

Introduction to the Symposium – Decarcerating Disability, Criminal Justice and Law: New Writing on Disability, Abolition and the Limits of Rights

Liat Ben-Moshe* and Linda Steele**

Abstract

Liat Ben-Moshe and Linda Steele introduce a Symposium on their 2020 publications *Decarcerating Disability: Deinstitutionalization and Prison Abolition* (Ben-Moshe) and *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Steele). Ben-Moshe and Steele introduce their own books and then identify connections between the books. They situate their discussion in the anti-carceral activism that emerged during 2020 and in longer term activist and scholarly work on deinstitutionalisation, prison abolition and rights in the criminal justice system.

Introduction

This Symposium came out of happenstance in pandemic time. Both our books came out during May 2020, in the early COVID-19 pandemic at a time of global lockdowns, into the void and much uncertainty. 2020 was also a year that saw the largest anti-racism mass mobilisations in the USA, when many people got ‘woke’ to the possibility and indeed necessity of a non-carceral world. As both our books show, many of these visions of a new world, which draw on longer term activist and scholarly work on prison abolition and rights in the criminal justice system, do not necessarily place disability/madness at their core.

* Associate Professor and Graduate Director, Criminology, Law and Justice, University of Illinois at Chicago, USA. Email lbenmosh@uic.edu

** Associate Professor, Faculty of Law, University of Technology Sydney, Australia. Email linda.steele@uts.edu.au

Indeed, the suggested alternatives to carcerality central to these visions could have the unintended and perverse consequence of expanding ableism and sanism and further entrenching incarceration of and state violence against disabled people. Thus, these visions of a new world could negatively impact those most marginalised and affected by state violence, notably disabled, Indigenous, people of colour and particularly people with intellectual and psychiatric disabilities. For example, proposals to defund the police and direct funding into social welfare and health could inadvertently enhance the coercive powers of mental health practitioners and social workers, and proposals to close prisons could leave intact other enclosed settings where disabled people are detained, such as forensic mental health centres, psychiatric facilities, group homes, nursing homes and residential facilities. These are the exact forces we discuss in our respective books and the pendulum swings between reform and abolition they produce.

The pandemic has also brought new relationalities and international solidarities. From our homes in the traditional unceded homelands of the Council of the Three Fires: the Ojibwe, Odawa, and Potawatomi Nations on Turtle Island (aka Chicago, USA where Liat Ben-Moshe resides) and the unceded lands of the Wadi Wadi People of Dharawal Country in the Illawarra region of New South Wales, Australia (where Linda Steele resides), we were fortunate to be on virtual calls and discussions of our work in Australia, Europe, USA and Canada (sometimes in the same day!), that were not possible beforehand. This symposium gathers some of these conversations from interlocutors engaged with, and sources of inspiration for, our work, especially from the field of law and society (broadly defined). We hope you read this as both an extended 'Author Meets Readers in Law and Society' and also as an intervention into a much-needed discussion about decarceration, disability, abolition and social justice, one in which law is both a potential tool of change and source of violence and harm. We also hope that the brief and open access format of the symposium will lend itself to use in teaching and teach-ins.

This symposium also provides a conversation to guide our continued work, with contributors connecting our books to significant events and political developments that have unfolded since we finished writing them in 2019. Since the spread of COVID-19 and governments' lack or lagging response to it, there is renewed engagement with the issue of

deinstitutionalisation in the context of the range of carceral spaces in which disabled people are confined, including large residential centres, nursing homes and group homes.¹ At the same time, in USA and Australia and in other locales globally, there is increased public and media attention to state violence associated with policing and calls to defund police and utilise alternatives to criminal justice systems for regulating the public and responding to harms. In Australia, much of this work has been led by First Nations women, thus centering the intersections of decarceration and decolonisation.² In the USA, these frameworks owe much to black feminist liberation struggles and analysis.³

As a result, calls for accountability and repair in response to injustices against disabled people are beginning to emerge more vocally. In USA, the Massachusetts legislature in 2022 has funded a commission on the history of state institutions for people with developmental and mental health disabilities.⁴ The Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability which was established in April 2019 is tasked with recommending how to prevent and respond to violence, abuse, neglect and exploitation of people with disability, and build a more inclusive society.⁵ The Royal Commission has noted in its Interim Report that it will further explore redress,⁶ and activists and scholars who have been advocating for redress eagerly await the Royal Commission's final report in September 2023. At an international level, the United Nations Committee on

¹ In the USA, see Jasmine Harris, 'Disability Law on the Frontlines' (2020) 106 *Cornell Law Review Online*. See also Jess Whatcott and Liat Ben-Moshe, 'Abolishing the Broom Closets in Omelas: Feminist Disability Analysis of Crisis and Precarity' (2021) 33(3) *Feminist Formations* 1. In Australia, see Claire Spivakovsky and Linda Steele, 'Disability Law in a Pandemic: The Temporal Folds of Medico-Legal Violence' (2022) 35(2) *Social and Legal Studies* 175.

² See, e.g., Paul Gregoire, 'Questionable Jurisdiction: Academic Amanda Porter on Policing First Nations', *Sydney Criminal Lawyers* (28 May 2021) <https://www.sydneycriminallawyers.com.au/blog/questionable-jurisdiction-academic-amanda-porter-on-policing-first-nations/>; Tabitha Lean, 'Why I am an Abolitionist', *Overland* (8 June 2021) <https://overland.org.au/2021/06/why-i-am-an-abolitionist/>.

³ Mariame Kaba, *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* (Haymarket Books, 2021); Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press, 2011); Angela Y Davis, Gina Dent, Erica R Meiners, and Beth E Richie, *Abolition. Feminism. Now* (Haymarket Books, 2022).

⁴ 'Special commission on state institutions', *FY 2023 Budget Summary* <https://budget.digital.mass.gov/summary/fy23/outside-section/section-144-special-commission-on-state-institutions>. For background context, see Asia London Palomba, 'The Quest to Honor Disabled Patients Buried in Anonymous Graves', *Atlas Obscura* (1 July 2021) <https://www.atlasobscura.com/articles/metfern-cemetery>.

⁵ Terms of Reference, Commonwealth Letters Patent, 4 April 2019, <https://disability.royalcommission.gov.au/publications/commonwealth-letters-patent>.

⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disabilities, *Interim Report* (October 2020) 258 <https://disability.royalcommission.gov.au/system/files/2020-10/Interim%20Report.pdf>.

the Rights of Persons with Disabilities (CRPD Committee) recently published guidelines on deinstitutionalisation, to assist States parties to the Convention on the Rights of Persons with Disabilities in realising the right in Article 19 of the Convention to live independently and be included in the community.⁷ The Guidelines continue the necessarily provocative work of the CRPD Committee in challenging the ongoing pervasiveness of institutionalisation and segregation, and add a new dimension in providing a detailed overview of the right to remedy and reparations for institutionalisation.

These developments over the past few years underscore the critical possibilities of our books to contribute to new ways of understanding and strategising relationships between disability, abolition, and deinstitutionalisation as decarceration; as much as they also necessarily prompt us to continue to push our thinking as new challenges emerge to these frameworks. We are grateful to the interlocutors in this symposium for forging some of these connections between our books, and the work yet to be done.

We are grateful to *feminists@law* for providing a forum for this symposium. Although both books are Foucauldian (critique narratives of progress, utilise a genealogical analysis and provide an analysis of biopolitics and disciplinary power), feminist theory and activism are central to our analysis of power and our broader abolitionist vision. While the feminist threads of the books are explored in greater detail by some of the contributors in the symposium (e.g. Dinesh Wadiwel and Deb Parkes), here we introduce three dimensions of our feminist engagement. We then situate each book and its aims, briefly connect the books with our broader research, and finally introduce the contributors.

Feminist inspirations

Both books are indebted to feminist of color analysis (especially Indigenous and black). In *Decarcerating Disability*, Ben-Moshe constructs a crip/mad of color analysis of decarceration and abolition. Abolition as a term, demand and practice, has a lineage connecting it from transatlantic slavery to present-day imprisonment. It is rooted in black history and liberation movements. As feminist abolitionists like Beth Richie, Angela Davis, Gina Dent, Erica

⁷ Committee on the Rights of Persons with Disabilities, *Guidelines on Deinstitutionalization, Including in Emergencies*, UN Doc CRPD/C/5 (10 October 2022).

Meiners⁸ and others point out, a feminist and queer analysis of what has come to be called the prison-industrial complex can shed light not only on those incarcerated who identify as women or gender nonconforming but on the entire rationale of segregation, punishment and incarceration.⁹ Crip/mad of color critique is about centering the experiences of disablement, sanism and ableism in criminal, racial and social justice movements. It is a critique of power, centering the knowledge of those who resist the entanglements of the therapeutic carceral state. Building on Cathy Cohen's provocation, it is a call to coalitional praxis.¹⁰

Turning to *Disability, Criminal Justice and Law*, Steele engages with the work of feminist critical race scholar Sherene Razack in two respects. First, she draws on Razack's work on the pathologisation of First Nations people through illness and disability. Razack argues in the context of coronial inquiries into First Nations deaths in custody that pathologisation enables narratives of inevitable decline and death that justify state violence and irresponsibility.¹¹ Steele applies this argument to the way in which the disability legal framing of criminalised disabled people through court diversion enables state violence in the form of coercive interventions through disability and mental health services. Second, Steele draws on Razack's work on anti-colonial pedagogies¹² to propose the need for critical disability legal pedagogies as one strategy to dismantle the role of the legal profession in criminalised disabled people's carceral control and debilitation.

Second, both books engage with feminist disability scholarship, particularly its analytical tools on intersectional dynamics of violence and oppression. For Ben-Moshe, it is important to enact crip/mad of color critique as methodology but also epistemology – a critique of power that comes from those in proximity to pathologisation, negative racialisation and criminalisation and have a politics of depathologisation (mad, crips, disabled and those who

⁸ Davis et al., above n 3.

⁹ Davis, above n 3.

¹⁰ Cathy J Cohen, 'Death and Rebirth of a Movement: Queering Critical Ethnic Studies' (2011) 37(4) *Social Justice* 126.

¹¹ Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (University of Toronto Press, 2015).

¹² Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (University of Toronto Press, 1998).

do not identify as such or are not politicised as such, partially because of forces of ableist repression and state abandonment (maiming, infrastructural implosion, selective and by design), or because of lack of a desire for identification or even dis-identification). As such she builds on the work of feminist disability scholars and mad studies more broadly, through their adjacent disability and mad cultures. Steele also draws on the work of feminist disability scholars, especially Alison Kafer and Eunjung Kim, on the intersections of temporality, gender, disability and violence. By reference to their work, Steele problematises the inevitability in court diversion of coercive intervention in the bodies and lives of disabled people.¹³

Third, both books contribute disability-centred perspectives to feminist debates – also often engaged with Foucauldian theory – about engaging with law reform and its dangers. In *Disability, Criminal Justice and Law*, Steele’s analysis of court diversion highlights three dimensions of feminist debates. First, Steele’s critique of the limits of law in unseating ableist hierarchies and social realities that shape particular disability-specific laws (such as court diversion) *and* of foundational legal concepts at the core of jurisdiction, legal personhood and sovereignty, provides a disability example of Carol Smart’s critique of the reproduction (rather than abolition) of women’s oppression through legal reform.¹⁴ Second, Steele’s critique of the construction of the ‘problem’ of criminalised disabled people in the criminal justice system as one of ‘overrepresentation’ (which implicitly assumes a certain equal representation in the criminal justice system is ever possible, thus erasing the hierarchies and violence on which criminal law and the criminal justice system rests) speaks to the critique advanced by Reg Graycar and Jenny Morgan that the emancipatory possibilities of legal reform for women are undermined by the narrow scope and terms of reference of law reform inquiries which are themselves informed by oppressive and exclusionary approaches to women.¹⁵ Third, Steele’s critique of the role of psychological and psychiatric experts, rather than disabled people themselves, in controlling the ‘truth’ of

¹³ Alison Kafer, *Feminist, Queer, Crip* (Indiana University Press, 2013); Eunjung Kim, *Curative Violence: Rehabilitating Disability, Gender, and Sexuality in Modern Korea* (Duke University Press, 2016).

¹⁴ Carol Smart, *Feminism and the Power of Law* (Routledge, 1989).

¹⁵ Reg Graycar and Jenny Morgan, ‘Law Reform: What’s in It for Women?’ (2005) 23(2) *Windsor Yearbook of Access to Justice* 393.

disabled people's existence – a truth which also constructs disabled people as irrational, incapable and dangerous – provides a contemporary, disability example of the argument advanced by Maria Drakopoulou in the context of eighteenth and nineteenth century women that legal reform takes place within the frame of a particular *episteme* that authorises certain ways of knowing and sources of knowledge.¹⁶ Steele's analysis highlights the impossibility of disabled people having a politically authorised role in legal reform and in turn the risk that legal reform can enable epistemic and ontological violence. Indeed, these three concerns with legal reform are so significant that in the penultimate chapter of *Disability, Criminal Justice and Law* Steele offers a range of strategies that 'de-centre' law, explicitly framed as alternatives to or contestations of legal reform.

As Ben-Moshe shows regarding the concept of carceral ableism and sanism, feminist scholar-activists such as Dean Spade,¹⁷ Beth Richie,¹⁸ Andrea Ritchie¹⁹ and others show that liberal approaches (legal protection, rights) to end or reduce state violence and organised abandonment (Gilmore's term²⁰) often results in demands to expand existing legal frameworks to accommodate marginalised populations rather than changing the status quo. This expansion is what abolitionists often term as reform measures, which increase the scope of harm (in this case, of incarceration as state violence in the lives of people with disabilities). For example, recent critiques of solitary confinement call for screening for mental health issues and the release of those with such issues from these types of confinement. But calling for certain populations to be released from jails and prisons often sends them to be reincarcerated in other institutions or by other means, including by forced drugging or by indefinite detention in detention centres, psychiatric hospitals or psych forensic units. It also legitimates the incarceration of all others who are not screened out, instead of abolishing the practice altogether.

¹⁶ Maria Drakopoulou, 'Feminism and the Siren Call of Law' (2007) 18 *Law Critique* 331.

¹⁷ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press, 2015).

¹⁸ Beth E Richie *Arrested Justice: Black Women, Violence, and America's Prison Nation* (New York University Press, 2012).

¹⁹ Joey L Mogul, Andrea J Ritchie, and Kay Whitlock. *Queer (In) Justice: The Criminalization of LGBT People in the United States* (Beacon Press, 2011).

²⁰ Ruth Gilmore Wilson, *Change Everything: Racial Capitalism and the Case for Abolition* (Haymarket Books, 2021).

Liat Ben-Moshe on Decarcerating Disability

The book is a project of activating a history of struggles and connecting movements and logics that have been intersecting but not visibly so: prison abolition, anti-psychiatry and deinstitutionalisation in the field of intellectual and developmental disabilities (I/DD).

In my larger body of work, I analyse incarceration as something that happens in various carceral enclosures and through various carceral logics that are intimately connected to disability/madness (such as nursing homes, psych facilities, group homes, prisons, asylums, etc.).²¹ In addition, sites of confinement (even if not disability specific) like immigration detention and prisons are sites of debilitation and disablement. We need to understand the connection between sites of incarceration, not through analogies or oppression Olympics. If the network of incarceration is connected, then the means for liberation must connect as well. This is what led me to link deinstitutionalisation and disability justice to prison abolition.

To those who claim that prison abolition and massive decarceration are utopian and could never happen, this book shows that they've happened already, although in a different arena, in the form of mass closures of disability residential institutions and psychiatric hospitals and the deinstitutionalisation of those who resided in them. I suggest that it is essential to interrogate deinstitutionalisation as a social movement, a mind-set, a logic to counter carceral logics. I argue that deinstitutionalisation is not just something that 'happened' but was a call for an ideological shift in the way we react to difference among us.

This interpretation showcases the gains that deinstitutionalisation made in the ways we treat disability and madness. I mean treatment both in terms of impetus to therapeutically 'treat' disability, but also in terms of social and cultural treatment, a shift in perspective towards disability rights, inclusion and perhaps justice. By viewing deinstitutionalisation in this way, this book brings to the forefront the critiques that disability/madness conjures up regarding rehabilitation, medicalisation and community. The book also offers critiques of

²¹ Liat Ben-Moshe, Chris Chapman and Allison C Carey (eds), *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (Palgrave Macmillan, 2014).

deinstitutionalisation and the ways it fortifies a narrow liberal approach to liberation through the framework of inclusion in specific able-racial-gendered capitalist formations.

But instead of learning from the lessons of deinstitutionalisation for abolition and understanding it as the largest (legal) decarceration shift in USA history, it is repeatedly (wrongly and dangerously) blamed for the rise of mass incarceration in the USA. It is often implied that the main reason that people with psychiatric disabilities ended up in prisons and jails is because of the closure of psychiatric hospitals from the early 1960s. Such claims amplify critiques that condemn the deinstitutionalisation movement as irresponsible and 'leaving people in the streets' and calls to 'bring back the asylum'. But as I show, deinstitutionalisation didn't lead to homelessness and increased incarceration; racism and neoliberalism did, via privatisation, budget cuts in all service/welfare sectors and little to no funding for affordable and accessible housing and social services while the budgets for corrections, policing and punishment (of mostly poor people of colour) ballooned.

Deinstitutionalisation led to shrinking psych facilities at the same moment that tough-on-crime policing began to take hold. But this had less to do with deinstitutionalisation and more to do with shifts in ideology, political economy²² and state capacities and priorities.²³ This 'tough on crime' and new policing strategies (like broken windows) that emerged at that time were of course race motivated and added to what I call race-ability, the embeddedness of racial tropes in constructing ability and disability: criminalisation entails the construction of both race (especially blackness) and disability (especially mental difference) as dangerous.

I show in the book how the discourse of respectability connects resistance to racial desegregation in the 1950s (and the creation of segregated neighborhoods to this day) and NIMBY (Not in My Backyard) practices against the construction of group homes. To understand this phenomenon, I utilise the neologism Dis Inc: I am using the word

²² Jean Stewart and Marta Russell, 'Disablement, Prison, and Historical Segregation' (2001) 53(3) *Monthly Review* 61; Marta Russell, *Beyond Ramps: Disability at the End of the Social Contract: A Warning from an Uppity Crip* (Common Courage Press, 1998).

²³ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (University of California Press, 2007).

'incorporated' to signal both the cultural and social incorporation of minority difference²⁴ into the status quo; and incorporation as a structure of political economic profit making (raking in profits from incarceration and disposability under capitalism through group homes, halfway houses, prisons). I also discuss the drawbacks of inclusion, the other side of Dis Inc – the incorporation of disability or 'the disabled' as a legitimate citizen, while erasing its uniqueness and difference. In other words, disability and people with disabilities should be welcome into the community, as long as they don't act or look transgressive, by race, class, sexuality, disability and more.

Therefore, one aim of this book is to construct and activate a genealogy of the largest decarceration movement in USA history: deinstitutionalisation. By connecting deinstitutionalisation with prison abolition, I also elucidate some of the limitations of disability rights and inclusion discourses and of tactics like litigation. One of my hopes is that such discussion grounds us more in understanding institutionalisation and housing segregation (for example) as state violence, a framework that has not anchored much scholarship and activism in disability fields. In so doing, I hope that we can build coalitions between queer, racial justice and disability justice organising. I elucidate this need by highlighting what I call crip/mad of color critique.

As discussed at the beginning of this Introduction, crip/mad of color critique builds on analysis offered by Cathy Cohen,²⁵ Dean Spade²⁶ and others who urge us to frame issues of criminalisation and incarceration through what Rod Ferguson²⁷ described as a queer of color critique. Such critique questions traditional white liberal approaches to these problems (such as calls requiring more legislation, incorporation within the system, etc.) and instead urges us to understand them through an intersectional lens that has a broader analysis of oppression and what liberation might be. Following such a framework, I demonstrate what

²⁴ Grace Kyungwon Hong and Roderick A Ferguson (eds), *Strange Affinities: The Gender and Sexual Politics of Comparative Racialization* (Duke University Press, 2011).

²⁵ Cathy J Cohen, 'Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?' (1997) 3(4) *GLQ: A Journal of Lesbian and Gay Studies* 437; C Cohen, 'Death and Rebirth of a Movement: Queering Critical Ethnic Studies' (2011) 37(4) *Social Justice* 126.

²⁶ Spade, above n 17.

²⁷ Roderick A Ferguson, *Aberrations in Black: Toward a Queer of Color Critique* (University of Minnesota Press, 2004).

crip/mad of color critique of incarceration adds. As Jina Kim suggests, 'As methodology, a crip-of-color critique examines how the language of disability undergirds the ongoing erosion of public resources alongside other forms of state-sanctioned violence.'²⁸ Such 'Crippling', as McRuer²⁹ suggests, is an analytical frame and does not necessitate looking for diagnostic evidence of disability. In other words, the analysis offered in this book about deinstitutionalisation and/as abolition, is not just about those who identify or are politicised as disabled people of color who are caught up in carceral systems (although it's important to recognise the high numbers of disabled people, especially those of color, in punitive, carceral and policing regimes). It's about centering carceral sanism and ableism and highlighting the entanglements of the therapeutic and carceral state. Through it, madness/disability broadens our conceptualisation of incarceration as something that happens not only through criminal justice pathways – but also in psych facilities, through chemicals, treatment orders, nursing homes and outside them. As such, it points to the need to connect disability/mad studies and knowledges to critical prison studies and abolition scholarship and knowledge.

The first part of the book conceptualises decarceration. I begin with a two-part genealogy (origin story, birth narrative, history of ideas) of deinstitutionalisation (chapters 1 and 2). Chapter 3 conceptualises what carceral abolition is. I posit that abolition is an epistemology and an ethical demand towards a non-carceral future.

The second part of the book focuses on resistance to decarceration. My case studies are: debunking the thesis that prisons became the new asylums; resistance to community living (housing desegregation) through the lens of race-ability; and the resistance to and fight for closure of institutions and prisons from the triad of parents of those institutionalised and incarcerated, unions and employees of these facilities, through the lens of labour and feminist care.

²⁸ Jina B Kim, 'Crippling the Welfare Queen: The Radical Potential of Disability Politics' (2021) 39(3) *Social Text* 79.

²⁹ Robert McRuer, *Crip Theory: Cultural Signs of Queerness and Disability* (NYU Press, 2006).

I end with the vexed relation between abolition and decarceration. I analyse the complex role legal efforts, especially class action (institutional reform) litigation, played in the closure of carceral enclosures (prisons and disability institutions). I show that the focus on deplorable conditions may have assisted in shaping the public's view as to the abuses taking place. It also politicised those incarcerated and institutionalised and their allies in important ways and brought on real changes (such as feminist struggles for more visitation, religious rights, health care, etc.). But it did not lead to abolishing these spaces of confinement or target their legitimacy, only their exceptionality. Instead, litigation led to calls to reform these facilities, which often aided in their expansion or entrenchment.

I conclude the book with a discussion of current 'alternatives' that expand the carceral state through carceral ableism and sanism: the praxis and belief that people with disabilities need special or extra protections, in ways that often expand and legitimate their further marginalisation and incarceration.

Connections to Steele's work

I became aware and intrigued by Steele's work through reading her previous articles.³⁰ I often teach her piece 'Disabling Forensic Mental Health Detention' in my criminology disability courses, as a way to introduce students to critical socio-legal scholarship that takes disability not just as core of analysis, but shows how disability is constructed by and through the law.

Her book (*Disability, Criminal Justice and Law*) is remarkable as a socio-legal analysis not (just) of disability law and rights but of the role law plays in *creating* disability. Steele shows how, through specialised courts and regulations, the law constructs disability, it *disables*. It also criminalises, or constructs disability as an (a special) object of legal intervention, what Steele terms here and elsewhere as 'disability-specific lawful violence'. The law is a mechanism of debilitation.

³⁰ Especially Linda Steele, 'Troubling Law's Indefinite Detention: Disability, the Carceral Body and Institutional Injustice' (2021) 30(1) *Social & Legal Studies* 80; Linda Steele, 'Disabling Forensic Mental Health Detention: The Carcerality of the Disabled Body' (2016) 19(3) *Punishment & Society* 327.

Specialised legal treatment of disability is masked in benevolence, the appearance or assumption that court diversion (what might be, wrongly, called ‘alternatives to imprisonment’) is a service to benefit disabled and mad people, one not rooted in racism, colonialism and coercion. But as she shows (in the context of various Anglo contexts like Canada, Australia and the UK), court diversion captures disabled/mad people who otherwise might not even be under criminal justice supervision.

Court diversion is not an alternative to incarceration or a therapeutic antidote to criminalisation; it is another building block of what others call the PIC (Prison-industrial complex) or the institutional-archipelago; it maintains the logic and function of disability incarceration.

Her argument belies conventional analysis and disability advocacy, which often decries the *lack* of access to resources that criminalised disabled people face. Steele shows that special treatment or the production of disability resources is not a boon to disabled (or disabled criminalised) people; it is as harmful as its lack. And both the lack of resources and their abundance (through coercive state mechanisms) is filtered through race, colonialism, class, gender and more.

Steele’s book, like my own, offers an important critique of inclusion and rights policies and discourses: it’s not about *lack* of access to services, but the nature and legitimisation of these services. Through focusing on the role of the law in constructing disability (and hierarchising it), Steele shows the problem with (legal) inclusion – it constructs, preserves, naturalises and increases the threshold of seemingly legitimate (criminal justice) control and (state) violence. I wholeheartedly agree with her important suggestion that ‘we must approach court diversion as part of a much bigger, systemic problem with law that we need to resist – the inclusion in legal doctrine and legal process of disability as a lawful and legitimate basis on which to circumvent equality for disabled people in the criminal justice system and to drastically shift the thresholds of permissible control, violence and injustice’.³¹

³¹ Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, 2020) 1.

More specifically, in regard to current discourses and policies that seem beneficial and benevolent, Steele suggests that mechanisms like '[c]ourt diversion stratif[y] disabled populations in a deinstitutionalisation era to sustain the ongoing inequality and relative deprivation and precarity of those who are criminalised, even in the face of disability rights'.³² I would add that, as many³³ show, it is not just in face of (disability) rights that these mechanisms flourish, but perhaps because of them.

Steele's work engages with and expands what I called in *Decarcerating Disability* racial criminal pathologisation – the ways these three processes or techniques of power are entangled and co-constitutive, for example that criminalisation entails the construction of both race (especially blackness) and disability (especially mental difference) as dangerous. As she states: 'I use *criminalised disabled people* to refer to disabled people in the criminal justice system. ... this term more accurately reflects the deep entanglements of criminality and disability in terms of how control by law becomes possible and legitimate *through* disability for certain bodies marked as unfit and deviant (including those who are racialised, poor and/or Indigenous or First Nations), rather than 'disability' (as an *a priori* state of being) and 'criminal justice' being separate.'³⁴ As she further elaborates: 'disabled people who are of racialised minorities might be particularly targeted for discrimination and other harms in prison, including because of racialised perceptions of their behaviour that invite particularly punitive rather than therapeutic responses to their disability.'³⁵

Steele's book also works to expand what carcerality means, much beyond the prison or institution walls. Her work contributes to critical analysis of so-called *alternatives* to incarceration.³⁶ Her analysis of court diversion highlights that often what we think of as alternatives or reforms to injustice, actually strengthen the system (what I called carceral ableism/sanism). For a poignant example, Steele discusses in chapter 1 the issues with the

³² *ibid* 17.

³³ Spade, above n 17; Chandan Reddy, *Freedom with Violence* (Duke University Press, 2011).

³⁴ Steele, above n 31, 12.

³⁵ *ibid*.

³⁶ Maya Schenwar and Victoria Law, *Prison by Any Other Name: The Harmful Consequences of Popular Reforms* (The New Press, 2020).

concept and practice of Mental Health courts, a phenomenon we see now in the USA in full force (for example the recent introduction of CARE courts in California³⁷).

As a whole, Steele's work expands carceral studies and highlights the central role that settler/race-ability plays in it. First, Steele's recent work extends her analysis of carcerality to care homes/nursing homes, dementia units and other sites we don't typically think of as forms of imprisonment and carcerality.³⁸ Second, in this book she shows how forms of diversion extend carcerality and control to other locales (psych facilities, community treatment orders).

Third, Steele expands carcerality beyond locales or even logics to an analysis of how these attach to bodies/subjectivities. Through a Foucauldian analysis she shows how court diversion and the law recapitulate to a medical diagnostic model, which then follows the person and in so doing brings carcerality wherever the person goes. As she states: 'Drawing on ideas of biopolitical subjectivity, I argue that court diversion transforms criminalised individuals from criminal legal subjects known and acted upon by reference to the criminal offence to disabled legal subjects known and acted upon by reference to their disability (as a medical phenomenon).'³⁹

Community treatment orders, court diversion and specialised courts, forensic detention and other forms of punishment of people designated as criminalised disabled, are not attached to a particular material, architectural space or a particular court order, but instead attach to

³⁷ California's governor's 'new plan to get Californians in crisis off the streets and into housing, treatment, and care. The Community Assistance, Recovery and Empowerment (CARE) Court is a new framework to get people with mental health and substance use disorders the support and care they need': Governor of the State of California, *Governor Newsom's New Plan to Get Californians in Crisis Off the Streets and into Housing, Treatment, and Care* (Fact Sheet, 2022) https://www.gov.ca.gov/wp-content/uploads/2022/03/Fact-Sheet_-_CARE-Court-1.pdf.

³⁸ Sara Dehm, Claire Loughnan and Linda Steele, 'COVID-19 and Sites of Confinement: Public Health, Disposable Lives and Legal Accountability in Immigration Detention and Aged Care' (2021) 44(1) *University of New South Wales Law Journal* 59; Linda Steele, Kate Swaffer, Ray Carr, Lyn Phillipson and Richard Fleming, 'Ending Confinement and Segregation: Barriers to Realising Human Rights in the Everyday Lives of People Living with Dementia in Residential Aged Care' (2021) 26(2) *Australian Journal of Human Rights* 308; Linda Steele, Ray Carr, Kate Swaffer, Lyn Phillipson and Richard Fleming, 'Human Rights and Confinement of People Living with Dementia in Care Homes' (2020) 22(1) *Health and Human Rights* 7; Linda Steele, Kate Swaffer, Lyn Phillipson and Richard Fleming, 'Questioning Segregation of People Living with Dementia in Australia: An International Human Rights Approach to Care Homes' (2019) 8(3) *Laws* 1.

³⁹ Steele, above n 31, 81.

individuals' bodies via medico-legal designations as disabled. The disabled body is the space of punishment and it makes material, architectural spaces punitive.⁴⁰ In essence, carcerality is not about what the person designated as disabled does or did – it is what they *are* (or perceived/labeled as being), which is an idea rooted in eugenic logics.

Because of this expansive analysis, Steele's work shifted and expanded my own thinking on abolition of carcerality. Although my work discusses these so-called diversion or alternatives to incarceration as carceral ableism and sanism, it did not take into account the ways the punitiveness follows the person and not just increases the scope of incarceration. As she astutely remarks elsewhere, 'it is not so much that the "net" is enlarged with the advent of new material architectural spaces of control, but rather that disabled bodies make space punitive by stretching the net as they move through space'.⁴¹

Her analysis shows that we need to conceptualise or underscore abolition more expansively as well. I suggested that dis-epistemology (the idea of letting go of specific knowledges and ways of knowing) is abolitionary. Abolition requires a change⁴² in thinking, in knowing, in being, one that 'also acknowledges and challenges the temporal and carnal logics underpinning the carcerality of the disabled body itself'.⁴³ That is no small feat, but scholarship like Steele's provides us with some tools to begin building and dismantling such systems of power.

Linda Steele on Disability, Criminal Justice and Law: Reconsidering Court Diversion

Court diversion⁴⁴ is conventionally considered beneficial because it provides judges with a legal alternative to conviction and sentence in specific relation to disabled people appearing before them on criminal charges. In turn, court diversion can facilitate freedom from prison and also a pathway to accessing disability and mental health services. Thus, court diversion

⁴⁰ Steele, 'Disabling Forensic Mental Health Detention', above n 30.

⁴¹ *ibid*, 341.

⁴² Gilmore Wilson, above n 20.

⁴³ Steele, 'Disabling Forensic Mental Health Detention', above n 30, 329.

⁴⁴ I define 'court diversion' as 'a legal process whereby a judge is able to make an order that moves a disabled person appearing before them on criminal charges into treatment and support provided by disability and mental health services, in lieu of a sentence (and sometimes even a conviction)': Steele, above n 31, 2, see further 27-35.

is viewed by many scholars, disability advocates and policy-makers as a way in which law (legal doctrine and legal process) and legal actors (lawyers and judges) can play a positive role in addressing overrepresentation of disabled people in the criminal justice system. This is because overrepresentation is typically understood as caused by disabled people not having access to disability and mental health services in the community. This lack of access to services is said to coincide with the failure of governments to ensure appropriate treatment and support in the community in the aftermath of the gradual downsizing and closure of large-scale asylums and disability institutions associated with deinstitutionalisation.⁴⁵

My critical concern with this conventional understanding of court diversion emerged from my work as a community lawyer representing people with intellectual disability in New South Wales (Australia) Local Court criminal justice matters. Applying for court diversion under section 32 of the then *Mental Health (Criminal Procedure) Act 1990* (NSW) was a key part of this role. My concerns were threefold. First, I was concerned that even though court diversion did shift disabled people off the trajectory of trial, conviction and sentenced punishment, it still involved coercive (in the sense of involuntary) intervention in community disability and mental health settings.⁴⁶ Second, I was concerned that court diversion also provided additional opportunities for perpetration of unlawful violence and legal violence against disabled people through disability and mental health services.⁴⁷ My third concern was that court diversion was impacting a particularly marginalised group of people with disability – individuals who had already been subjected to victimisation, settler colonial and state violence, disability service and government irresponsibility, including First Nations people and/or people who have been in out of home care or the juvenile justice system – only offering coercive, medicalised responses and not delivering recognition and accountability in relation to their past experiences of harm and injustice.⁴⁸

⁴⁵ *ibid* 2-4, 35-38.

⁴⁶ *ibid* 47-54.

⁴⁷ *ibid* 4-5, 54-57.

⁴⁸ *ibid* 52-54.

In *Disability, Criminal Justice and Law* I address these concerns through an exploration of court diversion through an analytical framework that draws on tools related to three key concepts: ‘disability’, ‘carcerality’, and ‘legality’.⁴⁹ Building into the framework tools related to legality was particularly important because existing critical scholarship on disability and criminal justice had largely emerged at the intersections of disability studies and critical criminology and was applied to the operation of the criminal justice system (particularly sites and practices of incarceration), and thus had not considered how law structures, authorises and legitimises carceral control and violence through the criminal justice system. Engaging with the intersection of law and violence in the criminal justice context was particularly important for me, given my broader scholarship on ‘disability-specific lawful violence’.⁵⁰ I then use this framework to explore a specific case study on court diversion – and one that I was familiar with from my legal practice – diversion in New South Wales pursuant to the then named *Mental Health (Forensic Provisions) Act 1990* (NSW).

In *Disability, Criminal Justice and Law*, I argue court diversion debilitates criminalised disabled people (a term I use deliberately to highlight how disabled people are both targeted and subjectified through criminal justice and criminal legal systems). This concept of debility (which Ben-Moshe also engages with in her book⁵¹) – was developed by Jasbir Puar⁵² and draws on earlier work by Lauren Berlant on slow death⁵³ and Foucault on scientific racism⁵⁴ among others. Debility refers to the slow wearing down and depletion of entire populations deemed surplus to society – not spectacular one-off acts of violence but the way society and legal systems are structured to limit possibilities for flourishing across one’s life and across the community.⁵⁵ Noting my specific interest in law and legality, I argue

⁴⁹ *ibid* 74-118.

⁵⁰ Spivakovsky and Steele, above n 1; Linda Steele, ‘Disability, Abnormality and Criminal Law: Sterilisation as Lawful and “Good” Violence’ (2014) 23(3) *Griffith Law Review* 467; Linda Steele, ‘Temporality, Disability and Institutional Violence: Revisiting *In Re F*’ (2017) 26(3) *Griffith Law Review* 378.

⁵¹ Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition* (University of Minnesota Press, 2020).

⁵² Jasbir Puar, *Right to Maim: Debility, Capacity, Disability* (Duke University Press, 2017).

⁵³ See, e.g., Lauren Berlant, ‘Slow Death (Sovereignty, Obesity, Lateral Agency)’ (2007) 33(4) *Critical Inquiry* 754.

⁵⁴ See, e.g., Michel Foucault, ‘Lecture 17 March 1976’, in Mauro Bertani and Alessandro Fontana (eds), *Society Must be Defended* (D Macey, trans) (Penguin Books, 1997) 239; Michel Foucault, ‘Lecture 8 January 1975’, in Valerio Marchetti and Antonella Salomoni (eds), *Abnormal: Lectures at the Collège de France, 1974–1975* (G Burchell, trans) (Picador, 2003) 291.

⁵⁵ Puar, above n 52.

that law has a key role in debilitation of criminalised disabled people. Court diversion enables carceral control through disability and mental health services of individuals who are otherwise beyond criminal law (in the sense they have not or cannot be convicted and sentenced). Court diversion provides legal pathways between otherwise disparate legal domains, spaces and modes of control that are not used in criminal law (such as guardianship law, civil mental health law, case management, restrictive practices in group homes) and in doing so both sustains and serves to legitimise lifelong violence and precarity experienced by disabled people in the criminal justice system.

Through *Disability, Criminal Justice and Law* I aim to make three contributions to socio-legal scholarship. One contribution is to invite greater scholarly attention to the legal dynamics and nuances of disability segregation, incarceration and violence – how legal process, jurisdiction, legal doctrine and legal actors structure, enable and legitimate oppression, and in ways that are assumed to be law operating in a humane and empowering register. In particular, the book shows the importance of such attention both for scholars who research and advocate with and for criminalised disabled people, and for scholars who research and advocate with and for other marginalised populations who might be identified as benefitting from ‘therapeutic’ alternatives to prison (e.g., women, First Nations people and people who use drugs) in a context that is more removed from the critical disability scholarship and disability justice activism.

A second contribution is to encourage more scholarly analysis of the ways that law authorises violence through mental health and disability services in the ‘deinstitutionalised’ community, and to critique the role of the ‘dark past’ of institutions⁵⁶ in the interventions that occur through mental health and disability service provision and the construction of laws authorising these interventions as benevolent and even empowering. Relatedly, I hope to inspire more critical attention to the intersection of criminal law on the one hand and guardianship and mental health laws on the other. My analysis of court diversion demonstrates a curious circularity at play in diversion, whereby mental health and disability services are the protective, safe and therapeutic alternative to the harmfulness of criminal

⁵⁶ Niklas Altermark, *Citizenship, Inclusion and Intellectual Disability* (Routledge, 2018) 2.

justice systems and prisons, where these services are perpetrating violence in a more concentrated manner specifically in relation to disabled people – but their violence is erased in this circularity by reason of their ‘rescuing’ role vis-à-vis the prison.

The third contribution I aim to make through *Disability, Criminal Justice and Law* is to begin a conversation in socio-legal scholarship on how we remedy and redress (in an individual legal sense) or repair (in a broader social and collective sense) the injustices to criminalised disabled people, both those done through court diversion and mental health and disability services *and* those that criminalised disabled people have experienced across their lives (particularly those in which the state and mental health and disability services are complicit). Transformative justice and disability justice movements, as well as self-advocacy, disability rights and survivor/peer/consumer movements, have for decades variously been advocating for greater legal and political equality and improved access to resources, as well as recognition of and accountability for past harms. In the final chapter of my book, I draw on threads from these movements to suggest how legal doctrine and legal process *and* lawyers, law teachers and law students can contribute to social justice for criminalised disabled people.

Since writing *Disability, Criminal Justice and Law*, I have shifted from focusing in my research on the role of law in *enabling and legitimating violence*, to the possibilities and limits of law in *reckoning with and repairing violence*.⁵⁷ This work is a necessary continuation of where I left off in my book, and continues my grappling with how we as socio-legal scholars and lawyers use the tools available to us through law, while also looking inwards at our own complicity in and accountability for the harms we are seeking to redress.

Connections to Ben-Moshe’s work

I preface my discussion of the intersections between *Disability, Criminal Justice and Law* and *Decarcerating Disability* by noting the profound impact of Ben-Moshe’s earlier work on *Disability, Criminal Justice and Law*. Our two books were published in the same year and

⁵⁷ Linda Steele, ‘Sites of Conscience: Redressing Disability Institutional Violence’ (2022) 3(2) *Incarceration: An International Journal of Imprisonment, Detention and Coercive Confinement*; Linda Steele and Kate Swaffer, ‘Reparations for Harms Experienced in Residential Aged Care’ (2022) 24(2) *Health and Human Rights* 71.

thus were developed separately. However, Ben-Moshe's 2017 article critiquing the call for a return to the 'asylum' (or coercive, in-patient mental health treatment) as the logical response to the perceived failure of deinstitutionalisation⁵⁸ was central to my thinking through the ways in which court diversion laws are perceived as necessary and benevolent through the trope of the failure of deinstitutionalisation. Ben-Moshe's 2014 collection *Disability Incarcerated*, co-edited with Chris Chapman and Allison Carey,⁵⁹ introduced to me the 'institutional archipelago' as a way to think about the connections between disparate sites and systems through which criminalised disabled people circulate. In turn, I hope my scholarship has done justice to Ben-Moshe's important work by utilising her scholarship in a socio-legal context to explore the *legal* dynamics of disability carceral control.

Turning specifically to *Decarcerating Disability*, I would like to focus on four critical threads in Ben-Moshe's book: 'carceral ableism', 'abolition', geographies of deinstitutionalised communities (e.g., NIMBYism), and Disability Inc. I will show how these four critical threads particularly resonate with two trajectories in my recent scholarship since I completed *Disability, Criminal Justice and Law*. In doing so, I hope to demonstrate the broader significance and relevance of *Decarcerating Disability* beyond the criminal justice-institutionalisation nexus and to a diverse range of carceral contexts and critical and theoretical concerns in disability socio-legal scholarship.

The first trajectory is the shift in my research from the criminal justice context to other disability carceral spaces and techniques: residential aged care facilities⁶⁰ (also referred to as nursing homes (USA) and care homes (UK)), use of restrictive practices in community residential settings,⁶¹ and sheltered workshops⁶² (also referred to as 'supported employment' (USA), 'social enterprises' (UK) and 'supported employment' (Australia)). Two concepts developed in Ben-Moshe's book are particularly useful for analysing the

⁵⁸ Liat Ben-Moshe, 'Why Prisons are not "the New Asylums"' (2017) 19(3) *Punishment & Society* 272.

⁵⁹ Ben-Moshe et al. (eds), above n 21.

⁶⁰ Dehm et al., above n 38; Steele et al., 'Ending Confinement and Segregation', above n 38; Steele et al., 'Human Rights and Confinement of People Living with Dementia in Care Homes', above n 38; Steele et al., 'Questioning Segregation of People Living with Dementia in Australia', above n 38.

⁶¹ Spivakovsky and Steele, above n 1.

⁶² Linda Steele, 'Law and Disability 'Supported' Employment in Australia: The Case for Ending Segregation, Discrimination, Exploitation and Violence of People with Disability at Work' (2023, forthcoming) 49(1) *Monash University Law Review*.

interlocking dynamics of inclusion and violence in these other settings. One concept is ‘carceral ableism’. Ben-Moshe defines ‘carceral ableism’ as the assumption that disabled people are inherently in need of control and protection: ‘the praxis and belief that people with disabilities need special or extra protections, in ways that often expand and legitimate their further marginalisation and incarceration’.⁶³

The concept of ‘carceral ableism’ is significant because it captures the inherent ‘carcerality of the disabled body’ which is associated with medical and legal epistemologies and ontologies of disability rather than with how disabled people are treated in specific systems or sites.⁶⁴ As such, the concept signals the centrality to abolition of carceral control across diverse sites and practices, and the importance of surfacing and dismantling the cultural and medical (and indeed also legal) constructions of disability as grounded in protection and control, rather than focusing only on freeing disabled people from specific conditions of incarceration and control. Indeed, Ben-Moshe shows that carceral ableism has in part facilitated the incarceration of disabled people through other sites (group homes, nursing homes and prisons) in the aftermath of deinstitutionalisation. Applying the concept of ‘carceral ableism’ to my research on residential aged care facilities – and specifically to secure dementia care units within these facilities – and the use of restrictive practices in community residential settings, illuminates both how these non-criminal settings can be understood as punitive and violent, and the importance of interrogating how carceral ableism makes the existence of and harmful conditions within these segregating and coercive contexts seem necessary and benevolent, including at the level of specific legal technologies through which carceral ableism circulates in law, including legal subjectivity, the exercise of judicial discretion, and jurisdictional questions.

‘Abolition’ is another concept from Ben-Moshe’s book that is significant to my exploration of a wider range of disability carceral spaces and techniques, by illuminating the importance of attending to epistemologies of disability. In *Decarcerating Disability* Ben-Moshe takes the term ‘abolition’ with a long and wide usage⁶⁵ and carefully draws out three interconnected

⁶³ Ben-Moshe, above n 51, 17.

⁶⁴ Linda Steele, ‘Disabling Forensic Mental Health Detention’, above n 30.

⁶⁵ Ben-Moshe, above n 51, 17-21.

dimensions – the physical closure of settings and movement of people out of those settings, the transformation of society to provide the resources and supports to people outside of those settings, and transformation of the epistemologies that make institutionalisation of disabled people necessary and natural.⁶⁶ Ben-Moshe’s conceptual articulation of ‘abolition’ provides an invaluable response to counter the arguments by opponents of abolition (including legal scholars) who reduce deinstitutionalisation to the caricatured singular act of moving people out of institutional buildings and leaving them for dead on the streets. In particular, her approach emphasises the importance of transformation of the practices, resources and knowledges that shape the communities disabled people come to live in after deinstitutionalisation. Applying Ben-Moshe’s approach to abolition to residential aged care (as I have done⁶⁷) highlights the necessity to build communities and provide resources for disabled people (including people living with dementia) and also demands a fundamental rethink of the cultural (and I would say legal) epistemologies that make institutionalisation and segregation in residential aged care seem natural and necessary. Moreover, applying Ben-Moshe’s approach to ‘abolition’ to sheltered workshops highlights the obligation on the state and private industry to make open workplaces accessible to disabled people. This is particularly important given that calls for transition away from sheltered workshops are usually opposed on the basis such a move will undermine the entire financial sustainability of the organisations operating sheltered workshops and also place significant stress on families, thus not merely blaming abolition for harm to disabled people but actually blaming abolition for harm to the entire service sector and families that are said to rely on them.

The second trajectory in my research is how we use law to respond to – to reckon with, redress and repair – the injustices against disabled people, including specifically injustices associated with institutionalisation. In this research, I have focused on two sets of practices: reparations⁶⁸ and sites of conscience⁶⁹ (place-based memory practices). The most obvious point of relevance of *Decarcerating Disability* to this trajectory is Ben-Moshe’s nuanced

⁶⁶ *ibid* 111-133, 280-283.

⁶⁷ Dehm et al., above n 38.

⁶⁸ Steele and Swaffer, above n 57.

⁶⁹ Steele, ‘Sites of Conscience’, above n 57.

analysis of decarceration litigation.⁷⁰ Contributing to the long tradition of socio-legal critiques of the possibilities and limits of judicial processes and remedies in recognising and repairing structural injustice, Ben-Moshe draws on the political and lived aftermaths of court decisions to question how litigation can be evaluated as ‘successful’ and signals the need to be attentive to how ableism circulates in the framing and outcomes of the litigation. Ben-Moshe’s analysis serves as an important reminder to me and other socio-legal scholars to take a careful and critical approach to assessing the value of law as a tool of social justice, and to be mindful of the legal *and* cultural and material outcomes of litigation (noting that sometimes these can run at cross purposes).

Decarcerating Disability is also a vital text in advancing work on how we use law to respond to – to reckon with, redress and repair – the injustices against disabled people in two further respects. Ben-Moshe’s detailed critique of how ‘NIMBY’ activism shaped experiences *and* geographies of community in the aftermath of deinstitutionalisation⁷¹ indicates the need for a broader temporal frame to collective reparations. Specifically, her work highlights the importance of going beyond a singular focus on reckoning with, redressing and repairing past harms in institutions, to additionally engage collective reparative practices to redress and repair the harms of exclusion and segregation in the communities in which disabled people live in the aftermath of deinstitutionalisation. To this end, we might draw on reparative curatorial and memorial practices utilised in the context of reparations for racial segregation. For example, the District Six Museum in South Africa⁷² – which contains exhibitions engaging with the memories and heritage of District Six, and connects these to contemporary questions around community and identity⁷³ – ‘is actively engaged in the undoing of conceptions of community’ through ‘simultaneously launch[ing] programs that interrogate notions of community, home, and race, while also attempting to build an anti-

⁷⁰ Ben-Moshe, above n 51, 229-268.

⁷¹ *ibid* 161-187.

⁷² During Apartheid Black South Africans and other racialised groups were forcibly removed from their homes and land in District Six in South Africa and moved to substandard housing.

⁷³ Stacy Douglas, *Curating Community: Museums, Constitutionalism, and the Taming of the Political* (University of Michigan Press, 2017); Karen E Till, ‘Resilient Politics and a Place-Based Ethics of Care: Rethinking the City through the District Six Museum in Cape Town, South Africa’ in Bruce Evan Goldstein (ed), *Collaborative Resilience, Moving Through Crisis to Opportunity* (MIT Press, 2012) 283.

apartheid city'.⁷⁴ Indeed, the necessity for such a reparative approach in the context of disability institutionalisation is implicit in Ben-Moshe's analysis of the evolution of decarceration litigation from a focus on harmful conditions within institutions through to a focus on the discrimination inherent to institutionalisation and the demand to make more equal and just futures beyond the institution: 'the fight is not so much about the institution and its conditions as about what comes *after or even instead of* the institution'.⁷⁵

The threading through *Decarcerating Disability* of an analysis of the political economy of institutionalisation and incarceration offers significant insights to broaden approaches to individual reparations. Drawing on earlier work by Marta Russell on warehousing, Ben-Moshe offers the concept of 'Disability Inc' in which 'Incorporated' has the double meaning of the conditional 'inclusion' of disabled people into the fold of community and citizenship when they meet certain standards of white, heteronormative respectability, and corporate profit from the extraction of disabled people's labour or disability through their 'incarceration'.⁷⁶ This concept is particularly useful to a broadening of how we frame reparations. As I have argued elsewhere, too often scholarly and policy analysis of segregation of and violence against disabled people is framed in terms of disadvantage and harm to disabled individuals and reparations in the form of compensation or recognition payments.⁷⁷ Yet, Ben-Moshe's work highlights the importance of broadening our view to additionally recognise the advantage and benefit to perpetrators of segregation and violence, notably financial gain.⁷⁸ As such the concept of 'Disability Inc' provides a prism through which to explore restitution as a form of reparations. Considering how reparations can compel perpetrators to forego the financial and other benefits of harm to disabled people, can provide novel starting points for re-making communities and supports in ways that do not position disabled people as a source of profit. This is particularly important given many operators of institutions (including governments and charitable organisations) continue to deliver services (albeit rebranded as inclusive and empowering) and to hold

⁷⁴ Douglas, above n 73.

⁷⁵ Ben-Moshe, above n 51, 254.

⁷⁶ *ibid* 246, see also 11-15.

⁷⁷ Steele, above n 62.

⁷⁸ *ibid*.

considerable assets and wealth (including through the redevelopment or sale of sites of former institutions).

Ultimately, *Decarcerating Disability* and Ben-Moshe's larger body of work provides provocative and novel approaches to the relationship between disability, violence and inclusion that challenge socio-legal scholars to pay closer attention to the lived, material, cultural and epistemological dynamics of how carceral control of disabled people is enabled and responded to through and beyond law.

Symposium contributors

We invited a group of scholars who are colleagues, collaborators and interlocutors and whose work we greatly admire and have ourselves engaged with, to critically reflect on our books. In particular, we asked them to consider how our books intersect with their work and with recent events and political shifts, and what questions they might have for us in further advancing our work. By way of brief introduction to their scholarship: Chris Chapman's work investigates the relationship between disability and violence, and how benevolence in professional ethics and practice can justify violence.⁷⁹ Sarah Lamble's work highlights transformative justice as providing alternative frameworks of accountability, and critiques alternatives to prison for trans people and LGBTQ hate crime legislation as extending carceral control.⁸⁰ Jamelia Morgan researches the relationships between disability, law and criminal justice, and advances DisCrit (Disability Studies and Critical Race

⁷⁹ Chris Chapman, 'Becoming Perpetrator: How I Came to Accept Restraining and Confining Disabled Aboriginal Children' in Bonnie Burstow, Brenda A LeFrancois and Shaindl Diamond (eds), *Psychiatry Disrupted: Theorizing Resistance and Crafting the (R)evolution* (McGill-Queen's University Press, 2014) 16; Chris Chapman, 'Five Centuries' Material Reforms and Ethical Reformulations of Social Elimination' in Liat Ben-Moshe, Chris Chapman and Allison C Carey (eds), *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (Palgrave Macmillan, 2014) 25; Chris Chapman, Allison C Carey and Liat Ben-Moshe, 'Reconsidering Confinement: Interlocking Locations and Logics of Incarceration' in Liat Ben-Moshe, Chris Chapman and Allison C Carey (eds), *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (Palgrave Macmillan, 2014) 3; Chris Chapman and AJ Withers, *A Violent History of Benevolence: Interlocking Oppression in the Moral Economies of Social Working* (University of Toronto Press, 2014).

⁸⁰ Sarah Lamble, 'Queer Investments in Punishment: Sexual Citizenship, Social Movements and the Expanding Carceral State' in Jinhana Haritaworn, Adi Kuntsman and Sylvia Posocco (eds), *Queer Necropolitics* (Routledge, 2015) 151; Sarah Lamble, 'Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment' (2013) 24(3) *Law and Critique* 229; Sarah Lamble, 'The Marketisation of Prison Alternatives' (2014) 97(1) *Criminal Justice Matters* 14; Sarah Lamble, 'Transforming Carceral Logics: 10 Reasons to Dismantle the Prison Industrial Complex Using a Queer/trans Analysis', in Eric A Stanley and Nat Smith (eds), *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (AK Press, 2011) 235.

Theory, mostly in Education) and critical disability studies analysis of criminal law and procedure.⁸¹ Debra Parkes's writing and practice focusses on anti-carceral remedies, and how we engage with law to deliver accountability for state violence and advance prison abolition.⁸² Dinesh Wadiwel researches the relationship between disability, race and violence, and explores the legal authorisation and epistemic normalisation of torture of disabled people.⁸³ Sheila Wildeman focuses on solitary confinement and anti-carceral remedies, and explores the possibilities and limitations of engaging litigation (notably the writ of habeas corpus) to resist incarceration of disabled people.⁸⁴ All of these exemplary contributors (and hopefully we too) embody a spirit of scholar/activism, or praxis, that connects critiques of incarceration and the law with critical disability analysis, and does so from the position of critiquing normalisation and advancing the liberation of disabled/mad people.

⁸¹ Jamelia N Morgan, 'Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities' (2017-2018) 24 *Buffalo Human Rights Law Review* 81; Jamelia N Morgan, 'Policing Under Disability Law' (2021) 73 *Stanford Law Review* 1401; Jamelia N Morgan, 'Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation' (2019) 96(4) *Denver Law Review* 973; Jamelia N Morgan, 'The Paradox of Inclusion: Applying Olmstead's Integration Mandate in Prisons' (2020) XXVII(2) *Georgetown Journal on Poverty Law and Policy* 205; Jamelia N Morgan, 'Why Disability Studies in Criminal Law and Procedure?', UC Irvine School of Law Research Paper No 2021-39, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887139.

⁸² Debra Parkes, 'Starting with Life: Murder Sentencing and Feminist Abolitionist Praxis' in Kelly Struthers Montford and Chloë Taylor (eds), *Building Abolition: Decarceration and Social Justice* (Routledge, 2021) 151; Debra Parkes, 'Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic' (2017) 32(2) *Canadian Journal of Law & Society* 165; Debra Parkes, 'Women in Prison: Liberty, Equality, and Thinking outside the Bars' (2016) 12 *Journal of Law & Equality* 127.

⁸³ Dinesh Wadiwel, 'Disability and Torture: Exception, Epistemology and "Black Sites"' (2017) 31(3) *Continuum* 388; Dinesh Wadiwel, 'Restriction, Norm, "Umwelt": A Response' (2020) 51(4) *New Literary History: A Journal of Theory and Interpretation* 751.

⁸⁴ Rusi Stanev and Sheila Wildeman, 'Freedom: A Work in Progress' in Eilionoir Flynn, Anna Arstein-Kerslake, Cliona de Bhailís and Maria Laura Serra (eds), *Global Perspectives on Legal Capacity Reform* (Routledge, 2019); Sheila Wildeman, 'Agonizing Identity in Mental Health Law and Policy (Part II): A Political Taxonomy of Psychiatric Subjectification' (2016) 39(1) *Dalhousie Law Journal* 147; Sheila Wildeman, 'Disabling Solitary: An Anti-Carceral Critique of Canada's Solitary Confinement Litigation' in Claire Spivakovsky, Linda Steele and Penelope Weller (eds), *The Legacies of Institutionalisation: Disability, Law and Policy in the 'Deinstitutionalised' Community* (Hart Publishing, 2020) 87; Sheila Wildeman, "Habeas Corpus Unbound" in Colleen M Flood and Paul Daly (eds), *Administrative Law in Context*, 4th ed (Emond Publishing, 2021).