

Disability, Criminal Justice, and Abolition: Recognizing and Remediating Law's Violence

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Abstract

In this short essay, I explore how Liat Ben-Moshe's *Decarcerating Disability: Deinstitutionalization and Prison Abolition* and Linda Steele's *Disability, Criminal Justice and Law: Reconsidering Court Diversion* provide helpful analytical frameworks for legal practitioners, students, and scholars committed to responding to law's role in producing and legitimating violence against historically marginalized groups, and in particular disabled people. This essay surfaces three key insights that Ben-Moshe and Steele provide legal scholars, practitioners, and students: the importance of the intersectional method, critical analysis on how law is complicit in ongoing forms of disability-based subordination, particularly within the criminal legal system, and the imperative of the abolitionist ethic as a necessary response to redressing forms of state violence, including in particular, legally sanctioned harms to disabled people.

In *Decarcerating Disability: Deinstitutionalization and Prison Abolition*, Liat Ben-Moshe demonstrates the feasibility of prison abolition and deftly maps out its possibilities by connecting histories of advocacy behind movements for deinstitutionalization (i.e., advocacy aimed at closing large psychiatric hospitals and congregate facilities for individuals with

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intellectual and developmental disabilities) with the past and ongoing movements to abolish the prison industrial complex.

In *Disability, Criminal Justice and Law: Reconsidering Court Diversion*, Linda Steele provides case studies and a decisively critical lens on an oft-lauded genre of criminal legal system reform: court diversion programs. Steele persuasively demonstrates how disability diagnoses act as pathways into court surveillance and control, and a mechanism for circumventing the rights of disabled people. As Steele maintains, court diversion programs rely on and exploit disability labels as a pathway for “coercive intervention that surpasses what is otherwise possible through criminal law.”¹

Following the racial reckoning protests during the summer of 2020, the modern-day Prison-Industrial-Complex abolition movement has emerged as an organizing practice not only within social movements but also among radical legal professionals, lawyers, and law students. Both books are timely contributions for scholars (myself included) who write critically about the carceral state through the lens of abolition. These books provide helpful analytical guides for practitioners, students, and scholars dedicated to dismantling law’s role in group-based violence and subordination. Indeed, in particular, both books provide an analysis grounded in a specific focus on disabled people who are in contact with the criminal legal system, or what Steele terms ‘criminalized disabled people’.

Both books emphasize the importance of intersectionality as a methodology for surfacing injuries—physical, mental, emotional, symbolic, or otherwise. For example, Liat Ben-Moshe defines the “processes of criminalization and pathologization” that link race and disability as constructs in what she terms “racial criminal pathologization”.² As Ben-Moshe explains in reference to the police killings of Michael Brown, Officer Darren Wilson testified that Brown was described “not just as animalistic but as crazy, pathological, abnormal...

¹ LINDA STEELE, *DISABILITY, CRIMINAL JUSTICE AND LAW: RECONSIDERING COURT DIVERSION* 45-46 (2020).

² LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 25-26 (2020).

Race is coded in disability, and vice versa. It's impossible to untangle antiblack racism from processes of pathologization, ableism, and sanism".³

Both scholars surface the complicity of law and legal actors in contributing to the subordination of disabled people, particularly how law exposes criminalized disabled people to violence and premature death, institutionalization, detention, or imprisonment. For example, key to law's subordinating function—i.e. how law obscures the violence it inflicts while legitimizing it—is what Steele terms "disability-specific lawful violence".⁴ As Steele explains, disability labels provide a lawful justification for state-sanctioned surveillance and control. In *Decarcerating Disability*, Ben-Moshe cautions against the uncritical reliance on litigation in movements to reform prisons. Ben-Moshe notes that "using the law to create change assumes that the law is just and is a fruitful arena through which change can come to harmed populations. Litigation and rights discourse draw on the state in fixing social ills of its own creation".⁵

Lastly, the abolitionist ethic pervades both books. The vast scope of violence targeted at criminalized disabled people and legitimated through law provides a forceful argument against reform. Both authors' critical accounts provide strong arguments for why legal actors and advocates—whether judges, lawyers, legal workers (jailhouse lawyers, law clerks, legal secretaries), paralegals—should hesitate to adopt legal reforms without considering whether the specific policy intervention furthers or entrenches the harms of the criminal legal system—or extends the longevity of these violent systems as a whole. In short, both works provide forceful arguments in support of abolition.

In my work, I apply insights from critical disability theory to understand how law fails to adequately protect the rights of disabled people, and to surface reforms and radical interventions to reduce or eliminate those harms.⁶ Like Ben-Moshe's and Steele's books, my work is focused on issues affecting criminalized disabled people and disabled people in all

³ *Id.* at 25.

⁴ STEELE, *supra* note 1, at 4.

⁵ BEN-MOSHE, *supra* note 2, at 68.

⁶ JAMELIA MORGAN, DISABILITY'S FOURTH AMENDMENT, 122 COLUM. L. REV. 489, 491-98 (2022); JAMELIA MORGAN, POLICING UNDER DISABILITY LAW, 73 STAN. L. REV. 1404-1411 (2021).

carceral spaces. Given my position within a law school, and the constraints of law more generally, much of my work offers an account for how laws, policies—even those framed as legal “reforms”—discriminate against disabled people, contribute to the social subordination of disabled people, or leave them vulnerable to state violence and premature death.

Both works push me as a legal scholar to examine how law not only fails to protect but actively launders and then legitimates violence against criminalized disabled people once contact with the criminal legal system is made. Ben-Moshe and Steele’s work push me as a legal scholar to map out the ways law plays this pernicious role and to find a way to disrupt the ease through which disability labels can function as a mechanism for legally sanctioned discipline, control, and violence.

Liat Ben-Moshe critiques prison reform litigation and provides reasons to avoid uncritical use of law in movements for abolition. Ben-Moshe posits:

[W]ill cases reliant on disablement lead to a rethinking of mass incarceration, or will they instead lead to incarceration by means that comply with the court’s vision of ‘humane’ incarceration, for example, the opening of more jails and prisons so they are less overcrowded or provide more psychopharmaceuticals (the most common “treatment” of mental crisis in prison), what Kilgore referred to as carceral humanism?⁷

As the excerpt from Ben-Moshe suggests, the uncritical use of the law even where focused on disablement would do little to undermine ‘carceral ableism’ and would also be fundamentally inconsistent with the long-term goals of abolitionists. And, as Steele’s book helps to illuminate, law legitimizes surveillance and control while masking forms of oppression. Steele notes that “the actions of lawyers, judges and law reformers are pervasive throughout” the violence Steele documents, including “criminalisation, medicalisation, incarceration and victimisation”. Indeed, as Steele emphasizes “much of” this violence “is legal violence or takes place in institutional settings where individuals have

⁷BEN-MOSHE, *supra* note 2, at 261, 263.

ended up by legal decisions”.⁸ Steele calls for a “critical disability legal pedagogy,” and argues that “[l]egal pedagogy should be an integral aspect of contesting criminalised disabled people’s carceral control and debilitation”. Steele cautions law teachers to recognize that:

because they are, in effect, teaching violence when they teach law without critical reflection on disability . . . they are representing violence—both against disabled people and through legal ontologies of disability—as rightly lawful and just, and this sustains other dynamics and forces of oppression.⁹

Steele’s insights provide not only useful guidance to law teachers who teach law as pertains to the carceral state, but to legal practitioners who are working to dismantle the systems’ violence as they navigate their ethical obligations to remedy these systemic injustices while reckoning with their own complicity in systems that harm.

With these insights in mind, a few questions remain for the current discussion: Given the violence that law inflicts, what should (or could) the role of law be within abolitionist movements? Legal scholar Dorothy Roberts calls for “abolition constitutionalism”¹⁰ while legal scholar Amna Akbar calls for a more radical approach to law.¹¹ Yet, if law is complicit in the subordination of disabled people, how do lawyers and legal workers use law to reduce harms facing disabled people and remove barriers that can allow movements to organize and mobilize for their collective liberation? Are there ways that law can be utilized to facilitate what Mariame Kaba refers to as the “experimentation” required for abolitionist movements?¹² Both works offer answers to these questions, or a helpful analytical framework for responding to these questions, among other insights, and provide invaluable critical analysis for those interested in promoting the liberation of all historically marginalized and oppressed peoples, including and especially disabled people.

⁸ STEELE, *supra* note 1, at 206.

⁹ STEELE, *supra* note 1, at 210-11.

¹⁰ DOROTHY E. ROBERTS, FOREWORD: ABOLITION CONSTITUTIONALISM, 133 HARV. L. REV. 1, 3 (2019).

¹¹ AMNA A. AKBAR, TOWARD A RADICAL IMAGINATION OF LAW, 93 N.Y.U. L. REV. 405 (2018).

¹² MIRIAM KABA, WE DO THIS ‘TIL WE FREE US. Haymarket Books (2021).
