

CENTERING DISABILITY JUSTICE

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ABSTRACT

The coronavirus pandemic surfaced existing faults in the disability rights strategy, exposing a porousness in access to the promises of the Americans with Disabilities Act (ADA) for disabled Black, Indigenous, and other People of Color. This article examines the unsustainability of disability rights through the lens of Blackness and disability to argue that the future effectiveness of disability rights advocacy demands a re-centering that incorporates principles of Disability Justice. This recalibration requires a shift from a single-issue focus on disability to an informed consciousness that confronts the role of racism/ableism on Black, Indigenous, and other People of Color in accessing disability rights protections. This singular focus reflects the lack of intersectional analysis when it comes to issues of disability. It further points to the need for advocates to more strongly align themselves with other social justice movements in developing a strategy for disability rights and to intentionally center the voices and leadership of Black, Indigenous, and other People of Color into disability rights strategy.

This article argues that the absence of a critical racism/ableism analysis is subsuming the goals of disability equality under the ADA. In particular, the single-issue focus on disability is erasing the complex experiences that multiply marginalized disabled people experience, creating a revolving door of inequities that are compounded in disabled communities of color. This article focuses on Blackness in four areas: education, access to medical care, police violence, and the unjustified segregation of people with disabilities in carceral spaces. It further narrows its analysis by centering the discussion on Blackness and deaf/ disabled people and persons who are categorized with intellectual, developmental, cognitive, and/or psychiatric disability.

This examination endeavors to show that communities of color are benefiting very little by ADA advances and, in many respects, are existing under the conditions of a pre-ADA world. In so arguing, this article finds that a re-centering of the disability rights strategy is

required to bridge a disconnect that has developed over time between disability rights advances and people with disabilities who live at the intersection of marginalized identities. This article concludes by applying three principles of the Disability Justice framework—intersectionality, centering the leadership and voices of the disabled communities most impacted, and cross-movement solidarity—to suggest a broader disability rights framework that centers its work more intentionally and structurally beyond a single disability-rights focus. Through this re-centering, this article seeks to map a way forward for the future of disability rights.

INTRODUCTION

In “explor[ing] the Black body in the context of whiteness,” George Yancy describes the confiscation of the Black body.¹ He writes, “[t]his confiscation occurred in the form of the past brutal enslavement of Black bodies, the cruel and sadistic lynching of Black bodies, the sexual molestation of Black bodies on Southern plantations, the literal breeding of Black bodies for white exploitation and the unethical experimentation on Black bodies during the horrific ‘Tuskegee Syphilis Study’.”²

Yancy’s historical references are entrenched in hundreds of years of white supremacist brutality and oppression. This concept of the confiscation of the Black body applies with equal truth today when examining disability through the lens of Blackness.³ The confiscation of the Black disabled “bodymind” is prevalent and enduring.⁴ Because of the historical and current permanence of white supremacy, it pervades even the best-intentioned policies and legislation.

The comparison of disability oppression to the experience of slavery and segregation of Black people in the United States is

1. GEORGE YANCY, *BLACK BODIES, WHITE GAZES: THE CONTINUING SIGNIFICANCE OF RACE* xv, 1 (2008).

2. *Id.*

3. This article uses the word Blackness and Black as general terms to signify persons who are discriminated against because of their skin color in the United States. This includes African-Americans, Afro-Latinx, Black-Indigenous, Afro Indigenous, West-Indians, and others.

4. This article refers to the body and mind as one by using the term “bodymind,” which is defined as “[t]he relationship between the human body and mind as a single integrated entity.” *SINS INVALID, SKIN, TOOTH AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE* 146 (2d ed. 2019). The term “bodymind is used instead of saying ‘body and mind’ to affirm the reality that our minds and bodies cannot be separated.” *Id.* See SAMI SCHALK, *BODYMINDS REIMAGINED (DIS)ABILITY, RACE, AND GENDER IN BLACK WOMEN’S SPECULATIVE FICTION* 5–6 (2018) for a more detailed background on the term “bodymind.”

persistent across disability rights discourse that focuses on the ADA and its predecessor, section 504 of the Rehabilitation Act (Section 504).⁵ The Americans with Disabilities Act (ADA) has been called “an ‘emancipation proclamation’ for [Americans] with disabilities.”⁶ In testimony before a House of Representatives subcommittee in support of the ADA passage, a white supporter commented:

What difference . . . is the change from persons who were beaten to death because of their disabilities in the assumption that the evil spirits would leave them, to slaves who were beaten to death because they happened to be black and viewed by their persecutors as people who are lesser than they—four-fifths of a man, was it?⁷

Further, analogizing disability oppression and slavery is simplistic, reductive, and reinforces the white disability narrative.⁸ Disabled enslaved, for example, were often “[f]orced to remain in slavery during emancipation and then placed against their will in makeshift almshouses and asylums” where they engaged in forced labor.⁹ Further, following the signing of the Emancipation Proclamation in 1862, slavery took on many different forms that resulted in the government-sanctioned brutality and segregation of Black people in the United States.¹⁰ These forms included

5. See, e.g., JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 126 (1994) (“[t]he history of segregation has been every bit as devastating for disabled Americans as it has been for black ones”); DORIS Z. FLEISCHER & FRIEDA ZAMES, DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION 215 (2001) (“[l]ike Ralph Ellison’s ‘Invisible Man,’ many members of the disability population, historically, were ignored, isolated, removed from the community.”) *Id.* at 69 (people with disabilities have been “relegated to second-class citizenship no less than people of color.”).

6. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 581 (2004).

7. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended 42 U.S.C. § 12101), reprinted in LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT: PREPARED FOR THE COMMITTEE ON EDUCATION AND LABOR, U.S. HOUSE OF REPRESENTATIVES, ONE HUNDRED FIRST CONGRESS, SECOND SESSION, VOLUMES 1-2 130 (1990).

8. See, e.g., Jim Downs, *The Continuation of Slavery: The Experience of Disabled Slaves During Emancipation*, 28 DISABILITY STUD. Q. (2008).

9. *Id.*

10. See *infra* notes 12, 13 and 14.

sharecropping,¹¹ lynching, Black Codes,¹² and convict leasing.¹³ From around 1877 to the 1950s, governments enforced Jim Crow, and the Supreme Court validated laws that legalized segregation against Black people living in the United States.¹⁴

This racism and disability discrimination analogy is often how race is incorporated into disability rights analysis.¹⁵ *Olmstead v. L.C.*, for example, is often heralded as the *Brown v. Board of Education* of disability rights.¹⁶ As one advocate described, *Olmstead* is as significant to people with disabilities as *Brown v. Board of Education* was to people of color.¹⁷ Yet, the fact that Louis Curtis, one of the plaintiffs in *Olmstead*, was a Black woman is erased in the litigation and historical references.¹⁸

The invisibilization of disabled people who possess multiple marginalized identities reflects the single-issue disability focus norm that pervades disability advocacy. This erasure leaves little understanding of the role that identity (race, class, gender identity, sexual orientation, and others that Curtis may have claimed) played in Curtis' experience at the Georgia psychiatric institution and what, if any, role this erasure had in the litigation strategy. Rather, Curtis' identity was limited to her psychiatric and intellectual disability.¹⁹

11. MELISSA NORTON, DUKE SANFORD WORLD FOOD POL'Y CTR., POWER & BENEFIT ON THE PLATE: THE HISTORY OF FOOD IN DURHAM, NORTH CAROLINA 21–31 (2020) (explaining that sharecropping required poor Black farmers to rent small plots of land from white landowners and to give a portion of their crop yield back to the landowner).

12. ANGELA Y. DAVIS, THE ANGELA DAVIS READER 76 (Joy James eds., 1st ed. 1998) (citing E. FRANKLIN FRAZIER, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 303 (1969) (describing how Black Codes “criminalized such behavior as vagrancy, bre[a]ch of job contracts, absence from work, the possession of firearms, insulting gestures or acts”).

13. *The Untold History of Post-Civil War 'Neoslavery'*, NPR (Mar. 25, 2008, 10:00AM), <https://www.npr.org/templates/story/story.php?storyId=89051115>.

14. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (affirming segregationist laws as constitutional).

15. Compare *infra* note 35 for examples of recent scholarship that critiques disability rights through an intersectional analysis.

16. Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”*: *The Disability Rights Cases*, 104 COLUM. L. REV. 49, 49 n.4 (2004) (collecting sources); Charles R. Bliss & C. Talley Wells, *Applying Lessons from the Evolution of Brown v. Board of Education to Olmstead: Moving from Gradualism to Immediate, Effective, and Comprehensive Integration*, 26 GA. ST. U. L. REV. 705, 705 (2010).

17. LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 256 (2020) (citing Derrick Henry, *New Obituary Article for Elaine Wilson*, ATLANTA J.-CONST. (Dec. 10, 2004), <https://www.legacy.com/obituaries/atlanta/obituary.aspx?pid=2907375>).

18. *Id.*

19. *Id.*

The future of disability rights²⁰ requires advocacy and discourse that holds racism/ableism and interlocking systems of oppression at its center to better assess who is being left out of ADA advancements and why—and what steps future disability rights strategies can take to more intentionally center racism/ableism in its framework. The absence of a critical racism/ableism consciousness framework in a disability rights strategy threatens the future effectiveness of the ADA. Litigation is a strategic and necessary tool used to advance protections under the ADA, but it has limitations with respect to remedies. By focusing litigation and advocacy on single issues, we may solve for one inequity while others abound. This strategy, as a consequence, creates a revolving door of inequities for Black people with disabilities and other multiply marginalized disabled people. Challenging the single-issue approach to litigation and engaging in a broader advocacy perspective or strategy is required in moving toward a racism/ableism disability framework.

Olmstead v. L.C. largely shaped the trajectory in the fight for disability rights over the past twenty-two years.²¹ This landmark case resulted in a cascade of litigation to hasten the closure of institutions and secure greater access to community-based supports and services for people with disabilities in a range of areas that include housing, mental health support, education, and employment support.²² However, the execution of *Olmstead*—and who is benefitting under the ADA—presents a more complex narrative when examined through the prism of “the racialized experience of disability.”²³ This article focuses its inquiry on anti-Black racism/ableism.²⁴ Ableism, at its base, “is oppression faced due to disability/impairment (perceived or lived), which not only signals disability as a form of difference but constructs it as inferior.”²⁵ Through this prism, for many Black people

20. I use the terminology “disability rights” throughout this piece in a more limited way to focus on the varying advocacy efforts and analysis related to the Americans with Disabilities Act and section 504 of the Rehabilitation Act. When writing more specifically about disability rights as a particular movement in time, I use capital letters: “Disability Rights Movement.”

21. See, e.g., Natalie M. Chin, *Group Homes as Sex Police and the Role of the Americans with Disabilities Act*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 388–89 (2018).

22. *Id.* at 389–90.

23. Sami Schalk, *Contextualizing Black Disability and the Culture of Dissemblance*, 45 J. WOMEN CULTURE & SOC’Y 535, 535 (2020).

24. Throughout this article I use the term racism/ableism to denote the co-construction of these identities. This term denotes that racism and ableism are not mutually exclusive but work together to reconstitute the subjugation and discrimination experienced by people with disabilities.

25. BEN-MOSHE, *supra* note 17, at 16.

with disabilities and Black deaf/ disabled²⁶ people who are subjugated by class, gender, sexual orientation, and other constructs, the promises of the ADA are failing. The failure of the ADA is most exposed when examined through the experiences of deaf/disabled people and persons who are categorized with intellectual, developmental, cognitive, and/or psychiatric disability.

In analyzing disability as a shared experience by all disabled people,²⁷ disability advocacy and discourse erase how the ADA is executed in ways that fail to account for the structural inequalities that overlap to compound and create a reconstituted form of racism/ableism against disabled Black, Indigenous, and other People of Color.²⁸ When the coronavirus pandemic surfaced in late 2019, it magnified the existing faults in the disability rights strategy.²⁹ For the Black disabled community, the coronavirus pandemic reflected a historical resonance, displaying the modern confiscation of the Black disabled bodymind by society and government built from past foundations of slavery, ableism, racism, and eugenics.³⁰

At the time of this article, the pandemic maintained its path of harm in Black communities. Black Americans represent 12.4% of the population and suffered 13.7% of known COVID-19 deaths.³¹ Said another way, within less than one year of its emergence, COVID-19 has killed 1 in every 645 of Black Americans, which necessarily

26. The term deaf/disabled seeks to name the importance of identifying deaf people as part of disability communities, thereby resisting disability hierarchies. HEARD, <http://www.behearddc.org> (last visited May 14, 2021).

27. This article interchanges between using identity-first and person-first language to reflect the differing views on the use of language when writing about disability. In academia, for example, person-first language is largely the default (i.e., people with a disability) when discussing disability. Many in the disabled community choose identity-first language. See, e.g., Lydia X.Z. Brown, *The Significance of Semantics: Person-First Language: Why It Matters*, AUTISTIC HOYA (Aug. 4, 2011), <https://www.autistichoya.com/2011/08/significance-of-semantics-person-first.html> (“In the autism community, many self-advocates and their allies prefer terminology such as ‘Autistic,’ ‘Autistic person,’ or ‘Autistic individual’ because we understand autism as an inherent part of an individual’s identity.”).

28. Lydia X. Z. Brown et al., *Radical Disability Politics*, in ROUTLEDGE HANDBOOK OF RADICAL POL. 178, 186 (A.J. Withers & Liat Ben-Moshe eds., 2019).

29. See Daniel Young, *Black, Disabled and Uncounted*, NAT’L HEALTH L. PROGRAM (Aug. 7, 2020), <https://healthlaw.org/black-disabled-and-uncounted/>.

30. See Liat Ben-Moshe & Sandy Magana, *An Introduction to Race, Gender, and Disability: Intersectionality, Disability Studies, and Families of Color*, 2 WOMEN, GENDER & FAMS. COLOR 105, 105 (2014).

31. APM Research Lab Staff, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RES. LAB (Mar. 5, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race>.

includes Black disabled people. Further, research documents that “Black, Indigenous and Latino Americans,” when using an indirect age adjustment, have a COVID-19 death rate averaging 2.7 times higher nationally compared to the white population.³²

There is consensus among disability advocates and scholars that the ability of the ADA to achieve greater inclusion, access, and equality for people with disabilities requires more.³³ What this “more” is occupies much debate. Largely missing from disability scholarship is an examination of how the ADA is failing people with disabilities who live at the intersection of disability and a racialized identity and what strategies can be utilized to more effectively challenge the inequities in disability equality for multiply marginalized populations.³⁴

32. The data tracking by APM Research of COVID-19 mortality rates fails to extrapolate for the virus’s impact on other marginalized identities outside of race. It also does not indicate what identities encompass “Latino Americans,” e.g., Afro-Latinx, white-Latinx. Additional data is required, but unavailable, to connect the dots in painting a clearer picture of COVID’s impact on the disabled community, and specific racialized and marginalized populations within the disabled community. *Id.* Because age-specific death rates are not available, APM Research uses indirect standardization to approximate the impact of COVID-19 when comparing two populations that differ significantly in their age distributions, as may be the case among different racial groups. *Id.* Members of the U.S. House of Representative proposed a bill in April 2020, *Equitable Data Collection and Disclosure of COVID-19 Act*, seeking to, in part, collect disaggregated data on COVID-19 “testing, treatment, and outcomes.” H.R. 6585, 116th Cong. (2020); see also Bonnielin Swenor, *Dearth of Disability-Related COVID-19 Data can Confound Response Efforts*, STAT (June 12, 2020), <https://www.statnews.com/2020/06/12/dearth-disability-related-covid-19-data-confound-response-efforts/>.

33. See Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819, 822 (2015); Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1810 (2005).

34. This critique of disability scholarship is not to say that the issues of disability, race, and other intersection of identity are absent from scholarly discussion. This article hopes to build on the existing scholarship that aims to center issues of race, ableism, poverty, gender, and other intersections into disability rights discourse. See, e.g., BEN-MOSHE, *supra* note 17, at 1; Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENVER L. REV. 973, 976 (2019); Alice Abrokwa, *When They Enter, We All Enter: Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 MICH. J. RACE & L. 15, 17 (2018); Michael L. Perlin & Heather E. Cucolo, *Tolling for the Aching Ones Whose Wounds Cannot Be Nursed: The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER RACE & JUST. 431, 435–36 (2017); Michelle A. Travis, *Gendering Disability to Enable Disability Rights Law*, 105 CALIF. L. REV. 837, 839 (2017); Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 428, 463 (2001) (arguing that “[d]isability rights strategies should focus more on the promotion of economic, racial, and gender justice” and the need for disability policy to “re-imagine social policies and advocacy agendas addressing both poverty and disability.”).

Scholars have long explored what “more” is needed to strengthen the force of the ADA and address the “deep-rooted structural obstacles to disability equality.”³⁵ Samuel Bagenstos, generally emphasizing the failure of the ADA to root out structural inequalities in employment, has urged disability rights advocates to “move beyond” the “antidiscrimination/accommodation strategy”³⁶ by embracing, for example, social welfare interventions that focus more on universality versus individual interventions, such as expanding the eligibility for public health insurance and the services covered under these programs.³⁷

Additional strategies proposed by disability rights scholars to address ADA limitations include “adopt[ing] a disability human rights paradigm.”³⁸ This paradigm “combines the type of civil and political rights provided by antidiscrimination legislation . . . with the full spectrum of social, cultural, and economic measures . . . bestowed by many human rights treaties.”³⁹ Other proposals include using “targeted constitutional strategies” to reframe the rights of people with disabilities;⁴⁰ “challeng[ing] the roots of disability stigma . . .” by eliminating the secrecy that shrouds the adjudicative procedures brought under the ADA;⁴¹ and “claim[ing] disability identity” as a means of “challenging stereotypes on a large scale and disrupting longstanding conceptions linking disability inextricably to limitation.”⁴²

The disability rights framework emphasizes individualism and self-sufficiency with the goal of assimilation through integration at its core.⁴³ Historically, advocates of the ADA promoted this ideal,

35. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 11 (2009) [hereinafter Bagenstos, LAW AND CONTRADICTIONS]

36. *Id.* at 149.

37. *Id.* at 140–42, 149. Bagenstos has further argued for “the need to build on and go beyond ‘the principle of integrationism’ and [to] embrace ‘the abolitionist understanding of the equal protection of the laws’ when thinking about the future of the disability rights movement.” Samuel R. Bagenstos, *From Integrationism to Equal Protection: tenBroek and the Next 25 Years of Disability Rights*, 13 U. ST. THOMAS L.J. 1, 17, 32 (2016).

38. Michael A. Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1205 (2007).

39. *Id.* at 1205–06.

40. Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 533 (2014).

41. Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 462 (2015).

42. Katie R. Eyer, *Claiming Disability*, 71 B.U. L. REV. (forthcoming 2021).

43. See, e.g., Martha Minow, *Accommodating Integration*, 157 U. PA. L. REV. PENNUMBRA 1, 3 (2008) (“American disability law shares the same preoccupation with distinct and autonomous individuals that underlies much of U.S. law.”); Brown et al., *supra*

centering a “rights-focused, welfare opposing approach...[that] disproportionately benefit[ed] a relatively advantaged class of people with disabilities.”⁴⁴ This approach remains largely unchanged today as the ADA has less impact for disabled people who live at the intersection of multiply marginalized identities.⁴⁵ Consequently, the single-issue focus on disability anchors the disability rights framework, further reflecting the need for a re-imagined approach to disability analysis and advocacy. As Michael Perlin and Heather Ellis Cucolo stated in their discussion on the marginalization of certain non-dominant communities in disability law, “we need to focus on why the struggle to overcome rights violations is often greater for persons who are not of the dominant race or gender, and why it is essential that this area of law must be studied in the context of prevailing social policies as they relate” to disability.⁴⁶

Is it possible to re-imagine a disability rights future that incorporates a racism/ableism consciousness? This article explores this possibility by arguing that a re-centering of the disability rights strategy is required to bridge a disconnect that has developed over time between the promises of the ADA and disabled Black, Indigenous, and other People of Color. This recalibration requires a shift to an informed consciousness that confronts the role of racism, ableism, and its intersections on disabled Black and other multiply marginalized disabled communities.

Disability Justice offers principles to guide disability rights into the future.⁴⁷ Created and led by disabled people of color and queer and gender non-conforming disabled people of color, Disability Justice emerged in response to how the disability rights movement prioritized a single-issue civil rights framework at the expense of the lived experiences of disabled people who live “at intersecting junctures of oppression.”⁴⁸ As a framework, Disability Justice centers the experiences of “disabled people of color, immigrants with disabilities, queers with disabilities, trans and gender non-conforming people with disabilities, people with disabilities who are houseless, people with disabilities who are incarcerated, people with disabilities who have

note 28, at 179 (“Rights frameworks in general can be described as assimilationist rather than radical (radical in the sense of transforming the root causes of oppression).”).

44. Samuel R. Bagenstos, *The Future of Disability Rights*, 114 YALE L.J. 1, 82 (2004).

45. See *infra* Parts III.B, IV.A.

46. Perlin & Cucolo, *supra* note 34, at 432.

47. For greater depth on the principles of Disability Justice, see *infra* Part II.

48. SINS INVALID, SKIN, TOOTH, AND BONE, THE BASIS OF OUR MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER 12 (1st ed. 2016) [hereinafter SKIN, TOOTH, AND BONE].

had their ancestral lands stolen, amongst others.”⁴⁹ In this centering, Disability Justice seeks to identify and resist how ableism intersects with capitalism and white supremacy to designate bodies and minds as deviant, unvaluable, or unproductive.⁵⁰

Disability Justice is grounded in principles that include recognizing the complexity and nuance of intersectional identity in challenging systems of oppression, pushing back against capitalist notions of productivity as a means to value one’s worth, engaging in cross-disability movement building and cross-movement solidarity, and envisioning a collective liberation where all bodyminds are valued.⁵¹ These principles share some ideologies of critical theorists who challenge the limitations of rights-based and legal strategies.⁵² Activists and scholars have long-critiqued the shortcomings of the rights-based model in civil right strategies as failing to root out inequities “facing intersectionally targeted communities” and sometimes exacerbating the systems of “violence and control” that they intend to address.⁵³ Disability Justice, however, further unpacks this critique by centering within its framework the role of ableism, viewing it as “[t]he root of disability oppression.”⁵⁴

This article proposes a critical racism/ableism consciousness framework that is guided by principles of Disability Justice. This framework also relies heavily on visionaries of Critical Race Theory and Disability Critical Theory.⁵⁵ In exploring concepts such as

49. Patty Berne, *Disability Justice - A Working Draft by Patty Berne*, SINS INVALID (June 9, 2015), <https://www.sinsinvalid.org/blog/disability-justice-a-working-draft-by-patty-berne>.

50. *Id.*

51. SINS INVALID, *supra* note 4, at 25–26.

52. See Linda Steele et al., *Who is Diverted? Moving Beyond Diagnosed Impairment towards a Social and Political Analysis of Diversion*, 38 SYDNEY L. REV. 179, 181 (2016).

53. Dean Spade, *Intersectional Resistance and Law Reform*, 38 J. WOMEN CULTURE & SOC’Y 1031, 1032, 1042–43 (2013); see, e.g., Alan David Freeman, *Legitimizing Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978) (arguing that “[a]nti-discrimination law has [] been ultimately indifferent to the condition of the victim; its demands are satisfied if it can be said that the ‘violation’ has been remedied”); Beth Ribet, *Surfacing Disability Through a Critical Theoretical Paradigm*, 2 GEO. J. L. & MOD. CRITICAL RACE PERSP. 209, 223 (2010) (“the particular challenge of responding to systemic violent or exploitative disablement . . . may not be readily fully realizable through an equality paradigm . . . or through a rights-based matrix for making claims”).

54. SINS INVALID, *supra* note 4, at 15.

55. See *infra* Part I.B.2. Deep respect and gratitude to the scholars and activists of Critical Race Theory, Disability Critical Theory, Critical Race Feminism, Latin American Critical Race Theory (LatCrit), and other progressive theorists for laying the groundwork and stimulating my thinking in this endeavor.

intersectionality, a term first conceptualized by Kimberlé Crenshaw,⁵⁶ a racism/ableism consciousness framework seeks to serve as a guide for further exploration by disability rights advocates and scholars in re-imagining a disability rights future beyond the single-issue narrative of disability.

This framework centers racism/ableism as the co-constituted systems that are the root of the disability-based harm, dislodging the white, single-issue disability focus as the normative frame. Through this centering, a critical racism/ableism consciousness framework demands an examination of disability through the prism of its intersections—race, class, sexual orientation, gender, immigrant status, and others—and further recognizes with equal weight the physical, cognitive, and psychological impact of disability on one’s bodymind.⁵⁷

The legacy of slavery, racism/ableism, and eugenics are central driving forces in sustaining oppressive systems that disproportionately impact disabled Black, Indigenous, and other People of Color.⁵⁸ In not recognizing the history and harm of white supremacy that Yancy describes and how it pervades disability and many types of oppression, any disability strategy will fall short.

Part I of this article explores the history of enslavement and the racialization of eugenics as the building blocks of ableism and the social construction of disability. This section then discusses a disability rights movement that followed a course largely centered on white maleness as the normative identity in disability strategy and concludes with an overview of Disability Critical Theory. Part II discusses the emergence of Disability Justice.

56. Kimberlé Crenshaw first introduced the concept of intersectionality in *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989). Since its inception over thirty years ago, the term intersectionality has taken on many interactions. In a recent interview with Crenshaw, she described what intersectionality means today: “It’s basically a lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other. We tend to talk about race inequality as separate from inequality based on gender, class, sexuality or immigrant status. What’s often missing is how some people are subject to all of these, and the experience is not just the sum of its parts.” Katie Steinmetz, *She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What It Means to Her Today*, TIME (Feb. 20, 2020), <https://time.com/5786710/kimberle-crenshaw-intersectionality/>.

57. Subini A. Annamma, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY EDUC. 1, 11–12 (2013).

58. See Abrokwa, *supra* note 34, at 23–25, 38–39, 44.

Part III asserts that the “race-neutral,” single-issue focus on disability is failing as a tool to achieve equal opportunities and access for people who live at the intersection of disability, race, and other marginalized identities. To illustrate, I center the analysis on Blackness as it intersects with education, deaf/disabled incarcerated people, access to medical care, police violence, and the expansion of carceral spaces for people with psychiatric disabilities. I focus more specifically on these areas as they relate to individuals with intellectual, developmental, cognitive, and psychiatric disabilities.

In conclusion, Part IV applies three principles of Disability Justice—intersectionality, centering the voices of the disabled communities most impacted, and cross-movement solidarity—to illustrate a broader disability rights framework that centers its work more intentionally and structurally beyond a single disability-rights focus. In acknowledging that “disabled Black and brown creators face a specific ‘invisibilization’ and erasure of [their] political and cultural work,” this article is not an argument to co-opt the principles of Disability Justice or water down the politics of its movement.⁵⁹ Rather, these words are a call for disability rights advocates and scholars to engage more intentionally in centering racism/ableism and principles of Disability Justice in the collective efforts to challenge and dismantle discriminatory systems with the goal of transformative justice.

I. RACE & THE SOCIAL CONSTRUCTION OF DISABILITY

A. *An Historical Examination of the Racialization of Disability & the Pathologizing of Race*

“The United States government and corporations have always used constructed ideas around disability and criminality alongside constructed ideas about class and race to classify, criminalize, cage, and disappear its ‘undesirables.’”

-Talila A. Lewis⁶⁰

The history of Blackness and disability in the United States created the fertile foundation that nurtures the interlocking systems of racism/ableism that are stifling the ADA and its impact for Black

59. LEAH L. PIEPZNA-SAMARASINHA, CARE WORK: DREAMING DISABILITY JUSTICE 11 (2018).

60. Talila “TL” Lewis, *Disability Justice Is an Essential Part of Abolishing Police and Prisons*, LEVEL (Oct. 7, 2020), <https://level.medium.com/disability-justice-is-an-essential-part-of-abolishing-police-and-prisons-2b4a019b5730>.

people with disabilities. By examining the “historical, social, and economic context” of disability, we can critique through an intersectional lens how the “very embodiment of [B]lackness and disability” is subject to state and social control.⁶¹

This section traces some of the historical building blocks in the co-construction of anti-Black racism and disability. This analysis seeks to make connections in how the historical roots of racism/ableism legitimize and perpetuate the disabling and discarding of the Black bodymind in modern law and society. The discussion then moves into a critique of the Disability Rights Movement in how it evolved through the default lens of whiteness to create a racial stratification of disability. And, in doing so, maintained a disability rights framework that effectively omits the voices and policy priorities of disabled people of color and other multiply marginalized disabled people.

A working definition of ableism by Talila Lewis, Dustin Gibson, and other “Disabled Black and other negatively racialized people”⁶² anchors this discussion because their definition encapsulates the complex meaning of ableism when examining the enduring state and societal control of Black and brown disabled bodies.

Ableism: A system that places value on people’s bodies and minds based on societally constructed ideas of normality, intelligence, excellence, desirability, and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, misogyny, colonialism, imperialism and capitalism. This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person’s language, appearance, religion and/or their ability to satisfactorily [re]produce, excel and “behave.” You do not have to be disabled to experience ableism.⁶³

In centering ableism as the root of disability oppression, Disability Justice peels back the layers of an intricate and purposeful

61. Nirmala Erevelles, *Crippin’ Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline*, in *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA* 81, 87 (Liat Ben-Moshe et al. eds., 2014) (quoting Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17 *CULTURE & COUNTERMEMORY: “AM.” CONNECTION* 64, 67 (1987)) (“black bodies and disabled bodies are inextricably intertwined in the punitive patrol of bodily boundaries.”).

62. A working definition by Talila “TL” Lewis in conversation with Disabled Black and other negatively racialized folk, especially Dustin Gibson, updated in January 2021. Talila “TL” Lewis, *January 2021 Working Definition of Ableism*, TALILA A. LEWIS (Jan. 1, 2021), <https://www.talilalewis.com/blog/january-2021-working-definition-of-ableism>.

63. *Id.*

system fueled by a centuries-long history rooted in white supremacy that sanctioned the enslavement, institutionalization, criminalization, and sterilization of Black people for profit, dominance, and control.⁶⁴ Analyzing ableism through this definitional framework allows for a deeper analysis of disability. It further provides a tool to examine more critically who is and is not most benefitting from the ADA.

1. *Enslavement*

The legacy of slavery created an enduring recipe for ableism, developing and cementing “conceptions of ability [as] largely based on race.”⁶⁵ Views that garnered legitimacy based on pseudoscience and reinforced through law and society equated Blackness with mental and physiological inferiority⁶⁶ and cemented tropes around the Black bodymind as innately dangerous, depraved, and prone to criminality,⁶⁷ and labeled Black women as sexually aggressive.⁶⁸ As expressed by Nirmala Ervelles, “[B]lackness itself does not stand in for skin color. *Black* and *disabled* are not just linguistic tropes used to delineate difference, but are, instead, materialist constructs produced for the appropriation of profit in an historical context where Black disabled bodies were “subjected to the most brutal violence.”⁶⁹

64. *Id.*

65. Subini Annamma & Deb Morrison, *DisCrit Classroom Ecology: Using Praxis to Dismantle Dysfunctional Education Ecologies*, 73 *TEACHING & TCHR. EDUC.* 70, 72 (2018).

66. Samuel A. Cartwright, *Report on the Diseases and Peculiarities of the Negro Race*, *NEW ORLEANS MED. & SURGICAL J.* 691, 693, 694 (1851) (“debasement of mind, which has rendered the people of Africa unable to take care of themselves.”).

67. *See, e.g.*, THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA. TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY* (Paul Finkelman ed., U. of Ga. Press 1999) (1858). An ardent supporter of slavery, Cobb, who was an attorney and law professor, saw slavery as an imperative to “republican equality” and as a “protection from *pauperism*.” *Id.* at ccxiii, ccxiv (emphasis in the original). Author of a pro-slavery treatise, Cobb articulated support for the necessity of slavery and believed “negroes are less addicted to crime, and [healthier] and long-lived, in a state of slavery than freedom.” *Id.* at cciv-ccv. The release of the 1915 film, *Birth of a Nation*, reinforced tropes of Black men as menacing, rapists and “beasts that would destroy both white families and southern civilization as a whole.” SUSAN BURCH & HANNAH JOYNER, *UNSPEAKABLE: THE STORY OF JUNIUS WILSON* 31 (2007). Membership of the Ku Klux Klan surged at the release of the film with the KKK using this film propaganda to recruit members. *100 Years Later, What’s The Legacy of ‘Birth of a Nation?’*, NPR (Feb. 8, 2015), <https://www.npr.org/sections/codeswitch/2015/02/08/383279630/100-years-later-whats-the-legacy-of-birth-of-a-nation>.

68. HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 45 (2006).

69. Ervelles, *supra* note 61, at 87.

The New Orleans Surgical and Medical Journal, for example, published “*Report on the Diseases and Physical Peculiarities of the Negro Race*” in 1851 that proffered theories such as Drapetomania and Dysaesthesia Aethiopica.⁷⁰ In this writing, Dr. Samuel Cartwright asserted that enslaved laborers were deemed to have “a disease of the mind” called Drapetomania that “induce[d] the Negro to run away.”⁷¹ The remedy, according to Cartwright, was “whipping the devil out of them” as a “preventive measure against absconding.”⁷²

Cartwright used the term Dysaesthesia Aethiopica, referring to it as a “disease peculiar to negroes, affecting both mind and body.”⁷³ The terms Drapetomania and Dysaesthesia allowed Cartwright to label enslaved workers with a “mental disease” for what can be characterized as actions taken when enslaved persons challenged their slaveholder.⁷⁴ Cartwright reasoned that Dysaesthesia existed as “a natural offspring of negro liberty.”⁷⁵

Entrenched in the capitalist political system that drove the value and worth of the Black enslaved body, ableism determined whether the enslaved worker was “productive or useful—in the fields, in labor and reproduction, through sexual exploitation, in the house of the master, or . . . in medicine.”⁷⁶ Slaveholders punished enslaved workers more severely if they could not keep up with the rigorous demands of labor, which often included those with actual or perceived mental or cognitive impairments.⁷⁷ The punishment ranged from severe beatings to abandonment without food or resources for survival and murder.⁷⁸

By the mid-nineteenth century, the “perceived links between race and disability in the legal realm were . . . so naturalized that they appeared to have always existed, though, they had . . . been forged through statute and case law that reached back to the colonial era.”⁷⁹

70. Cartwright, *supra* note 66, at 707, 709.

71. *Id.* at 707.

72. *Id.* at 708.

73. *Id.* at 709.

74. *Id.* at 708–10.

75. Cartwright, *supra* note 66, at 710.

76. Rachel Dudley, *Toward an Understanding of the ‘Medical Plantation’ as a Cultural Location of Disability*, 32 *DISABILITY STUD. Q.* (2012).

77. DEA H. BOSTER, *AFRICAN AMERICAN SLAVERY AND DISABILITY: BODIES, PROPERTY AND POWER IN THE ANTEBELLUM SOUTH, 1800-1860* 64 (2012).

78. *Id.* In his autobiography, Douglass described the treatment of his cousin, “a lame young woman” who experienced severe beatings by the slave holder until her eventual abandonment. FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* 93–94 (2008).

79. Jennifer L. Barclay, *The Greatest Degree of Perfection: Disability and the Construction of Race in American Slave Law*, 46 *S.C. REV.* 27, 28 (2014).

Following the emancipation of enslaved people, in 1862, for example, the *North Carolina Medical Journal* reasoned that due to inherent physical and mental weakness of “the negro” in adapting to the demands of a free society, emancipation of the enslaved in the South resulted in “insanity” and “mental and physical degeneration.”⁸⁰ States enacted laws that enforced and incorporated into white society the legitimization that Blackness equated with inferiority, “metaphorically render[ing] enslaved people virtually ‘feeble-minded’ as if they were perennially afflicted with intellectual deficiencies.”⁸¹

Slavery’s blueprint has endured. Structures of power reinforce ideals of normalcy, intelligence, and productivity.⁸² As expressed by Beth Ribet, “[r]ace, as a category grounded in notions of physical, cognitive, moral deficit, and defect, reinforces and relies on a construct of White, European, bodies and minds as normal, healthy, and reflecting a more complete or idealized evolution/civilization.”⁸³ Racism/ableism cannot be disengaged from the other.⁸⁴ And dehumanization is a tenet of ableism.⁸⁵ As such, disability law advocacy and discourse cannot disengage from centering racism/ableism into the disability rights framework.

Cartwright’s pathologizing of the Black bodymind to legitimize using forms of violence to attain control of the enslaved body, as an example, is not a practice that dissolved with slavery.⁸⁶ Similarly, false science that determined Black people were impervious to pain—or could endure pain at a greater degree than white people—is also

80. JOHN F. MILLER, THE EFFECTS OF EMANCIPATION UPON THE MENTAL AND PHYSICAL HEALTH OF THE NEGRO OF THE SOUTH 5, 6 (1896).

81. Barclay, *supra* note 79, at 37; see also Leon J. Hilton, *Avonte’s Law: Autism, Wandering, and the Racial Surveillance of Neurological Difference*, 50 AFR. AM. REV. 221, 223 (2017) (noting how the label of Drapetomania “rendered slaves’ flight from captivity a form of mental illness, is an early, indicative example of the persistent scientific, social, and cultural pathologization of the black psyche as preternaturally irrational, unruly, criminal, and insane.”).

82. Ribet, *supra* note 53, at 245.

83. *Id.* at 240.

84. Liat Ben-Moshe uses the term “race-ability” to reflect “the ways race and disability, and racism, sanism, and ableism as intersecting oppressions, are mutually constitutive and cannot be separated, in their genealogy (eugenics, for example), current iterations of resistance (in the form of disability justice, for example), or oppression (incarceration and police killing, for example).” BEN-MOSHE, *supra* note 17, at 5.

85. *Id.* at 5.

86. Cartwright, *supra* note 66, at 1.

reflected in modern society.⁸⁷ Theories embedded in racism/ableism that legitimized the subjugation and control of the Black bodymind during slavery are ubiquitous today.

The theories have morphed into varying iterations that provide a basis for their purported legitimacy. These iterations include the punitive treatment of disabled children and young adults in specialized school settings, the intentional isolation and withholding of information from deaf/disabled incarcerated people, by the withholding of life sustaining treatment of a Black, disabled man over the objection of his loved one, through state violence against Black people with disabilities, and by the unjustified institutionalization of homeless people with psychiatric disabilities.⁸⁸

2. Eugenics

Exploring eugenics theories and its modern application through the interlocking systems of racism/ableism provides another building block atop the history of enslavement to deepen the understanding of how “race and disability are mutually constitutive and inseparable.”⁸⁹ Between 1890 and 1920, the theory of eugenics began to take hold in the United States.⁹⁰ Leading up to this period in the United States, scientific racism had successfully embedded itself into society providing “a biological and ethical rationale for enslavement.”⁹¹ And Black Codes and Jim Crow laws further legitimized the role of state power over the bodyminds of Black people, reinforcing Black racial inferiority and subjugation.⁹² Together with this foundation of white

87. See BENJAMIN MOSELEY, A TREATISE ON TROPICAL DISEASES, AND ON THE CLIMATE OF THE WEST-INDIES 472–73 (1787) (claiming that Black people bore a greater capacity to endure pain than white people, Moseley noted, “what would be the cause of insupportable pain to a white man, a Negro would almost disregard.”); Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences Between Blacks and Whites*, 113 PNAS 4296, 4296 (2016) (“a substantial number of white laypeople and medical students and residents hold false beliefs about biological differences between blacks and whites and demonstrates that these beliefs predict racial bias in pain perception and treatment recommendation accuracy.”).

88. See *infra* Part III.B.

89. ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE 113 (2014).

90. PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL 136 (2010); see also JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 193 (1994).

91. WASHINGTON, *supra* note 68, at 33.

92. See *The Black Codes and Jim Crow Laws*, NAT’L. GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/black-codes-and-jim-crow-laws/> (last visited May 14, 2021).

supremacy and ableism, eugenics theory also tapped into society's anger at paying taxes to support those who were deemed not self-sufficient and affirmed that heredity played a significant role in the transmission of imbecility, insanity, and crime.⁹³

The 1927 Supreme Court decision, *Buck v. Bell*, found constitutional grounds for states to forcibly sterilize “mental defectives” and individuals who are “afflicted with hereditary forms of insanity [and] imbecility.”⁹⁴ In a decisively worded three-page decision, Justice Holmes reasoned, “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.”⁹⁵ Eugenicists sought to create a “superior human stock” by eradicating the reproduction of “undesirables,” who would perpetuate cycles of “poverty, crime and vice, unwanted children, insanity and feeble-mindedness.”⁹⁶

In her essay, *White Privilege and White Disadvantage*, Khiara M. Bridges examines the racial trajectory of eugenics as it relates to racialized identities and reproductive control.⁹⁷ In the pre-civil rights era, Bridges argues, eugenics focused on the coercive sterilization of white people with the goal of creating a master white race.⁹⁸ She noted that eugenics theories focused on the “most disadvantaged white people—the intellectually and physically disabled, the mentally ill, the incarcerated, the poor” because they represented the “biggest threat to the white gene pool.”⁹⁹

Bridges notes that the government's focus away from its goal of protecting a superior white race to the sanctioned sterilization of poor Black women occurred “after the Civil Rights Movement forced the installation of formal racial equality across the country,”¹⁰⁰ In making this point, Bridges points out the dramatic increase in the forced

93. Paul A. Lombardo, *Medicine Eugenics and the Supreme Court Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 10 (1996).

94. 274 U.S. 200, 205–06 (1927).

95. *Id.* at 207.

96. TRENT, JR., *supra* note 90, at 136; *see also* MENTAL RETARDATION IN AMERICA 226–27 (Steven Noll & James W. Trent, Jr. eds., 2004).

97. Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 480 (2019) (emphasis in original).

98. *Id.*

99. *Id.* at 468.

100. *Id.* at 472.

sterilization of Black women through specific decades.¹⁰¹ In the 1930s and 1940s, for example, “black people represented 23% of those sterilized.”¹⁰² Between 1958 and 1960, Bridges notes that Black women represented “59% of those sterilized” with these numbers rising to 64% between 1964 and 1966.¹⁰³ In 1965, Fannie Lou Hamer, the leader of the Mississippi Freedom Democratic Party, testified before Congress that 60% of the Black women in her town in Mississippi were sterilized for no medical reason and without their consent.¹⁰⁴ The forced sterilization of Black women became so pervasive in the South that it was termed “Mississippi appendectomies.”¹⁰⁵ Eugenics through the form of reproductive control focused on Black women and women of color persisted through the “post-civil rights decades”¹⁰⁶

The federal government began funding sterilization as a form of birth control.¹⁰⁷ Between 1970 and 1980, sterilization rates rose from 200,000 to over 700,000,¹⁰⁸ targeting low-income women with the goal of “curb[ing] the reproduction of the poor.”¹⁰⁹ Black women and other women of color were primary targets.¹¹⁰ The violence of forced sterilization “was committed by doctors paid by the government to provide health care for these women.”¹¹¹ The government sterilization program found success largely “under the auspices of a government

101. *Id.*

102. Bridges, *supra* note 97, at 470 (internal citations omitted).

103. *Id.*

104. Julius Paul, *The Return of Punitive Sterilization Proposals: Current Attacks on Illegitimacy and the AFDC Program*, 3 L. & SOC'Y REV. 77, 92 (1968).

105. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 146 (1998).

106. Bridges, *supra* note 97, at 470 (internal citations omitted).

107. ROBERTS, *supra* note 105, at 90.

108. *Id.* Government's focus on the sterilization of Black women did not inoculate other communities of women as government targets. Between 1973–76, the Indian Health Service—an agency within the Department of Health and Human Services—were deemed responsible for the sterilization of 3,406 women and 142 men—3,001 of the sterilized women were between the ages of 15–44. Letter from Comptroller Gen. of the U.S., to James G. Abourezk, Sen. (Nov. 4, 1976) [hereinafter *Comptroller Report*], <https://www.gao.gov/assets/120/117355.pdf> (discussing, in part, the “permanent sterilization of Indians at Indian Health Services Facilities.”). To put in perspective, “[p]er capita this figure [for the number of sterilized women] is equivalent to sterilizing 452,000 non-Indian women . . .” Gregory W. Rutecki, *Forced Sterilization of Native Americans: Later Twentieth Century Physician Cooperation With National Eugenic Policies?*, 27 ETHICS & MED. 33, 34 (2011) (citing Bill Wagner, *Lo the Poor and Sterilized Indian*, 136 AM. 75 (1977)).

109. PAUL LOMBARDO, *A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIENCE TO THE HUMAN GENOME ERA* 176 (Paul Lombardo ed., 2011).

110. *Id.* at 175.

111. ROBERTS, *supra* note 105, at 90.

fed by the myth of the lazy, hyperfertile welfare mother”¹¹² who were viewed as “unemployed black women.”¹¹³ The idea being that “some *socially* deficient populations would produce children whose *environments* would predispose them to deviance.”¹¹⁴ President Nixon shared the belief that population policies would “improve[] poor women’s reproductive control to alleviate both the welfare crisis and social unrest.”¹¹⁵

While Bridges concludes that “*on the whole, eugenicists working in the early twentieth century were uninterested in people of color,*”¹¹⁶ eugenics has always centered its focus on disabled, poor, Black, Indigenous, and other People of Color in its policies and application—both before and after the civil rights era.¹¹⁷ When defining eugenics as the ability of the government to sanction the reproductive and bodily control over one’s bodymind, however, then eugenics policies have never been about white people, specifically; it is rooted in white supremacy and ableism.¹¹⁸

The post-civil rights era marked *a* period where theories of eugenics overtly and violently adopted a racist and ableist motivation. But the mainstreaming of eugenics theories evolved on the backs of racialized bodies. Racism/ableism built the theoretical framework of eugenics through the scientific, government, societal, and judicial legitimization of slavery; through the state-enforcement of Black Codes, Jim Crow, and anti-miscegenation laws; and through the United States immigration policies of the early twentieth century that

112. WASHINGTON, *supra* note 68, at 203.

113. *Id.*

114. Bridges, *supra* note 97, at 473 (emphasis in original text).

115. LOMBARDO, *supra* note 109, at 166. On Christmas Eve in 1970, President Nixon signed into law the Family Planning Services and Population Research Act of 1970. *Id.* at 167. This Act, referred to as the “Birth Curb Bill,” provided \$382 million in federal funding to address population control through providing “subsidized contraceptive research, birth control counseling, and the distribution of contraceptives to the poor.” *Id.* Less than five months after the passage of the Birth Curb Bill, the Office of Economic Opportunity (OEO), which ran the population control programs together with the Department of Health, Education and Welfare (HEW)—the agency designated to fight the War on Poverty—included sterilization as part of its program for family planning. *Id.* at 167.

116. Bridges, *supra* note 97, at 466 (emphasis in original).

117. Carlos K. Blanton, *From Intellectual Deficiency to Cultural Deficiency: Mexican Americans, Testing, and Public School Policy in the American Southwest, 1920–1940*, 72 PAC. HIST. REV. 39, 43 (2003) (describing how intelligence testing was used to justify racial segregation of Mexican Americans in the Southwest United States); *see also* TALITHA L. LEFLOURIA, *CHAINED IN SILENCE: BLACK WOMEN AND THE CONVICT LABOR IN THE NEW SOUTH* 146–71 (2015) (describing how state officials used prison farms to extract labor from Black women during the early 20th century).

118. WASHINGTON, *supra* note 68, at 202.

focused on ethnicity and labels such as “feeble-minded” and “slow-witted” to exclude those who are deemed “from inferior nations,”¹¹⁹ to name only a few key historical points.

The application of eugenics theories on Black, disabled people in the early 20th century is further reflected in the story of Junius Wilson.¹²⁰ North Carolina attempted to erase Wilson in 1925 after he was unjustifiably institutionalized in a psychiatric hospital for the “criminally insane” following a false charge of rape.¹²¹ Wilson remained institutionalized for sixty-eight years, remaining confined even after the state dropped the criminal charges in 1970, “merely because he was deaf, [B]lack and poor.”¹²² Before Wilson’s release at the age of ninety-six, the state surgically castrated him, noting the words “criminally insane, mentally deficient, sexually perverted, and deaf and dumb” in his sterilization records.¹²³ The only substantiated diagnosis in these records was Wilson’s deafness.¹²⁴

Laura I. Appleman examines the connection between eugenics and mass incarceration. She reasons that eugenics theories “supported by the medical establishment, the law, and the police power of the state”¹²⁵ contributed to the “long-term detention and isolation”¹²⁶ of the “mentally ill, the cognitively and physically disabled, and the ‘socially undesirable.’”¹²⁷ This treatment, she explains, relied on eugenicist views that the disabled, infirm, and others deemed “unfit,” “feeble-minded” or “undesirable” were predisposed to vagrancy, criminality, promiscuity and acted as a drain on society’s resources.¹²⁸ And, as a result, the state exercised the power to “detain, contain, and control the disabled.”¹²⁹ In tracing this history, Appleman argues that, “[o]ver time, attitudes about eugenics, class, and disability combined to create the policies that led to our current nationwide system of punitive detention.”¹³⁰

119. Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 33, 47 (Paul K. Longmore & Lauri Umansky eds., 2001).

120. BURCH & JOYNER, *supra* note 67, at 1.

121. *Id.* at 47.

122. *Id.* at 129.

123. *Id.* at 47.

124. *Id.*

125. Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 *DUKE L.J.* 417, 436 (2018).

126. *Id.* at 419.

127. *Id.*

128. *Id.* at 445.

129. *Id.* at 436.

130. Appleman, *supra* note 125, at 419.

In the exploration of eugenics and its modern-day impact on people with disabilities, history provides a lens to examine the co-construction of disability and anti-Blackness and its impact on the current iteration of eugenics influenced policies in disability rights advocacy. The post-civil rights era merely modernized and fine-tuned the application of eugenics driven policies, making them more palatable societally and politically. And in the 21st century, these policies continue to evolve, almost intractably, with an enduring impact on Black and brown, disabled communities.

B. Critiquing the White Disability Rights Narrative

1. A Brief History of the White Single-Issue Narrative in Disability Rights Framing

The ADA centers on notions of independence, autonomy, self-sufficiency, and integration by advancing disability equality through litigation¹³¹ and civil rights-based strategies.¹³² The disability civil rights framework took form in the 1970s¹³³ and grew out of a need to coalesce a “disability rights movement that spanned a splintered universe.”¹³⁴ By exploring the events leading up to Section 504 and the ADA, this section will discuss how these two pieces of major disability rights legislation evolved to create a Disability Rights Movement predicated on white male heteronormative privilege and explore the enduring legal framework of this legacy.¹³⁵

Far from a monolith, the disability rights community comprises different groups with varying platforms, goals, and demands: the deaf/disabled community who “reject[] disability hierarchies and rigid definitions of disability, [] recognizing deaf people as part of disability communities,”¹³⁶ “the ‘independent blind’ [and] self-described ‘psychiatric survivors,’ who seek deinstitutionalization and an end to the control medical doctors

131. See JACQUELINE V. SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 86 (2003).

132. See *id.* at 14.

133. See BEN-MOSHE, *supra* note 17, at 178; ANNE LANGE, *PAUL LONGMORE: DISABILITY SCHOLAR AND ACTIVIST, HISTORIAN OF EARLY AMERICA* 162 (2006) (unpublished manuscript) (on file with the Regional Oral History Office, The Bancroft Library, University of California, Berkeley).

134. SHAPIRO, *supra* note 5, at 126.

135. This article limits its focus to disability rights history concentrating on developments around section 504 and the ADA. For a more expansive summary of the disability rights movement, see BAGENSTOS, *LAW AND CONTRADICTIONS*, *supra* note 35, at 13–33.

136. HEARD, <https://behearddc.org> (last visited Oct. 29, 2021).

have over their lives.”¹³⁷ Psychiatric survivors may include those who ascribe to the mad movement. A movement that embraces madness as a “natural facet of the human condition” and an inherent part of one’s identity, some choosing to reject medication and other treatments.¹³⁸ And people with intellectual and developmental disabilities, who engage in self-advocacy such as community education, lobbying and public policy advocacy to protect and promote self-determination and civil rights.

Disability communities further encompass “people with diseases such as epilepsy, diabetes, and [] HIV, who seek appropriate medical treatment and an end to stereotypical assumptions that they pose a threat to themselves and others” and “people with such ‘hidden disabilities’ as chronic fatigue syndrome and multiple chemical sensitivity, who want others to acknowledge the reality of their conditions and accommodate them.”¹³⁹

Due to the many factions in the disability community, there was no collective voice for a singular movement to fight for disability rights legislation.¹⁴⁰ To achieve the legislative successes of Section 504 and the ADA, the emerging Disability Rights Movement needed to cultivate a “universalistic disability”¹⁴¹—a “cross-disability identification.”¹⁴² This cross-disability identification took form around the mid-1970s with “the common experience of exclusion” from mainstream society as the “catalyst for shared identity and a target for collective action.”¹⁴³

The manufacturing of a common experience of disability to gain momentum for a collective action resulted in a movement predicated on being white and male, emphasizing as the forefront of the struggle people with physical disabilities.¹⁴⁴ In the mid-1970s, Donald Galloway, the only Black person working at Berkeley, California’s Center for Independent Living (CIL), suggested to the CIL board of

137. See BAGENSTOS, *LAW AND CONTRADICTIONS*, *supra* note 35 at 3–4.

138. s.e. smith, *Judi Chamberlin: Mad Pride and the Fight Against Institutionalizing Women*, ROOTED IN RIGHTS (March 29, 2019), <https://rootedinrights.org/judi-chamberlin-mad-pride-and-the-fight-against-institutionalizing-women/>.

139. *Id.* at 4.

140. See LANGE, *supra* note 133, at 161–62.

141. *Id.* at 162.

142. *Id.* at 163.

143. RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS* 6 (1984).

144. See JUDITH HEUMANN & KRISTEN JOINER, *BEING HEUMANN: AN UNREPENTANT MEMOIR OF A DISABILITY RIGHTS ACTIVIST* 162–64 (2020); BEN-MOSHE, *supra* note 17, at 176–77.

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directors the idea of starting a Black caucus in an effort to hear the concerns of the black disabled community.¹⁴⁵

Galloway, who was the director of CIL services for the blind, recounted the dismissive reaction to his idea:

That went over like a lead balloon, because the attitude was, “We’re all one, and there’s no need for it. That would be like a blind group trying to say that we wanted the blind to be paid attention to more.” It was part of the whole attitude that no special group should be dominant. Although . . . the people that were physically disabled, basically ran the joint.¹⁴⁶

Affluent white men and women (mostly men) with social and political access largely drove the disability rights framework from the 1970s through the passage of the ADA in 1990.¹⁴⁷ Early disability rights activists attained jobs “within the Washington establishment,” working for members of Congress and as staffers on committees and within federal agencies.¹⁴⁸

In 1973, Congress passed the Rehabilitation Act with little fanfare.¹⁴⁹ With no floor debates or hearings, the Rehabilitation Act was signed into law by President Nixon and viewed only as a spending bill that allocated over \$1 billion dollars in federal aid for people with

145. *Black #Disability History: Don Galloway, Independent Living and the Black Community*, LEAD ON NETWORK (Feb. 12, 2016), <https://leadonnetwork.org/wordpress/2016/02/12/black-disability-history-don-galloway-independent-living-and-the-black-community/>.

146. FRED PELKA, *WHAT WE HAVE DONE: AN ORAL HISTORY OF THE DISABILITY RIGHTS MOVEMENT* 220 (2012). Stories such as Galloway’s are rare to encounter in disability history and scholarship because there is little recorded historical accounts of the role and influence of non-white disabled people in developing the disability rights policy agenda at this time and in the disability rights movement, generally.

147. *See id.* (discussing the resistance received from the Community of Independent Living when Galloway suggested starting a black caucus within CIL “to make sure [Black disabled people] got their voices heard.” Galloway further stated that “he knew that the emphasis [by CIL] was with people who were physically disabled”); *see also* Leroy F. Moore Jr. et al., *Developing and Reflecting on a Black Disability Studies Pedagogy: Work from the National Black Disability Coalition*, 35 *DISABILITY STUD. Q.* (2015) (discussing the birth of “institutional disability power” where “members of the dominant culture” created disability groups and “were not required or called to check their privilege when setting up these organizations.”); *see also* BEN-MOSHE, *supra* note 17, at 85 (noting that mostly white men with physical disabilities maintained the forefront of the Disability Rights Movement in the 1970’s.)

148. SWITZER, *supra* note 131, at 85.

149. *See* Kitty Cone, *Short History of the 504 Sit In*, *DISABILITY RTS. EDUC. & DEF. FUND*, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/> (last visited May 14, 2021).

disabilities over the course of two years.¹⁵⁰ An unnoticed provision of the bill included Section 504, which prohibited discrimination based on disability by any public or private entity that received federal funds.¹⁵¹ It was the first piece of legislation to extend protections for discrimination against people with disabilities.

It would take four years and a twenty-five-day sit-in by deaf and disabled protestors at the United States Department of Health, Education and Welfare (504 sit-in)¹⁵² offices in San Francisco, national demonstrations,¹⁵³ extensive Congressional hearings,¹⁵⁴ and meetings with disability activists and state senators before Congress signed the Section 504 regulations into law.¹⁵⁵ Disability rights historians view the San Francisco sit-in as “the political coming of age of the disability rights movement.”¹⁵⁶

The 504 sit-in demonstrated an act of civil disobedience that—for the first time—brought a cross-section of the disabled and non-disabled community together.¹⁵⁷ An act of defiance, the sit-in took months of preparation through the leadership of Judy Heumann and involved networking with civil rights groups around the country that did not necessarily center disability in their advocacy.¹⁵⁸ It symbolized a moment in disability history where a nascent Disability Rights Movement connected with the Black church, Chicano community, gay rights groups, labor unions, groups that represented the formerly incarcerated and recovering substance abusers and, most notably, the Black Panthers who endorsed the sit-in publicly and provided food to the 125 protesters throughout the sit-in.¹⁵⁹

The momentum from the 504 sit-in as it relates to cross-movement and cross-disability organizing did not endure. In his book, *No Pity: People with Disabilities Forging a New Civil Rights Movement*, Joe Shapiro described the 504 sit-in as “a blip on the screen

150. See SHAPIRO, *supra* note 5, at 68.

151. Section 504 provides that “No otherwise qualified individual with a disability in the United States . . . 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 . . .” 29 U.S.C. § 794(a) (2021).

152. See FLEISCHER & ZAMES, *supra* note 5, at 54. HEW was the federal agency responsible for promulgating federal regulations for section 504. *See id.* at 52.

153. See HEUMANN & JOINER, *supra* note 144, at 145.

154. *See* Cone, *supra* note 149.

155. *See id.*

156. SHAPIRO, *supra* note 5, at 71; *see also* Susan Schweik, *Lomax’s Matrix: Disability, Solidarity, and the Black Power of 504*, 31 DISABILITY STUD. Q. (2011).

157. Schweik, *supra* note 156, at 1.

158. HEUMANN & JOINER, *supra* note 144, at 81.

159. Schweik, *supra* note 156, at 108; HEUMANN & JOINER, *supra* note 144, at 81.

of national consciousness,” arguing that it came a decade too early for the country to view disability rights as a civil rights issue.¹⁶⁰ Perhaps it can also be seen as a lost moment for a burgeoning Disability Rights Movement to begin developing a consciousness beyond the single issue of disability.

During this time of cross-disability movement building centered on the 504 sit-in, the intersections as it relates to disability were not prioritized in building the strength of disability rights moving forward. While people with disabilities reflect a broad range within the disabled community, historical accounts of the Disability Rights Movement are largely silent on the role and influence of disabled Black, Indigenous, and other People of Color in leadership roles and developing the disability rights strategy.¹⁶¹

There is an implicit focus throughout disability discourse and scholarship that reinforces disability essentialism—the assumption that “disability discrimination is a monolithic experience that is divorced from other forms of oppression.”¹⁶² As a result, “there is a defining essence to disability experience and inequality” that, in disability scholarship, while analyzed as race-neutral, presumes a white, heteronormative racial identity.¹⁶³ Critiques of the whiteness in disability rights discourse and advocacy are not new. Vilissa Thompson started the hashtag #DisabilityTooWhite in 2016 to “eradicate the erasure” of disabled people of color within history and disability rights advocacy.¹⁶⁴ In recognizing the accomplishments and important work of the Disability Rights Movement,¹⁶⁵ Disability Justice activists share the critique that the single-issue, rights-based strategy of civil rights advocacy “address[es] the symptoms of inequity but not the root.”¹⁶⁶

People with physical disabilities guided disability policy, with the emphasis largely centered on “promoting the removal of architectural barriers, increased employment for people with disabilities, and

160. SHAPIRO, *supra* note 5, at 74.

161. *See generally id.*

162. Angela Frederick & Dara Shifrer, *Race and Disability: From Analogy to Intersectionality*, 5 SOC. RACE & ETHNICITY 200, 203 (2018).

163. *Id.*

164. Sarah Blahovec, *Confronting the Whitewashing of Disability: Interview with #DisabilityTooWhite Creator Vilissa Thompson*, HUFFPOST (June 28, 2016), https://www.huffpost.com/entry/confronting-the-whitewash_b_10574994.

165. Berne, *supra* note 49.

166. SINS INVALID, *supra* note 4, at 15.

independent living.”¹⁶⁷ The ADA’s “focus on independence and self-reliance provided a way of appealing to the more conservative people with disabilities” in the early stages of the Disability Rights Movement “without alienating those who held more liberal orientations.”¹⁶⁸

Section 504 served as the blueprint for the ADA.¹⁶⁹ Advocates of the ADA promoted this same ideal, centering a “rights-focused, welfare-opposing approach . . . [that] disproportionately benefits a relatively advantaged class of people with disabilities.”¹⁷⁰ ADA legislation declared as its goal “equality of opportunity, full participation, independent living, and economic self-sufficiency” for people with disabilities.¹⁷¹ In enacting the ADA, Congress acknowledged the legislature’s broad goals of ensuring that the ADA “provide[d] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”¹⁷² by identifying society’s history of isolating and segregating disabled people as a form of discrimination.¹⁷³ It placed an affirmative duty on private and public entities to address the “pervasive and social problem” of disability-based discrimination.¹⁷⁴ And it sought to target discrimination in areas that include employment, housing, public accommodations, and access to public services, programs and activities.¹⁷⁵

There is no dispute as to the ADA’s broad impact on the lives of people with disabilities. What requires a deeper inquiry is why the ADA has fallen short in its impact on disabled people with racialized and other marginalized identities—and, in particular, with disabled Black, Indigenous and other People of Color who are labeled with intellectual, developmental, cognitive, and psychiatric disabilities. In exploring further, it is helpful to examine some of the intentions of the ADA framers.

A strong message around the ADA included using productivity as a barometer for a disabled person’s value and worth and balancing that with the economic interest of the U.S. economy.¹⁷⁶ More specifically, 42 U.S.C. § 12101(a)(8) reads:

167. BEN-MOSHE, *supra* note 17, at 85.

168. BAGENSTOS, LAW AND CONTRADICTIONS, *supra* note 35, at 31.

169. HEUMANN & JOINER, *supra* note 144, at 138.

170. BAGENSTOS, *supra* note 44, at 82.

171. 42 U.S.C. § 12101(a)(7) (2021).

172. *Id.* § 12101(b)(1).

173. *Id.* § 12101(a)(5).

174. *See, e.g., id.* § 12101(a)(3).

175. *Id.*

176. *See, e.g.,* 42 U.S.C. § 12101(a)(7).

the continuing existence of unfair and unnecessary discrimination and prejudice *denies people with disabilities the opportunity to compete* on an equal basis and to pursue those *opportunities for which our free society is justifiably famous*, and costs the United States billions of dollars in unnecessary expenses resulting from *dependency and nonproductivity*.¹⁷⁷

The ADA “by design, did not reach collateral requirements for” successful community integration or “market participation” for communities of color who, at that time (and still today) confronted structural barriers to access, such as “improved opportunities for a quality education or vocational training or access to health care and affordable housing.”¹⁷⁸ As such, the ADA did not consider disabled Black, Indigenous and other People of Color in its goal of disabled people competing and living “on an equal footing with nondisabled persons.”¹⁷⁹ With a focus on curtailing the welfare state, ADA legislation became more palatable to fiscal and social conservatives.¹⁸⁰ The infusion of the 42 U.S.C. § 12101(7) language provides insight on who the ADA was intended to benefit.

In an examination of the period on and around the 1990 passage of the ADA, in areas of economic equality, access to employment, housing, and affordable medical care, Black Americans were not competing on an “equal footing” with their white counterparts due to structural barriers that largely remain unchanged today.¹⁸¹ The 1990s, the decade of the ADA passage, reflected a time when Black people lived five to seven years less than their white counterparts; experienced higher incidences of morbidity and mortality rates; “suffer[ed] almost half the nation’s maternal deaths; experience[ed] infant mortality rates as high as underdeveloped countries; and suffer[ed] more than 60,000 ‘excess deaths’ annually.”¹⁸² The median income of the Black family documented in the 1990 census remained

177. *Id.* § 12101(a)(8) (emphasis added).

178. Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 484 (2015) (emphasis added).

179. *Id.* at 484 (emphasis added).

180. BAGENSTOS, LAW AND CONTRADICTIONS, *supra* note 35, at 31.

181. Heather Long & Andrew V. Dam, *The Black-White Economic Divide is as Wide as it was in 1968*, WASH. POST (June 4, 2020, 9:19AM), <https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/>; *see also* MEGHAN HENRY ET AL., U.S. DEP’T OF HOUSING & URB. DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS PART I: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 10, 23 (2020).

182. W. M. Byrd & Linda A. Clayton, *An American Health Dilemma: A History of Blacks in the Health System*, 84 J. NAT’L MED. ASS’N 189, 192 (1992).

at 56 percent to that of white families—one percentage point less than in 1968.¹⁸³

The years leading up to the passage of the ADA also reflected the George H. W. Bush administration's continuation of President Reagan's "War on Drugs" that led to an unprecedented escalation of the prison population well into the 1990s that targeted Black and brown people.¹⁸⁴ Throughout the 1990s, inequities in the public school system remained stark with "schools serving greater numbers of students of color ha[ving] significantly fewer resources than schools serving mostly white students," including unqualified teachers, no science laboratory facilities, word processors, or other resources routinely provided to white suburban schools.¹⁸⁵

The rights-based model of the ADA was designed based on the idea that formal legal equality could be achieved and people with disabilities receive the same opportunities as people without disabilities.¹⁸⁶ This anti-discrimination principle created a system that marginalized disabled people who are "intersectionally targeted"¹⁸⁷ based on race, gender, sexuality, class, immigration status, and other identities, creating a social and racial stratification of disability rights that left out multiply marginalized people with disabilities.

The vision of the ADA did not extend beyond white, male normativity. The ableist framing of the ADA, and by extension the application of the modern disability rights framework, continues to perpetuate and reinforce racial and structural inequities and expanded control over the Black disabled bodymind in its "race-neutral" single-issue application. In thinking about racism/ableism as "normalizing processes that are interconnected and collusive"; wherein "racism validates and reinforces ableism, and ableism validates and reinforces racism,"¹⁸⁸ the current disability rights framework must adapt.

183. Robert Manduca, *Income Inequality and the Persistence of Racial Economic Disparities*, 5 SOC. SCI. 182, 182 (2018).

184. See, e.g., SENT'G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 3 (MAY 2021), [HTTPS://WWW.SENTENCINGPROJECT.ORG/WP-CONTENT/UPLOADS/2021/07/TRENDS-IN-US-CORRECTIONS.PDF](https://www.sentencingproject.org/wp-content/uploads/2021/07/TRENDS-IN-US-CORRECTIONS.PDF).

185. Linda Darling-Hammon, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/#cancel>.

186. Bagenstos, *supra* note 44, at 23–24.

187. Spade, *supra* note 53, at 1033, 1046.

188. Annamma, *supra* note 57, at 6.

2. *Disability Critical Theory*

In re-imagining a disability rights framework as a tool to more intentionally center the intersections of racism/ableism in disability advocacy and discourse, Disability Critical Theory (DisCrit) is an important pillar. DisCrit originated through the lens of disability and education, seeking to analyze how ableism and racism work in tandem.¹⁸⁹ DisCrit theorizes “about the ways in which race, racism, dis/ability and ableism are built into the interactions, procedures, discourses, and institutions of education, which affect students of color with dis/abilities qualitatively differently than white students with dis/abilities.”¹⁹⁰

The DisCrit theoretical framework is important in that its tenets are influencing “scholars to expose and dismantle entrenched inequities in education.”¹⁹¹ These tenets interweave with the deeper intersectional and transformative approach of Disability Justice discussed in Parts II and IV that planted the seeds for the vision of reimagining the future of disability rights. Conceived by Subini Annamma, David Connor, and Beth Ferri, DisCrit is a theoretical framework that represents another tentacle that evolved from the groundwork laid by Critical Race Theory, LatCrit, Fem-Crit, Feminist Legal Studies, and Disability Studies.¹⁹² DisCrit scholars credit Disability Justice artists and activists who center conversations on “how interlocking systems of oppression have affected the lives of disabled people of color” as “deeply influential” to the development of its theoretical perspective.¹⁹³

DisCrit combines aspects of Disability Studies, Critical Race Theory, and “critical race feminist scholarship and activism”¹⁹⁴ to incorporate “a dual analysis of race and ability.”¹⁹⁵ It is designed to “explore[] ways in which both race and ability are socially constructed and interdependent.”¹⁹⁶ DisCrit surfaced in response to the scarcity of racial analysis in Disability Studies.¹⁹⁷ As critiqued by Christopher

189. *Id.* at 1.

190. *Id.* at 7.

191. Subini A. Annamma et al., *Disability Critical Race Theory: Exploring the Intersectional Lineage, Emergence, and Potential Futures of DisCrit in Education*, 42 REV. RSCH. EDUC. 46, 47 (2018).

192. Annamma, *supra* note 57, at 6.

193. Annamma, *supra* note 191, at 50.

194. *Id.* at 47.

195. Annamma, *supra* note 57, at 1.

196. *Id.* at 5.

197. *Id.* at 3.

Bell, Disability Studies “whitewash[ed] disability history, ontology and phenomenology,” positioning whiteness at the center.¹⁹⁸ At the same time, disability studies scholars expressed critique of CRT and its tendency to medicalize disability, viewing it as solely a “biological category, as an immutable and pathological abnormality rooted in the medical language of symptoms and diagnostic categories.”¹⁹⁹

In contrast to CRT, disability studies scholars describe disability in similar analytic as critical race theorists who explained race as a social construction created by a legal and political system that gave race its meaning, viewing “disability as a socially constructed category that derives meaning and social (in)significance from the historical, cultural, political, and economic structures that frame social life.”²⁰⁰

Coined in 2013, DisCrit remains a newer theoretical framework, asserting its intent “to extend CRT and [Disability Studies] in ways that are useful and thoughtful to better understand how concepts of race and ability are intertwined.”²⁰¹ DisCrit, for example, seeks to expand the dimension of CRT by examining how “race and dis/ability are co-constructed,”²⁰² defining “disability [as] a political identity, socially constructed in tandem with race and class, rather than an objective medical condition.”²⁰³ In identifying disability as a social construction, DisCrit does not minimize the physical, cognitive, and psychological impact of disability on one’s bodymind.²⁰⁴ Its tenets are as follows:

- (1) Focusing on the ways in which the interdependency of racism and ableism “uphold notions of normalcy”;
- (2) Valuing the inadequacies of the single-issue focus of identity;
- (3) Emphasizing that race and ability are socially constructed and the concurrent “material and psychological impacts of being labeled as raced or dis/abled”;

198. Christopher Bell, *Introducing White Disability Studies: A Modest Proposal*, in *DISABILITIES STUD. READER* 275 (Lennard J. Davis eds., 2006); see also Shancia Jarrett, *Lost and Found: The Stories of Blacks with Disabilities Found in the Community*, 35 *DISABILITY STUD. Q.* (2015) (critiquing the white centering in Disability Studies “[t]he concrete and present conditions of being Black and disabled fail to withhold any significant or tangible impact within my studies.”).

199. Nirmala Erelles & Andrea Minear, *Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality*, 4 *J. LITERARY & CULTURAL DISABILITY STUD.* 127, 132 (2010) (internal quotations omitted).

200. *Id.*

201. Annamma, *supra* note 57, at 6.

202. *Id.* at 5.

203. Annamma, *supra* note 191, at 50.

204. Annamma, *supra* note 57, at 11.

- (4) Privileging the narratives of disabled people of color;
- (5) Considering the impact of law, public policy, and history in the subjugation of individual rights;
- (6) Recognizing “whiteness and Ability as Property and that gains for people labeled with dis/abilities have largely been made as the result of interest convergence of white, middle-class citizens”; and
- (7) Requiring cross-movement building to combat “all forms of resistance.”²⁰⁵

A review of the seven tenants of DisCrit present several recurring and overlapping themes with Disability Justice that are central to this article’s discussion.

II. THE EMERGENCE OF DISABILITY JUSTICE

As a movement-building framework, Disability Justice is not an academic theory.²⁰⁶ It is a practice that presents opportunities for movement building.²⁰⁷ Disability Justice is “a vision of the future,” much like Critical Race Theory, in its reimagining of a future world.²⁰⁸ For Disability Justice, this future is one “where all individuals and communities are valued and seen as beautiful.”²⁰⁹ In 2005, discussions about a “second wave” in disability rights began between “disabled queers and activists of color.”²¹⁰ Conversations evolved and that same year, Black, brown, queer, and trans members of the original Disability Justice Collective,²¹¹ founded by Patty Berne, Mia Mingus, Stacey Milbern, Leroy Moore, Eli Clare, and Sebastian Margaret, coined the term Disability Justice.²¹²

Disability Justice confronts the history of the Disability Rights Movement as centering “people with mobility impairments” at the

205. *Id.*

206. Nomy Lamm, *This Is Disability Justice*, BODY IS NOT AN APOLOGY (Sept. 2, 2015), <https://thebodyisnotanapology.com/magazine/this-is-disability-justice/>.

207. See SINS INVALID, *supra* note 4, at 23–24.

208. See Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 2 (2019). Capers further expresses, “[t]he goal of [Critical Race Theory (CRT)] is not racial domination – it is certainly not racial comeuppance. The goal of CRT is equality, including along lines of gender, sexuality, class, and disability.” *Id.* at 38.

209. See SINS INVALID, *supra* note 4, at 4.

210. *Id.* at 16.

211. The Disability Justice Collective is “a national collective centering the lives and leadership of disabled people of color, Trans[], queer, poverty class folks and all brilliance from the margins.” *Disability Justice Collective*, LITTLEGLOBE, <https://www.littleglobe.org/portfolio/disability-justice-collective/> (last visited May 14, 2021).

212. PIEPZNA-SAMARASINHA, *supra* note 59, at 10.

expense of marginalizing other forms of disability and/or impairment such as intellectual, psychiatric, cognitive disabilities, and chronic illness.²¹³ It focuses on moving away from a disability rights framework of assimilation and independence to that of interdependence—and embracing a broader concept of access.²¹⁴ In essence, “[w]here disability rights seeks to change social conditions for some disabled people via law and policy, Disability Justice moves beyond law and policy: It seeks to radically transform social conditions and norms in order to affirm and support all people’s inherent right to live and thrive.”²¹⁵

Disability Justice emerged as “a movement-building framework” to “center the lives, needs, and organizing strategies of disabled queer and trans and/or Black and brown people marginalized from mainstream disability rights organizing’s white-dominated, single-issue focus.”²¹⁶ The Disability Justice framework links the connections of heterosexism, eugenics, settler colonialism, capitalism, and white supremacy to ableism in challenging how these interconnected systems are rooted in disability oppression.²¹⁷ It further urges a move from individualized to collective justice—an approach that requires a critical examination of the systemic issues and structural inequalities that uphold oppressive systems.²¹⁸

As expressed by Berne, “There was phenomenal and historic work to develop the disability rights movement in the U.S.”²¹⁹ that included “advancing a philosophy of independent living and opening possibilities for people with disabilities through the establishment of civil rights for people with disabilities.”²²⁰ Berne contextualizes the Disability Rights Movement “within its era of emergence” noting that it “left us with ‘cliff-hangers’ that have yet to be resolved.”²²¹

213. See SINS INVALID, *supra* note 4, at 13.

214. See, e.g., Mia Mingus, *Changing the Framework: Disability Justice*, LEAVING EVIDENCE (Feb. 12, 2011, 1:56 PM), <https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice/>.

215. Lewis, *supra* note 60.

216. PIEPZNA-SAMARASINHA, *supra* note 59, at 10.

217. See SINS INVALID, *supra* note 4, at 18.

218. Greg Macdougall, *Beyond Access: Mia Mingus on Disability Justice (video interview)*, EQUITABLEEDUCATION.CA (Nov. 30, 2013), <https://equitableeducation.ca/2013/mia-mingus-disability-justice>.

219. See Berne, *supra* note 49.

220. *Id.*

221. *Id.*; SINS INVALID, *supra* note 4, at 13.

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Disability Justice further critiques the disability rights framework as one that often benefits those who “can achieve status, power and access through a legal or rights-based framework,” which it recognizes may not be a possible avenue or appropriate for many disabled people.²²² Leah Lakshmi Piepzna-Samarasinha explained, “[a] rights framework says that the ADA and other pieces of civil rights legislation give disabled ‘citizens’ our rights: we simply state the law and get our needs met. Disability justice says: What if you’re disabled and undocumented? . . . What if you don’t have money to sue an inaccessible business?”²²³

In an evolving set of ten principles, Disability Justice embraces the complexity of the intersectional identity, centers the leadership of Disability Justice on those most impacted by the systems of oppression, and resists the productivity-driven conceptions of capitalism to recognize that one’s value and worth is not dependent on “‘normative’ levels of productivity.”²²⁴ Its principles further include building cross-movement solidarity, recognizing the wholeness that is found in the history and life experience of disabled people—recognizing the necessity of individual and collective sustainability in fighting for justice and liberation, and valuing the participation of all disability identities.²²⁵ Lastly, the principles emphasize interdependence, collective access, and a move toward collective liberation “that leaves no bodymind behind.”²²⁶

III. REVOLVING INEQUITIES: BLACKNESS, DISABILITY, & THE ADA DEFERRED

“The caged bird sings with a fearful trill of things unknown but longed for still and his tune is heard on the distant hill for the caged bird sings of freedom.”

-Maya Angelou²²⁷

222. SINS INVALID, *supra* note 4, at 13.

223. PIEPZNA-SAMARASINHA, *supra* note 59, at 32.

224. SINS INVALID, *supra* note 4, at 23–24.

225. *See id.* at 24–25.

226. *Id.* at 26.

227. Maya Angelou, *Caged Bird in SHAKER, WHY DON’T YOU SING?* (1983).

“What happens to a dream deferred? Does it dry up like a raisin in the sun? Or fester like a sore—And then run? Does it stink like rotten meat? Or crust and sugar over—like a syrupy sweet? Maybe it just sags like a heavy load. Or does it explode?”

*-Langston Hughes*²²⁸

Even as developments in ADA and *Olmstead* jurisprudence enhance equal access and community integration for people with disabilities,²²⁹ “the iron cage of governmentality looms large.”²³⁰ Liat Ben-Moshe refers to the “governable iron cage” as representative of “seemingly more humane ways of capture, ways that need constant administrative oversight as a result of litigation or consent decrees in specific facilities or states.”²³¹

This section builds on the concept of the governable iron cage to argue that the execution of the ADA by entities who are mandated to carry out the statute’s purpose is creating an unwitting partnership between systems that maintain the authority to confiscate and confine with a law intended to address the segregation and confinement of people with disabilities.²³² This partnership is creating a eugenics pipeline that is pronounced in the areas of special education, the treatment of deaf/disabled incarcerated people, access to medical care and treatment, police violence, and the expansion of carceral intervention for people with psychiatric disabilities.

228. Langston Hughes, *Harlem* in COLLECTED WORKS OF LANGSTON HUGHES (2002).

229. See, e.g., *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 459 (6th Cir. 2020) (holding that a change in Medicaid budget methodology put individuals with developmental disabilities at serious risk of institutionalization); *Martinez v. Cuomo*, 459 F. Supp. 3d 517, 526 (S.D.N.Y. 2020) (requiring the New York Governor to have sign language interpreters during briefings on the coronavirus outbreak); *Am. Council of Blind of New York, Inc. v. City of New York*, No. 18 CIV. 5792 (PAE), 2020 U.S. Dist. LEXIS 194231, at *2 (S.D.N.Y. Oct. 20, 2020) (requiring the City of New York to provide non-visual crossing information at the vast majority of its signalized intersections, to accommodate blind and low-vision pedestrians); *United States v. Mississippi*, 400 F. Supp. 3d 546, 579 (S.D. Miss. 2019) (asserting that Mississippi’s mental health system unnecessarily institutionalized adults with psychiatric disabilities instead of providing community-based services).

230. BEN-MOSHE, *supra* note 17, at 247.

231. *Id.* at 246.

232. See *id.*; see also Hilton, *supra* note 81, at 224 (quoting Avonte’s Law Act of 2015, S. 163, 114th Cong. (2015)) (“when appeals for state recognition and protection of a certain disenfranchised group . . . can so seamlessly become the grounds for intensifying the surveillance and securitization to which that same group is subjected.”); Lewis, *supra* note 60.

A. The Eugenics Pipeline

The post-civil rights racialization of eugenics as a coercive tool of reproductive and social control continues today with its primary targets being people who are under the control of the carceral state, which I include as jails,²³³ prisons,²³⁴ group homes for people with intellectual and developmental disabilities,²³⁵ adult guardianship,²³⁶ the family regulation system,²³⁷ nursing facilities and immigrant detention centers²³⁸ and those individuals who are targets of this system. These carceral spaces disproportionately include people with intellectual, developmental, cognitive, and psychiatric disabilities and represent examples of what has become a part of the eugenics pipeline.²³⁹

233. See Corey G. Johnson, *California Bans Coerced Sterilization of Female Inmates*, REVEAL (Sept. 26, 2014), <https://www.revealnews.org/article-legacy/california-bans-coerced-sterilization-of-female-inmates/>; Kalhan Rosenblatt, *Judge Offers Inmates Reduced Sentences in Exchange for Vasectomy*, NBC (July 21, 2017, 1:15 PM), <https://www.nbcnews.com/news/us-news/judge-offers-inmates-reduced-sentences-exchange-vasectomy-n785256> (a Tennessee judge “signed a standing order, which permitted inmates to have their sentences shortened by 30 days in exchange for the sterilizing procedure”).

234. See, e.g., *Sterilization of Women in Prison: A Curated Collection of Links*, MARSHALL PROJECT, <https://www.themarshallproject.org/records/955-sterilization-of-women-in-prison> (last visited May 14, 2021) (collection of articles focused on the issue of coerced sterilization of incarcerated persons with an emphasis on women in prison).

235. See, e.g., Chin, *supra* note 21, at 384–86.

236. See *In re Guardianship of Moe*, 960 N.E.2d 350, 355 (Mass. App. Ct. 2012) (finding trial court violated the due process rights of a woman with intellectual disability by appointing her parents as guardians with the direction that they abort her pregnancy and sterilize her); see also *Kennedy v. Kennedy*, 845 N.W.2d 707, 708 (Iowa 2014) (denying son’s petition to remove mother as guardian after she had her son sterilized without his consent).

237. See *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001) (holding that child welfare agency workers violated the due process rights of a parent with intellectual disability after coercing her to undergo sterilization with the promise of getting her kids back).

238. See Steven Moore, *ICE is Accused of Sterilizing Detainees. That Echoes the U.S.’s Long History of Forced Sterilization*, WASH. POST (Sept. 25, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/09/25/ice-is-accused-sterilizing-detainees-that-echoes-uss-long-history-forced-sterilization/>; Arit John, *Arizona GOPer Resigns After Calling for Forced Sterilization of Women on Medicaid*, ATLANTIC (Sept. 15, 2014), <https://www.theatlantic.com/politics/archive/2014/09/arizona-goper-resigns-after-calling-for-forced-sterilization-of-women-on-medicaid/380191/>.

239. Robert A. Wilson, a professor of philosophy at La Trobe University in Melbourne, Australia, coined the term “eugenics pipeline.” See, e.g., Robert A. Wilson, *Eugenics Never Went Away*, AEON (June 5, 2018), <https://aeon.co/essays/eugenics-today-where-eugenic-sterilisation-continues-now> (“Eugenics survivors are those who have lived through eugenic interventions, which typically begin with being categori[z]ed as less than fully human – as ‘feeble-minded’, as belonging to a raciali[z]ed ethnic group assumed to be inferior, or as having a medical condition, such as epilepsy, presumed to be heritable. That categori[z]ation enters them into a eugenics pipeline.”).

As argued by Robert A. Wilson:

The ongoing eugenic sterilisation of people with disabilities, prisoners, poor people, people from certain racialised ethnic groups and indigenous people (especially women) affects precisely the same sorts of people explicitly targeted by eugenics before 1945. These sterilisations are not a reminder of a eugenics past. They result from continuing and new eugenics pipelines.²⁴⁰

The eugenics pipeline, however, expands beyond its connection to carceral spaces and reproductive and social control. The application of eugenics theories as a means of government control over one's bodymind—as a system that devalues and disregards one's human worth based on notions of productivity and perceptions of white, ableist normativity—resound through modern law and society in the United States. The interconnected relationship between eugenics and systems that have categorized persons interacting with those systems as dangerous, unworthy, and disposable legitimizes the role that society plays in making disabled Black, Indigenous, and other People of Color disappear—it is what fuels the eugenics pipeline.

B. The Eugenics Pipeline: A Year In Review

The eugenics pipeline is embedded in ableism; it is a process by which systems of state and societal control use specific categorizations of disability to legitimize the incarceration, segregation, discarding, and confiscation of the racialized, disabled bodymind. The growing strength of the eugenics pipeline is antithetical to the goals of the ADA.²⁴¹ This section endeavors to illustrate how Black people with disabilities and deaf/disabled incarcerated people are benefiting very little by ADA advances and, in many respects, are existing under the conditions of a pre-ADA world.

240. *Id.*

241. See David Pfeiffer, *Eugenics and Disability Discrimination*, 9 *DISABILITY & SOC'Y* 481, 482 (1994).

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*1. Education**A. Judge Rotenberg Educational Center*

In March 2020, following decades of lawsuits, grassroots organizing, political efforts, and the documented deaths, suicides, and torture of students enrolled at the Judge Rotenberg Educational Center²⁴² (JRC or “the Center”), the Food and Drug Administration (FDA) issued a prohibition on the Center’s policy of using electric shock devices to correct “self-injurious or aggressive behavior.”²⁴³ In administering electric shock to its residents, JRC used the graduated electronic decelerator (GED). The GED allowed a JRC employee to push a button that is connected to a device that is attached to a JRC resident.²⁴⁴ The device sends an electric shock at differing intensity levels.²⁴⁵ Residents on average received two shocks a week, with some residents receiving ten to thirty per week.²⁴⁶ Effects of the GED on residents included burns, suicidal ideation, anxiety, aggression, loss of sensation in the limbs.²⁴⁷

The decision by the FDA to prohibit electronic shock devices targeted this practice by the JRC, which is a self-proclaimed day and

242. For an extensive and thorough history of the efforts to end the practice by JRC of using electric shock therapy, see Lydia X.Z. Brown, *Living Archive & Repository on the Judge Rotenberg Center’s Abuses: U.S. Federal Gov’t Agencies*, LABORING FOR DISABILITY JUSTICE & LIBERATION (May 2, 2021), <https://autistichoya.net/judge-rotenberg-center/#federalgovt>; see also Letter from Jeff Rosen, Chairperson, Nat’l Council on Disability, to Margaret A. Hamburg, Comm’r, U.S. Food and Drug Admin. (Mar. 27, 2014), <https://ncd.gov/publications/2014/03272014>; *Judge Rotenberg Center: A History of Torture*, ADAPT, <https://adapt.org/jrc/> (last visited May 14, 2021); Letter from Jonathan Young, Chairman, Nat’l Council on Disability, to Allison Nichol, Chief, Dep’t of Just. Disability Rts. (April 12, 2012), <https://ncd.gov/publications/2012/DOJApril132012>; Shain M. Neumeier & Lydia X.Z. Brown, *Torture in the Name of Treatment: The Mission to Stop the Shocks in the Age of Deinstitutionalization*, in *AUTISTIC COMMUNITY AND THE NEURODIVERSITY MOVEMENT: STORIES FROM THE FRONTLINE* 195 (Steven K. Kapp ed. 2020).

243. 21 C.F.R. § 895.105 (2021). In banning the use of electric shock devices, the FDA cited to the weakness of evidence that such devices are effective and emphasized the negative, and sometimes deadly, emotional, psychological and physical risks associated with the use of electric shock devices. See *FDA Takes Rare Step to Ban Electrical Stimulation Devices for Self-Injurious or Aggressive Behavior*, FDA (March 4, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-rare-step-ban-electrical-stimulation-devices-self-injurious-or-aggressive-behavior>.

244. See Lydia X.Z. Brown, *Judge Rotenberg Ctr. Survivor’s Letter*, AUTISTIC HOYA (Jan. 15, 2013), <https://www.autistichoya.com/2013/01/judge-rotenberg-center-survivors-letter.html>.

245. See *id.*

246. See U.S. FOOD & DRUG ADMIN ET AL., *NEUROLOGICAL DEVICES PANEL 128* (2014).

247. See *id.* at 57, 225.

residential school.²⁴⁸ It enrolls students from age five through adults who are labeled as “emotionally disturbed,” intellectually disabled, or on the autism spectrum and exhibit “behavioral, emotional, and/or psychiatric problems.”²⁴⁹ It is the only facility in the country that uses electric shocks as a routine disciplinary measure for students.²⁵⁰ To understand both the belatedness and gravity of the FDA’s decision, some background is necessary.

The struggle to end the use of electronic shock at JRC spans decades.²⁵¹ It involves a prolonged fight by Autistic self-advocates, disability, and parent advocates to close JRC, an institution created in 1971.²⁵² In an open public hearing of the FDA in 2014, the Director of Research at JRC testified in support of the use of electronic shock as a successful method to “treat . . . behavior disorder,” noting that the application of the electronic shock on students caused pain, but no harm.²⁵³ JRC’s testimony took place just one year after the United Nations Special Rapporteur on Torture published a report that determined that the use of electronic shock and physical restraints at JRC violated the United Nations Convention on Torture.²⁵⁴ The report urged the U.S. government to investigate and address these human rights violations.²⁵⁵ The fight to end the use of electric shock therapy gained short-lived national attention when a grainy black and white video surfaced, ten years after its original recording in 2002, showing a young man with his four limbs spread outward, tied to a restraint board.²⁵⁶ In the video, you can hear his voice pleading, “[p]lease stop,

248. *See id.* at 92; *see also* 21 C.F.R. § 895.105.

249. *See Judge Rotenberg Educational Center: A Day and Residential School*, JUDGE ROTENBERG CTR., <https://www.judgerc.org/> (last visited May 14, 2021).

250. *See* Jacey Fortin, *F.D.A. Bans School Electric Shock Devices*, N.Y. TIMES (Mar. 6, 2020), <https://www.nytimes.com/2020/03/06/us/electric-shock-fda-ban.html>; *see also* News Release, U.S. Food & Drug Admin., FDA Takes Rare Step to Ban Electrical Stimulation Devices for Self-Injurious or Aggressive Behavior (Mar. 4, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-rare-step-ban-electrical-stimulation-devices-self-injurious-or-aggressive-behavior>.

251. *See* Fortin, *supra* note 250.

252. *See* Neumeier & Brown, *supra* note 242, at 196.

253. U.S. FOOD & DRUG ADMIN ET AL., *supra* note 246, at 123–24.

254. *See* Human Rts. Council, Rep. on the Special Rapporteur on Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, U.N. Doc. A/HRC/22/53/Add.4, at 84 (Mar. 4, 2013).

255. *See id.* at 84.

256. *See* Lydia X. Z. Brown, *FOX Undercover on Judge Rotenberg Center*, YOUTUBE (May 9, 2012), <https://www.youtube.com/watch?v=BxtZXUheQ8E>.

please stop.”²⁵⁷ His body is writhing as he screams while several people lean over and around him.²⁵⁸

The video shows Andre McCollins, a young Black man who was eighteen-year-old at the time and living at the JRC.²⁵⁹ In the video, McCollins was given “31 electronic shocks as punishment for misbehaving” as part of the Center’s “behavior modification program.”²⁶⁰ The experience left burns on McCollins’s arms and legs,²⁶¹ and emotional and psychological harm.²⁶² McCollins’s mother fought in court for the release of this video.²⁶³ The footage led to a 2012 lawsuit against the Center and an extended jury trial, which disclosed that “[a]ll but one of [the 31] shocks . . . was for tensing up or screaming, in anticipation of or response to shocks or restraints, while the other shock he received was for failure to remove his coat.”²⁶⁴ The case ended in a settlement before the jury reached a verdict.²⁶⁵

Throughout the years of advocacy challenging JRC and its treatment of students, little attention was given by media,²⁶⁶ federal

257. *See id.*

258. *See id.*

259. *See id.*

260. Jennifer Gonnerman, *31 Shocks Later*, N.Y. MAG. (Aug. 31, 2012), <https://nymag.com/news/features/andre-mccollins-rotenberg-center-2012-9/>.

261. *See* Amy Burkholder, *Controversy over Shocking People with Autism, Behavioral Disorders*, CBS NEWS (Aug. 5, 2014, 5:00 PM), <https://www.cbsnews.com/news/controversy-over-shocking-people-with-autism-behavioral-disorders/>; *see* Gonnerman, *supra* note 260.

262. *See* Gonnerman, *supra* note 260.

263. *See* Kerima, *#AutisticWhileBlack The Sacrifice of Andre and Cheryl McCollins*, INTERSECTED (Mar. 14, 2018, 12:11 AM), <http://intersectedisability.blogspot.com/2018/03/autisticwhileblack-sacrifice-of-andre.html>.

264. Shain Neumeier, *The Judge Rotenberg Ctr. on Trial, Part One*, AUTISTIC SELF ADVOC. NETWORK (Apr. 16, 2012), <https://autisticadvocacy.org/2012/04/the-judge-rotenberg-center-on-trial-part-one/>. Long before the release of the 2012 footage of McCollins, advocacy groups were organizing and movement building around the issue of the use of electroshock therapy. *See* Neumeier & Brown, *supra* note 242, at 196. For an extensive resource list of information and advocacy concerning the Center, *see id.*

265. Shain Neumeier, *The Judge Rotenberg Ctr. on Trial, Part 7*, AUTISTIC SELF ADVOC. NETWORK (Apr. 28, 2012), <https://autisticadvocacy.org/2012/04/the-jrc-on-trial-part-7/>.

266. *See, e.g.,* Heather Vogell & Annie Waldman, *New York City Sends \$30 Million a Year to School With History of Giving Kids Electric Shocks*, PROPUBLICA (Dec. 23, 2014, 10:00AM), <https://www.propublica.org/article/nyc-sends-30-million-a-year-to-school-with-history-of-giving-kids-shocks> (lacking analysis of race or class despite including a single sentence noting that ninety percent of JRC students are non-white); *see also* Emily Jacobs, *School for the Disabled Won’t Stop Electrically Shocking its Students*, N.Y. POST (Dec. 18, 2018, 9:17 PM), <https://nypost.com/2018/12/18/school-for-the-disabled-wont-stop-electrically-shocking-its-students/> (describing the controversy surrounding Judge Rotenberg Center’s use of shocks without mentioning the race or class demographics of the student

and state government agencies,²⁶⁷ and disability rights advocacy groups²⁶⁸ that the majority of students at JRC are low-income, Black, and brown.²⁶⁹ Based on publicly available data examined from 2002, when McCollins was a student at JRC, until 2018, the Center had a stark increase in the number of Black and Hispanic students compared to white students.²⁷⁰ For example, Black student enrollment went from 39.32% of the student population in 2002 to 52.89% in 2018.²⁷¹ In contrast, white student enrollment saw a marked decrease from 2002, comprising about 35.95% of the student population to about 17.36% of the student enrollment in 2018, according to the latest publicly available data.²⁷² This 2018 data further reflects that 52% of students

body); Jenifer McKim, *School Shocks Students With Disabilities. The FDA Is Moving To Ban The Practice*, NPR (Jan 23, 2019, 7:24 AM), <https://www.npr.org/2019/01/23/687636057/massachusetts-school-defends-use-of-electric-shock-treatments>; Ed Pilkington, *Human Rights Body Calls on US School to Ban Electric Shocks on Children*, GUARDIAN (Dec. 18, 2018), <https://www.theguardian.com/us-news/2018/dec/18/judge-rotenberg-center-electric-shocks-ban-inter-american-commission-human-rights>; Denise Powell, *Electric Shock Therapy on Special Needs Students: Treatment or Torment?*, ABC NEWS (July 1, 2018, 9:52 PM), <https://abcnews.go.com/Health/electric-shock-therapy-special-students-treatment-torment/story?id=56238582>.

267. See generally JRC PROGRAM VISITATION REP., OBSERVATIONS AND FINDINGS OF OUT-OF-STATES PROGRAM VISITATION: JUDGE ROTENBERG EDUCATIONAL CENTER (2006) (describing investigative findings and detailed data about disability diagnosis demographics without mention of student's race or class identities); see also Letter from Patty Murray, Ranking Member, Senate Comm. on Health, Educ., Lab. & Pensions, to Dr. Stephen M. Hahn Comm'r of Food and Drugs (Feb. 10, 2020), <https://www.help.senate.gov/imo/media/doc/2020.02.07%20FDA%20rule%20on%20electric%20shock%20FINAL.pdf> (condemning the use of shocks on disabled students at JRC without mention of race or class makeup of the student body).

268. See Press Release, ADAPT, ADAPT Demands the FDA to Stop Shocking Disabled People into Submission (Mar. 9, 2018), <https://adapt.org/adapt-demands-the-fda-to-stop-shocking-disabled-people-into-submission/> (calling on the FDA to release regulations to end the use of shocks at JRC); see generally ACLU, WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION FOR A HEARING ON: THE SAFETY AND EFFECTIVENESS OF AVERSE CONDITIONING DEVICES (2014) (describing the disability demographics of the student body without mention of race or class).

269. See *School of Shock*, NPR (Sept. 4, 2007, 9:00 AM), <https://www.npr.org/transcripts/14156303> (reporting that many JRC students are from "neighborhoods often in New York City that were among the poorest in the city . . . like south Bronx or northern Harlem").

270. See *Elsi Table Generator*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/ccd/elsi/tableGenerator.aspx> (last visited May 14, 2021) (this is the table generator where data originated). "Black" and "Hispanic" are the terms used by *Elsi Table Generator*.

271. *Id.*

272. *Id.*

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at the Judge Rotenberg Center were Black, 27% were Hispanic, and 17% were white.²⁷³

When you consider the JRCs' total enrollment over the sixteen-year-period from 2002 to 2018, students of color (identified by JRC as American Indian/Alaska Native, Asian/Pacific Islander, Hispanic, and Black) consistently made up more than 60% of the student population.²⁷⁴ Between 2011–18, the trend at JRC showed a marked increase in students of color, making up about 80% of the student population in 2018.²⁷⁵

The documented accounts of torture by survivors of JRC spanned years.²⁷⁶ Decades before using electric shock on its residents, JRC held a long track record of using “extremely prolonged restraint, food deprivation, deep muscle pinching, forced inhalation of ammonia, and sensory assault techniques,” for what it described as “behavioral modification.”²⁷⁷

While the FDA banned the use of electric shock after decades of protests, lives ruined, and deaths, a federal appeals court vacated the final rule the following year,²⁷⁸ allowing the practice to continue. JRC remains a benefactor of government funding.²⁷⁹ The Center remains open with a \$70 million annual revenue,²⁸⁰ and an Executive Director salary of \$321,000.²⁸¹

JRC represents the embodiment of racism/ableism sanctioned by the federal government to legitimize the social control of the disabled

273. *Id.*

274. *Id.*

275. See NAT'L CTR. FOR EDUC. STAT, *supra* note 270.

276. See, e.g., “*It is mind and body torture*” – Jennifer Msumba, survivor of JRC, ADAPT, <https://adapt.org/it-is-mind-and-body-torture-jennifer-msumba-survivor-of-jrc/> (last visited May 14, 2021).

277. *Laboring for Disability Justice & Liberation: Living Archive & Repository on the Judge Rotenberg Center's Abuses*, AUTISTIC HOYA, <https://autistichoya.net/judge-rotenberg-center/> (last visited May 14, 2021); see also Lydia X.Z. Brown, *The Crisis of Disability Is Violence: Ableism, Torture, and Murder*, 29 TIKKUN MAG. 31 (2014) (describing the JRC's use of “food deprivation, forced inhalation of ammonia, and prolonged use of restraint and seclusion”).

278. *Judge Rotenberg Educ. Ctr. v. U.S. Food and Drug Admin.*, 3 F.4th 390, 399 (D.C. Cir. 2021).

279. See *Admissions*, JUDGE ROTENBERG CTR., <https://www.judgerc.org/admissions.html> (last visited May 14, 2021) (“students are funded by public school districts and various state agencies”).

280. See *Judge Rotenberg Educ. Ctr. Inc.*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/42489805> (last visited May 14, 2021).

281. See Paul Kix, *The Shocking Truth*, BOS. MAG. (June 17, 2008), <https://www.bostonmagazine.com/2008/06/17/the-shocking-truth/>.

Black and brown body/mind. Residents as young as five years old to adulthood are categorized through the label of intellectual and developmental disability with “large numbers of people whose primary neurodivergence is psychiatric disability or mental illness, many of whom arrive through referrals from the juvenile criminal legal system.”²⁸²

As expressed by Shain M. Neumeier and Lydia X. Z. Brown, “[t]his particular blend of ableist and racist targeting . . . call[s] into question how and why so many activists working publicly against JRC have little to no understanding of the racial implications of JRC’s population and increasingly overt ties to the criminal punishment system”²⁸³ The explicit targeting by JRC of the racialized population is reflected in JRC enrollment documents over the past twenty years, and through recruitment tactics.

These tactics include outreach to criminal court judges and probation officers, as well as targeting new students to enter JRC from New York juvenile jails and Rikers Island.²⁸⁴ The recruiting efforts employed further define JRC as a government sanctioned player in the eugenics pipeline that segregates, confiscates, and discards the racialized disabled bodymind as a means of social control.

B. The Georgia Network for Education & Therapeutic Support Program

Around the same time that the FDA banned the use of electric shock devices at JRC, a federal court allowed two federal cases to move forward that challenged a statewide public education program that segregated, abused, and isolated students with disabilities.²⁸⁵ The Georgia Network for Education and Therapeutic Support (GNETS) is a statewide program that started in 1970 that is operated, regulated, and funded by the state of Georgia.²⁸⁶ It serves approximately 5,000 students between the ages of 3 and 21 with intellectual, developmental, and psychiatric disabilities and who are labeled as having severe “emotional and behavior disorder.”²⁸⁷ GNETS

282. Neumeier & Brown, *supra* note 242, at 199.

283. *Id.*

284. See, e.g., Jennifer Gonnerman, *Nagging? Zap. Swearing? Zap.*, MOTHER JONES (Aug. 20, 2007), <https://www.motherjones.com/politics/2007/08/nagging-zap-swearing-zap-new-yorks-investigations-rotenberg-center/>; Gonnerman, *supra* note 260.

285. See *United States v. Georgia*, 461 F. Supp. 3d 1315, 1317 (N.D. Ga. 2020); Ga. Advoc. Off. v. Georgia, 447 F. Supp. 3d 1311, 1315 (N.D. Ga. 2020).

286. See *United States*, 461 F. Supp. 3d at 1317–18.

287. See Class Action Complaint at 3, 26, Ga. Advoc. Off. v. Georgia., 447 F. Supp. 3d 1311 (N.D. Ga. 2020).

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programs serve all of Georgia's 181 public school districts, operating in 53 segregated "centers" throughout Georgia.²⁸⁸

GNETs enrolls primarily low-income, Black students; in "[f]all 2015, every one of the 77 students placed in GNETS by the Atlanta Public Schools was African American."²⁸⁹ The range of allegations against GNETS include warehousing students where they received little to no educational instruction; segregating students in poor-quality buildings, some of which were formally used as segregated "Black-only" schools during the Jim Crow era; using dog collars, isolation rooms and other forms of punitive treatment to harshly discipline students; subjecting students to behavioral experimentations; failing to provide adequate mental health treatment to students,²⁹⁰ and lacking "libraries, cafeterias, gyms, science labs, music rooms, or playgrounds" for students to access.²⁹¹

In 2015, the Department of Justice (DOJ) completed a multi-year investigation against GNETS finding that the program segregated and isolated students with disabilities in violation of the ADA by, *inter alia*, failing to give students the opportunity to receive therapeutic and educational supports in a more integrated setting.²⁹² Five years later, after Georgia failed to take steps to address the DOJ's findings of discrimination, the two federal lawsuits survived Georgia's motions to dismiss and will be consolidated.²⁹³

JRC and GNETS started in 1970 and 1971, respectively.²⁹⁴ Nearly half a century since its founding, each institution disproportionately targets racialized disabled students. Legitimized by

288. See *id.* at 28; see also Alan Judd, *Georgia 'Psychoeducational' Students Segregated by Disability, Race*, ATLANTA J.-CONST. (Apr. 28, 2016), http://specials.myajc.com/psychoeducation/?ecmp=AJC_internallink_4292016_AJCToMyAJC_psycho_ed_atlanta.

289. Class Action Complaint at 25, *Ga. Advoc. Off.*, 447 F. Supp. 3d at 1311 (citing Judd, *supra* note 288).

290. See Judd, *supra* note 288; Alan Judd, *In Psychoeducational School, Behavioral Experiment for Troubled Child*, ATLANTA J.-CONST. (May 5, 2016), <http://specials.myajc.com/psychoedexperiment/>.

291. *Ga. Advoc. Off.*, 447 F. Supp. 3d at 1316.

292. See Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., to Nathan Deal, Governor of Ga., and Sam Olens, Att'y Gen. of Ga. 1 (July 15, 2015), <https://www.justice.gov/sites/default/files/crt/legacy/2015/07/15/gnetslof.pdf>.

293. See *Ga. Advoc. Off.*, 447 F. Supp. 3d at 1328.

294. See *Georgia Network for Educational and Therapeutic Support*, GA. DEP'T OF EDUC., <https://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Georgia-Network-for-Special-Education-and-Supports.aspx> (last visited May 14, 2021); see Heather Morrison, *Judge Rotenberg Center Has History on its Side as FDA Looks to Ban Electric Shock Therapy*, MASSLIVE (Jan. 7, 2019), https://www.masslive.com/news/2016/07/fda_goes_up_against_a_long_his.html.

the federal government who funds and sanctions their conduct, each facility illustrates the strength of the eugenics pipeline that is built from the roots of systemic racism/ableism to segregate, confiscate, and discard the Black and brown disabled bodymind who is categorized as disruptive and violent with “behavioral needs.”²⁹⁵

2. Deaf/Disabled Incarcerated Individuals

The coronavirus pandemic exacerbated the isolation and information deprivation that deaf/disabled people experience in carceral facilities. Because we know that policing disproportionately impacts Black disabled people, the impact of COVID in carceral facilities also disproportionately falls on Black disabled people.²⁹⁶ In May 2020, as the coronavirus steadily spread through carceral facilities,²⁹⁷ advocates shared during a webinar on COVID-19 and mass incarceration²⁹⁸ how one deaf incarcerated person understood COVID to mean having “the flu . . . a sore throat or a runny nose.”²⁹⁹ The purposeful deprivation of deaf/disabled incarcerated individuals of information and the ability to effectively communicate with legal counsel, loved ones, and others resonates in history. It reflects a period where states enacted laws that stripped enslaved persons of the right to knowledge. Through the passage of state laws, enslaved persons who gathered to learn to read or write faced corporal punishment that could include “lashes.”³⁰⁰ Yet, keeping information and knowledge from deaf/disabled incarcerated individuals remains unchanged despite continued advocacy to change this practice.

295. *Ga. Advoc. Off.*, 447 F. Supp. 3d at 1315; see also Letter from Vanita Gupta to Nathan Deal & Sam Olens, *supra* note 292, at 19.

296. See Abigail Abrams, *Black, Disabled and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities*, TIME (June 25, 2020), <https://time.com/5857438/police-violence-black-disabled/>.

297. See *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (May 14, 2021, 4:50 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

298. See BEHEARDDC, *HEARD Webinar on Mass Incarceration & COVID-19 – ASL with Spanish & English Interpretation*, YOUTUBE (Aug. 11, 2020), https://www.youtube.com/watch?v=YZRjK6XonvY&t=4s&ab_channel=BEHEARDDC.

299. See *id.* (timestamps 1:10:35–1:12:05: image description of a video taken with a deaf incarcerated person who is discussing their understanding of COVID-19 and an explanation of the purpose of copy-signing a video clip). The video is not shown to the webinar audience as to protect the identity of the incarcerated person. The webinar host is signing back to the webinar audience, or copy-signing, what the deaf incarcerated person is expressing in the video clip; 1:12:15–1:12:52 for the copy-signing of video clip.

300. *The Slave Experience: Education, Arts, & Culture*, PBS: THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/education/docs1.html> (last visited May 14, 2021).

In August 2020, the Federal Communications Commission (FCC) issued a notice of a fourth proposed rule, *Rates for Interstate Inmate Calling Services*.³⁰¹ Buried in paragraph 136 of this 94-page proposed rule read: “*Disability Access*.”³⁰² In this section, the FCC sought comment on three questions: (1) whether “[incarcerated people with disabilities] have adequate access to Telecommunications Relay Services?”; (2) what forms of [telecommunication services] should inmate calling services providers make available; and (3) “what can the Commission do to facilitate that?”³⁰³

Over the past decade, the FCC invited comment on this same issue, failing to listen to advocate’s demands for functionally equivalent communication in jails and prisons for deaf/disabled people, incarcerated children of deaf adults, and people with communication disabilities.³⁰⁴ Between FCC’s first comment invitation and the most recent iteration of the proposed comment, advocates—particularly the organization HEARD³⁰⁵—provided extensive evidence of the deathly consequences and the continued devastation of communication deprivation on disabled people.³⁰⁶ Despite these efforts, advocacy groups again, are making this demand. But this time, it was during the COVID-19 pandemic as deaf/disabled people are denied life-saving medical information.³⁰⁷

As a result of the outdated, and sometimes non-existent, telecommunication technology, incarcerated people who are deaf/disabled have no “basic access to telecommunications services and equipment.”³⁰⁸ FCC has effectively denied incarcerated people

301. See *Rates for Interstate Inmate Calling Services*, 85 Fed. Reg. 67480 (proposed Oct. 23, 2020) (codified at 47 C.F.R. pt 64).

302. *Id.* at 67495.

303. *Id.*

304. See *What Today’s “Historic” FCC Vote Means to Deaf & Disabled People*, TALILA A. LEWIS (Nov. 17, 2016), <https://www.talilalewis.com/blog/what-todays-historic-fcc-vote-means-for-deaf-disabled-people>.

305. HEARD, <https://behearddc.org>, (last visited Oct. 29, 2021).

306. See Letter from Talila A. Lewis, Founder & Volunteer Dir., HEARD, to Marlene H. Dortch, Comm’n Sec’y, Fed. Commc’ns Comm’n 2 (Nov. 23, 2019), [https://ecfsapi.fcc.gov/file/112406219977/HEARD%20FCC%20Comment%20Cover%20\(Nov%202020\).pdf](https://ecfsapi.fcc.gov/file/112406219977/HEARD%20FCC%20Comment%20Cover%20(Nov%202020).pdf).

307. See *id.*

308. See BEHEARDDC, *John Wilson, Jr.’s Long Journey Home*, YOUTUBE (Sept. 1, 2020), <https://www.youtube.com/watch?t=731&v=9rwo44gem0g&feature=youtu.be>; Comments of HEARD et al. at 1, *In re Rates for Interstate Inmate Calling Services*, No. 12-375 (Nov. 23, 2020), <https://ecfsapi.fcc.gov/file/1123290918519/2020.11.23%20Accessibility%20Coalition%20arceral%20Communications%20Comments%20final.pdf>.

with communications disabilities “the ability to communicate with family, loved ones, and legal counsel, sometimes for years.”³⁰⁹ The actions of the FCC represent a more subtle form of state control over the disabled bodymind. Similar to JRC and GNETS, it provides another example of the eugenics pipeline driven by structural racism/ableism and sanctioned by the government to legitimize the isolation and discarding of the Black disabled bodymind.

3. Health Care

Michael Hickson was a forty-six-year-old Black father of five who died of complications from COVID-19 after a court-appointed guardian, in collaboration with doctors, discontinued his medical treatment, including hydration and nutrition for six days, over the objection of his wife of eighteen years.³¹⁰

Prior to his death, Hickson’s wife recorded the following conversation she had with her husband’s doctor, later expressing her concern that the “doctors were placing less value on her husband’s life because he was a Black man who was disabled.”³¹¹

Doctor: “So as of right now, his quality of life . . . he doesn’t have much of one.”

Melissa Hickson: “What do you mean? Because he’s paralyzed with a brain injury he doesn’t have quality of life?”

Doctor: “Correct.”

Melissa Hickson: “Who gets to make that decision whether somebody’s quality of life, if they have a disability, that their quality of life is not good?”³¹²

309. See Letter from HEARD to Marlene H. Dortch, Comm’n Sec’y, Fed. Comm’n Comm’n 2 (Jan. 12, 2015), <https://ecfsapi.fcc.gov/file/60001013058.pdf> (“Men and women across this nation continue to spend months, and sometimes years, with no communication with their children and loved ones—simply because of their disability.”); see also Christie Thompson, *Why Many Deaf Prisoners Can’t Call Home*, MARSHALL PROJECT (Sept. 19, 2017), <https://www.themarshallproject.org/2017/09/19/why-many-deaf-prisoners-can-t-call-home>.

310. Mr. Hickson’s wife and sister were each independently seeking guardianship over Mr. Hickson. See Kim Roberts, *Austin Hospital Withheld Treatment from Disabled Man Who Contracted Coronavirus*, TEXAN (June 29, 2020), <https://thetexan.news/austin-hospital-withheld-treatment-from-disabled-man-who-contracted-coronavirus/>. A court appointed a guardian to make end-of-life decisions for Mr. Hickson while the guardianship case was pending in court. See *id.*

311. Ariana E. Cha, *Quadriplegic Man’s Death From COVID-19 Spotlights Questions of Disability, Race and Family*, WASH. POST (July 5, 2020, 9:40 AM), <https://www.washingtonpost.com/health/2020/07/05/coronavirus-disability-death/>.

312. Texas Right to Life, *Quadriplegic COVID-19 Patient Starved by Texas Doctor*

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Mrs. Hickson will never know whether the decision to withhold life-sustaining treatment to her husband was medically sound.³¹³ Doctors are routinely given deference in their medical judgment. Nor will she know what role his Blackness played in the medical decision. What is known is history's treatment of Black people in medicine and in institutionalized settings. And the actions taken by medical professionals and state governments concerning rationing of care during COVID-19.³¹⁴

Medical racism as a form eugenics—state control to legitimize the discarding and confiscation of the Black bodymind—is deeply embedded in history. There was Dr. Jason Maron Sims.³¹⁵ Sims performed gynecological experiments on enslaved women.³¹⁶ During these experiments, other physicians assisted Sims to forcibly restrain the “unanesthetized slave woman . . . through her shrieks of agony as Sims determinedly sliced, then sutured her genitalia.”³¹⁷ And the Tuskegee Syphilis Experiment in the 1930s where, for forty-one years, the United States Public Health Service withheld effective syphilis treatment from Black men who the government told were receiving free health assessments, screening, and treatment.³¹⁸ The coronavirus pandemic forced the United States to face a stark reminder that pandemics are not a “great equalizer”³¹⁹ in how they ravage communities.

Because of His Disability, YOUTUBE (June 26, 2020), https://www.youtube.com/watch?v=jq_gtjnzZg.

313. See Joseph Stramondo, *COVID-19 Triage and Disability: What NOT to Do*, AM. J. BIOETHICS (Mar. 30, 2020), <http://www.bioethics.net/2020/03/covid-19-triage-and-disability-what-not-to-do/>.

314. Natalie Chin & Jasmine Harris, *Examining How Crisis Standards of Care May Lead to Intersectional Medical Discrimination Against COVID-19 Patients*, CTR. FOR PUB. REPRESENTATION, <https://www.centerforpublicrep.org/wp-content/uploads/FINAL-Intersectional-Guide-Crisis-Care-PDF.pdf> (last visited Nov. 11, 2021).

315. See HARRIET A. WASHINGTON, *MEDICAL APARTHEID THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 2* (2006).

316. See *id.* at 3.

317. *Id.*

318. See *id.* at 161.

319. Stephen A. Mein, *COVID-19 and Health Disparities: The Reality of “the Great Equalizer,”* J. GEN. INTERNAL MED. (May 14, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7224347/>; see also Mark Honigsbaum, *Epidemics Have Often Led to Discrimination Against Minorities – This Time is No Different*, CONVERSATION (June 26, 2020, 8:42 AM), <https://theconversation.com/epidemics-have-often-led-to-discrimination-against-minorities-this-time-is-no-different-140189>.

4. *Police Violence & Carceral Spaces*³²⁰

The family of Charleena Lyles held a vigil in Seattle as the country continued to erupt in protests over the murder of George Floyd, Breonna Taylor, and countless others by police.³²¹ Lyles, a thirty-year-old Black, pregnant woman with an extensive mental health history that involved the police being called to her home at least twenty times, was killed by police in 2017.³²² Lyles called 911 on a Sunday morning to report a burglary, and, according to the two officers' account, brandished a knife when the police entered her apartment.³²³ The police responded by shooting her seven times.³²⁴

Held three years following her death, the “remembrance vigil” included a list of demands by Lyles’ family,³²⁵ which included the call to defund the Seattle police and reinvest in the community and for the city to drop challenges to the recently revised Seattle Police Department inquest rules—rules that seek to provide more transparency in the investigations of police use of deadly force.³²⁶

320. This article refers to carceral spaces in an expanded way, moving beyond the idea that carceral spaces are specific to prisons and jails. *See, e.g.*, BEN-MOSHE, *supra* note 17, at 23 (“sites of incarceration are varied and include prisons, nursing homes, psychiatric hospitals, residential facilities for those with intellectual and other disabilities, and, at times, our own homes (or their lack)”).

321. *See* Sara J. Green, *Hundreds Gather to Remember Charleena Lyles, a Black Woman Killed by Seattle Police in 2017, Amid Growing Movement Against Police Violence*, SEATTLE TIMES (June 19, 2020, 6:53 AM), <https://www.seattletimes.com/seattle-news/hundreds-gather-to-remember-charleena-lyles-a-black-woman-killed-by-seattle-police-in-2017-amid-growing-movement-against-police-violence/>.

322. *See* Phillip A. Goff & Kim S. Buchanan, *Charleena Lyles Needed Health Care. Instead, She Was Killed*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/opinion/charleena-lyles-seattle-police-shooting.html?smid=tw-nytopinion&smtyp=cur>.

323. *See id.*

324. *See* Green, *supra* note 321.

325. *See* Katrina Johnson et al., *Charleena Lyles Remembrance Vigil*, FACEBOOK (June 18, 2020, 9:00 PM), https://www.facebook.com/events/256243055440977/?acontext=%7B%22event_action_history%22%3A%7B%22mechanism%22%3A%22search_results%22%2C%22surface%22%3A%22search%22%7D%7D.

326. *See id.*; *see also* Steve Miletich, *Plan to Resume Inquests Stalled by Challenges from City of Seattle, and Now Coronavirus*, SEATTLE TIMES (Mar. 29, 2020, 6:00 AM), <https://www.seattletimes.com/seattle-news/crime/plan-to-resume-inquests-stalled-by-challenges-from-city-of-seattle-and-now-coronavirus/> (the inquest rules “seek to determine the root causes behind the use of deadly force by law enforcement, rather than focusing on the subjective perceptions of officers and their justification for using deadly force.”) For Black disabled people with psychiatric disabilities, the home—or homelessness—can quickly transform into a carceral space through police engagement, as occurred with Lyles. There is no shortness of tragic outcomes where the police fatally shot an individual with a psychiatric condition in their own home. *See* Shaun King, *If You Are Black and in a Mental Health Crisis*,

About a month following the Lyles vigil, in the neighboring state of California, several disability rights groups commenced a federal lawsuit challenging the treatment of disabled individuals with mental health and psychiatric conditions.³²⁷ The lawsuit, *Disability Rights California v. County of Alameda*,³²⁸ challenges a range of practices, noting the disproportionate impact on Black Alameda residents. These actions by the county and its health care system, including “the illegal segregation of adults with serious mental health disabilities into . . . psychiatric institutions” and “subjecting adults with serious mental health disabilities to a high risk of” institutionalization, incarceration, and homelessness due to the lack of “adequate intensive community-based mental health services.”³²⁹

5. Covid-19

The coronavirus pandemic further provides an intimate view of how the legacy of slavery and the underpinnings of eugenics theories continue to inform law and society. This view included witnessing carceral spaces administer the experimental treatment of hydroxychloroquine on Black and brown people as a COVID-19 treatment³³⁰ that medical experts later linked to deaths;³³¹ the

911 Can Be a Death Sentence, INTERCEPT (Sept. 29, 2019, 8:00 AM), <https://theintercept.com/2019/09/29/police-shootings-mental-health/>.

327. See *DRC Lawsuit Against Alameda County*, DISABILITY RTS. CAL. (July 30, 2020), <https://www.disabilityrightsca.org/cases/drc-lawsuit-against-alameda-county>.

328. See *id.*

329. Complaint at 1–3, *Disability Rts. Cal. v. City of Alameda*, 2020 WL 4452089 (N.D.Cal. 2020) (No. 3:20-CV-05256-JCS). On April 21, 2021, the DOJ, Civil Rights Division, issued a finding against Alameda County, John George Psychiatric Hospital, and Santa Rita jail in an investigation related to the facts underlining the Disability Rights California lawsuit. Letter from Pamela S. Karlan, Principal Deputy Assistant Att’y Gen., C.R. Div., Dep’t of Just., to Keith Carson, President, Alameda Cnty. Bd. of Supervisors, Gregory J. Ahern, Alameda Cnty. Sheriff/Coroner, Santa Rita Jail, Mark Fratzke, Alameda Health Sys., Interim Chief Operating Officer (Apr. 22, 2021), <https://www.justice.gov/crt/case-document/file/1388891/download>. The DOJ found, in part, that Alameda County violated the ADA as interpreted by *Olmsted* for institutionalizing people with mental health disabilities—or placing such persons at risk of institutionalization—who need and can receive mental health treatment in the community. *Id.* at 2, 7.

330. KHOU 11 Staff, *Family Hopeful Hydroxychloroquine Will Help Texas City Grandmother Recover From COVID-19*, KHOU (April 6, 2020, 5:00 PM), <https://www.khou.com/article/news/health/coronavirus/anti-malaria-drug-being-used-to-treat-texas-city-coronavirus-patients/285-8ada8747-c624-4c8a-8651-64a762086a37>.

331. See Toluse Olorunnipa, *Drug Promoted by Trump as Coronavirus ‘Game Changer’ Increasingly Linked to Deaths*, WASH. POST (May 15, 2020, 6:41 PM), https://www.washingtonpost.com/politics/drug-promoted-by-trump-as-coronavirus-game-changer-increasingly-linked-to-deaths/2020/05/15/85d024fe-96bd-11ea-9f5e-56d8239bf9ad_story.html.

inaccessibility of hydroxychloroquine for people with autoimmune diseases such as Lupus—a chronic illness that impacts women of color two to three times more than white women³³²—following the hoarding of the drug by medical and government institutions³³³ as a result of President Donald Trump’s claim that it could treat COVID-19;³³⁴ the decision of state and medical personnel to withhold medical treatment for COVID-19 to patients based on the belief that their disability has already diminished their quality of life;³³⁵ in the unsanitary and overcrowding of prisons and immigration detention centers as COVID-19 spread throughout these facilities;³³⁶ and in statistics that found that nearly 34% of coronavirus deaths are linked to nursing homes³³⁷—with COVID-19 ravaging nursing homes with largely Black and Latinx residents.³³⁸

The United States Supreme Court, in a one paragraph opinion, stayed a decision to require the implementation of safety measures by the Orange County Jail in California.³³⁹ The intended purpose of the safety measures was to protect the 3,000 pretrial detainees and incarcerated people, “488 of whom were medically vulnerable to

332. The Lupus Foundation of America identified women of color as “African Americans, Hispanics/Latinos, Asians, Native Americans, Alaska Natives, Native Hawaiians and other Pacific Islanders.” *Lupus Facts and Statistics*, LUPUS FOUND. AM., <https://www.lupus.org/resources/lupus-facts-and-statistics> (last visited May 14, 2021). Recent research indicates that lupus affects 1 in 537 young Black women. See Emily C. Somers et al., *Population-Based Incidence and Prevalence of Systemic Lupus Erythematosus: The Michigan Lupus Epidemiology and Surveillance Program*, 66 *ARTHRITIS & RHEUMATOLOGY* 369, 369 (2014).

333. See Walter Pavlo, *Bureau of Prisons Recently Purchased Hydroxychloroquine, Controversial COVID-19 Treatment*, *FORBES* (Apr. 7, 2020), <https://www.forbes.com/sites/walterpavlo/2020/04/07/bureau-of-prisons-recently-purchased-hydroxychloroquine-controversial-covid-19-treatment/?sh=431102c62839>.

334. See Charles Ornstein, *Lupus Patients Can’t Get Crucial Medication After President Trump Pushes Unproven Coronavirus Treatment*, *PROPUBLICA* (Mar. 22, 2020, 12:41 PM), <https://www.propublica.org/article/lupus-patients-cant-get-crucial-medication-after-president-trump-pushes-unproven-coronavirus-treatment>.

335. See Roberts, *supra* note 310; see also Texas Right to Life, *Quadriplegic COVID-19 Patient Starved by Texas Doctor Because of His Disability*, *YOUTUBE* (June 26, 2020), <https://www.youtube.com/watch?v=jq-gtjnzZg>.

336. See John Washington, *Coronavirus ‘Hotbeds of Infection’ In and Around Detention Centers*, *INTERCEPT* (Dec. 9, 2020), <https://theintercept.com/2020/12/09/ice-covid-detention-centers/>.

337. See *More Than One-Third of U.S. Coronavirus Deaths Are Linked to Nursing Homes*, *N.Y. TIMES* (Jan. 12, 2021), <https://www.nytimes.com/interactive/2020/us/coronavirus-nursing-homes.html?referringSource=articleShare>.

338. See also *The Striking Racial Divide in How Covid-19 Has Hit Nursing Homes*, *N.Y. TIMES* (Sept. 10, 2020), <https://www.nytimes.com/article/coronavirus-nursing-homes-racial-disparity.html>.

339. See *Barnes v. Ahlman*, 140 S. Ct. 2620, 2620 (2020).

COVID-19” at the time the injunction was filed.³⁴⁰ In her scathing dissent, Justice Sotomayor found that the Supreme Court improperly disregarded that the district court and Ninth Circuit Court of Appeals “applied well-established law to the particular facts” of this case.³⁴¹ She reasoned that the district court held that the respondents were likely to succeed in showing that the jail “was deliberately indifferent to the health and safety of its inmates and . . . violated federal disability rights law.”³⁴²

This Year in Review does not reflect outliers in how law and society legitimize the eugenics pipeline for racialized and multiply marginalized disabled people. Disabled children lived and suffered in segregated facilities such as the Willowbrook State School and the Pennhurst State School and Hospital.³⁴³ Similar methods of corporal and psychological punishment that existed at Willowbrook and Pennhurst continue at the JRC and the GNETS program—sustaining a form of confiscation of young Black and brown disabled bodyminds who are caught in the revolving door of these carceral spaces in the name of education and treatment.³⁴⁴

The act of the carceral state to isolate and invisibilize deaf/disabled incarcerated persons through the deprivation of communication access and the withholding of information is also repeated, time and time again.³⁴⁵ The FCC’s decade-long failure to implement and mandate the implementation of effective communication services for the deaf/disabled incarcerated population is embedded in some of the philosophies that kept Wilson institutionalized for sixty-eight years.³⁴⁶ Namely, that deaf/disabled

340. *Id.* at 2624.

341. *Id.* at 2622.

342. *Id.*

343. See *Halderman v. Pennhurst State School and Hospital*, DISABILITY JUST., <https://disabilityjustice.org/halderman-v-pennhurst-state-school-hospital/> (last visited May 14, 2021); see also *The Closing of Willowbrook*, DISABILITY JUST., <https://disabilityjustice.org/the-closing-of-willowbrook/> (last visited May 14, 2021).

344. See ADAPT, *supra* note 276; see also Judd, *supra* note 288.

345. See ACLU & NAD *File Lawsuit on Behalf of Georgian Deaf Prisoners*, ACLU (June 20, 2018), <https://www.aclu.org/press-releases/aclu-nad-see-class-action-behalf-deaf-prisoners-georgia-denied-communication-access> (“previously incarcerated deaf people do not have access to information about the conditions of their release, probation guidelines or instructions from their probation officers”); see also Christie Thompson, *Why Many Deaf Prisoners Can’t Call Home*, WIRED (Sept. 19, 2017), <https://www.wired.com/story/why-many-deaf-prisoners-cant-phone-home/> (Deaf incarcerated people are “unable to participate in many work programs, AA meetings, or classes. And prison orders—like calls for head counts or meal times—are often given orally”).

346. See BURCH & JOYNER, *supra* note 67, at 129.

people may be “flattened and secreted away” as an acceptable form of controlling the bodymind³⁴⁷ through isolation and the deprivation of communication access with the world around them. Lastly, the State has a painful and sustaining history of confiscating and erasing the lives of Black disabled individuals such as Hickson, Lyles, and the countless Alameda County houseless who have a cognitive and/or a psychiatric disability.³⁴⁸

C. Why a Racism/Ableism Consciousness Centered in Disability Justice Matters in a Disability Rights Future

Disability rights can further build on critical race theory and its descendant theories to envision a world where we move beyond the disability rights framework of accessibility, integration, and independence. This is not to say that these concepts are not important in challenging practices of discrimination and segregation. Rather, this call is to view these notions more broadly as part of a larger and more nuanced framework built on key principles of Disability Justice.³⁴⁹ In essence, as expressed by Disability Justice advocate, Mia Mingus, “we must understand and practice an accessibility that moves us closer to justice, not just inclusion or diversity.”³⁵⁰

The application of critical theory in legal practice seeks to transform social systems with the goal of shaping a more equitable world—by challenging the norms (social, legal, political) that contribute to society’s acquiescence to the disenfranchisement, invisibilization, and erasure of multiply marginalized communities. The interconnected veins of critical theories disrupt normativity. This disruption seeks to bring issues of racism,³⁵¹ feminism,³⁵²

347. Alice Abrokwa, *When They Enter, We All Enter: Opening the Door To Intersectional Discrimination Claims Based On Race And Disability*, 24 MICH. J. RACE & L. 15, 46 (2018).

348. See *Crownsville: A Piece of Maryland History That Shouldn't Be Forgotten*, ACLU (Feb. 28, 2014, 12:00 AM), <https://www.aclu-md.org/en/news/crownsville-piece-maryland-history-shouldnt-be-forgotten> (describing the history of torture, abuse, and death experienced by Black people detained at Crownsville State Hospital); see also Abrams, *supra* note 296 (identifying that Black people with psychiatric disabilities are disproportionately impacted by police violence).

349. Mingus, *supra* note 214.

350. *Id.*

351. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

352. See, e.g., Moya Bailey & Izaetta A. Mobley, *Work in the Intersections: A Black Feminist Disability Framework*, 33 GENDER & SOC'Y 19 (2018).

queerness,³⁵³ disability,³⁵⁴ fatness,³⁵⁵ gender,³⁵⁶ and others to the foreground—primarily through an intersectional critique. Critical race theorists, for example, push against the legal status quo “to develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination.”³⁵⁷

In marrying theory with praxis, a critical racism/ableism consciousness framework that centers principles of Disability Justice can create an opportunity to expand the disability strategy through an approach that looks beyond the single issue of disability discrimination to a goal of social transformation. This framework recognizes that the foundational policies and ideals that supported enslavement and eugenics remain intact and must be considered when engaging in the implementation of a remedial approach to the harm. History is a resource that can contextualize the way we look at and solve current problems. It provides a playbook that discloses the psyche that built the foundations of racism/ableism. This historical playbook discloses past mistakes and successes to act as a guide in disability advocacy.

A consequence of not confronting disability rights through an intersectional lens rooted in a racism/ableism consciousness centered in Disability Justice is that the successes of the ADA and other disability rights laws only scratch the surface of the structural inequities that uphold the attendant harm. As a result, when engaging in the implementation of a remedial approach to the harm, the conditions remain that caused that harm. These conditions fester, acting as sustenance to the initial injustice to create the likelihood that the harm will repeat with its stronger roots intact. In thinking about disability advocacy, confronting racism/ableism is a tool to move justice forward. The Year in Review, *supra*, is reflective of a revolving

353. See, e.g., Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUD. 437 (1997).

354. See, e.g., Laura Jaffee & Kelsey John, *Disabling Bodies of/and Land: Reframing Disability Justice in Conversation with Indigenous Theory and Activism*, 5 DISABILITY & GLOB. S. 1407 (2018); Jina B. Kim, *Toward a Crip-of-Color Critique: Thinking with Minich’s “Enabling Whom?”*, 6.1 LATERAL (2017).

355. See, e.g., Anna Mollow, *Unvictimized: Toward a Fat Black Disability Studies*, 50 AFR. AM. REV. 105 (2017).

356. See, e.g., Michael Gill & Nirmala Erevelles, *The Absent Presence of Elsie Lacks: Hauntings at the Intersection of Race, Class, Gender, and Disability*, 50 AFR. AM. REV. 123 (2017).

357. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991).

door of inequities that disability advocacy cannot penetrate without a reimagined framework that centers Disability Justice.

IV. CENTERING DISABILITY JUSTICE

*I am done with disability simply being “included” in able bodies people’s agenda and living only when it’s convenient. I want us to tap into the transformative powers of disability, instead of gaining access to the current system . . . and doing nothing to change that system. We don’t simply want to join the ranks of the privileged, we want to challenge and dismantle those ranks and question why some people are consistently at the bottom.*³⁵⁸

- Mia Mingus

A. *The Building Blocks of a Racism/Ableism Consciousness Framework that Centers Disability Justice*

A racism/ableism consciousness framework is grounded in three principles of Disability Justice: intersectionality, centering and amplifying marginalized disabled voices, and building cross-movement solidarity. First, this framework critically examines how intersectionality interlaces with any advocacy approach.³⁵⁹ An intersectional approach, however, is not limited to identity awareness.³⁶⁰ In reimagining a disability rights framework, it is necessary to view intersectionality with all of its complexities.³⁶¹ In her work, Sami Schalk adopts “an intersectional approach that acknowledges the role of identity, experience, social systems of privilege and oppression, and social constructions.”³⁶² Schalk explains that this approach “allow[s] us, for example, to read enactments of medical and scientific racism as not only racist, but also as ableist toward both disabled and nondisabled people of color.”³⁶³

Jay Justice, a Jamaican American queer disabled woman, succinctly explained the necessity of advocating through an intersectional framework: “My disability does not add to the challenges created by racial injustice. The institutionalized ableism

358. Mia Mingus, *Access Intimacy, Interdependence and Disability Justice*, LEAVING EVIDENCE (Apr. 11, 2017), <https://leavingevidence.wordpress.com/2017/04/12/access-intimacy-interdependence-and-disability-justice/>.

359. SINS INVALID, *supra* note 4, at 23.

360. See generally SKIN, TOOTH, AND BONE, *supra* note 48.

361. *Id.*

362. SCHALK, *supra* note 4, at 141–42.

363. *Id.* at 140.

and state-mandated poverty, that is inexorably linked to disability because of the policies enacted by our government, is what adds to the challenges created by racial injustice.”³⁶⁴ Because disability/racial/class-based and other intersecting oppressions are so inextricably linked through ableism, embracing a similarly nuanced intersectional approach, as Schalk describes, in disability advocacy can provide the depth needed to look beyond the single issue of disability identity.

Second, this framework requires a centering of the leadership and voices of the disabled communities most impacted by the harm.³⁶⁵ Critiques of the whiteness in disability rights are not new. Disabled people of color have taken many initiatives to elevate the voices of Black, Indigenous, and other People of Color due to the absence of these voices in disability rights discourse.³⁶⁶ To name a few: Vilissa Thompson started the hashtag #DisabilityTooWhite to “eradicate the erasure” of disabled people of color within history and disability rights advocacy.³⁶⁷ Alice Wong founded and directs the Disability Visibility Project, “an online community dedicated to creating, sharing, and amplifying disability media and culture.”³⁶⁸

Wong started the Disability Visibility Project because of the absence of stories for and about disabled people,³⁶⁹ and amplifies the voices of disabled people of color.³⁷⁰ The Disability Visibility Project showcased a series called “ADA 30 in Color” that highlighted original essays “on the past, present, and future of disability rights and justice by disabled” Black, Indigenous, and other People of Color³⁷¹ to mark the 30th anniversary of the ADA and recently published a book,

364. Sherina Poyyail, *Black and Disabled: How Racial Discrimination Is Amplified by Ableism*, RESET YOUR EVERYDAY (June 8, 2020), <https://resetyoureyveryday.com/black-and-disabled-how-racial-discrimination-is-amplified-by-ableism/>.

365. SINS INVALID, *supra* note 4, at 23; *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

366. *See* Blahovec, *supra* note 163; *see also* DISABILITY VISIBILITY PROJECT, <https://disabilityvisibilityproject.com/about/> (last visited May 14, 2021).

367. Blahovec, *supra* note 164.

368. DISABILITY VISIBILITY PROJECT, *supra* note 366.

369. Angel Powell, *The Visibility of Disability: An Interview with Activist Alice Wong*, ADOLESCENT (Jan. 10, 2019), <https://www.adolescent.net/a/the-political-visibility-of-disability-an-interview-with-alice-wong>. As of 2018, DVP collected about 140 oral histories, many of which are archived in the Library of Congress. *Id.*

370. Keah Brown, *Disabled People of Color Struggle To Be Heard*, ESTABLISHMENT (Oct. 14, 2016), <https://theestablishment.co/disabled-people-of-color-struggle-to-be-heard-b6c7ea5af4b4/index.html>.

371. ADA 30 In Color, DISABILITY VISIBILITY PROJECT, <https://disabilityvisibilityproject.com/ada30/> (last visited May 14, 2021).

Disability Visibility First Person Stories from Twenty-First Century that further elevates the voices of disabled people.³⁷²

Similarly, Lydia X.Z. Brown, E. Ashkenazy, and Morénike Giwa Onaiwu released the book, *All the Weight of Our Dreams on Living Racialized Autism*, to center and amplify the lives, thoughts, and experiences of autistics of color.³⁷³ And Sins Invalid is “a disability justice based performance project . . . [that] centraliz[es] artists of color and LGBTQ/gender-variant artists as communities who have been historically marginalized.”³⁷⁴ Sins Invalid published a Disability Justice Primer: *Skin, Tooth, and Bone The Basis of Movement is Our People* that “offers analysis, history, and context for the growing Disability Justice Movement.”³⁷⁵ Sins Invalid also engages in a range of cultural and political work, including political education and community organizing.³⁷⁶ Talila A. Lewis is the co-founder and volunteer director of HEARD, the only organization (volunteer-dependent, non-profit) in the country that advocates to “correct & prevent deaf wrongful convictions; end abuse of incarcerated people with disabilities; decrease recidivism for deaf and returning individuals; and increase representation of deaf people in professions that can combat mass incarceration.”³⁷⁷

Early efforts of the disability rights movement to cultivate a shared disability identity as a means to advance disability law and policy resulted in exclusion—and the erasure of multiplymarginalized disabled people. Rarely in disability rights advocacy are the voices of those most impacted by systems of oppression elevated or the leadership of disabled BIPOC or queer and gender non-conforming BIPOC reflected.³⁷⁸ The work of Thompson, Wong, Brown, Lewis

372. ALICE WONG, *DISABILITY VISIBILITY: FIRST PERSON STORIES FROM THE TWENTY-FIRST CENTURY* (2020).

373. LYDIA X.Z. BROWN ET AL., *ALL THE WEIGHT OF OUR DREAMS: ON LIVING RACIALIZED AUTISM* x-xxii (2018).

374. *Mission & Vision*, SINS INVALID, <https://www.sinsinvalid.org/mission> (last visited May 14, 2021).

375. *Disability Justice Primer*, SINS INVALID, <https://www.sinsinvalid.org/disability-justice-primer> (last visited May 14, 2021).

376. *Sins Invalid Community Events Calendar*, SINS INVALID, <https://www.sinsinvalid.org/> (last visited May 14, 2021).

377. *About Me*, TALILA A. LEWIS, <https://www.talilalewis.com/about.html> (last visited May 14, 2021).

378. See, e.g., Keah Brown, *Disabled People of Color Struggle to Be Heard*, ESTABLISHMENT (Oct. 14, 2016), <https://theestablishment.co/disabled-people-of-color-struggle-to-be-heard-b6c7ea5af4b4/index.html> (expressing that “Disabled organizations should be hiring disabled people of color . . . to spearhead projects [and] acknowledge when they mess up and give a sincere apology while taking steps to make sure it won’t happen

and others represent the voices that are seldom heard in disability rights advocacy. For example, in her essay for the Disability Visibility Project, “ADA 30: No Justice for Disabled Native People,” Jen Deerinwater discusses what the ADA means to her “as a disabled and chronically ill Indigenous person.”³⁷⁹ Deerinwater resides in Oklahoma, a state with one of the largest Native populations in the United States.³⁸⁰

Citing to Oklahoma’s lack of access to affordable housing, medical care, and clean water, in addition to the inadequate availability of COVID-19 testing and facilities to process tests, and the environmental pollution that overwhelms the state, she concludes, “[h]onestly, [the ADA] means very little to me. I’d rather the ADA exist than not, but as we’re seeing under COVID-19 it means very little for Native lives.”³⁸¹ Elevating the voices and leadership of those most impacted by systems of oppression foregrounds the disability narrative and experience. It incorporates into disability rights strategy the lived experience of multiply marginalized people with disabilities, prioritizing the need to “engag[e] frontline communities in shaping policy and selecting priorities.”³⁸² As expressed by Angela P. Harris and Aysha Pamukcu, “insistence on leadership” from the community most impacted “can serve as a check on expert-driven policies and majoritarian legal initiatives that reinforce subordination.”³⁸³

Third, a racism/ableism consciousness framework that centers Disability Justice emphasizes the intentionality needed to build and sustain cross-movement solidarity as an essential tool to penetrate oppressive systems through “the politics of alliance.”³⁸⁴ The centering of Disability Justice is equally critical to racial justice, reproductive justice, environmental justice, gender justice, LGBTQIA justice, food justice, and other advocacy in building and sustaining cross-advocacy

again.” The author further argues that the “disability community has a long way to go” and “[i]f[] disability activism isn’t inclusive, it isn’t activism”).

379. Jen Deerinwater, *ADA 30: No Justice for Disabled Native People*, DISABILITY VISIBILITY PROJECT (July 19, 2020), <https://disabilityvisibilityproject.com/2020/07/19/ada-30-no-justice-for-disabled-native-people/>.

380. *Id.*

381. *Id.*

382. Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 810–11 (2020).

383. *Id.* at 811.

384. *10 Principles of Disability Justice*, SINS INVALID (Sept. 17, 2015), <https://www.sinsinvalid.org/blog/10-principles-of-disability-justice>.

movements.³⁸⁵ Disability Justice is inextricably linked to all of these social justice movements.³⁸⁶

Deerinwater's view that Indigenous disabled lives are expendable, even with the advancements of the ADA, identifies the interlocking systems that are disproportionately impacting disabled Indigenous people.³⁸⁷ This includes racism, poverty, ableism, medical racism,³⁸⁸ and environmental injustice.³⁸⁹ It also creates space to critically engage with the role of disabling conditions in conceiving a disability rights strategy. Disabling conditions such as poverty, incarceration, environment, violence, barriers to healthcare access, and others. Confronting these interlocking systems is an integral part of a disability rights strategy. It is a challenging task that requires intentionality in building and sustaining relationships with social justice movements to work in solidarity for transformative justice.

*B. Applying a Racism/Ableism Consciousness Framework in
Disability Rights Advocacy*

Continuing to look at disability rights as a single issue struggle that the ADA can ameliorate creates a revolving door of racist/ableist outcomes. The ADA's singular view erases the racism/ableism experience that is deeply rooted in history, making invisible large segments of the Black, Indigenous, and People of Color disabled community. And, within this racialized disabled community, individuals with intellectual, developmental, psychiatric, and cognitive disability and deaf/disabled persons are disproportionately targets of the eugenics pipeline. A pipeline that leads to the

385. See *supra* Part III.C.

386. See, e.g., Catherine Jampel, *Intersections of Disability Justice, Racial Justice and Environmental Justice*, 4 ENV'T SOC. 122, 125 (2018); Robyn M. Powell, *Confronting Eugenics Means Finally Confronting Its Ableist Roots*, 27 WM. & MARY J. RACE, GENDER, & SOC. JUST. (forthcoming 2021); Natasha Simpson, *Disabling Justice? The Exclusion of People with Disabilities from the Food Justice Movement*, in *DISABILITY STUDIES AND THE ENVIRONMENTAL HUMANITIES: TOWARD AN ECO-CRIP THEORY* 403 (Ray Sarah Jaquette & Sibara Jay ed., 2017); Mia Mingus, *On Claiming My Movement: Disability and Reproductive Justice*, LEAVING EVIDENCE (Dec. 2, 2009, 9:12 PM), <https://leavingevidence.wordpress.com/2009/12/02/on-claiming-my-movement-disability-and-reproductive-justice/>.

387. Deerinwater, *supra* note 379.

388. Vikas Gampa et al., *Racialization as a Barrier to Achieving Health Equity for Native Americans*, 22 AMA J. ETHICS 874, 876 (2020).

389. Katherine Bagley, *Connecting the Dots Between Environmental Injustice and the Coronavirus*, YALE ENVIRONMENT 360 (May 7, 2020), <https://e360.yale.edu/features/connecting-the-dots-between-environmental-injustice-and-the-coronavirus>.

segregation, incarceration, confiscation, and discarding of the racialized, othered, disabled bodymind. The next chapter of the ADA requires a racism/ableism consciousness framework rooted in principles of Disability Justice.

In 2018, several disability justice advocates responded to a white paper (“Ruderman Report”³⁹⁰) on media coverage, police violence and disability.³⁹¹ The response held to account the report’s failure to analyze the issue of police violence and disability through a critically intersectional lens.³⁹² Rather, the authors of the report (two white men, one of whom is disabled) relied on the narratives of Black and Indigenous and other People of Color while simultaneously erasing the on-the-ground work of those most impacted by police violence.³⁹³ In essence, the response by disability justice advocates noted that the report “situate[ed] white people as the authoritative experts over the lives and experiences of Black Indigenous and people of color.”³⁹⁴ The response concluded with the following statement:

If foundations and organizations are genuinely interested in addressing ableism intersected with racism, whether in the context of police violence or related issues, they must start by learning and building from existing work, deferring to the expertise of those with lived experience who are already working on these issues. This is the only path that allows for the implementation of community-based research models where Black Indigenous and people of color with disabilities take the lead in research design and interpretation and analysis that supports our political and cultural projects. This is the only path that is in line with our vision for a just world.³⁹⁵

390. DAVID M. PERRY & LAWRENCE CARTER-LONG, RUDERMAN FAM. FOUND., RUDERMAN WHITE PAPER ON THE MEDIA COVERAGE OF USE OF FORCE AND DISABILITY (2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf.

391. LYDIA X.Z. BROWN ET AL., ACCOUNTABLE REPORTING ON DISABILITY, RACE, & POLICE VIOLENCE: A COMMUNITY RESPONSE TO THE “RUDERMAN WHITE PAPER ON THE MEDIA COVERAGE OF USE OF FORCE AND DISABILITY” 16 (2016), <https://docs.google.com/document/d/117eoVeJVP594L6-1bgL8zpZrzgojfsveJwcWuHpkNcs/edit>. The Harriet Tubman Collective is “a collective of Black Deaf and Disabled organizers, community builders, activists, dreamers, lovers striving for radical inclusion and collective liberation.” *Id.*

392. *Id.* at 1.

393. *Id.* at 7.

394. *Id.*

395. *Id.* at 11.

Over thirty years ago, Mari Matsuda wrote *Looking to the Bottom: Critical Legal Studies and Reparations*.³⁹⁶ She presented views that disability justice advocates build upon as a principle of Disability Justice—the necessity that leadership comes from those most impacted. Matsuda argued for the need to seek out voices of those who experience discrimination and navigate, as a matter of survival, systems of oppression³⁹⁷—what Matsuda described as “organic intellectuals.”³⁹⁸ Namely, “people of color in America.”³⁹⁹

Matsuda explains organic intellectuals as “grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression.”⁴⁰⁰ She reasons that “[t]he technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so.”⁴⁰¹ Matsuda’s article was, at that time, a call to action for critical legal scholars to center the “actual experience, history, culture, and intellectual tradition of people of color” in legal advocacy and discourse.⁴⁰²

The critical response by disability justice advocates to the Ruderman Report reflects a long-standing and deep disconnect between disability rights advocacy and scholarship and confronting the absence of Black, Indigenous, and other People of Color disabled voices, experiences, culture, history, intellectual tradition, and leadership in advocacy efforts. This absence is reflected in efforts to address systemic issues that impact racialized and multiply marginalized disabled communities.

What benefit do we receive from analyzing advocacy through a racism/ableism consciousness framework? At the completion of the five-year DOJ investigation against the GNETS program, for example, the DOJ published a twenty-one-page-opinion concluding that the State of Georgia violated Title II of the ADA in violation of *Olmstead* in its treatment of the students enrolled in the GNETS program.⁴⁰³ In its report and subsequent federal complaint filed the following year, the DOJ focused only on disability, making no mention throughout

396. Matsuda, *supra* note 365, at 323.

397. *Id.* at 346 (“One needs to ask who has the real interest and the most information. Those who are oppressed in the present world can speak most eloquently of a better one.”).

398. *Id.* at 325. Matsuda attributes the origins of this term “organic intellectuals” to the Italian Marxist philosopher, Antonio Gramsci. *Id.*

399. *Id.*

400. Matsuda, *supra* note 365, at 325.

401. *Id.*

402. *Id.*

403. See Letter from Vanita Gupta to Nathan Deal & Sam Olens, *supra* note 292, at 13.

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years of investigation of the impact of student demographics such as race or socio-economic status on why GNETS operated in the inhumane manner that it did.⁴⁰⁴

How does a five-year investigation of racist, ableist, eugenics-driven policies by GNETS fail to analyze the role of race and class in how the GNETS program operated and thrived? How does the State of Georgia continue funding the GNETS program at seventy million dollars per year after the DOJ investigation?⁴⁰⁵ The use of dog collars for humiliation, segregated and dilapidated classrooms, corporal punishment, and little chance of receiving a diploma due to the absence of effective school programming, are practices⁴⁰⁶ resound from history. For years, Georgia failed to give poor, Black students who are labeled with “behavior-related disabilities” an education, effectively discarding them from the public eye.⁴⁰⁷ We have been here before.

This ADA-single-issue remedy of mere integration cannot begin to address systemic failures based on racism/ableism and class that sustained GNETS and its power to subjugate disabled students. Similar to Reconstruction after the Civil War, which failed, in part, because of the resistance by white supremacist power structures to support the economic and social transition of enslaved persons into society—and confront the legacy of slavery, GNETS will continue. GNETS will continue in other iterations if integration—and not the confrontation of the systemic issues—is the primary goal.

Had the DOJ approached the GNETS investigation with a curiosity and commitment to confront the systemic structures that created the culture of GNETS, we could work toward achieving a deeper understanding of GNETS’ machinations and identify the steps needed to suffocate the fertile grounds that allowed this torturous institution to thrive. We could, for example, better understand why Black parents were told that GNETS was the only option for their disabled children, and how this misinformation thrived in poor, Black communities.

GNETS is not simply a disability issue. Through a racism/ableism consciousness framework, we could elicit conversations between GNETS and the families, we can analyze the statistics or quotas that GNETS tried to target for student enrollment,

404. *See id.* at 2.

405. *Id.* at 18.

406. *Id.* at 16–18.

407. *Id.* at 2.

we can unravel the systematic way the GNETS program specifically targeted Black, brown and low-income families and what that strategy was—whether unconscious or intentional. We can center the voices and lived experiences of students and parents at GNETS to drive the narrative, policy, and legal goals. We can invest in building cross-collaborative relationships with disability rights, racial justice, education rights, and poverty groups to highlight the intersectional oppression that plagues GNETS and strategize about intersectional remedies.

Five years after the DOJ finding, the GNETS program remains active in federal court.⁴⁰⁸ The federal lawsuit filed by two disability rights groups, the Georgia Advocacy Office (GAO) and The Arc of the United States (ARC), unlike the DOJ, mention the racial and socioeconomic composition of GNETS students in their federal complaint.⁴⁰⁹ In doing so, the complaint specified that “[f]ifty-four percent of students in Georgia’s psychoeducational programs are African American, compared to thirty-seven percent in all public schools statewide.”⁴¹⁰

The GAO/ARC complaint further stated that “the percentage of African American students in GNETS exceeds 60 percent” with “the percentage [] as high as 89 percent” in some areas with the majority of students eligible for Medicaid.⁴¹¹ Yet, the complaint does not yet paint a narrative through a racism/ableism consciousness lens.⁴¹² The remedy sought in the GNETS federal lawsuit is for GNETS students to receive “services necessary to ensure [GNETS students] equal educational opportunity in classrooms with their non-disabled peers.”⁴¹³ Perhaps this case is an opportunity to apply the racism/ableism consciousness framework that centers Disability Justice to achieve transformative justice, moving beyond what is achieved through disability rights, alone.

A recently filed lawsuit, *Sixth District of the American Methodist Episcopal Church v. Kemp*,⁴¹⁴ reflects the strengths of advocacy that is conducted through a framework that foregrounds intersectionality,

408. See *Ga. Advoc. Off. v. Georgia*, 447 F. Supp. 3d 1311, 1328 (N.D. Ga. 2020).

409. See Class Action Complaint at 25, *Ga. Advoc. Off. v. Georgia*, 447 F. Supp. 3d 1311 (N.D. Ga. 2020).

410. *Id.* (citing Judd, *supra* note 288).

411. *Id.*

412. See generally *id.*

413. *Id.* at 47.

414. First Amended Complaint, *Sixth Dist. of the Am. Methodist Episcopal Church v. Brian Kemp*, No. 1:21-CV-01284 (N.D. Ga. May 24, 2021).

engages with history in presenting its legal claims, and engages a cross-section of community voices.⁴¹⁵ *Kemp* challenges Georgia Senate Bill 220 (S.B. 220), a sweeping law that includes multiple provisions that limit and restrict voting access, including stricter voter identification laws for absentee ballots, the elimination of mobile voting centers, limiting the number of available absentee ballot drop boxes, and making it a misdemeanor to provide food or water to voters who are waiting in line.⁴¹⁶

In response to S.B. 220, a broad coalition of civic, religious, civil and disability rights groups⁴¹⁷ filed an eighty-seven-page amended complaint seeking injunctive and declaratory relief.⁴¹⁸ The amended complaint is striking in many respects for its direct confrontation of Georgia's history of reinforcing white supremacy through the voter suppression and intimidation of Black voters.⁴¹⁹ The complaint uses language that squarely asserts the disproportionate impact that S.B. 220 will have on voters of color with disabilities and Black Georgians with disabilities, in particular.⁴²⁰ It further incorporates statistics that highlight the economic inequality of Black and Latinx Georgians⁴²¹ and reflects the depth of stakeholder representation through its named plaintiff organizations. The amended complaint, for example, includes how S.B. 220 will disproportionately impact Georgia residents who are Muslims, African woman, and disabled people of color.

For example, in its discussion S.B. 220 and disability discrimination, the complaint identifies the social conditions of disability that create barriers to disabled voters, including poverty and unemployment in contrast to focusing on disability as the single issue that impedes access to voting for disabled people.⁴²² This complaint is one example of how to incorporate a racism/ableism consciousness framework into the early stages of litigation. The amended complaint

415. *Battle for Representation*, S. POVERY L. CTR., <https://www.splcenter.org/battle-representation-ongoing-struggle-voting-rights> (last visited May 14, 2021).

416. Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, (Apr. 2, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html>.

417. The plaintiffs in *Kemp* include Sixth District of the African Methodist Episcopal Church, Delta Sigma Theta Sorority Inc., and Southern Christian Leadership Conference, Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund of Georgia and several disability advocacy groups, including The Arc of the United States, Georgia ADAPT, Georgia Advocacy Office. See First Amended Complaint, *supra* note 414, at 1.

418. See generally *id.*

419. *Id.* at ¶¶ 140–52.

420. *Id.* at ¶¶ 2, 6, 182–93.

421. *Id.* at ¶ 201.

422. *Id.* at ¶ 183.

is powerful, in part, because it weaves in the history of Georgia's white supremacist past and present to support its legal arguments and remedies sought.

This voting rights litigation brought plaintiffs together who seem disparate, with the goal of advocating collectively; white supremacy impacts all of these communities. While the singular issue of voting rights may make this complaint more easily suitable for emphasizing how this law impacts marginalized and multiply marginalized communities, its choice in expanding and deepening the focus through the incorporation and emphasis on history, race, ethnicity, and disability and its intersections provides an effective example of the impact that a complaint can have when it moves beyond arguing under a single classification.

CONCLUSION

The weight of history continues to shape laws and policies that legitimize the decisions by public and private actors to torture, isolate, withhold life sustaining treatment, and forcibly institutionalize deaf/disabled, Black, Indigenous, and other People of Color. Isolating disability rights advocacy from broader systemic issues perpetuates the notion that access to disability rights is executed on equal grounds. Yet, the revolving door of inequities that disproportionately impact the Black and brown disabled community reflects a different reality.

A racism/ableism consciousness framework challenges how institutional culture and practices of white supremacy, racism/ableism, and heteropatriarchy influence disability rights advocacy. More specifically, it involves critiquing how these institutional cultures and practices shape the priorities, discourse, decisions, and strategies in disability rights work. This internalized work requires a humility in acknowledging and course correcting the role that white supremacy has long played in developing disability rights strategies and strained coalition building with disabled people of color.⁴²³ It further requires a recognition of and a strategy around how to navigate conversations concerning the stigma and fear experienced by some disabled communities of color to self-identify and disclose their disability.⁴²⁴

423. See, e.g., Jennifer L. Erkulwater, *How the Nation's Largest Minority Became White: Race Politics and the Disability Rights Movement, 1970–1980*, 30 *J. POL'Y HIST.* 367, 371, 372, 386 (2018).

424. Morgan, *supra* note 34, at 985 (“It also fails to acknowledge that historically marginalized groups may find it challenging to identify as having a disability.”).

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The racial and economic disparities exposed by the coronavirus pandemic together with the murder of George Floyd and other Black people killed by police re-ignited a national discourse on the enduring legacy of white supremacy in the United States. As dialogue and mobilization efforts continue, it is equally critical to confront the role of white supremacy in how disability rights advocacy and discourse has evolved to create limitations in how the ADA and other disability rights laws are applied, and who most benefits. By engaging both critically and creatively in how to foster a disability rights future that foregrounds principles of Disability Justice, advocates can foster a future beyond the limits of the ADA.