatic. Nearly 2.3 million people are currently incarcerated in the United States, including 63,000 children.³²¹ The research presented here suggests that this system of mass incarceration traumatizes entire generations and communities, making them eligible for the robust benefits of federal disability laws. While this Note proposes that children should be the first plaintiffs for these claims, such litigation is a foot in the door; adults can follow. Ultimately, recognizing that traumatic experiences during both juvenile and adult incarceration can give rise to claims in disability law could affect the conditions of confinement and postrelease outcomes of an extraordinary number of incarcerated and formerly incarcerated people.

321. See Sawyer & Wagner, *supra* note 254.