
ARTICLE

DISABILITY REPRODUCTIVE JUSTICE

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The fragility of reproductive rights in the United States has never been so clear. From the Supreme Court's recent Dobbs v. Jackson Women's Health Organization decision, which overturned Roe v. Wade, to a quickly growing number of states passing draconian state laws that drastically limit—and in some states, ban—access to safe and legal abortion care, reproductive freedom is under siege at every turn. This difficult reality has elevated the importance of reproductive rights to the forefront of many people's consciousness. At the same time, the discourse concerning reproductive rights has been narrowly focused and has failed to recognize the scope of reproductive decisionmaking beyond abortion. In addition, the reproductive rights movement has traditionally overlooked the myriad other ways in which marginalized populations, including people with disabilities, experience reproductive oppression.

This Article responds to the contemporary besiege on reproductive freedom and the persistent reproductive oppression experienced by people with disabilities by proposing a vision to help activists, legal professionals, scholars, and policymakers conceive of and articulate the basic contours of a paradigm shift that supports the coalescence of the disability justice and reproductive justice movements. To do so, first the Article examines the origins of weaponizing sexuality and reproduction to subjugate disabled people in the United States. Drawing on legal scholarship and social science research, it then elucidates the scope of the problem by describing the social context and institutions that propagate the sexual and reproductive oppression of people with disabilities and highlights contemporary examples of such injustices. Thereafter, the Article introduces and explores the tenets of two complementary frameworks for analyzing and confronting the reproductive oppression of people with

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disabilities: disability justice and reproductive justice. Finally, guided by the tenets of disability justice and reproductive justice, it further develops a jurisprudential and legislative framework for achieving and delivering reproductive justice for people with disabilities.

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INTRODUCTION

The future of reproductive rights in the United States is bleak. From the Supreme Court's recent *Dobbs v. Jackson Women's Health Organization* decision,¹ which overturned *Roe v. Wade* and the nearly fifty years of legal precedent that the watershed decision established,² to a precipitously growing

¹ 142 S. Ct. 2228 (2022).

² See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding that the U.S. Constitution protects the right to privacy, which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874-879 (1992) (affirming *Roe's* holding that the U.S. Constitution protects the right to terminate a pregnancy, and establishing the "undue burden" framework to determine when that right could be regulated); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 624 (2016) (finding that a surgical-center requirement and an

number of states enacting draconian state laws that significantly limit—and in some states, ban—access to safe and legal abortion,³ reproductive freedom is under siege at every turn.⁴ This harsh truth has elevated the importance of reproductive rights to the forefront of many people’s consciousness.⁵ At the same time, the discourse concerning reproductive rights has been narrowly focused and has failed to recognize the scope of reproductive decisionmaking beyond abortion.⁶ Further, it has overlooked the myriad other ways in which marginalized populations, including people with disabilities,⁷ experience reproductive oppression.

Recent revelations about Britney Spears’s battle to end her conservatorship illustrate a common way that reproductive autonomy is legally denied to many people with disabilities and reinforces why we must take a more comprehensive approach to fighting for reproductive freedom moving forward. Britney Spears was initially placed under conservatorship in

admitting-privileges requirement in Texas law constituted an “undue burden” on the constitutional right to have an abortion).

³ See *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., <https://states.guttmacher.org/policies> [<https://perma.cc/5N9E-5LBY>] (Oct. 2, 2022) (illustrating abortion restrictions across the United States since the Supreme Court overturned *Roe v. Wade*).

⁴ See, e.g., *Dobbs*, 142 S. Ct. at 2242 (overruling *Roe*); see also Mary Ziegler, *The End of Roe Is Coming, and It Is Coming Soon*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/opinion/supreme-court-abortion-mississippi-law.html> [<https://perma.cc/5FXD-MY2K>] (“After hearing arguments, I now believe that the justices will fully overturn *Roe v. Wade* when their decision comes down next year.”).

⁵ Scott Clement, William Bishop & Robert Barnes, *Americans Broadly Support Supreme Court Upholding Roe v. Wade and Oppose Texas Abortion Law, Post-ABC Poll Finds*, WASH. POST (Nov. 16, 2021, 6:00 AM), <https://www.washingtonpost.com/politics/2021/11/16/post-abc-poll-abortion-supreme-court> [<https://perma.cc/KSH9-9E7X>] (finding that sixty percent of Americans believe that the Supreme Court should uphold *Roe*); Libby Cathey & Sarah Donaldson, *Thousands Demonstrate at Supreme Court as Justices Consider Historic Abortion Case*, ABC NEWS (Dec. 1, 2021, 1:16 PM), <https://abcnews.go.com/Politics/thousands-demonstrate-supreme-court-justices-historic-abortion-case/story?id=81478636> [<https://perma.cc/7FEM-HAX3>] (reporting demonstrations of thousands of people outside of the Supreme Court during the oral arguments in *Dobbs v. Jackson Women’s Health Organization*).

⁶ See *infra* Section III.B (contextualizing the reproductive rights movement and its narrow focus on abortion rights and disregard of the reproductive oppression experienced by marginalized populations).

⁷ This Article recognizes the importance of language in shaping how we think about disability and how ableism can pervade language choices as well as reflect and perpetuate disability-based subordination. Lydia X. Z. Brown, *Ableism/Language*, AUTISTIC HOYA, <https://www.autistichoya.com/p/ableist-words-and-terms-to-avoid.html> [<https://perma.cc/G5B4-FU79>] (Nov. 16, 2021). Accordingly, this Article uses person-first and identity-first language interchangeably (e.g., “people with disabilities” and “disabled people”) to acknowledge the disability community’s diverse language preferences. See generally Dana S. Dunn & Erin E. Andrews, *Person-First and Identity-First Language: Developing Psychologists’ Cultural Competence Using Disability Language*, 70 AM. PSYCH. 255 (2015) (exploring the evolving language preferences among people with disabilities).

2008 after experiencing a mental health crisis.⁸ For the next thirteen years, Britney Spears's conservators exercised complete dominion over her life, such as deciding who she could see and how she could spend her money.⁹ In June 2021, Britney Spears stunned the world when she delivered a heartbreaking statement pleading for an end to her thirteen-year conservatorship and presenting a lengthy list of abuses she had allegedly suffered, including forced medication, surveillance, confinement, and grueling labor demands.¹⁰ Among the countless injustices that she endured, one was especially egregious: Britney Spears wanted to get married and have more children but was unable to do so because her conservators would not authorize the removal of her intrauterine device (IUD).¹¹ Specifically, she stated,

I want to be able to get married and have a baby I wanted to take the (IUD) out so I could start trying to have another baby. But this so-called team won't let me go to the doctor to take it out because they don't want me to have children — any more children.¹²

Fortunately, because of her tenacity and significant public outcry, Britney Spears's conservatorship was terminated in November 2021.¹³ Yet, this positive outcome does not negate the fact that for over a decade, Britney Spears was denied her reproductive autonomy because of her disability. Moreover, most people subjected to conservatorships lack Britney Spears's platform and resources, making overcoming these incredibly restrictive legal arrangements often insurmountable.¹⁴

Although Britney Spears's deplorable experiences with conservatorship may not, at first glance, seem like a reproductive rights issue, what happened to her is neither unique nor uncommon. Indeed, that people with actual or

⁸ Joe Coscarelli & Julia Jacobs, *Judge Ends Conservatorship Overseeing Britney Spears's Life and Finances*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/12/arts/music/britney-spears-conservatorship-ends.html> [<https://perma.cc/V9CG-6RK9>].

⁹ *Id.*

¹⁰ Jem Aswad, *Read Britney Spears' Full Statement Against Conservatorship: 'I Am Traumatized'*, VARIETY (June 23, 2021, 3:59 PM), <https://variety.com/2021/music/news/britney-spears-full-statement-conservatorship-1235003940> [<https://perma.cc/87N9-AQJT>] (providing a transcript of Spears's June 23, 2021, statement advocating for the end of her conservatorship to Los Angeles Superior Court Judge, Brenda Penny).

¹¹ *Id.*; see also Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VA. L. REV. ONLINE 246, 247-48 (2021) (situating Britney Spears's experience within the nation's long history of weaponizing reproduction to subjugate people with disabilities).

¹² Aswad, *supra* note 10.

¹³ Anastasia Tsioulcas, *Britney Spears' Conservatorship Has Finally Ended*, NPR (Nov. 12, 2021, 5:16 PM), <https://www.npr.org/2021/11/12/1054860726/britney-spears-conservatorship-ended> [<https://perma.cc/7YVY-QTNF>].

¹⁴ See *infra* Section I.I.C (explaining guardianships, also known as conservatorships in some states, and the ways that these legal arrangements oppress disabled people's reproductive freedom).

perceived disabilities—including physical, intellectual, sensory, and psychiatric disabilities—should be denied reproductive autonomy remains a persistent, unrelenting belief plaguing our nation. Each day, sexuality and reproduction is weaponized to subjugate disabled people through forced sterilization, coerced abortion, inadequate access to sexual and reproductive health services and information, surveillance and regulation of disabled parents, and loss of child custody.¹⁵ For people of color with disabilities and LGBTQ+ people with disabilities, these reproductive injustices are even more pronounced.¹⁶ The reproductive oppression experienced by people with disabilities is woven into our laws, policies, and collective conscience. Accordingly, to transform our society into one that respects and supports reproductive freedom for disabled people, systems that propagate these injustices must be wholly dismantled and we must create a society where all people are afforded their fundamental right to decide “whether to bear or beget a child.”¹⁷

This is undeniably an austere time for reproductive freedom in the United States. It is also one of immense possibility. Now is the time to shift attention away from the courts and onto policymaking, organizing, and the electorate.¹⁸ More importantly, we must reframe the fight for reproductive freedom from one that only focuses on abortion to one that centers reproductive justice.¹⁹ To that end, we must incorporate not only the right to not have a child but also the right to have a child and the right to parent that child safely and with dignity.²⁰ Above all, future fights for reproductive freedom must be fully

¹⁵ See *infra* Part I, II (describing the origins and reproductive oppression and explaining how people with disabilities continue to experience reproductive oppression today).

¹⁶ Zoe Brennan-Krohn & Rebecca McCray, *Britney Spears’ Reproductive Freedom Is a Disability Rights Issue*, ACLU (June 25, 2021), <https://www.aclu.org/news/civil-liberties/britney-spears-reproductive-freedom-is-a-disability-rights-issue> [<https://perma.cc/2VUE-4CBN>] (“Spears’ experience is part of a long history of people with disabilities—most often people of color—being robbed of the right to control their reproductive destinies.”); NAT’L LGBTQ TASK FORCE, *QUEERING REPRODUCTIVE JUSTICE: A TOOLKIT* 25-26 (Zsea Beaumonis, Candace Bond-Therault, Stacey Long Simmons & Sabrina Rewald eds., 2017), www.thetaskforce.org/reprotoolkit [<https://perma.cc/GNA9-N6CU>] (“The right of disabled LGBTQ people to parent is critical to intersectional, LGBTQ repro* advocacy.”).

¹⁷ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹⁸ Rachel Rebouché, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights*, 7 U.C. IRVINE L. REV. 579, 604 (2017) (“The challenge of access cannot be addressed necessarily by a robust set of rights; the problem is one of politics—how communities and countries decide to allocate social goods and social assistance. Reproductive justice’s reliance on community and grassroots mobilization engages these political considerations.”).

¹⁹ See *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/A85X-ENAN>] (“SisterSong defines Reproductive Justice as the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.”); see also *infra* Section III.B (expanding on the concept of reproductive justice).

²⁰ *Id.*

inclusive of all people,²¹ with an intentional focus on marginalized populations, such as people with disabilities, whom have the most to lose and whom have been traditionally disregarded from these efforts.

This Article responds to the contemporary besiege on reproductive freedom and the persistent reproductive oppression experienced by people with disabilities by proposing a vision to help activists, legal professionals, scholars, and policymakers conceive of and articulate the basic contours of a paradigm shift that supports the coalescence of the disability justice and reproductive justice movements. Part I examines the origins of weaponizing sexuality and reproduction to subjugate disabled people in the United States. Part II further considers the social context and institutions that propagate the sexual and reproductive oppression of people with disabilities by exploring contemporary examples of such injustices. Part III introduces and explores the tenets of two complementary frameworks for analyzing and confronting the reproductive oppression of people with disabilities: disability justice and reproductive justice. Finally, guided by the tenets of disability justice and reproductive justice, Part IV further develops a jurisprudential and legislative framework for achieving and delivering reproductive justice for people with disabilities.²²

I. THE ORIGINS OF REPRODUCTIVE OPPRESSION

People with disabilities endure a complex web of oppression that connects history to contemporary treatment in American culture, medicine, and law. Indeed, the United States has a dreadful history of preventing disabled people from controlling their destinies, including implementing laws, policies, and practices that constrained their reproductive decisionmaking. Therefore, any examination of current reproductive injustices experienced by disabled people must be rooted in an understanding of the unique history and cultural stereotypes that have shaped their experiences. This Part lays the foundation for this examination by describing eugenics-era laws, policies, and practices that restricted reproduction by disabled people and other marginalized populations.

Prior to the late nineteenth and early twentieth centuries, most people with disabilities resided at home, where their families were responsible for

²¹ Importantly, while reproduction is typically framed as being central to women's lives, transgender, nonbinary, and gender-nonconforming people also need comprehensive reproductive health services and information. I do not intend to further marginalize the reproductive experiences of people who do not identify as women. Accordingly, the Article uses gender-neutral language whenever possible; however, this Article does use the term "women" in some instances, where that terminology is in the research or a cited source.

²² I previously proposed a version of this framework. See Powell, *supra* note 11, at 261-270.

their care.²³ At that time, disabled people typically did not marry or have children and instead “were often hidden from the public eye and kept in social isolation, fostering and reflecting a common understanding of disabled people as dependent and incapable of filling adult roles of intimacy, sexuality and parenthood.”²⁴

However, the late nineteenth and twentieth centuries brought the establishment (and later, proliferation) of institutions for disabled people, where they were isolated from their communities.²⁵ Institutions functioned as an apparatus of “social control and coercion.”²⁶ During this time, eugenicists endorsed policies that encouraged procreation among favored groups of people while restricting procreation, including compulsory sterilization, segregation of institutionalized individuals by sex, and prohibition of marriage of those deemed to have “hereditary defects.”²⁷ According to Adam Cohen, eugenicists’ “greatest target was the ‘feebleminded,’ a loose designation that included people who were mentally [disabled], women considered to be excessively interested in sex, and various other categories of individuals who offended the middle-class sensibilities of judges and social workers.”²⁸ Hence, the eugenics movement focused on stopping people whom society believed unfit for parenthood from reproducing,²⁹ grounded in the belief that their offspring would be dangerous and burdensome to society.³⁰

²³ See David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, in HANDBOOK OF DISABILITY STUDIES 23 (Gary L. Albrecht, Katherine D. Seelman & Michael Bury eds., 2001) (recounting how families and local communities had the primary responsibility of caring for disabled people).

²⁴ Claudia Malacrida, *Mothering and Disability: From Eugenics to Newgenics*, in ROUTLEDGE HANDBOOK OF DISABILITY STUDIES 467, 467 (Nick Watson & Simo Vehmas eds., 2d ed. 2020).

²⁵ *Id.* at 467-68; see also Braddock & Parish, *supra* note 23, at 31-43 (reviewing the history of the first mental hospitals and residential facilities for disabled people in the United States).

²⁶ Braddock & Parish, *supra* note 23, at 34.

²⁷ ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 5 (2016); see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 n.6 (2001) (“The record does show that some States, adopting the tenets of the eugenics movement of the early part of this century, required extreme measures such as sterilization of persons suffering from hereditary mental disease.”).

²⁸ COHEN, *supra* note 27, at 6.

²⁹ See Eric M. Jaegers, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 U. LOUISVILLE J. FAM. L. 947, 948 (1992) (explaining that the purpose of eugenics was to prevent “reproduction by those deemed socially or mentally inferior”).

³⁰ See generally Robyn M. Powell, *Confronting Eugenics Means Finally Confronting Its Ableist Roots*, 27 WM. & MARY J. RACE, GENDER, & SOC. JUST. 607 (2021) (examining the country’s history of eugenics); see also Powell, *supra* note 11, at 250-252 (discussing involuntary sterilization laws that were based on the belief that disabled people were “socially inadequate” and therefore should not be permitted to have children); Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV.

The Supreme Court adopted this line of reasoning in the 1927 *Buck v. Bell* decision.³¹ At seventeen years old, Carrie Buck, who was deemed “feeble minded,”³² became pregnant after apparently being sexually assaulted by her foster parents’ relative.³³ To presumably conceal the sexual violence, Carrie was committed to the Virginia State Colony for Epileptics and Feeble-minded, where her mother was also institutionalized.³⁴ After giving birth, Carrie’s daughter, Vivian, was adopted by her foster family, and Carrie never saw her daughter again.³⁵ Subsequently, the institution sought to sterilize Carrie in accordance with the state’s compulsory sterilization law. After a sequence of appeals, the Court upheld Virginia’s law authorizing state institutions to condition release upon sterilization was upheld as constitutional, in part, on the grounds that it served “the best interests of the patients and of society.”³⁶ Tellingly, Virginia’s statute was premised on the idea that “many defective persons . . . would likely become by the propagation of their kind a menace to society.”³⁷ Justice Holmes, writing for the majority, found that “[i]t would be strange if [the State] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.”³⁸ Concluding this historical decision, Justice Holmes declared that “[t]hree generations of imbeciles are enough.”³⁹

Throughout the twentieth century, more than thirty states passed compulsory sterilization laws like Virginia’s.⁴⁰ By 1970, nearly 70,000 Americans—most of whom were disabled, poor, or people of color—were

862, 865 (2004) (discussing the evolution and increased popularity of the eugenics movement leading to widespread acceptance of sterilization laws directed at disabled populations); Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 2 (1996) (“Physicians . . . lobbied for laws that reflected eugenic theory and . . . adopted the rhetorically powerful language of public health law and characterized unchecked procreation among the ‘socially inadequate’ as an epidemic force.”).

³¹ 274 U.S. 200 (1927).

³² *Id.* at 205.

³³ Stephen Jay Gould, *Carrie Buck’s Daughter*, 2 CONST. COMMENT. 331, 336 (1985).

³⁴ *Id.* at 334.

³⁵ *Id.* at 338.

³⁶ *Buck*, 274 U.S. at 206-08.

³⁷ See Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed 1974).

³⁸ *Buck*, 274 U.S. at 207.

³⁹ *Id.*

⁴⁰ Lombardo, *supra* note 30, at 12.

involuntarily sterilized.⁴¹ Notably, *Buck* has never been overturned, meaning that it remains good law.⁴²

As previously mentioned, state statutes barring disabled people from marrying or sanctioning marriages only after the age of forty-five were another hallmark of the eugenics era.⁴³ For example, a Connecticut law banned “epileptics, imbeciles, and feeble-minded persons from marrying or having extramarital relations before age forty-five.”⁴⁴ By 1912, several states had eugenic marriage laws,⁴⁵ and a 1974 study found that these statutes still existed in nearly forty states.⁴⁶ Remarkably, these laws remain in some states.⁴⁷

Succinctly, disabled people have experienced an enduring legacy of reproductive oppression. Throughout the eugenics era, states regulated the sexuality and reproductive lives of people with disabilities through the implementation of laws, policies, and practices that were justified by protecting disabled people, their potential children, and society.⁴⁸ As described in the following Part, the same eugenics-based ideologies that once led to institutionalization, forced sterilization, and marriage restriction laws, today manifest in laws, policies, and practices that continue to weaponize sexuality and reproduction to subjugate disabled people.

41 *The Supreme Court Ruling that Led to 70,000 Forced Sterilizations*, NPR (Mar. 17, 2016, 1:22 PM), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> [<https://perma.cc/CE8G-95P3>].

42 Fifteen years after *Buck* was decided, the Supreme Court struck down an Oklahoma law requiring that people with two or more convictions for felonious offenses be sterilized. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Although both *Skinner* and *Buck* concern involuntary sterilization statutes, *Skinner's* analysis took a narrower focus, relating only to the punitive sterilization of criminals, thereby avoiding addressing the forced sterilization of people with disabilities. *Id.* at 544.

43 Braddock & Parish, *supra* note 23, at 35; see also Brooke Pietrzak, *Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment*, 17 DEVS. MENTAL HEALTH L. 1, 35-39 (1997) (reviewing common justifications for marriage restrictions concerning disabled people).

44 Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1432 (1981).

45 Braddock & Parish, *supra* note 23, at 35.

46 Pietrzak, *supra* note 43, at 2.

47 See *id.* (describing the most recent systematic investigation of these statutes undertaken in 1997 that found that thirty-three states still had laws restricting people with intellectual or psychiatric disabilities from marrying); see also Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 548-49 (2014) (describing current state laws that restrict people with disabilities from marrying). Moreover, government policies that reduce or terminate disability benefits if people with disabilities get married result in continuing marriage restrictions for many. *Id.* at 549 n.132.

48 See, e.g., Pietrzak, *supra* note 43, at 35 (describing these justifications in the context of marriage restrictions).

II. CONTEMPORARY REPRODUCTIVE OPPRESSION

*"History is not the past. It is the present."*⁴⁹

Nearly 100 years after the infamous *Buck v. Bell* decision, people with disabilities continue to endure reproductive oppression. Today, despite the substantial—and increasing—size of the disability community, “the sexual and reproductive health needs of this population largely have been ignored.”⁵⁰ Moreover, attitudes and presumptions about people with disabilities’ sexuality and reproduction has been “reified in laws, social policies, and public spaces that deny the fact that people with disabilities are sexual beings.”⁵¹

Analysis and advocacy based on reproductive justice necessitates fully understanding the myriad ways sexuality and reproduction is weaponized to subjugate people with disabilities. To that end, this Part limns the contemporary reproductive experiences of disabled people. It begins by describing the panoply of sexual and reproductive health disparities experienced by people with disabilities and the structural roots of these inequities. Next, it details the lack of sexual education provided to people with disabilities and its detrimental effects. It then explains the ways that disabled people are restricted from reproductive decisionmaking, especially because of guardianship. Thereafter, this Part explores barriers to contraception and abortion faced by people with disabilities, focusing on the role of laws and policies that serve as an impediment. Next, it discusses ways that people with disabilities are denied opportunities to express their sexuality. Finally, it concludes by explaining ever-present threats to parenthood experienced by disabled people at the hands of the child welfare system.

⁴⁹ James Baldwin, *Black English: A Dishonest Argument*, in BLACK ENGLISH AND THE EDUCATION OF BLACK CHILDREN AND YOUTH 54, 55 (Geneva Smitherman ed., 1981).

⁵⁰ Caroline Signore, Maurice Davis, Candace M. Tingen, & Alison N. Cernich, *The Intersection of Disability and Pregnancy: Risks for Maternal Morbidity and Mortality*, 30 J. WOMEN'S HEALTH 147, 148 (2021).

⁵¹ Margaret Campbell, *Disabilities and Sexual Expression: A Review of the Literature*, SOCIOLOGY COMPASS, July 2017, at 8.

A. Sexual and Reproductive Health Disparities

Extensive research demonstrates that people with disabilities experience a range of health care disparities.⁵² Specifically, disabled people contend with attitudinal, communication, physical, policy, programmatic, social, and transportation barriers that impede access to health care services and information and lead to deleterious health outcomes.⁵³ Indeed, despite legal protections, including Section 504 of the Rehabilitation Act of 1973 (Section 504),⁵⁴ the Americans with Disabilities Act of 1990 (ADA),⁵⁵ and the Patient Protection and Affordable Care Act (ACA),⁵⁶ disabled people encounter “persistent inequalities” accessing health care.⁵⁷ Predictably, these disparities extend to sexual and reproductive health services. According to the World Health Organization and the World Bank, people with disabilities experience a range of unmet sexual and reproductive health needs, including limited access to sexual education and contraception, inadequate reproductive health screening, and insufficient health care provider knowledge about the intersection of disability, sexuality, and reproduction.⁵⁸ Thus, “many women with disabilities express particular difficulties accessing comprehensive, high-quality reproductive health care.”⁵⁹

Tellingly, research suggests that people with disabilities are less likely to receive adequate preventive sexual and reproductive health services than people without disabilities. For example, studies have found that people with intellectual disabilities are less likely than others to receive regular Pap tests, often because caregivers or health care providers arbitrarily deem them

⁵² Gloria L. Krahn, Deborah Kelin Walker & Rosaly Correa-De-Araujo, *Persons with Disabilities as an Unrecognized Health Disparity Population*, 105 AM. J. PUB. HEALTH S198, S201 (2015). Research consistently shows that people with disabilities experience barriers to accessing health care and have adverse health outcomes. *See id.* (showing population differences in health care access, health behaviors, and various health outcomes).

⁵³ *See* Robyn M. Powell, *Applying the Health Justice Framework to Address Health and Health Care Inequities Experienced by People with Disabilities During and After COVID-19*, 96 WASH. L. REV. 93, 104-07 (2021) (describing the current state of health and health care inequities for people with disabilities).

⁵⁴ Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796.

⁵⁵ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

⁵⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

⁵⁷ Nancy R. Mudrick & Michael A. Schwartz, *Health Care Under the ADA: A Vision or a Mirage?*, 3 DISABILITY & HEALTH J. 233, 233 (2010).

⁵⁸ *See* WORLD HEALTH ORG. & THE WORLD BANK, WORLD DISABILITY REPORT 60-61, 79 (2011), <https://apps.who.int/iris/handle/10665/44575> [<https://perma.cc/EPZ2-5ZAK>].

⁵⁹ Caroline Signore, *Reproductive and Sexual Health for Women with Disabilities, in ELIMINATING INEQUITIES FOR WOMEN WITH DISABILITIES: AN AGENDA FOR HEALTH AND WELLNESS* 93, 93 (Shari E. Miles-Cohen & Caroline Signore eds., 2016).

unnecessary.⁶⁰ Further, research shows that people with disabilities are more likely than people without disabilities to become infected with sexually transmitted infections, which underscores the importance of preventive sexual and reproductive health services.⁶¹ People with intellectual disabilities are also less likely than others to be screened for breast or cervical cancer.⁶²

Inaccessible or inadequate perinatal care is a significant issue facing many disabled people. A burgeoning body of scholarship has examined the experiences of disabled women from preconception to postpartum and has found that as people with disabilities continue to enjoy increased opportunities for community participation and advances in technology, disabled women are increasingly choosing to become pregnant.⁶³ Today, women with and without disabilities now have comparable pregnancy rates.⁶⁴ Nevertheless, extensive research reveals that women with disabilities experience higher risks of complications and poorer outcomes than nondisabled women.⁶⁵ In particular, studies have found that disabled women may be at higher risk than other women for pregnancy, delivery, and postpartum complications, such as gestational diabetes, preeclampsia, cesarean delivery, preterm birth, low-birth-weight infants, and stillbirth.⁶⁶ A

⁶⁰ See Robyn M. Powell, Susan L. Parish & Eliana Rosenthal, *Role of Family Caregivers Regarding Sexual and Reproductive Health for Women and Girls with Intellectual Disability: A Scoping Review*, 64 J. INTEL. DISABILITY RSCH. 131, 149-150 (2020) (citing studies which indicate that people with intellectual disabilities who live at home with family caregivers are less likely to receive Pap tests).

⁶¹ Lucy Emma Craig, Zhong Eric Chen & Joanne Barrie, *Disability, Sexual and Reproductive Health: A Scoping Review of Healthcare Professionals' Views on their Confidence and Competence in Care Provision*, 48 BMJ SEXUAL & REPROD. HEALTH 7, 8 (2020) (citing studies).

⁶² See Powell et al., *supra* note 60, at 132 (synthesizing findings from research about reduced breast cancer and cervical cancer screening among women with intellectual disabilities).

⁶³ Monika Mitra, Linda M. Long-Bellil, Suzanne C. Smeltzer & Lisa I. Iezzoni, *A Perinatal Health Framework for Women with Physical Disabilities*, 8 DISABILITY & HEALTH J. 499, 499 (2015) (citing studies).

⁶⁴ See Lesley A. Tarasoff, Fahmeeda Murtaza, Adele Carty, Dinara Salaeva, Angela D. Hamilton & Hilary K Brown, *Health of Newborns and Infants Born to Women with Disabilities: A Meta-analysis*, PEDIATRICS, Dec. 2020, at 2 (citing studies on pregnancy rates among women with disabilities).

⁶⁵ *Id.*; Mitra et al., *supra* note 63, at 499 (citing studies).

⁶⁶ See, e.g., Lesley A. Tarasoff, Saranyah Ravindran, Hannan Malik, Dinara Salaeva & Hilary K. Brown, *Maternal Disability and Risk for Pregnancy, Delivery, and Postpartum Complications*, 222 AM. J. OBSTETRICS & GYNECOLOGY 27, 29-33 (2020) (synthesizing studies on perinatal outcomes among women with disabilities); Ilhom Akobirshoev, Susan L. Parish, Monika Mitra & Eliana Rosenthal, *Birth Outcomes Among US Women with Intellectual and Developmental Disabilities*, 10 DISABILITY & HEALTH J. 406, 409 (2017) (documenting adverse maternal and child health outcomes among women with intellectual and developmental disabilities); Hilary K. Brown & Monika Mitra, *Improved Obstetric Care for People with Disabilities: An Urgent Call for Accessibility and Inclusion*, 31 J. WOMEN'S HEALTH 4, 4 (citing studies showing increased risk of adverse pregnancy outcomes among women with disabilities); Monika Mitra, Michael M. McKee, Ilhom Akobirshoev, Anne Valentine, Grant Ritter, Jianying Zhang, Kimberly McKee & Lisa I. Iezzoni, *Pregnancy, Birth, and*

recent study found that Black women with intellectual and developmental disabilities are more likely to give birth to preterm infants than white women with intellectual and developmental disabilities, likely due to health disparities stemming from the multiplicative effect of ableism and racism.⁶⁷

People with disabilities experience a wide range of barriers that impede their access to perinatal care. Specifically, physical, communication, programmatic, and attitudinal barriers can influence maternal (e.g., maternal health, functioning, cesarean delivery) and infant outcomes (e.g., low birth weight, preterm birth, NICU admissions, clinical complications).⁶⁸ “Numerous studies indicate that women with disabilities encounter barriers accessing and navigating perinatal care[.]”⁶⁹ For example, a study found that forty-four percent of gynecology practices were inaccessible to women with disabilities.⁷⁰ Indeed, many disabled women report encountering physical access barriers in clinical offices, such as a lack of height-adjustable examination tables and accessible weight scales.⁷¹ Additionally, after giving birth, women with disabilities are often placed in hospital rooms that lack accessibility features, such as inaccessible beds, restrooms, bassinets, and changing tables.⁷²

Women with disabilities often report that their biggest barriers to accessing perinatal care are healthcare providers who are unknowledgeable about pregnancy among disabled people and healthcare providers who are

Infant Outcomes Among Women Who Are Deaf or Hard of Hearing, 58 AM. J. PREVENTATIVE MED. 418, 420 (2020) (finding adverse maternal and child health outcomes among women who are deaf and hard of hearing).

⁶⁷ See Ilhom Akobirshoev, Monika Mitra, Susan L. Parish, Anne Valentine & Tiffany A. Moore Simas, *Racial and Ethnic Disparities in Birth Outcomes and Labor and Delivery Charges Among Massachusetts Women with Intellectual and Developmental Disabilities*, 58 INTELL. & DEVELOPMENTAL DISABILITIES 126, 133 (2020) (citing data on the comparably higher risk of preterm birth among Black women with intellectual and developmental disabilities).

⁶⁸ See Mitra et al., *supra* note 63, at 501-04 (proposing a conceptual framework for studying perinatal health for women with physical disabilities, which posits that individual factors, mediating factors, and environmental factors influence maternal and child outcomes).

⁶⁹ See Tarasoff et al., *supra* note 64, at 7 (citing studies).

⁷⁰ Tara Lagu, Nicholas S. Hannon, Michael B. Rothberg, Annalee S. Wells, K. Laurie Green, McAllister O. Windom, Katherine R. Dempsey, Penelope S. Pekow, Jill S. Avrunin, Aaron Chen & Peter K. Lindenauer, *Access to Subspecialty Care for Patients with Mobility Impairment: A Survey*, 158 ANNALS INTERNAL MED. 441, 444 (2013).

⁷¹ See Mitra et al., *supra* note 63, at 499.

⁷² See Monika Mitra, Linda M. Long-Bellil, Lisa I. Iezzoni, Suzanne C. Smeltzer & Lauren D. Smith, *Pregnancy Among Women with Physical Disabilities: Unmet Needs and Recommendations on Navigating Pregnancy*, 9 DISABILITY & HEALTH J. 457, 459 (2016) (reporting findings from interviews with women with disabilities revealing that disabled women often encounter accessibility barriers in hospitals after giving birth).

unsupportive of their pregnancy desires.⁷³ Some researchers have found that interactions with health care providers, especially negative encounters, can influence pregnancy decisions among disabled women.⁷⁴ Strikingly, qualitative interviews with fourteen obstetric clinicians who treat women with physical disabilities reported that they had not received any education or training about treating pregnant women with disabilities.⁷⁵ A study of 1,000 obstetrician-gynecologists about practice accessibility, training, attitudes, and perspectives concerning treating women with disabilities also revealed substantial barriers.⁷⁶ Specifically, this study found that only seventeen percent of obstetrician-gynecologists had received information or training on providing health care to disabled women.⁷⁷ Moreover, only nineteen percent of obstetrician-gynecologists felt “definitely” adequately prepared to care for pregnant disabled women.⁷⁸ In addition, more than half of obstetrician-gynecologists reported difficulty communicating with women with sensory or intellectual disabilities.⁷⁹

Furthermore, studies indicate that disabled women often encounter health care providers who explicitly and implicitly question “their ability to become pregnant, carry the baby to term, deliver safely, and/or care for the newborn.”⁸⁰ Disabled women also encounter negative attitudes concerning pregnancy and parenting from other sources, including family members and the general public.⁸¹ “This negativity can have wide-ranging effects, including increased stress (with the associated pregnancy health risk) and a hesitancy

⁷³ See Denise Lawler, Joan Lalor & Cecily Begley, *Access to Maternity Services for Women with a Physical Disability: A Systematic Review of the Literature*, 3 INT’L J. CHILDBIRTH 203, 212-213 (2013) (summarizing several studies about perinatal care for women with physical disabilities).

⁷⁴ See Tracey A. LaPierre, Mary K. Zimmerman & Jean P. Hall, “Paying the Price to Get There”: *Motherhood and the Dynamics of Pregnancy Deliberations Among Women with Disabilities*, 10 DISABILITY & HEALTH J. 419, 422 (2017) (“Healthcare providers significantly influenced the pregnancy decisions of these women by shaping perceptions of feasibility (and risk) related to their current and future health Participants reported conversations with medical professionals who they perceived as judgmental or unsupportive.”).

⁷⁵ See Suzanne C. Smeltzer, Monika Mitra, Linda Long-Bellil, Lisa I. Iezzoni & Lauren D. Smith, *Obstetric Clinicians’ Experiences and Educational Preparation for Caring for Pregnant Women with Physical Disabilities: A Qualitative Study*, 11 DISABILITY & HEALTH J. 8, 10 (2018) (“None of the 14 clinicians received training about caring for women with disabilities when they were students, residents, or fellows. All clinicians learned on the job, including those whose specialty was maternal-fetal medicine . . .”).

⁷⁶ See Laura H. Taouk, Michael F. Fialkow & Jay A. Schulkin, *Provision of Reproductive Healthcare to Women with Disabilities: A Survey of Obstetrician–Gynecologists’ Training, Practices, and Perceived Barriers*, 2 HEALTH EQUITY 207, 207 (2018).

⁷⁷ *Id.* at 209.

⁷⁸ *Id.* at 212.

⁷⁹ *Id.* at 210.

⁸⁰ Signore et al., *supra* note 50, at 148 (citing studies about perinatal care for disabled women).

⁸¹ *Id.*

to seek care.”⁸² In fact, many disabled women delay or forgo perinatal care because of these negative attitudes.⁸³

B. *Scarcity of Comprehensive and Accessible Sexual Education*

Undeniably, comprehensive sexual education is an important aspect of reproductive justice.⁸⁴ Without such information

[t]here is no way that young people—especially young people who are already marginalized—can make decisions about birth control; know the signs of an abusive relationship; decide if, when and how to become a parent; understand consent; or even enjoy a pleasurable sexual experience if they’re not provided with the medically accurate and shame-free sex education they need.⁸⁵

Hence, comprehensive and accessible sexual education is an important strategy for preventing sexual violence and ensuring that disabled people can enjoy their right to sexual agency.⁸⁶

Despite its importance, however, extant studies suggest that many people with disabilities do not have access to adequate sexual and reproductive health information, including sexual education. In fact, students with disabilities are frequently denied comprehensive sex education, with some being entirely left out of sex education classes and others feeling “excluded by the omission of relevant disability-related sex information.”⁸⁷ Research has found that most sexual education curricula intended for people with disabilities, and specifically people with intellectual and developmental disabilities, are not evidence-based.⁸⁸ Only three states explicitly consider disabled students in their sexual education requirements, and only six states and the District of Columbia provide optional resources for an accessible sexual education

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Marie-Amélie George, *Queering Reproductive Justice*, 54 U. RICH. L. REV. 671, 684 (2020) (noting the importance placed by reproductive rights advocates on sex education).

⁸⁵ Monica Edwards, *Let’s Talk About Sex (Education)*, MS. (Sept. 5, 2019), <https://msmagazine.com/2019/09/05/sex-ed-is-a-reproductive-justice-issue> [<https://perma.cc/5V66-UZZV>].

⁸⁶ See Amy Swango-Wilson, *Meaningful Sex Education Programs for Individuals with Intellectual/Developmental Disabilities*, 29 SEXUALITY & DISABILITY 113, 114 (2011) (“Education has the potential to encourage positive sexuality, promote the decisionmaking abilities about that sexuality and empower the individual with [intellectual or developmental disabilities] to act on their decisions.”).

⁸⁷ Barbara Waxman Fiduccia, *Current Issues in Sexuality and the Disability Movement*, 18 SEXUALITY & DISABILITY 167, 171-172 (2000).

⁸⁸ See H.J. Graff, R.E. Moyher, J. Bair, C. Foster, M.E. Gordon & J. Clem, *Relationships and Sexuality: How Is a Young Adult with an Intellectual Disability Supposed to Navigate?*, 36 SEXUALITY & DISABILITY 175, 176 (2018) (“[P]ublished curricula currently in use . . . have little empirical support for teaching sexuality to people with significant disabilities.”).

curriculum for students with disabilities.⁸⁹ A recent study found that compared to nondisabled women, women with cognitive disabilities were less likely to learn about six formal sex-education topics; namely how to say no to sex, methods of birth control, where to get birth control, how to use a condom, sexually transmitted infections, and preventing HIV/AIDS.⁹⁰ In addition, that study found that women who received education on more topics were more likely to use contraception.⁹¹

Not receiving comprehensive and accessible sexual education can lead to devastating outcomes for disabled people. For example, studies indicate that young people with disabilities are at an increased risk of exposure to HIV/AIDS and other sexually transmitted infections, in part, because they are often denied access to comprehensive and accessible sexual education.⁹² Moreover, for people with disabilities, not receiving sexual education may result in higher rates of experiencing sexual violence combined with a limited ability to report that violence because of lack of knowledge.⁹³ In addition, allowing disabled people “to remain ignorant about the[ir] rights and options does [not] allow them to make healthy choices regarding sexual partners and activities.”⁹⁴

The right to comprehensive and accessible sexual education is especially important for LGBTQ+ people with disabilities who often experience the erasure or dismissal of their sexual or gender identities by people who assume they are sexually unwilling or unable. Research suggests that LGBTQ+

⁸⁹ SIECUS, COMPREHENSIVE SEX EDUCATION FOR YOUTH WITH DISABILITIES: A CALL TO ACTION 17 (2021), <https://siecus.org/wp-content/uploads/2021/03/SIECUS-2021-Youth-with-Disabilities-CTA-1.pdf> [<https://perma.cc/EHV2-M2R3>].

⁹⁰ See Eun Ha Namkung, Anne Valentine, Lee Warner & Monika Mitra, *Contraceptive Use at First Sexual Intercourse Among Adolescent and Young Adult Women with Disabilities: The Role of Formal Sex Education*, 103 CONTRACEPTION 178, 180 (2021) (describing the study and its findings).

⁹¹ *Id.* at 180.

⁹² See Craig et al., *supra* note 61, at 7-8 (citing studies); Nora Ellen Groce, Poul Rohleder, Arne Henning Eide, Malcolm MacLachlan, Sumaya Mall & Leslie Swartz, *HIV Issues and People with Disabilities: A Review and Agenda for Research*, SOC. SCI. & MED., Jan. 2013, at 31-40 (analyzing current research regarding on the intersection of HIV/AIDS and persons with disabilities and calling for greater attention to the topic). For additional background reading on the relationship between HIV and persons with disabilities, see U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., WORLD HEALTH ORG. & U.N. PROGRAMME ON HIV/AIDS, DISABILITY AND HIV POLICY BRIEF (2009), https://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2010/jc1632_policybrief_disability_en%5B1%5D.pdf [<https://perma.cc/RTZ9-CP6U>].

⁹³ See Amy Swango-Wilson, *Meaningful Sex Education Programs for Individuals with Intellectual/Developmental Disabilities*, 29 SEXUALITY & DISABILITY 113, 113-18 (2011) (“The individual[s] with [intellectual and/or developmental disabilities] who experience sexual abuse often do not recognize the abuse. If they do recognize the abuse they are discouraged from reporting.”).

⁹⁴ Mya Vaughn, Kurt Silver, Sophia Murphy, Renee Ashbaugh & Amanda Hoffman, *Women with Disabilities Discuss Sexuality in San Francisco Focus Groups*, 33 SEXUALITY & DISABILITY 19, 42 (2015).

people with disabilities often face unique problems in exploring potential opportunities to engage in sexual relationships under the supervision of their caretakers or families.⁹⁵ Moreover, when LGBTQ+ people with disabilities receive information about sexual and reproductive health it is often inadequate because it is heteronormative.⁹⁶ Thus, without access to comprehensive sexual education that is accessible to and inclusive of varying gender identities and sexual orientations, LGBTQ+ people with disabilities' reproductive autonomy is thwarted.

C. Denial of Reproductive Decisionmaking

From forced sterilization to compulsory contraception, people with disabilities continue to be denied opportunities to make decisions about their reproductive destinies. As in the case of Britney Spears, guardianship, also known as conservatorship in some states, is the most common legal mechanism for controlling people with disabilities' sexual and reproductive autonomy. Briefly, guardianship is a "fiduciary relationship between a guardian and a ward or other incapacitated person, whereby the guardian assumes the power to make decisions about the ward's person or property."⁹⁷ Typically, guardianship is involuntary and imposed on people with intellectual or psychiatric disabilities and older adults with dementia.⁹⁸ According to disability justice advocates,

While the law varies from state to state, guardianship orders routinely authorize third parties to make decisions about the most personal and important decisions in an individual's life—choices that impact the person's own body and reproductive health; how and where they receive medical,

⁹⁵ See Nathan J. Wilson, Alexandra M. Bright, Jemima Macdonald, Patsie Frawley, Brenda Hayman & Gisselle Gallego, *A Narrative Review of the Literature About People with Intellectual Disability Who Identify as Lesbian, Gay, Bisexual, Transgender, Intersex or Questioning*, 22 J. INTELL. DISABILITIES 171, 190 (2018) (recounting the story of a young man with disabilities who was denied the opportunity to make his own decisions regarding sexual activity).

⁹⁶ See Lesley A. Tarasoff, "We Exist": *The Health and Well-Being of Sexual Minority Women and Trans People with Disabilities*, in ELIMINATING INEQUITIES FOR WOMEN WITH DISABILITIES: AN AGENDA FOR HEALTH AND WELLNESS 179, 187 (Shari E. Miles-Cohen & Caroline Signore eds., 2016) (citing studies).

⁹⁷ *Guardianship*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁹⁸ See Jennifer Moyer, *Guardianship and Conservatorship*, in EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS & INSTRUMENTS 309, 309 (Springer ed. 2005); see also Sara Luterman, *Free Comrade Britney!*, THE NATION (Mar. 31, 2020), <https://www.thenation.com/article/society/britney-spears-conservatorship/> [<https://perma.cc/U22D-94E7>]; Sara Luterman, *The Darker Story Just Outside the Lens of Framing Britney Spears*, THE NEW REPUBLIC (Feb. 12, 2021), <https://newrepublic.com/article/161344/framing-britney-spears-review-disability-legal> [<https://perma.cc/4F5N-CMDR>].

psychiatric, and psychological treatment; how the money and resources they work to earn are spent; and even with whom they associate.⁹⁹

Although compulsory sterilization has waned since its height of popularity during the Eugenics-era, it has never entirely ceased. In fact, most states still permit the sterilization of disabled people with prior judicial authorization.¹⁰⁰ At the same time, even with ostensible judicial protections, people with disabilities often have their reproductive freedom threatened.¹⁰¹ For example, fears about courts undermining the reproductive freedom of disabled people surfaced in 2018 during hearings for Justice Brett Kavanaugh's confirmation to the Supreme Court.¹⁰² Specifically, his 2007 opinion in *Doe ex rel. Tarlow v. District of Columbia*¹⁰³ demonstrated an appalling disrespect for people with disabilities. In that case, the D.C. Circuit Court of Appeals held that the District had no constitutional or legal obligation to consider the preferences of people with intellectual disabilities who were in its custody before sanctioning elective surgeries, including abortion.¹⁰⁴ In an opinion written by then-Judge Kavanaugh, the Court reasoned that "accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions—with harmful or even deadly consequences to intellectually disabled persons."¹⁰⁵ Additionally, then-Judge Kavanaugh ruled that no substantive due process claims were involved because "plaintiffs [did] not show[] that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' and 'implicit in the

⁹⁹ *Statement from Disability Justice and Supported Decision-Making Advocates: Britney Spears Spotlights the Need for Change Now*, CTR. FOR PUB. REPRESENTATION (June 25, 2021), <https://supporteddecisions.org/wp-content/uploads/2021/07/Disability-Org-Statement-on-Britney-Spears-FINAL-6-25-2021.pdf> [<https://perma.cc/49UP-S48A>].

¹⁰⁰ Vanessa Volz, *A Matter of Choice: Women with Disabilities, Sterilization, and Reproductive Autonomy in the Twenty-First Century*, 27 WOMEN'S RTS. L. REP. 203, 208 (2006).

¹⁰¹ See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 360, 364 (1978) (holding a judge immune from liability despite authorizing the sterilization of a woman with an intellectual disability without notice to the woman, without appointing a guardian *ad litem*, and without giving the petition a docket number or placing it on file in the clerk's office, as required by statute).

¹⁰² Robyn Powell, *Judge Kavanaugh's Supreme Court Nomination Could Put the Americans with Disabilities Act in Danger*, REWIRE NEWS GRP. (July 26, 2018), <https://rewire.news/article/2018/07/26/judge-kavanaughs-supreme-court-nomination-could-put-the-americans-with-disabilities-act-in-danger> [<https://perma.cc/7RX7-LW9T>].

¹⁰³ 489 F.3d 376 (D.C. Cir. 2007).

¹⁰⁴ *Id.* at 378-81.

¹⁰⁵ *Id.* at 382.

concept of ordered liberty”¹⁰⁶ Notably, scholars have portrayed then-Judge Kavanaugh’s opinion as “implicitly reaffirming *Buck v. Bell*.”¹⁰⁷

A 2012 case involving Mary Moe,¹⁰⁸ a thirty-two-year-old pregnant woman with a psychiatric disability similarly demonstrates how courts and guardians deny disabled people their reproductive autonomy.¹⁰⁹ In that case, Mary’s parents petitioned a Massachusetts family court for guardianship over their daughter so that they could force Mary to have an abortion.¹¹⁰ While Mary fervently opposed abortion, the court appointed her parents as co-guardians and sanctioned that Mary be “coaxed, bribed, or even enticed . . . by ruse” into a hospital for an abortion.¹¹¹ Additionally, the judge ordered that Mary be sterilized “to avoid this painful situation from recurring in the future.”¹¹² Ultimately, the decision was reversed on appeal, with the appellate court noting specifically in regard to the sterilization order that “[n]o party requested this measure, none of the attendant procedural requirements ha[ve] been met, and the judge appears to have simply produced the requirement out of thin air.”¹¹³ Although Mary’s case had a positive outcome consistent with her articulated wishes, her case reveals how people with disabilities experience threats to their reproductive freedom even with supposed judicial protections.

Indeed, compulsory sterilization or contraception is often depicted by courts and guardians as a protective measure in the “best interest” of people with disabilities, or necessary for their safety.¹¹⁴ Recent studies have found

¹⁰⁶ *Id.* at 383. Tellingly, following Judge Kavanaugh’s remand, the district court eventually found that the District of Columbia’s consent for the unwanted abortions on two of the women was unconstitutional and constituted battery. *Doe v. District of Columbia*, 206 F. Supp. 3d 583, 632 (D.D.C. 2016).

¹⁰⁷ *Mary Ann Case, Abortion, the Disabilities of Pregnancy, and the Dignity of Risk*, in *DISABILITY, HEALTH, LAW, AND BIOETHICS* 51, 58 (I. Glenn Cohen, Carmel Shachar, Anita Silvers & Michael Ashley Stein eds., 2020); *see also* Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 *HARV. L. & POL’Y REV.* 273, 287 (2020) (contending that the practices upheld by then-Judge Kavanaugh in *Doe* exemplify the eugenic practice of “violently denying the reproductive rights of disabled people”).

¹⁰⁸ Mary Moe is a pseudonym; Massachusetts law requires that informed consent proceedings for an abortion be kept confidential. Mass. Gen. Laws ch. 112, § 12R (2022).

¹⁰⁹ *In re Guardianship of Moe*, 960 N.E.2d 350, 352-353 (Mass. App. Ct. 2012).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 353 (quoting the family court’s decision).

¹¹² *Id.* (quoting the family court’s decision).

¹¹³ *Id.* at 355.

¹¹⁴ Robyn M. Powell & Michael Ashley Stein, *Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 *FRONTIERS L. CHINA* 53, 62-66 (2016) (examining court decisions that have authorized sterilization based on the “best interest” standard); *see also* Justine Wu, Yael Braunschweig, Lisa H. Harris, Willi Horner-Johnson, Susan D. Ernst & Bethany Stevens, *Looking Back While Moving Forward: A Justice-Based, Intersectional Approach to Research on Contraception and Disability*, 99 *CONTRACEPTION* 267, 269

that women with disabilities, especially those with intellectual disabilities, are significantly more likely than women without disabilities to be sterilized and at younger ages.¹¹⁵ Today, sterilization of people with disabilities is primarily “driven by parents, guardians, and social service providers who are uneasy . . . [that] they will incur the additional burden of caring for the offspring.”¹¹⁶ Tellingly, in authorizing the sterilization of disabled people, courts often advance analogous presumptions to those put forward in *Buck*, such as that people with disabilities are “incapable of adequate parenting” and their children will “inevitably be a financial burden on the state.”¹¹⁷ Hence, although the “eugenic rhetoric might have declined,” the “eugenic motivations and eugenic laws did not.”¹¹⁸ While sterilization should indisputably be an option for permanent contraception for people who choose it, in light of the country’s history, it is not difficult to imagine that many of these sterilizations may be forced.

The “Ashley X” case offers another troubling example of how people with disabilities’ reproductive freedom is all too often denied. Ashley was a young girl with intellectual and physical disabilities.¹¹⁹ In 2004, at age six, a Washington hospital, with Ashley’s parents’ consent, performed a series of procedures, including growth attenuation via hormone therapy, a hysterectomy, and bilateral breast bud removal.¹²⁰ Ashley’s physicians and family defended the permanent alteration of her body by maintaining that the procedures ensured “the best possible quality of life,” by enabling her to

(2019) (citing studies indicating that guardians often request sterilization to protect disabled women “from pregnancy in the event of sexual assault”).

¹¹⁵ Justine P. Wu, Michael M. McKee, Kimberly S. McKee, Michelle A. Meade, Melissa Plegue & Ananda Sen, *Female Sterilization Is More Common Among Women with Physical and/or Sensory Disabilities than Women Without Disabilities in the United States*, 10 *DISABILITY & HEALTH J.* 400, 403 (2017); William Mosher, Rosemary B. Hughes, Tina Bloom, Leah Horton, Ramin Mojtabai & Jeanne L. Alhusen, *Contraceptive Use by Disability Status: New National Estimates from the National Survey of Family Growth*, 97 *CONTRACEPTION* 552, 556-57 (2018); Henan Li, Monika Mitra, Justine P. Wu, Susan L. Parish, Anne Valentine & Robert S. Dembo, *Female Sterilization and Cognitive Disability in the United States, 2011–2015*, 132 *OBSTETRICS & GYNECOLOGY* 559, 561 (2018).

¹¹⁶ Beverly Horsburg, *Schrödinger’s Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 *CARDOZO L. REV.* 531, 572 (1996).

¹¹⁷ Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 *BERKELEY WOMEN’S L.J.* 122, 126 (1993).

¹¹⁸ Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 *CARDOZO J.L. & GENDER* 319, 350 (2008).

¹¹⁹ Daniel F. Gunther & Douglas S. Diekema, *Attenuating Growth in Children with Profound Developmental Disability: A New Approach to an Old Dilemma*, 160 *ARCHIVES PEDIATRICS & ADOLESCENT MED.* 1013, 1014 (2006); Marcia H. Rioux & Lora Patton, *Beyond Legal Smoke Screens: Applying a Human Rights Analysis to Sterilization Jurisprudence*, in *CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW* 243-44 (Marcia H. Rioux, Lee Ann Bassler & Melinda Jones eds., 2011).

¹²⁰ Gunther & Diekema, *supra* note 119, at 1015.

be more easily cared for by her family, while also allowing her to “retain more dignity in a body that is healthier, more of a comfort to her, and more suited to her state of development.”¹²¹ In addition, Ashley’s parents claimed, “Ashley has no need for her uterus since she will not be bearing children,”¹²² and her physicians asserted that the hysterectomy helped both Ashley and her family because it “eliminate[d] the complications of menses.”¹²³ Hence, Ashley’s “best interest was equated with her parents’ ability to maintain her at home and being easily able to carry and move her.”¹²⁴ Appallingly, Ashley’s parents successfully sought these procedures with just the authorization of an internal ethics board and not through adjudication.¹²⁵ A later investigation found that the hospital had violated state law in this matter.¹²⁶ Nonetheless, the “Ashley Treatment” remains accepted globally, with families increasingly seeking to subject their children to similar procedures.¹²⁷

Regrettably, the denial of reproductive decisionmaking is a widespread disability justice issue. Like in the case of Britney Spears, research indicates that women with disabilities are often denied the opportunity to make decisions concerning contraception.¹²⁸ Meanwhile, evidence indicates that some guardians seek to suppress the sexual desires of their disabled teenage and adult children through medication.¹²⁹ Further, sometimes guardians force people with disabilities to undergo unwanted abortions while others require

121 THE “ASHLEY TREATMENT,” TOWARDS A BETTER QUALITY OF LIFE FOR “PILLOW ANGELS” 3, 12, <http://pillowangel.org/Ashley%20Treatment.pdf> [<https://perma.cc/TE53-GWUZ>] (Mar. 17, 2012) (noting that the document is authored by “Ashley’s Mom and Dad”).

122 *Id.* at 10.

123 Gunther & Diekema, *supra* note 119, at 1015.

124 Rioux & Patton, *supra* note 119, at 244-45.

125 *Id.* at 244 (“Ashley’s case was not adjudicated.”).

126 Amy Burkholder, *Report: ‘Pillow Angel’ Surgery Broke Law*, CNN (May 8, 2007, 5:44 PM), <http://www.cnn.com/2007/HEALTH/05/08/ashley.ruling/index.html> [<https://perma.cc/G6CE-4HJQ>] (“Children’s Hospital, in acknowledging its error, said that beyond implementing changes to ensure that sterilization of disabled children doesn’t happen again without a court order, it will seek court approval for other procedures involved in the controversial growth attenuation therapy.”).

127 Ed Pilkington & Karen McVeigh, *‘Ashley Treatment’ on the Rise Amid Concerns From Disability Rights Groups*, THE GUARDIAN (Mar. 15, 2012, 10:51 AM), <http://www.guardian.co.uk/society/2012/mar/15/ashley-treatment-rise-amid-concerns> [<https://perma.cc/549M-CRTS>] (“A controversial procedure to limit the growth of severely disabled children . . . has begun to spread among families in America, Europe and beyond.”).

128 An Nguyen, *Challenges for Women with Disabilities Accessing Reproductive Health Care Around the World: A Scoping Review*, 38 SEXUALITY & DISABILITY 371, 378 (2020) (citing several studies in which participants reported that they were not provided with the right to decide to use contraception, with health care providers or family members instead making the decision for them).

129 Loyal Coshway, Julia Broussard, Kruti Acharya, Karen Fried, Michael E. Msall, John D. Lantos & Leena Nahata, *Medical Therapy for Inappropriate Sexual Behaviors in a Teen with Autism Spectrum Disorder*, PEDIATRICS, Apr. 2016, at 1.

disabled people to continue pregnancies they did not want.¹³⁰ Although most guardians who deprive people with disabilities of these choices are presumably doing so out of genuine concern for the person in their care, sometimes “these decisions are informed by harmful stereotypes and false beliefs, and can be contrary to the wishes of the person with disabilities.”¹³¹

D. Barriers to Contraception and Abortion

Conversations about access to contraception and abortion for people with disabilities “invoke[] a complicated history in disability communities because [they] bring[] into focus a deep and enduring social assumption that many individuals with disabilities do not belong in reproductive conversations; they are rarely seen as sexual beings or as potential parents.”¹³² Undeniably, the tensions concerning access to contraception and abortion are persistent and deeply problematic. Consequently, people with disabilities’ access to contraception and abortion is often impeded.

For example, disabled people encounter a range of barriers to contraception. On the one hand, research indicates that disabled women have less contraception knowledge and lower contraception use than nondisabled women.¹³³ Research consistently shows that women with disabilities’ “contraceptive needs are frequently overlooked”¹³⁴ Consequently, compared to nondisabled women, disabled women have decreased knowledge about contraception, are less likely to receive family planning services, and are less likely to use contraception.¹³⁵ These disparities are most pronounced in women who are unemployed, have lower incomes, or have lower

¹³⁰ NAT’L P’SHP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOC. NETWORK, ACCESS, AUTONOMY, & DIGNITY: ABORTION CARE FOR PEOPLE WITH DISABILITIES 12-13 (2021) [hereinafter ABORTION CARE], <https://www.nationalpartnership.org/our-work/resources/repro/repro-disability-abortion.pdf> [<https://perma.cc/N9HQ-KFQS>]. Some states impose the additional requirement that a disabled person obtain court approval prior to obtaining abortion care. Elizabeth Ann McCaman, *Limitations on Choice: Abortion for Women with Diminished Capacity*, 24 HASTINGS WOMEN’S L.J. 155, 174 (2013).

¹³¹ ABORTION CARE, *supra* note 130, at 13.

¹³² MICHELLE JARMAN, DISABILITY RIGHTS THROUGH REPRODUCTIVE JUSTICE, in THE ROUTLEDGE HANDBOOK OF DISABILITY AND SEXUALITY 138 (Russell Shuttleworth & Linda R. Mona eds., 2020).

¹³³ Powell et al., *supra* note 60, at 132 (citing several studies that conclude contraception knowledge and use among women with intellectual disabilities is lower than knowledge and use among women without disabilities).

¹³⁴ Signore, *supra* note 59, at 100.

¹³⁵ Willi Horner-Johnson, Mekhala Dissanayake, Justine P. Wu, Aaron B. Caughey & Blair G. Darney, *Pregnancy Intendedness by Maternal Disability Status and Type in the United States*, PERSPS. ON SEXUAL AND REPROD. HEALTH, Mar. 2020, at 31-32 (finding that women with disabilities are less likely to receive timely prenatal care or constructive sex education).

educational attainment.¹³⁶ Research has also revealed that women with disabilities are significantly less likely to receive contraception or contraception counseling than nondisabled women.¹³⁷ Further, studies have found that women with disabilities have higher rates of unintended pregnancies than women without disabilities, underscoring the importance of contraception for disabled people.¹³⁸ On the other hand, like Britney Spears, some women with disabilities are forced by guardians to use contraception out of fear that the disabled person will become pregnant.¹³⁹ In these instances, disabled people are effectively sterilized because they are unable to reproduce due to forced contraception.

Similarly, disabled people, like other marginalized populations, experience numerous barriers to safe and legal abortion care. People with disabilities experience high rates of poverty, which makes it more difficult to pay for abortion care.¹⁴⁰ In addition, some people with disabilities are unable to travel to an abortion provider, especially in areas with limited to no providers.¹⁴¹ The cost and transportation barriers are especially notable because abortion providers are becoming increasingly scarce as states continue to impose laws significantly restricting abortion rights. For example, a 2018 study revealed that twenty-seven cities in the United States are “abortion deserts”—cities in which people must travel at least one-hundred miles to reach an abortion provider.¹⁴² According to the *New York Times*, over eleven million women of reproductive age nationwide live more than a one

¹³⁶ Jeanne L. Alhusen, Tina Bloom, Kathryn Laughon, Lillian Behan & Rosemary B. Hughes, *Perceptions of Barriers to Effective Family Planning Services Among Women with Disabilities*, *DISABILITY & HEALTH J.*, July 2021, at 1-2.

¹³⁷ *Id.*

¹³⁸ Horner-Johnson et al., *supra* note 135, at 33 (finding a higher proportion of unintended pregnancies among women with disabilities as compared to women without disabilities); *see also* Alhusen et al., *supra* note 136, at 1-2.

¹³⁹ Powell et al., *supra* note 60, at 132 (citing several studies that conclude contraception knowledge and use among women with intellectual disabilities is lower than knowledge and use among women without disabilities).

¹⁴⁰ ABORTION CARE, *supra* note 130, at 9-10; WOMEN ENABLED INT’L, *ABORTION AND DISABILITY: TOWARDS AN INTERSECTIONAL HUMAN RIGHTS-BASED APPROACH* 9 (2020), <https://womenenabled.org/wp-content/uploads/Women%20Enabled%20International%20Abortion%20and%20Disability%20-%20Towards%20an%20Intersectional%20Human%20Rights-Based%20Approach%20January%202020.pdf> [https://perma.cc/A2U6-EKGE] (“[W]omen with disabilities . . . frequently cannot afford to travel abroad for abortion.”).

¹⁴¹ ABORTION CARE, *supra* note 130, at 9-10.

¹⁴² Alice F. Cartwright, Mihiri Karunaratne, Jill Barr-Walker, Nicole E. Johns & Ushma D. Upadhyay, *Identifying National Availability of Abortion Care and Distance From Major US Cities: Systematic Online Search*, *J. MED. INTERNET RSCH.*, 2018, at 7.

hour drive from an abortion provider.¹⁴³ Further, according to the Guttmacher Institute, as of 2017, eighty-nine percent of counties in the United States have no known abortion providers.¹⁴⁴ Abortion deserts greatly harm marginalized populations, including disabled people. Critically, access to abortion care will become even more difficult as states increasingly move to restrict or ban abortions following the *Dobbs* decision.¹⁴⁵ Moreover, health care facilities that do not have accessibility features, such as ramps and height-adjustable examination tables, further hinder disabled people's access to abortion care.¹⁴⁶

In recent years, states have enacted laws, commonly known as “reason bans,” that prohibit abortions based on fetal disability diagnosis.¹⁴⁷ Anti-choice activists and legislators often claim that these laws have a false pretense “stopping discrimination against people with disabilities, while in actuality doing nothing to address—and potentially even increasing—the structural discrimination that people with disabilities face.”¹⁴⁸ As the National Partnership for Women & Families and the Autistic Self Advocacy Network explain,

Abortion bans based on a fetal diagnosis do not address the discrimination people with disabilities face or misinformation directed at prospective parents of people with disabilities, nor do they respond to the needs of people with disabilities, such as access to health care, economic security, housing, or other social supports.¹⁴⁹

In fact, reason bans “land[] heavily on disabled people’s body autonomy.”¹⁵⁰ In particular, reason bans “may have a chilling effect on patients who wish to obtain relevant medical information about a pregnancy and discuss that

¹⁴³ K.K. Rebecca Lai & Jugal K. Patel, *For Millions of American Women, Abortion Access Is Out of Reach*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/interactive/2019/05/31/us/abortion-clinics-map.html> [<https://perma.cc/8VUC-DTHB>].

¹⁴⁴ Data Center: *Percentage of Counties without a Clinic*, GUTTMACHER INST., <https://data.guttmacher.org/states/table?state=US&topics=58&dataset=data> [<https://perma.cc/K33T-47VH>].

¹⁴⁵ See *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/JN5X-RGNL>] (Sept. 23, 2022) (noting areas in which access to abortions has become increasingly difficult to due to recent changes to legislation).

¹⁴⁶ ABORTION CARE, *supra* note 130, at 10 (arguing that factors such as lack of accessible transportation and other logistics serve as barriers to abortion care for people with disabilities).

¹⁴⁷ *Id.* at 11.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE 59 (2d ed. 2019) [hereinafter SINS INVALID].

information openly with their doctor”, especially people with heritable disabilities.¹⁵¹

Realities concerning sexual violence as well as disability-related needs underscore the importance of abortion access for people with disabilities. Specifically, access to safe and legal abortion is especially significant for people with disabilities, as people with disabilities are uniquely vulnerable to sexual violence.¹⁵² In fact, research shows that people with disabilities are at least three-and-a-half times more likely than people without disabilities to experience sexual violence.¹⁵³ Moreover, “[t]he intersection of access to abortion care and maternal health is particularly important to some people with disabilities who are at a heightened risk of pregnancy-related health complications, or who may rely on medications that are contraindicated during pregnancy.”¹⁵⁴ This is “all the more pressing” for disabled people of color who experience even higher rates of pregnancy complications.¹⁵⁵

E. Restrictions on Sexuality

Reproductive justice recognizes that people have a right to express their sexuality.¹⁵⁶ Similarly, disability justice necessitates “the right to sexual pleasure and choice and desire for all types of disabled people.”¹⁵⁷ Undeniably, “[t]he expression of sexuality, including how individuals form and maintain intimate relationships, is a fundamental part of being human.”¹⁵⁸ Thus, sexual autonomy must be freely enjoyed by all people, including people with disabilities.

¹⁵¹ ABORTION CARE, *supra* note 130, at 11.

¹⁵² See, e.g., *In re Guardianship of J.D.S.*, 864 So. 2d 534, 536 (Fla. Dist. Ct. App. 2004) (involving the sexual battery of a twenty two year old woman with “severe” intellectual disabilities who was residing in a group home); Deborah W. Denno, *Sexuality, Rape and Mental Retardation*, 1997 U. ILL. L. REV. 315, 320-21 (discussing the particular challenge of determining consent in cases of rape involving people with intellectual disabilities).

¹⁵³ ERIKA HARRELL, U.S. DEP’T OF JUST., CRIME AGAINST PERSONS WITH DISABILITIES, 2009–2015—STATISTICAL TABLES (2017), <https://bjs.ojp.gov/content/pub/pdf/capd0915st.pdf> [<https://perma.cc/2D94-3XBJ>]; see also All Things Considered, *The Sexual Assault Epidemic No One Talks About*, NPR, at 2:06 (Jan. 8, 2018, 5:00 AM), <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about> [<https://perma.cc/6U7Y-YWE4>] (stating that people with intellectual disabilities are nearly seven times as likely to experience sexual assault as compared to people without disabilities).

¹⁵⁴ ABORTION CARE, *supra* note 130, at 6.

¹⁵⁵ *Id.*

¹⁵⁶ LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 9 (2017).

¹⁵⁷ SINS INVALID, *supra* note 150, at 118.

¹⁵⁸ Michael Brown & Edward McCann, *Sexuality Issues and the Voices of Adults with Intellectual Disabilities: A Systematic Review of the Literature*, 74 RSCH. DEVELOPMENTAL DISABILITIES 124, 124 (2018).

Despite its importance, however, “[g]aining sexual autonomy has long been a struggle for people with disabilities.”¹⁵⁹ According to Sins Invalid, a disability justice performance project, “[o]ne of the ways that disabled people are oppressed is through the negation of our sexualities as a means of denying the viability of our bodies, including our potential reproductive viability.”¹⁶⁰ In particular, “[d]isabled people face structural and attitudinal barriers when seeking sexual and reproductive autonomy.”¹⁶¹ Much of the attempt to suppress people with disabilities’ sexual expression is entrenched in Eugenics-era ideologies.¹⁶²

Harmful misconceptions about people with disabilities and their sexuality persists. Rooted in prejudiced constructs of sexuality,¹⁶³ some people with disabilities are perceived as sexually unwilling or unable.¹⁶⁴ Other disabled people—especially people with intellectual or psychiatric disabilities—are assumed to be hypersexual and incapable of having appropriate (i.e., non-promiscuous) sexual relationships.¹⁶⁵ People with intellectual disabilities are often perceived as childlike, and thus unable or uninterested in engaging in sexual expression.¹⁶⁶ Further, sexual expression by people with disabilities is sometimes viewed as dangerous and something that must be suppressed.¹⁶⁷

Presumptions about people with disabilities and sexual expression often lead to substantial oppression. For example, in situations where disabled people are presumed “eternal children”, “ableist infantilisation results in these individuals being regarded as a people who are indeed never able to develop

¹⁵⁹ Katherine L. Moore, *Disabled Autonomy*, 22 J. HEALTH CARE L. & POL’Y 245, 265 (2019).

¹⁶⁰ SINS INVALID, *supra* note 150, at 116.

¹⁶¹ Bethany Stevens, *Structural Barriers to Sexual Autonomy for Disabled People*, GPSOLO, Spring 2011, at 14.

¹⁶² Emily M. Lund, Anjali J. Forber-Pratt & Erin E. Andrews, *Combating Old Ideas and Building Identity: Sexual Identity Development in People with Disabilities*, in THE ROUTLEDGE HANDBOOK OF DISABILITY AND SEXUALITY 98 (Russell Shuttleworth & Linda R. Mona eds., 2020) (“The idea that sexual behaviour in people with disabilities should be suppressed has its roots largely in eugenicist policies and ideals, and disabled people have been historically subject to involuntary sterilisation.”).

¹⁶³ See generally Tom Shakespeare, *Disabled Sexuality: Toward Rights and Recognition*, 18 SEXUALITY AND DISABILITY 159, 161-62 (2000) (discussing the prejudices people with disabilities face in the context of sexuality, such as societal exclusion of people with disabilities, diminishing their self-esteem).

¹⁶⁴ Maureen S. Milligan & Aldred H. Neufeldt, *The Myth of Asexuality: A Survey of Social and Empirical Evidence*, 19 SEXUALITY AND DISABILITY 91, 91 (2001) (“[S]ociety . . . inaccurately perceives [disabled persons] as asexual beings and therefore unsuitable as romantic partners.”).

¹⁶⁵ Ann Craft, *Mental Handicap and Sexuality: Issues for Individuals with a Mental Handicap, Their Parents and Professionals*, in MENTAL HANDICAP AND SEXUALITY: ISSUES AND PERSPECTIVES 13-14 (1987); Renu Addlakha, Janet Price & Shirin Heidari, *Disability and Sexuality: Claiming Sexual and Reproductive Rights*, 25 REPROD. HEALTH MATTERS 4, 4 (2017) (“People with disabilities are . . . held to be asexual (or in some cases, hypersexual).”).

¹⁶⁶ Lund et al., *supra* note 162, at 97.

¹⁶⁷ *Id.*

a sexual identity, much less a healthy or fulfilling one.”¹⁶⁸ Based on beliefs about the ability of people with intellectual disabilities to consent to sexual activity, caregivers often deny people with intellectual disabilities the right to engage in sexual and romantic relationships.¹⁶⁹ For example, research indicates that some family caregivers discourage their disabled relatives from engaging in sexual relationships.¹⁷⁰ Some caregivers even try to prevent disabled people from masturbating.¹⁷¹ Moreover, some disabled adults who live in group homes are outright denied opportunities to engage in sexual relationships while others are significantly restricted.¹⁷² According to Natalie Chin, “[g]roup homes deny their residents opportunities related to gaining knowledge and information about sex, intimate relationships, marriage, and starting a family.”¹⁷³ Moreover, bans on sexual expression are “harmful when the message to people with disabilities becomes one where sexual behaviour for pleasure and sexual expression is something to be ashamed of.”¹⁷⁴ In addition, unfounded beliefs often lead to disabled people not receiving adequate sexual and reproductive health care services and information.¹⁷⁵ They can also result in forced sterilization because of guardians’ concerns about pregnancy.¹⁷⁶

For LGBTQ+ disabled people, these issues are amplified. For example, research reveals that LGBTQ+ disabled people often contend with “numerous barriers to expressing their sexuality and establishing and maintaining romantic and sexual relationships because of discrimination and stigma as well as a lack of awareness and education on the part of health care providers and society at large.”¹⁷⁷ Moreover, interviews with LGBTQ+ people with intellectual disabilities found that “in the context of virtual prohibition of their sexual activity within their homes, and a dearth of accessible alternatives, LGBTQ+ youth labeled with intellectual disabilities resort to uncomfortable and risky physical and social spaces for romantic and sexual

¹⁶⁸ *Id.* (internal quotation marks omitted).

¹⁶⁹ See generally Andrea Onstot, *Capacity to Consent: Policies and Practices That Limit Sexual Consent for People with Intellectual/Developmental Disabilities*, 37 *SEXUALITY & DISABILITY* 633, 634 (2019) (examining policies and practices that prevent people with intellectual disabilities from exercising their right to sexual and romantic relationships and proposing solutions).

¹⁷⁰ Powell et al., *supra* note 60, at 150 (reviewing research on the role of family caregivers and sexuality among people with intellectual and developmental disabilities).

¹⁷¹ *Id.*

¹⁷² Natalie M. Chin, *Group Homes as Sex Police and the Role of the Olmstead Integration Mandate*, 42 *N.Y.U. REV. L. & SOC. CHANGE* 379, 382-84 (2018).

¹⁷³ *Id.* at 383.

¹⁷⁴ Lund et al., *supra* note 162, at 97.

¹⁷⁵ Powell & Stein, *supra* note 114, at 57-58.

¹⁷⁶ *Id.* at 62-66.

¹⁷⁷ Tarasoff, *supra* note 64, at 187.

encounters.”¹⁷⁸ Further, research suggests that support staff often lack confidence and skills about how to discuss matters relating to sexual orientation with people with intellectual disabilities, which likely affects their ability to support people with intellectual disabilities who are LGBTQ+.¹⁷⁹ Thus, LGBTQ+ disabled people are often denied opportunities to engage in sexual relationships because of fallacies about both their sexual orientation and their disabilities.

F. Threats to Parenthood

The Supreme Court has repeatedly affirmed that the right to raise a family is a fundamental right protected by the Fourteenth Amendment of the Constitution.¹⁸⁰ Nonetheless, that right is still not afforded to people with disabilities.¹⁸¹ In particular, prejudice and speculation about the competencies of parents with disabilities—emulating those raised during the Eugenics movement—have led to contemporary discriminatory child welfare laws, policies, and practices that assume parental unfitness.¹⁸²

¹⁷⁸ Alex McClelland, Sarah Flicker, Denise Nepveux, Stephanie Nixon, Tess Vo, Ciann Wilson, Zach Marshall, Robb Travers & Devon Proudfoot, *Seeking Safer Sexual Spaces: Queer and Trans Young People Labeled with Intellectual Disabilities and the Paradoxical Risks of Restriction*, 59 J. HOMOSEXUALITY 808, 816 (2012).

¹⁷⁹ Edward McCann, Regina Lee & Michael Brown, *The Experiences and Support Needs of People with Intellectual Disabilities who Identify as LGBT: A Review of the Literature*, 57 RSCH. DEVELOPMENTAL DISABILITIES 39, 44-46 (2016) (summarizing findings from studies examining support staff’s attitudes towards people with intellectual disabilities).

¹⁸⁰ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Org. of Foster Fams.*, 431 U.S. 816, 842 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). However, in light of *Dobbs*, especially Justice Thomas’ questioning of rights not enumerated in the Constitution, it remains to be seen how this precedent will be treated in the future. See 142 S. Ct. 2228, 2300-04 (2022) (Thomas, J., concurring).

¹⁸¹ Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 L. & INEQ. 153, 153-54 (1998) (“Although persons with disabilities have made significant gains in recent years in overcoming the invidious discrimination with which they have long been burdened, the legal rights of parents with disabilities remain in question.”).

¹⁸² See generally NAT’L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 15 (2012) [hereinafter *ROCKING THE CRADLE*], https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_o.pdf [<https://perma.cc/S48R-C9N6>] (“The report provides a comprehensive review of the barriers and facilitators people with diverse disabilities—including intellectual and developmental, psychiatric, sensory, and physical disabilities—experience when exercising their fundamental right to create and maintain families, as well as persistent, systemic, and pervasive discrimination against parents with disabilities. The report analyzes how U.S. disability law and policy apply to parents with disabilities in the child welfare and family law systems, and the disparate treatment of parents with disabilities and their children.”).

The child welfare system, more accurately termed the family policing system,¹⁸³ pathologizes, controls, and punishes marginalized communities, including disabled parents and their children.¹⁸⁴ Parents with disabilities are more likely than parents without disabilities to be referred to the family policing system.¹⁸⁵ Disabled parents, especially parents with intellectual or psychiatric disabilities, also endure strikingly high rates of termination of parental rights.¹⁸⁶ Further, children of parents with intellectual or psychiatric disabilities are more likely than other children to be removed from their homes and placed in foster care.¹⁸⁷

Once involved with the family policing system, disabled parents and their children experience a range of injustices. For example, they are often denied adequate family preservation or reunification services and supports.¹⁸⁸ They also encounter pervasive biases and misconceptions that they are unable to care for their children, which can lead the family policing system and courts to presume that disabled parents will not be able to benefit from services and that separation is in the child's best interest.¹⁸⁹

Tellingly, nineteen percent of all children in foster care have parents with disabilities,¹⁹⁰ while children of parents with disabilities comprise only approximately nine percent of the country's youth.¹⁹¹ The National Council on Disability (NCD), an independent federal agency that advises the President and Congress on disability policy, described the family policing system's bias against disabled parents as "persistent, systemic, and pervasive[.]"¹⁹² Other federal agencies are in agreement, with the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS)

183 This Article recognizes the importance of language through the use of the phrase "family policing system" when referring to the multi-agency system historically referred to as the "child welfare" or "child protection" system. See Dorothy Roberts, *Abolish Family Policing, Too*, DISSENT MAG., <https://www.dissentmagazine.org/article/abolish-family-policing-too> [https://perma.cc/UQD7-4XM4]. Accordingly, this Article utilizes the term "family policing system," except when directly quoting others.

184 Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM 37, 85-86 (2022) (arguing that the family policing system harms disabled parents and their children).

185 Sasha M. Albert & Robyn M. Powell, *Supporting Disabled Parents and Their Families: Perspectives and Recommendations from Parents, Attorneys, and Child Welfare Professionals*, 15 J. PUB. CHILD WELFARE 530, 530 (2021).

186 *Id.* at 531.

187 *Id.*

188 *Id.*

189 *Id.* (citing studies).

190 Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERVS. REV. 22, 26 (2016).

191 ROCKING THE CRADLE, *supra* note 182, at 44.

192 *Id.* at 15, 51.

positing that the family policing system's prejudicial policies and practices toward parents with disabilities are "long-standing and widespread."¹⁹³

While the family policing system is seemingly instituted to protect children, it is often the source of considerable and enduring harm for both children and their parents. Compared to other children, children in foster care experience increased rates of mental health conditions, lower post-secondary educational attainment, increased rates of poverty and homelessness, and lower rates of health insurance.¹⁹⁴ Accordingly, children often fare better when they remain at home with their families.¹⁹⁵ Further, extant research has shown that children of disabled parents often live in fear that they could be separated from their parents, temporarily or permanently, because their parents are deemed incapable of caring for them.¹⁹⁶ Interestingly, a study of adult children of parents with intellectual disabilities discovered that children removed by the family policing system had subsequently reestablished and maintained contact with their parents.¹⁹⁷ Surely, this finding underpins the significance of family bonds. In addition, disabled parents often report "living in constant fear that they [will] eventually be reported [to the family policing system] because of their disability."¹⁹⁸ Parents with disabilities often are afraid to ask for help because they worry that someone may view them as unable to adequately care for their children and refer them to the family policing system.¹⁹⁹ Some disabled parents are even frightened to be in public with their children because they fear that a stranger will needlessly report them to the family policing system.²⁰⁰

193 U.S. DEP'T OF HEALTH & HUM. SERV., OFF. FOR C.R. ADMIN. FOR CHILDREN & FAMS. & U.S. DEP'T OF JUST., C.R. DIV. DISABILITY RTS. SECTION, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT 2 (Aug. 2015) [hereinafter TECHNICAL ASSISTANCE], <https://www.hhs.gov/sites/default/files/disability.pdf> [<https://perma.cc/DLD4-3DHC>].

194 CASEY FAM. PROGRAMS, IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 1-2 (2005), https://caseyfamilypro-wpengine.netdna-ssl.com/media/AlumniStudies_NW_Report_FR.pdf [<https://perma.cc/ZQ2V-MWWM5>].

195 See Powell, *supra* note 184, at 50 (citing studies that demonstrate that children tend to have better outcomes when they are not placed in foster care and instead remain at home).

196 David McConnell & Lyndsey Hahn, *Growing Up with Parents with Disabilities*, in THE ENCYCLOPEDIA OF CHILD AND ADOLESCENT DEVELOPMENT 7-8 (Stephen Hupp & Jeremy D. Jewell eds., 2020).

197 TIM BOOTH & WENDY BOOTH, GROWING UP WITH PARENTS WHO HAVE LEARNING DIFFICULTIES 58-59 (1998).

198 ROCKING THE CRADLE, *supra* note 182, at 82.

199 *Id.* at 82-84.

200 *Id.* at 82.

Parents with disabilities who are also people of color are likely to face compounded discrimination.²⁰¹ Extensive research shows that Black mothers are “especially likely to be monitored, regulated, and punished by the child welfare system[,]” and to lose custody of their children—often permanently—at disproportionately high rates.²⁰² Indigenous parents are also especially vulnerable to being separated from their children by the state.²⁰³ Thus, for disabled people of color, the threats to parenthood are heightened.

III. GUIDING TENETS TO A FRAMEWORK FOR ACHIEVING REPRODUCTIVE FREEDOM

Each day, sexuality and reproduction are weaponized to subjugate marginalized populations, including people with disabilities. The oppression of disabled people’s reproductive freedom is often the result of deeply entrenched ableist laws and policies. Accordingly, as activists, legal professionals, scholars, and policymakers respond to the increasing threats to reproductive freedom in the United States, their advocacy and analysis must consider people with disabilities. The jurisprudential and legislative framework proposed in Part IV, *infra*, is guided by the tenets of two complementary frameworks: disability justice and reproductive justice. Both disability justice and reproductive justice are intersectional social movements, theories, and praxes that provide important lenses for analyzing and responding to the ongoing weaponization of sexuality and reproduction to subjugate people with disabilities. This Part briefly describes each framework.

A. Disability Justice

Disability justice is an essential lens for dismantling the reproductive oppression of marginalized populations, including people with disabilities. Significantly “[r]eproductive [j]ustice is [d]isability [j]ustice.”²⁰⁴ Undoubtedly, ableism remains a deeply-rooted cause of the reproductive injustice experienced by disabled people. Disability justice offers an important framework for examining ableism as it relates to other forms of oppression and identity, including reproductive oppression.

²⁰¹ See NAT’L P’SHP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOCACY NETWORK, ACCESS, AUTONOMY, & DIGNITY: PEOPLE WITH DISABILITIES AND THE RIGHT TO PARENT 11-12 (Sept. 2021), <https://www.nationalpartnership.org/our-work/resources/repro/repro-disability-parenting.pdf> [<https://perma.cc/7JFY-4UUK>] (“Black parents are frequently unjustly surveilled and scrutinized by child welfare agencies and other government entities.”).

²⁰² *Id.* at 12.

²⁰³ *Id.* (citing studies focusing on the treatment of indigenous parents by the family policing system).

²⁰⁴ SINS INVALID, *supra* note 150, at 59.

Broadly, ableism is a system of prejudice and discrimination that devalues and excludes people with disabilities.²⁰⁵ Accordingly, ableism results in disabled people being perceived as inferior compared to nondisabled people. Ableist views embrace the notion that disability is “something that needs to be ameliorated, corrected or erased in order to come closer to the ideal able-bodied state.”²⁰⁶ “As a social process, ableism involves labeling—or pathologizing—bodies and minds as deviant, abnormal, incapable, incompetent, dependent, or impaired.”²⁰⁷ Like other systems of oppression, ableism operates at multiple levels and is therefore “a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society.”²⁰⁸

Disability justice is an intersectional social movement, theory, and praxis originally conceived in 2005 by the Disability Justice Collaborative, a group of queer, trans, and/or racialized disabled people.²⁰⁹ Disability justice encompasses ten fundamental principles needed to achieve a truly inclusive and just society:

1. Intersectionality . . . 2. Leadership of Those Most Impacted . . . 3. Anti-Capitalist Politics . . . 4. Cross-Movement Solidarity . . . 5. Recognizing Wholeness . . . 6. Sustainability . . . 7. Commitment to Cross-Disability Solidarity . . . 8. Interdependence . . . 9. Collective Access . . . [and] 10. Collective Liberation.²¹⁰

Disability justice recognizes that “[a]ll bodies are unique and essential” and, simultaneously, that “[a]ll bodies are confined by ability, race, gender, sexuality, class, nation state, religion, and more, and we cannot separate them.”²¹¹ Notably, this Article contributes to emergent legal scholarship that actively engages the tenets of disability justice.²¹²

²⁰⁵ Fiona Kumari Campbell, *Ableism as Transformative Practice*, in *RETHINKING ANTI-DISCRIMINATORY & ANTI-OPPRESSIVE THEORIES FOR SOCIAL WORK PRACTICE* 79-80 (Christine Cocker & Trish Hafford-Letchfield eds., 2014).

²⁰⁶ Justine Wu, Yael Braunschweig, Lisa H. Harris, Willi Horner-Johnson, Susan D. Ernst & Bethany Stevens, *Looking Back While Moving Forward: A Justice-Based, Intersectional Approach to Research on Contraception and Disability*, 99 *CONTRACEPTION* 267, 268 (2019).

²⁰⁷ Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 *DENV. L. REV.* 973, 981 (2019).

²⁰⁸ *Id.* at 980.

²⁰⁹ LEAH LAKSHMI PIEPZNA-SAMARASINHA, *CARE WORK: DREAMING DISABILITY JUSTICE* 15 (2018).

²¹⁰ *SINS INVALID*, *supra* note 150, at 22-26.

²¹¹ *Id.* at 19.

²¹² See, e.g., Katie Eyer, *Claiming Disability*, 101 *B.U. L. REV.* 547, 584 (2021) (using disability justice as a lens for understanding disability identity); Jasmine E. Harris, *Reckoning with Race and Disability*, 130 *YALE L.J.F.* 916, 931-35 (2021) (considering how disability justice has informed intersectional scholarship on people with disabilities); Powell, *supra* note 30, at 629-30 (applying a disability justice lens for disrupting eugenics); Morgan, *supra* note 207, at 989 (employing disability

Essential to disability justice is the understanding that universalist and individualist approaches to inequities are inevitably limited and inadequate. Indeed, the law has limits to achieving equality for people with disabilities. As attorney and organizer Talila A. Lewis aptly said, “Litigation can’t save us. The systems that abuse us can’t save us[.]”²¹³ Disability justice was established in response to the disability rights movement and emphasizes that addressing problems of disability-based discrimination requires attending to disparities created by race, immigration status, gender identity, sexual orientation, class, and other systems of oppression.²¹⁴ Specifically, in response to the disability rights movement, which has been overwhelmingly white, disability justice activists and scholars emphasize the need to shift activism beyond traditional legislative efforts. As Mia Mingus writes, “I want us to tap into the transformative powers of disability, instead of only gaining access to the current 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.”²¹⁵ Consequently, while “[t]he disability rights movement has been crucial to the liberation of people with disabilities[.]”²¹⁶ disability justice activists and scholars understand the importance of thinking beyond “gaining access to the current system,”²¹⁷ and instead working to dismantle structural oppression.²¹⁸ Therefore, “[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.”²¹⁹

justice as a framework for developing multidimensional consciousness); Powell, *supra* note 184, at 58 (proposing a framework for abolishing the child welfare system guided by disability justice).

²¹³ Marcy Karin & Lara Bollinger, *Disability Rights: Past, Present, and Future: A Roadmap for Disability Rights*, 23 U.D.C. L. REV. 1, 11 (2020) (quoting Talila A. Lewis’s remarks at the U.D.C. Law Review’s 2019 Symposium on disability rights).

²¹⁴ SINS INVALID, *supra* note 150, at 15-16; *see also* PIEPZNA-SAMARASINHA, *supra* note 209, at 15.

²¹⁵ Mia Mingus, *Access Intimacy, Interdependence and Disability Justice*, LEAVING EVIDENCE, (Apr. 12, 2017, 3:00 AM), <https://leavingevidence.wordpress.com/2017/04/12/access-intimacy-interdependence-and-disability-justice> [<https://perma.cc/8HEM-FFHX>].

²¹⁶ Nomy Lamm, *This is Disability Justice*, THE BODY IS NOT AN APOLOGY (Sept. 2, 2015), <https://thebodyisnotanapology.com/magazine/this-is-disability-justice> [<https://perma.cc/9FC2-BXFS>].

²¹⁷ Mingus, *supra* note 215, at 3.

²¹⁸ Lamm, *supra* note 216, at 3.

²¹⁹ Talila 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> [<https://perma.cc/6HJS-BWZX>].

Disability justice is rooted in intersectionality²²⁰ and was established as a “movement-building framework that would 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.”²²¹ Accordingly, “disability justice values an intersectional analysis which requires us to consider the complexities of reproductive justice in the context of ableism.”²²² Thus, disability justice is an important lens for analyzing and responding to the reproductive oppression experienced by disabled people, especially disabled people of color and LGBTQ+ people with disabilities for whom subjugation is magnified.

Disability justice also supports dismantling systems that oppress people with disabilities and addressing reproductive health disparities. To that end, disability justice recognizes that “[a]ccess to information, quality healthcare, and autonomy in decision-making are essential for the well-being of all.”²²³ In other words, to ensure that disabled people are afforded true choice, they must have access to comprehensive and accessible sexual and reproductive health services and information. Moreover, they must be provided opportunities to make decisions about their bodies. Above all, disability justice is essential because existing laws and policies are undeniably ineffective at ensuring reproductive freedom for disabled people.

B. *Reproductive Justice*

Reproductive justice is complementary to disability justice and provides an equally important lens for dislocating reproductive oppression. Reproductive justice is based on the international human rights framework and draws from reproductive rights and social justice. Reproductive justice was first “conceived in 1994 by feminists of color to conceptualize reproductive rights struggles embedded in social justice organizing that

²²⁰ In 1989, Kimberlé Crenshaw coined the term “intersectionality” to help explain the oppression of African-American women. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory & Antiracist Politics*, 1 U. CHI. LEGAL F. 139, 140 (1989) (stating that an analysis that does not take intersectionality into account will necessarily obscure the particular nature of oppression Black women face). Since then, intersectionality has been used to examine how people with multiple marginalized identities or statuses, including multiply-marginalized people with disabilities, experience subordination. See, e.g., Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 209, 211-22 (2011) (applying intersectionality to the study of disability).

²²¹ PIEPZNA-SAMARASINHA, *supra* note 209, at 11.

²²² SINS INVALID, *supra* note 150, at 61-62.

²²³ *Id.* at 61.

simultaneously challenged racism and classism, among other oppressions.”²²⁴ According to Loretta Ross, co-founder of the SisterSong Women of Color Reproductive Justice Collective, “[t]he Reproductive Justice framework analyzes how the ability of any woman to determine her own reproductive destiny is linked directly to the conditions in her community—and these conditions are not just a matter of individual choice and access.”²²⁵

Like disability justice, reproductive justice is rooted in intersectionality.²²⁶ Thus, reproductive justice is “based on the understanding that the impacts of race, class, gender, and sexual identity oppressions are not additive but integrative”²²⁷ and understands that only a holistic lens can adequately respond to them. In other words, the reproductive justice movement recognizes that reproductive choice “does not occur in a vacuum, but in the context of all other facets of a [person]’s life, including barriers that stem from poverty, racism, immigration status, sexual orientation and disability.”²²⁸ Therefore, reproductive justice understands how intersecting factors, such as race and disability, constrain the reproductive freedom of marginalized populations.

Reproductive justice emerged as a movement because women of color and members of other marginalized populations felt that the reproductive rights movement overlooked their needs and experiences.²²⁹ Reproductive justice, thus, goes beyond our traditional understanding of reproductive rights in two notable ways. First, reproductive justice acknowledges the importance of choice while also recognizing the broader social, legal, and institutional structures that affect people’s reproductive decisionmaking.²³⁰ Second, and relatedly, reproductive justice applies to all aspects of reproductive freedom rather than only abortion rights.²³¹

²²⁴ Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 328 (2013).

²²⁵ Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4 [hereinafter REPRODUCTIVE JUSTICE BRIEFING BOOK], <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fileID=4051> [https://perma.cc/RJ4B-GNNU].

²²⁶ ROSS & SOLINGER, *supra* note 156, at 73-74.

²²⁷ *Id.* at 74.

²²⁸ Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 71, 72 (2011).

²²⁹ *Id.* at 75.

²³⁰ REPRODUCTIVE JUSTICE BRIEFING BOOK, *supra* note 225, at 4 (“Moving beyond a demand for privacy and respect for individual decision making to include the social supports necessary for our individual decisions to be optimally realized, this framework also includes obligations [so] . . . [o]ur options for making choices [are] safe, affordable and accessible, three minimal cornerstones of government support for all individual life decisions.”).

²³¹ *See id.* (“Instead of focusing on the means—a divisive debate on abortion and birth control that neglects the real-life experiences of women and girls—the Reproductive Justice analysis focuses on the ends: better lives for women, healthier families, and sustainable communities.”).

Reproductive justice “includes not only a woman’s right not to have a child, but also the right to have children and to raise them with dignity in safe, healthy, and supportive environments.”²³² Notably, reproductive justice views each of these rights as equally important for achieving reproductive freedom.²³³ Central to reproductive justice is the recognition that “all fertile persons and persons who reproduce and become parents require a safe and dignified context for these most fundamental human experiences.”²³⁴ “By moving beyond the traditional pro-choice narrative and into the reality of lived experiences within the women’s communities, the reproductive justice movement focuses on the inequality among groups of women that inhibits access to these rights for some more than others.”²³⁵ Hence, reproductive justice reframes the discourse from “choice” to “access,” recognizing that a legal right to abortion is meaningless if people cannot access this care.

Similar to disability justice, reproductive justice moves beyond a focus solely on achieving rights. Reproductive justice demands “an integrated approach that draws on constitutional protections and movement-based policy strategies.”²³⁶ In addition, reproductive justice recognizes that “many kinds of laws shape the conditions in which women conceive and bear children.”²³⁷ Reproductive justice supports an affirmative government role “in ensuring that all women have the social, political, and economic power and resources to make the best decisions for themselves and their families.”²³⁸ To that end, reproductive justice necessitates both positive and negative rights, including states providing resources and supports that enable a person to exercise their right to have a child, to not have a child, and to parent one’s child.²³⁹ Furthermore, instead of relying solely on litigation and attorneys, reproductive justice also engages in grassroots and community organizing.²⁴⁰

232 Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights> [<https://perma.cc/XL9R-QAJH>].

233 See Luna & Luker, *supra* note 224, at 343 (“[R]eproductive justice is equally about the right to not have children, the right to have children, the right to parent with dignity, and the means to achieve these rights.”); see also *id.* at 328 (“[Reproductive justice] encompassed the right to not have a child but also moved beyond that to include the right to have a child and the right to parent any children one has.”).

234 ROSS & SOLINGER, *supra* note 156, at 9.

235 Seema Mohapatra, *Law in the Time of Zika: Disability Rights and Reproductive Justice Collide*, 84 BROOK. L. REV. 325, 343 (2019).

236 Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2240 (2018).

237 Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207, 210 (2018).

238 Sujatha Jesudason & Julia Epstein, *The Paradox of Disability in Abortion Debates: Bringing the Pro-Choice and Disability Rights Communities Together*, 84 CONTRACEPTION 541, 542 (2011).

239 ROSS & SOLINGER, *supra* note 156, at 169.

240 See London, *supra* note 228, at 71-72 (describing the aims of reproductive justice).

IV. A WAY FORWARD: DISABILITY REPRODUCTIVE JUSTICE

As described throughout this Article, a large and growing segment of the United States—approximately sixty-one million people, or twenty-six percent of the population²⁴¹—endures the ongoing weaponization of their sexuality and reproduction as a mechanism for subjugating them. Undeniably, this reproductive oppression is entrenched in our laws, policies, and collective conscience. Reckoning with the nation's current besiegement on reproductive freedom requires the inclusion of marginalized populations, especially people with disabilities. To that end, we must swiftly reframe the fight for reproductive freedom from one that only focuses on abortion to one that centers reproductive justice broadly.

Below, I further develop a jurisprudential and legislative framework for disrupting the longstanding systems that oppress disabled people's reproductive freedom.²⁴² The proposed framework is guided by the tenets of disability justice and reproductive justice. It encompasses five principles I believe are necessary to finally achieving reproductive justice for people with disabilities. First, to achieve reproductive justice, legal and policy solutions must be aimed at disrupting the intersecting oppressions experienced by multiply-marginalized people with disabilities. Second, activists, scholars, legal professionals, and policymakers must actively engage people with disabilities in establishing legal and policy responses. Third, legal and policy responses must be developed and implemented to guarantee that disabled people's rights to autonomy and self-determination are protected. Fourth, sexual and reproductive health services and information must be accessible and available to people with disabilities. Finally, disabled people must be ensured rights, justice, and wellness for themselves and their families.

The principles of disability reproductive justice are grounded in the existing legal and social science scholarship and are foundational elements of legal and policy solutions for addressing the reproductive oppression of disabled people. Importantly, the reproductive oppression experienced by disabled people is complex and requires an interdisciplinary and interprofessional response that engages all fields of expertise, including law, medicine, public health, social work, and organizing, among others. Thus, achieving reproductive freedom will necessitate a multifaceted approach. The need for such efforts could not be more timely or clear.

²⁴¹ Catherine A. Okoro, NaTasha D. Hollis, Alissa C. Cyrus & Shannon Griffin-Blake, *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults — United States, 2016*, 67 MORBIDITY & MORTALITY WKLY. REP. 882, 882 (Aug. 17, 2018).

²⁴² I proposed an earlier version of this framework in an Essay published in the *Virginia Law Review Online*. See Powell, *supra* note 11, at 261-70.

A. *Disrupt Intersecting Oppressions*

Audre Lorde famously said, “[t]here is no such thing as a single-issue struggle because we do not live single-issue lives.”²⁴³ Although the community is often seen as monolithic, with white cisgender people front and center, the community is far more diverse than is often recognized.²⁴⁴ Indeed, the disability community is hugely diverse in race, ethnicity, religion, gender identity, sexual orientation, and other demographics. People with disabilities, therefore, often experience multiple oppressions relating to their sexuality and reproduction, and we can only achieve true reproductive freedom by addressing how these multiple oppressions impact one another.

While all disabled people experience a range of threats to their reproductive freedom, these injustices are amplified for disabled people of color and LGBTQ+ people with disabilities. For example, research shows that people of color with disabilities as well as LGBTQ+ people with disabilities face significant and persistent barriers to sexual and reproductive health services and information, often leading to deleterious outcomes.²⁴⁵ Multiply-marginalized people with disabilities often receive minimal—if any—sexual education, and when they do, it is often not accessible or inclusive.²⁴⁶ Moreover, disabled people of color and LGBTQ+ people with disabilities also experience significant barriers to accessing contraception and safe and legal abortion, an issue that is only increasing as states and the judiciary continue to chip away at reproductive rights.²⁴⁷ LGBTQ+ people with disabilities are often denied opportunities to express their sexuality and gender identities because of entrenched ableism, heterosexism, and transmisia.²⁴⁸ Further, disabled people of color experience staggering threats to their parenthood because of the pervasive ableism and racism that undergird the family policing system.²⁴⁹

²⁴³ AUDRE LORDE, *SISTER OUTSIDER* 138 (1984).

²⁴⁴ See Carrie Elizabeth Mulderink, *The Emergence, Importance of #DisabilityTooWhite Hashtag*, 40 *DISABILITY STUD. Q.* (2020) (discussing how the hashtag #DisabilityTooWhite was used to draw attention to the focus on whiteness in conversations about disability); see also Sarah Blahovec, *Confronting the Whitewashing Of Disability: Interview with #DisabilityTooWhite Creator Vilissa Thompson*, HUFFPOST: BLOG (Dec. 6, 2017), https://www.huffpost.com/entry/confronting-the-whitewash_b_10574994 [<https://perma.cc/UAE3-EDY9>] (providing an interview discussion with founder of the hashtag #DisabilityTooWhite).

²⁴⁵ See *supra* Section II.A.

²⁴⁶ See *supra* Section II.B.

²⁴⁷ See *supra* Section II.D.

²⁴⁸ See *supra* Section II.E; see also Shain A. M. Neumeier & Lydia X. Z. Brown, *Beyond Diversity and Inclusion: Understanding and Addressing Ableism, Heterosexism, and Transmisia in the Legal Profession: Comment on Blanck, Hyseni, and Altunkol Wise’s National Study of the Legal Profession*, 47 *AM. J. L. & MED.* 76, 76 n.2 (2021) (arguing that the terms heterosexism and transmisia should be used rather than homophobia and transphobia because the latter are based on ableist underpinnings).

²⁴⁹ See *supra* Section II.F.

Therefore, the first principle to achieving disability reproductive justice requires activists, scholars, legal professionals, and policymakers to develop and implement legal and policy responses that are aimed at disrupting intersecting oppressions. Of note, Professor Jasmine Harris recently examined the dearth of legal scholarship studying the intersection of race and disability, noting, “discussions of race and disability do not use a critical-intersectional lens to interrogate inequities or a central subject of legal inquiry.”²⁵⁰ Disability reproductive justice should be used to begin to address this void.

B. Center People with Disabilities as Leaders

Critical to both reproductive justice and disability justice is the recognition that marginalized populations must be actively engaged as leaders in developing and implementing laws and policies that impact them. Indeed, a foundational aspect of justice-based approaches is “listening to, engaging, and developing affected communities.”²⁵¹ According to Sins Invalid, “[b]y centering the leadership of those most impacted, we keep ourselves grounded in real-world problems and find creative strategies for resistance.”²⁵² Centering people with disabilities as leaders is also aligned with the disability community’s ethos, “nothing about us, without us,” which emphasizes that disabled people should be actively involved in legal and policy efforts that impact them.²⁵³ Undeniably, when the voices of marginalized populations, including disabled people, are centered, solutions that benefit all members of society are conceived.

Cross-movement organizing, an important aspect of centering people with disabilities as leaders, is essential to disrupting the reproductive oppression of people with disabilities. Traditionally, there have been substantial tensions—particularly concerning issues of prenatal genetic testing for markers of disability and abortion on grounds of fetal disability diagnoses—between the disability rights and reproductive rights movements.²⁵⁴ Nevertheless, these tensions have come at high costs to both the disability rights and reproductive rights movements. As the Center for Reproductive Rights explains, “[t]he cost of ignoring tensions between the

²⁵⁰ Harris, *supra* note 212, at 926-27.

²⁵¹ Emily A. Benfer, *Health Justice: A Framework (& Call to Action) For the Elimination of Health Inequity & Social Injustice*, 65 AM. U. L. REV. 275, 338 (2015).

²⁵² SINS INVALID, *supra* note 150, at 23.

²⁵³ JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 14-15 (1998).

²⁵⁴ Bagenstos, *supra* note 107, at 280-81.

disability rights and reproductive rights movements is high.”²⁵⁵ Recently, in response, the Center for Reproductive Rights deliberately established partnerships with disability rights advocates as a way to begin bridging the gap between the movements.²⁵⁶ These conversations are an important reminder that the movements must work collectively to confront the subjugation of disabled people’s reproductive freedom and that purposefully including disabled people is essential to developing and implementing legal and policy responses.

Notably, centering disabled people as leaders is also aligned with the critical lawyering movement. In 1991, Professor Louise Trubek coined the term “critical lawyering” to refer to lawyering that seeks “to empower oppressed groups and individuals” and focuses on forging a path to achieve “a more just society.”²⁵⁷ Professor Trubek opined that critical lawyers must “encourage participation, personalize the issues, be skeptical of bureaucracy, be unbiased in approach to advocacy arenas, organize with other lawyers, and apply feminist and anti-racist analyses.”²⁵⁸ Critical lawyers’ “approach to social justice requires the participation of empowered communities. These lawyers work with communities by offering their technical expertise to interact with the legal system. The sustainability of these law practices relies heavily on the engagement of the community they are built to support.”²⁵⁹ Ultimately, critical lawyering necessitates “moves away from the lawyer as the central protagonist to the lawyer as collaborator with the client and community.”²⁶⁰

Therefore, the second principle needed for achieving disability reproductive justice requires activists, scholars, legal professionals, and policymakers to actively engage people with disabilities, especially people of color with disabilities and LGBTQ+ people with disabilities, in leading legal and policy responses to disrupt reproductive oppression. Such engagement will require an understanding of and respect for people with disabilities sharing their lived experiences and must involve elevating disabled people,

²⁵⁵ CTR. FOR REPRODUCTIVE RIGHTS, SHIFTING THE FRAME ON DISABILITY RIGHTS FOR THE U.S. REPRODUCTIVE RIGHTS MOVEMENT 2 (2017), <https://reproductiverights.org/wp-content/uploads/2020/12/Disability-Briefing-Paper-FINAL.pdf> [<https://perma.cc/DT9Q-9PQR>].

²⁵⁶ See *id.* (“Over a four-year period, the Center sought out partnerships with disability rights groups, educated our staff about disability rights, challenged our own assumptions and biases, and identified areas where our substantive work, and workplace, could incorporate perspectives of people with disabilities.”).

²⁵⁷ Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49, 50 (1991).

²⁵⁸ *Id.*

²⁵⁹ Luz Herrera & Louise G. Trubek, *The Emerging Legal Architecture for Social Justice*, 44 N.Y.U. REV. L. & SOC. CHANGE 355, 361 (2020).

²⁶⁰ *Id.* at 380.

especially multiply-marginalized disabled people, to leadership positions within both disability rights and disability justice movements. Recognizing that people with disabilities are the experts of their lives will lead to legal and policy responses that are disability-competent and address the actual reproductive needs of disabled people.

As explained previously, centering people with disabilities, especially multiply-marginalized disabled people, as leaders will facilitate cross-movement organizing and a broader effort toward fostering alliances and growing partnerships among the communities impacted most by the ongoing attacks on reproductive freedom. Cross-movement solidarity will create progress toward specific policy goals while also increasing and enhancing the dignity of people who can value one another's shared humanity. Practically, this means that those involved in the reproductive justice movement must deliberately include disabled people in their work. Likewise, disability rights and justice activists must acknowledge the diversity of the disability community and guarantee that disabled people from marginalized communities hold leadership roles within the movements. To achieve disability reproductive justice, disabled people, especially disabled people of color and LGBTQ+ people with disabilities, must be centered in all legal and policy responses to disrupt reproductive oppression.

C. *Protect Autonomy and Self-Determination*

As Britney Spears's tragic ordeal reveals, disabled people, especially people with intellectual or psychiatric disabilities, are often denied bodily autonomy and self-determination, which leads to reproductive oppression.²⁶¹ Constitutional doctrine concerning abortion was previously entrenched in a principle of autonomy.²⁶² Precisely, constitutional protections of abortion rights were rooted in the guarantee of "liberty" in the Due Process Clause of the Fourteenth Amendment.²⁶³ Indeed, the Supreme Court has ruled that the

²⁶¹ See *supra* Section II.C.

²⁶² See Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 876 (1993) ("The language of autonomy has provided the central rationale for protecting individual women's control over the abortion decision.").

²⁶³ However, these guarantees were regularly questioned in the context of abortion, even before the *Dobbs* decision, as seen in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992), which states that

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.

liberty protected by the Constitution comprises freedom in making “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy”²⁶⁴ Similarly, autonomy is a lynchpin of the disability rights movement.²⁶⁵

People with disabilities have unceasingly fought against paternalism and the belief that other people—specifically, family members and professionals—are best equipped to make decisions for disabled people.²⁶⁶

As explained previously, guardianship, also known as conservatorship in some states, is a draconian and antiquated system that has existed for centuries and robs disabled people of autonomy and self-determination.²⁶⁷ Importantly, guardianship is a notable way that many people with disabilities are deprived of their reproductive autonomy. “This issue of autonomy bleeds into reproductive justice, sexual freedom, and parental rights for disabled women.”²⁶⁸ Reprehensibly, many disabled people under guardianship, such as Britney Spears, are forced to use contraception to prevent pregnancy.²⁶⁹ Forced contraception is akin to involuntary sterilization since it prevents people, against their will, from procreating. According to the National Council on Disability, an estimated 1.3 million people with disabilities presently are under guardianship.²⁷⁰

²⁶⁴ *Id.* at 851. *But see* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (asserting that any right not explicitly enumerated in the Constitution must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty” to be protected by the Constitution).

²⁶⁵ See Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 795 (2007) (“[P]aternalism has historically been one of the most significant contributors to the disadvantage people with disabilities experience. Non-disabled parents, teachers, doctors, rehabilitation counselors, employers, and others have arrogated to themselves the prerogative to decide what is best for people with disabilities.”).

²⁶⁶ See CHARLTON, *supra* note 253, at 3 (“Control has universal appeal for [disability rights movement] activists because the needs of people with disabilities and the potential for meeting these needs are everywhere conditioned by a dependency born of powerlessness, poverty, degradation, and institutionalization. This dependency, saturated with paternalism, begins with the onset of disability and continues until death.”).

²⁶⁷ See Candida Moss, *The Romans, The Supreme Court, and Britney Spears—Conservatorship Abuse Has Been Happening for 2000 Years*, THE DAILY BEAST (June 26, 2021), <https://www.thedailybeast.com/britney-spears-the-romans-and-the-supreme-court-conservatorship-abuse-has-been-happening-for-2000-years> [<https://perma.cc/NJ39-4JCU>] (tracing the history of guardianship to Roman law).

²⁶⁸ Marissa Ditekowsky, *Disability Justice is Gender Justice: Acknowledging Disabled Women this Women’s History Month*, AMERICAN CONSTITUTION SOCIETY EXPERT FORUM (Mar. 8, 2021), <https://www.acslaw.org/expertforum/disability-justice-is-gender-justice-acknowledging-disabled-women-this-womens-history-month> [<https://perma.cc/L3DL-QHW9>].

²⁶⁹ Sara Luterman, *For Women Under Conservatorship, Forced Birth Control Is Routine*, THE NATION (July 15, 2021), <https://www.thenation.com/article/society/conservatorship-iud-britney-spears> [<https://perma.cc/TF8D-6FHL>].

²⁷⁰ NAT’L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 17 (2018),

To be sure, concerns about capacity are often raised as justification for denying people with disabilities autonomy. Specifically, “[o]ne argument frequently made in opposition to providing autonomy and support for sexual expression is that of *capacity*. . . .”²⁷¹ Of course, “[t]here will not be a ‘one size fits all’ approach to determining whether someone has the capacity to understand how to exercise their own sexual autonomy in a safe way.”²⁷² At the same time, current approaches that presume incompetence are “contrary to the established law, and based on perceptions, fears and bias, rather than facts and data.”²⁷³

Thus, the third principle for achieving disability reproductive justice requires the development and implementation of legal and policy responses that ensure people with disabilities’ autonomy and self-determination are protected. Although “[t]he guardianship system is designed as a last resort, applied only when an individual lacks capacity to make decisions,” there is “reason to believe that guardianships are imposed on many individuals without sufficient evidence of their decision-making incapacity and that, in some cases, disability alone appears to be used as a sufficient justification for the imposition of guardianship.”²⁷⁴

Legislative efforts are presently underway to begin to confront the injustice imposed on disabled people because of guardianship. For example, disability rights advocates across the nation are urging state legislatures to implement supported decision-making as a least restrictive alternative to guardianship.²⁷⁵ Succinctly, supported decision-making allows people with disabilities greater autonomy in their choices while receiving help with decision-making from people whom they prefer and trust.²⁷⁶ Supported decision-making “does not require court involvement and can be coupled with other legal tools, such as powers of attorney and advance health care

https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf
[<https://perma.cc/7LB7-TKD9>].

²⁷¹ Michael L. Perlin, Alison J. Lynch & Valerie R. McClain, “*Some Things Are Too Hot to Touch*”: Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses, 35 *TOURO L. REV.* 405, 411 (2019).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 *PENN ST. L. REV.* 1111, 1117 (2013).

²⁷⁵ *U.S. Supported Decision-Making Laws*, *CTR. FOR PUB. REPRESENTATION*, <https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions> [<https://perma.cc/UEB3-FE7A>] (listing states that have implemented supported decision-making).

²⁷⁶ *About Supported Decision-Making*, *CTR. FOR PUB. REPRESENTATION*, <https://supporteddecisions.org/about-supported-decision-making> [<https://perma.cc/2ND4-MVGG>].

directives, that promote self-determination and autonomy.”²⁷⁷ Further, a bipartisan group of Members of Congress have expressed interest in addressing guardianship abuse.²⁷⁸ Federal and state legislative responses are long overdue and urgently needed.

In addition, legal and policy responses are needed to thwart the “school-to-guardianship pipeline.”²⁷⁹ Specifically, although guardianship results in a major deprivation of autonomy, “it is often imposed as a matter of course.”²⁸⁰ For example, schools and healthcare providers often push parents to seek appointment as guardian upon their children turning eighteen-years-old.²⁸¹ Again, although guardianship was intended to be a last resort, there is reason to believe that is in fact often the first resort, which often has devastating and long-lasting effects. Indeed, courts often “approve guardianship petitions without asking many questions. And once a guardianship is created, it can be almost impossible to undo.”²⁸² Hence, protecting autonomy and self-determination in furtherance of disability reproductive justice requires confronting the school-to-guardianship pipeline.

D. *Ensure Sexual and Reproductive Health Services and Information are Accessible and Available to People with Disabilities*

As previously explained, disabled people encounter numerous barriers that threaten their access to sexual and reproductive health services and information.²⁸³ While federal disability rights laws, including the ADA,²⁸⁴ Section 504,²⁸⁵ and Section 1557,²⁸⁶ mandate that healthcare providers be accessible and prohibit disability-based discrimination, these statutes have

²⁷⁷ *U.S. Supported Decision-Making Laws*, *supra* note 275.

²⁷⁸ Veronica Stracqualursi, *Lawmakers Unveil Bipartisan Bill to ‘Free Britney,’ Targeting Conservatorships’ Abuse*, CNN (July 20, 2021, 12:40 PM), <https://www.cnn.com/2021/07/20/politics/free-act-conservatorships-britney-spears/index.html> [<https://perma.cc/UGL5-42G5>] (describing efforts by Congress to address guardianship abuse).

²⁷⁹ NAT’L COUNCIL ON DISABILITY, *TURNING RIGHTS INTO REALITY: HOW GUARDIANSHIP AND ALTERNATIVES IMPACT THE AUTONOMY OF PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES* 29–36 (2019), https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_o.pdf [<https://perma.cc/4KBS-7F7S>].

²⁸⁰ *Supported Decision Making & the Problems of Guardianship*, ACLU, <https://www.aclu.org/issues/disability-rights/integration-and-autonomy-people-disabilities/supported-decision-making> [<https://perma.cc/6GVJ-CPWW>].

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *See supra* Section II.A.

²⁸⁴ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

²⁸⁵ Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796.

²⁸⁶ Patient Protection & Affordable Care Act, 42 U.S.C. § 18116(a); 45 C.F.R. §§ 92.102–105 (2020).

failed to address the daily indignities and abuses experienced by people with disabilities.²⁸⁷ From general reproductive healthcare to perinatal care, to abortion care, disabled people encounter numerous and significant barriers that severely restrict their access to necessary sexual and reproductive health services.²⁸⁸ Additionally, transportation barriers often affect disabled people's access to sexual and reproductive health services. In fact, studies indicate that transportation is a "key factor influencing a disabled person's access to health services"²⁸⁹ Transportation accessibility transcends physical accessibility but also encompasses "the available routes, the reliability of the service and financial cost."²⁹⁰

Further, people with disabilities are often denied comprehensive and accessible sexual and reproductive health information, such as sexual education.²⁹¹ Deprived of such information, people with disabilities are unable to make informed decisions about their reproductive wellbeing. In other words, the scarcity of comprehensive sexual and reproductive health information impacts autonomy and self-determination.

Moreover, policy and programmatic barriers exist that curtail people with disabilities' access to sexual and reproductive health services and information. For example, because disabled people are more likely to be poor and receive public benefits, policies such as the Hyde Amendment, which bars the use of federal Medicaid funds for abortion care,²⁹² often inhibit their access to comprehensive sexual and reproductive health services.²⁹³ To illustrate, in 2016, around thirty-eight percent of working-age adults with disabilities were covered by Medicaid, and around twenty-seven percent were covered by Medicare.²⁹⁴ In other words, disabled people, especially disabled people of

²⁸⁷ Powell, *supra* note 30, at 625-27 (describing federal disability laws' application to matters concerning reproductive justice).

²⁸⁸ See *supra* Section II.A., II.D.

²⁸⁹ Rebecca J. Mitchell, Tayhla Ryder, Katia Matar, Reidar P. Lystad, Robyn Clay-Williams & Jeffrey Braithwaite, *An Overview of Systematic Reviews to Determine the Impact of Socio-Environmental Factors on Health Outcomes of People with Disabilities*, 30 HEALTH. & SOC. CARE CMTY. 1254, 1259-66 (2022) (citing studies).

²⁹⁰ *Id.*

²⁹¹ Powell & Stein, *supra* note 114, at 57-58 (explaining the implications of disabled people not receiving sexual education).

²⁹² See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 1263 (Dec. 27, 2020) (codifying the Hyde Amendment); see also Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, *The Hyde Amendment and Coverage for Abortion Services*, KAISER FAM. FOUND. (Mar. 5, 2021), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services> [<https://perma.cc/LU4X-5HWF>].

²⁹³ ROCKING THE CRADLE, *supra* note 182, at 178 ("Medicaid and Medicare [are] the primary health insurers for people with disabilities").

²⁹⁴ Jae Kennedy, Elizabeth Geneva Wood & Lex Frieden, *Disparities in Insurance Coverage, Health Services Use, and Access Following Implementation of the Affordable Care Act: A Comparison of*

color because they are more likely to receive Medicaid,²⁹⁵ are disproportionately impacted by the Hyde Amendment. Furthermore, within the past few years, Congress has made several attempts to repeal the ACA, which disabled people successfully fought off.²⁹⁶ Repealing the ACA would be devastating for people with disabilities as it would likely result in substantial cuts to Medicaid.²⁹⁷ While Medicaid does not cover abortion care, it does cover other types of sexual and reproductive health services and information, and reducing or eliminating Medicaid benefits would hinder people with disabilities' access.

As such, the third principle for achieving disability reproductive necessitates ensuring that sexual and reproductive health services and information are accessible and available. Increased compliance with and enforcement of existing legal protections are urgently needed to ensure reproductive freedom for people with disabilities. To that end, the U.S. DOJ and HHS Office for Civil Rights (OCR) must prioritize access to sexual and reproductive health services and information, such as by investigating alleged violations of disability-based discrimination by healthcare providers and enforcing federal disability rights laws as necessary.

People with disabilities also need access to comprehensive and accessible information about sexuality and reproduction. Both the Individuals with Disabilities Education Act and Section 504 require that "students with disabilities have the benefit of receiving access to the general curriculum, including comprehensive sex education when offered by schools."²⁹⁸ Nonetheless, people with disabilities are continuously denied access to comprehensive and accessible sexual education, which can lead to increased vulnerability of sexual violence and deleterious outcomes.²⁹⁹ Accordingly, the U.S. Department of Education should establish standards for sexual education for students with disabilities. Moreover, healthcare providers and

Disabled and Nondisabled Working-Age Adults, 54 INQUIRY: J. HEALTH CARE ORG., PROVISION, & FIN., 1, 4 (2017).

²⁹⁵ *Distribution of the Nonelderly with Medicaid by Race/Ethnicity*, KAISER FAM. FOUND., <https://www.kff.org/medicaid/state-indicator/medicaid-distribution-nonelderly-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/B36P-QEKQ>] (reporting that over fifty percent of the nonelderly receiving Medicaid in 2019 were people of color).

²⁹⁶ Robyn Powell, *Despite Arrests, People with Disabilities Continue to Fight for Their Lives*, REWIRE NEWS GRP. (July 7, 2017, 12:24 PM), <https://rewire.news/article/2017/07/07/despite-arrests-people-disabilities-continue-fight-lives> [<https://perma.cc/4ELR-HFHW>] (describing how people with disabilities have protested Congress' attempts to repeal the ACA).

²⁹⁷ *Id.*

²⁹⁸ James Sinclair, Laurie G. Kahn, Dawn A. Rowe, Valerie L. Mazzotti, Kara A. Hirano & Christen Knowles, *Collaborating to Plan and Implement a Sex Education Curriculum for Individuals with Disabilities*, 40 CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS 123, 123 (2017).

²⁹⁹ See *supra* Section II.B.

disability services providers must ensure that people with disabilities receive ongoing and comprehensive information about sexuality and reproduction. In addition to teaching about sexual violence, pregnancy prevention, contraception, and sexually transmitted infections, disabled people need information about sexuality and relationships. Importantly, sexual education must encompass diverse sexual orientations and gender identities.

Further, attention to the social determinants of health and their impact on access to sexual and reproductive health services and information is important.³⁰⁰ Developing and implementing laws and policies that recognize the social determinants of health will allow for addressing factors such as poverty and transportation and how they affect disabled people's access to sexual and reproductive health services and information. For example, given that a significant number of people with disabilities live in rural areas without access to transportation, the integration of telehealth services can increase opportunities for disabled people to access sexual and reproductive health services.³⁰¹ To that end, federal and state governments should enact statutory and regulatory changes, as needed, to expand telehealth sexual and reproductive health services. Congress should also allocate additional Medicaid funding for telehealth sexual and reproductive health services.³⁰² In other words, legal and policy reforms should be made to the health care delivery system to allow for greater access to sexual and reproductive telehealth services.³⁰³ Ultimately, by addressing the social determinants of health, disabled people will have greater access to those services and information.

³⁰⁰ See generally Benfer, *supra* note 251 (explaining the social determinants of health and the health justice framework).

³⁰¹ See Kathryn Wagner, *Healthcare Justice for Women with Disabilities: The Need for Integrative Primary Care Services and Education for Medical Providers*, 77 *SEX ROLES* 430, 431 (2017) (stating that 14 percent of women with disabilities live in rural areas); see also George M. Powers, Lex Frieden & Vinh Nguyen, *Telemedicine: Access to Health Care for People with Disabilities*, 17 *HOUS. J. HEALTH L. & POL'Y* 7, 12 (2017) (“[T]elemedicine offers a number of advantages that benefit individuals with disabilities to a greater extent than those without disabilities. Telemedicine can bring health care to consumers directly on demand while eliminating physical barriers and eliminating transportation costs.”).

³⁰² See generally Fabiola Carrión, Catherine McKee & Liz McCaman, *Medicaid Coverage of Family Planning Services Delivered via Telehealth*, NAT'L HEALTH L. PROGRAM (Dec. 16, 2020), <https://healthlaw.org/wp-content/uploads/2020/12/20-12-15.-Medicaid-coverage-of-telehealth-services-in-family-planning.pdf> [<https://perma.cc/AJP6-U2AK>] (recommending increased coverage of telehealth family planning services for Medicaid beneficiaries).

³⁰³ See Gabriela Weigel, Brittni Frederiksen, Usha Ranji & Alina Salganicoff, *Telemedicine in Sexual and Reproductive Health*, KAISER FAM. FOUND. (Nov. 22, 2019), <https://www.kff.org/womens-health-policy/issue-brief/telemedicine-in-sexual-and-reproductive-health> [<https://perma.cc/E6CJ-ZWHA>] (describing how reproductive telehealth services can help address unmet reproductive health needs, especially for rural populations).

Finally, in light of the *Dobbs* decision, the increased attempts by states to restrict abortion care, and the Hyde Amendment, Congress must mandate that all health insurers cover abortion care, including Medicaid and Medicare. For example, Congress should swiftly pass the Equal Access to Abortion Coverage in Health Insurance (EACH) Act, which would end the Hyde Amendment and related abortion funding restrictions in government health insurance plans.³⁰⁴ Additionally, Congress must work with disability rights and justice activists to identify other policy and programmatic barriers to sexual and reproductive health services and information.

E. *Guarantee Rights, Justice, and Wellness for People with Disabilities and Their Families*

Finally, it is impossible to effectively respond to the pervasive reproductive oppression experienced by people with disabilities without considering the significant role of law and policy in undermining reproductive justice. Indeed, people with disabilities and their families encounter numerous laws and policies that threaten their rights, justice, and wellness. These threats are widespread and require substantial attention. For disabled people of color and LGBTQ+ people with disabilities, threats to rights, justice, and wellness are magnified.

Poverty is a persistent and substantial barrier to people with disabilities being afforded reproductive freedom. It is also a barrier largely created by laws and policies. For example, disabled people are often prohibited from marrying because they risk losing necessary benefits, such as Supplemental Security Income (SSI) and Medicaid, because of draconian income and asset rules.³⁰⁵ To illustrate, consider a mother with a disability who is unemployed and receives a mere \$841 each month in SSI benefits.³⁰⁶ She also receives Medicaid benefits, which covers the costs of her personal care assistants, who provide in-home assistance with personal care and household chores. She would like to marry the father of her children but cannot because she will

³⁰⁴ *EACH Act Would Remove Major Economic Barriers to Abortion Access in the U.S.*, CTR. FOR REPROD. RTS. (Mar. 25, 2021), <https://reproductiverights.org/each-act-would-remove-major-economic-barriers-to-abortion-access-in-the-u-s> [<https://perma.cc/58FT-RKVY>].

³⁰⁵ See, e.g., Robert E. Rains, *Disability and Family Relationships: Marriage Penalties and Support Anomalies*, 22 GA. ST. U. L. REV. 561, 567 (2006) (describing how people with disabilities who marry could experience a reduction in total SSI benefits); Waterstone, *supra* note 47, at 549 n.132 (explaining governmental policies that reduce or terminate benefits if people with disabilities get married and how these rules result in continuing marriage restrictions for many).

³⁰⁶ *SSI Federal Payment Amounts for 2022*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/SSI.html> [<https://perma.cc/2RY6-PJB9>].

become ineligible for SSI and Medicaid once his income is considered.³⁰⁷ She would also like to work, at least part-time, but cannot because she will lose her SSI benefits if she earns more than \$1,350.³⁰⁸ Since Medicaid eligibility in her state is tied to receipt of SSI benefits,³⁰⁹ she will also lose Medicaid and needed in-home personal care assistants. Restrictive and outdated federal and state rules force this mother to live in poverty and prohibit her from getting married.

According to the U.S. Department of Labor's Bureau of Labor Statistics, in 2020 only eighteen percent of people with disabilities were employed, compared to sixty-two percent of people without disabilities.³¹⁰ While many more people with disabilities, like the mother described above, would like to work, "SSI and reliance on state and federal subsidized health insurance keep most disabled people in a poverty trap."³¹¹ As scholar and activist Bethany Stevens aptly wrote, "The political economy of disablement is egregious by keeping disabled people at a living wage that is below the poverty line, and it has a negative impact on their sexual and reproductive autonomy."³¹² Reproductive freedom should not be contingent on where people live, how much they make, or who they are. And yet, as the above narrative exemplifies, all too often these factors infringe on people with disabilities' reproductive justice.

Furthermore, people with disabilities, especially disabled people of color and LGBTQ+ people with disabilities, often additionally contend with discriminatory legal and social service systems that separate them from their families.³¹³ As previously explained, the family policing system targets people

307 Bethany Stevens, *Structural Barriers to Sexual Autonomy for Disabled People*, 38 HUM. RTS. 14, 15 (2011) ("Social Security's Supplemental Security Insurance (SSI) disincentives to marriage continue to place many disabled people in the position of deciding whether to marry or cohabitate and lose benefits; or remain single to retain life-sustaining benefits."). Although marriage is certainly not required to form families, it should be available to people with disabilities to the same extent that it is for people without disabilities.

308 *Substantial Gainful Activity*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/sga.html> [<https://perma.cc/56U5-SWLM>].

309 MaryBeth Musumeci & Kendal Orgera, *Supplemental Security Income for People with Disabilities: Implications for Medicaid*, KAISER FAM. FOUND. (June 23, 2021), <https://www.kff.org/medicaid/issue-brief/supplemental-security-income-for-people-with-disabilities-implications-for-medicaid/> [<https://perma.cc/454G-RGSH>] ("SSI eligibility generally is a pathway for Medicaid eligibility, [and] changes that affect the ability of people with disabilities to obtain or retain SSI also can affect the ability of people with disabilities to access Medicaid.").

310 U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., *Persons with a Disability: Labor Force Characteristics—2021* (Feb. 24, 2021), <https://www.bls.gov/news.release/pdf/disabl.pdf>. [<https://perma.cc/FLJ2-XAAM>].

311 Stevens, *supra* note 307, at 15.

312 *Id.*

313 See *supra* Section II.F.

of color and disabled parents using pathology, control, and punishment.³¹⁴ The reasons for this staggering discrimination are many, but ableist laws and policies play a significant role. For example, an estimated two-thirds of state child welfare system laws explicitly include parental disability—usually intellectual or psychiatric disabilities—as grounds for termination of parental rights.³¹⁵ Thus, in many states, disabled people are lawfully denied their right to raise children. Moreover, the Adoption and Safe Families Act (ASFA),³¹⁶ the federal law governing the family policing system, does not reference parents with disabilities, but the statute contains ableist provisions that negatively impact disabled parents and their children.³¹⁷ For example, parents with disabilities often have trouble complying with the strict timelines set forth by ASFA because obtaining adequate services and supports often takes longer than the mandated timelines.³¹⁸ Additionally, ASFA allows family policing agencies to bypass the provision of reasonable efforts and instead terminate parental rights if the child has been “subjected . . . to aggravated circumstances,” which some states have interpreted to include parental disability.³¹⁹ In other words, some states forgo preferring family reunification services simply because the parent is disabled.

³¹⁴ See *supra* Section II.F.

³¹⁵ ROCKING THE CRADLE, *supra* note 182, at 16.

³¹⁶ Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

³¹⁷ ROCKING THE CRADLE, *supra* note 182, at 93–96 (detailing ways that ASFA disparately impacts disabled parents).

³¹⁸ Ella Callow, Kelly Buckland & Shannon Jones, *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. C.L. & C.R. 9, 22 (2011); see also Christina Risley-Curtiss, Layne K. Stromwall, Debra Truett Hunt & Jennifer Teska, *Identifying and Reducing Barriers to Reunification for Seriously Mentally Ill Parents Involved in Child Welfare Cases*, 85 FAM. SOC’Y 107, 112 (2004) (“Most important to parents with a serious mental illness, ASFA affirms and clarifies specific exceptions that permit states to refuse reunification efforts, and requires states to initiate or join termination of parental rights . . . proceedings for children who have been in care 15 of the most recent 22 months.”); Colby Brunt & Leigh Goodmark, *Parenting in the Face of Prejudice: The Need for Representation for Parents with Mental Illness*, 36 CLEARINGHOUSE REV. 295, 299 (2002) (“These requirements can be especially onerous for mentally ill parents. Judges may view mental illness as lifelong and intractable—and therefore not amenable to resolution in a fifteen-month period.”); Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities as Parents: The ADA and the CRPD*, 57 FAM. CT. REV. 21, 25 (2019) (“[S]hort time periods for reunification may make it very difficult for people to achieve reunification goals if they require longer time periods for accessing services or learning successfully from them.”); ROCKING THE CRADLE, *supra* note 182, at 87–88 (detailing the difficulties parents with disabilities experience related to complying with ASFA’s timelines).

³¹⁹ 42 U.S.C. § 671(a)(15)(D)(i)–(iii); see also ROCKING THE CRADLE, *supra* note 182, at 90–92 (describing how some states have included parental disability among reasons to bypass providing reasonable efforts).

Finally, people with disabilities, especially people of color with disabilities and LGBTQ+ people with disabilities, are deeply affected by the ongoing attacks on abortion care.³²⁰ Since the Court decided *Roe*, states have enacted more than 1,300 restrictions on abortion.³²¹ In 2021 alone, over 500 abortion restrictions have been introduced in forty-seven states, and more than eighty of those bills have been enacted.³²² The incessant assaults on access to safe and legal abortion care only serve to further oppress marginalized populations, including disabled people. Indeed, with *Roe* now overturned, abortion is expected to soon become illegal in twenty-six states.³²³

Accordingly, the fifth principle for achieving disability reproductive justice requires people with disabilities be guaranteed rights, justice, and wellness for themselves and their families. To that end, an in-depth analysis of existing laws and policies that affect people with disabilities and reproductive freedom is urgently needed. Such examination must include laws and policies that are ostensibly facially neutral but are applied in ways that reflect societal biases and prejudices and that ultimately operate to the detriment of people with disabilities, such as family policing system laws and policies. While a complete analysis is beyond the scope of this Article, below are some areas that warrant attention. In the end, legal and policy solutions that reflect the fifth principle will need to be comprehensive and transformative.

For example, laws and policies that cause people with disabilities to live in poverty necessitate swift consideration. Amending the income and asset rules that keep people with disabilities in poverty would allow them to have livable incomes and the families they desire.³²⁴ Elevating disabled people

³²⁰ See generally, ABORTION CARE, *supra* note 130 (providing examples of how multiply marginalized disabled people encounter barriers to abortion care).

³²¹ Elizabeth Nash & Lauren Cross, *2021 is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (June 14, 2021), <https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades> [https://perma.cc/AXV2-JGR3].

³²² *Id.*

³²³ Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion without Roe: Here's Which Ones and Why*, GUTTMACHER INST. (Oct. 28, 2021), <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why> [https://perma.cc/XT9V-EKN5].

³²⁴ See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 32 (2004) (“[P]ublic health insurance programs themselves impose serious impediments to the participation of people with disabilities in the labor force.”); see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-934, MODERNIZING FEDERAL DISABILITY POLICY 1 (2007), <http://www.gao.gov/new.items/do7934sp.pdf> [https://perma.cc/2BTX-B44S] (“This [disability] program growth is exacerbated by the low rate of return to work for individuals with disabilities receiving cash and medical benefits.”); U.S. GOV’T ACCOUNTABILITY OFF., GAO/HEHS-96-62, SSA DISABILITY: PROGRAM REDESIGN NECESSARY TO ENCOURAGE RETURN TO WORK 39-47 (1996), <https://www.govinfo.gov/content/pkg/GAOREPORTS-HEHS-96->

with disabilities out of poverty would also allow them greater access to reproductive health services and information.³²⁵ To that end, employment opportunities similarly need to be expanded so that people with disabilities can work and earn livable wages. In addition, Section 14(c) of the Fair Labor Standards Act,³²⁶ which allows people with disabilities to be paid subminimum wages, must be immediately repealed. Ultimately, all laws and policies that relegate disabled people must be transformed.

Further, disabled parents and their children must be able to live free from fear of unnecessary separation. Accordingly, the family policing system must be entirely dismantled.³²⁷ In pursuit of abolishing the family policing system, we must reimagine a world that provides families with adequate and nonpunitive supports and resources. Recognizing that abolition takes time, legal protections must be immediately implemented to safeguard families already ensnared in the system. Specifically, removing parental disabilities as grounds for termination of parental rights from state statutes, providing high-quality legal representation, and increasing enforcement by DOJ and HHS' OCR of violations of disability rights laws will reduce the number of families subjected to the family policing system, an important step in achieving family policing system abolition.³²⁸

Lastly, action is urgently needed to thwart the ongoing and increasing attacks on access to safe and legal abortion care. The judiciary may not be the appropriate venue for doing so considering the current composition of the Supreme Court.³²⁹ Instead, efforts should focus on legislative solutions. For example, Congress must pass the Women's Health Protection Act (WHPA),

62/pdf/GAOREPORTS-HEHS-96-62.pdf [https://perma.cc/F4A2-54NY] (noting that the benefit structure provides disincentives to low-wage work and impedes the return to work).

³²⁵ Powell, *supra* note 11, at 269-70 (examining the how poverty impacts disabled people's reproductive freedom); *see also* ABORTION CARE, *supra* note 130, at 7-8 (describing the ways in which economic insecurity impedes access to abortion care).

³²⁶ Fair Labor Standards Act, 29 U.S.C. § 214(c) (2014); *see also* Zoe Brennan-Krohn, *Employment for People with Disabilities: A Role for Anti-Subordination*, 51 HARV. C.R.-C.L. L. REV. 239, 246-47 (2016); U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-260, SUBMINIMUM WAGE PROGRAM: FACTORS INFLUENCING THE TRANSITION OF INDIVIDUALS WITH DISABILITIES TO COMPETITIVE INTEGRATED EMPLOYMENT 5-10 (2021), <https://www.gao.gov/assets/gao-21-260.pdf> [https://perma.cc/SYX2-U5D2]

³²⁷ I propose a legal and policy agenda for family policing system abolition in an article published by the *Yale Journal of Law and Feminism*. *See generally* Powell, *supra* note 184. The recommendations described herein are part of that broader agenda.

³²⁸ *See generally id.* (describing the urgent need for these transformative legal and policy solutions).

³²⁹ Nina Totenberg, *Supreme Court's New Supermajority: What It Means for Roe v. Wade*, NPR (Dec. 31, 2020), <https://www.npr.org/2020/12/31/951620847/supreme-courts-new-supermajority-what-it-means-for-roe-v-wade> [https://perma.cc/5F5L-BVKJ] (noting that some legal scholars believe the Supreme Court will soon overturn *Roe v. Wade* because of the majority conservative bench).

which would create a national protection against state abortion bans and medically unnecessary restrictions.³³⁰ WHPA would guarantee that the right to abortion care is a reality in every state.³³¹ Importantly, all efforts to protect the right to safe and legal abortion care must be inclusive of marginalized populations, including disabled people.

CONCLUSION

While it is undeniably an austere time for reproductive freedom in the United States, it is also one of immense possibility. Now is the time to shift attention away from the courts and onto policymaking, organizing, and the electorate. More importantly, it is time to reframe the fight for reproductive freedom from one that focuses only on abortion to one that centers reproductive justice. To that end, we must incorporate not only the right to not have a child but also the right to have a child and the right to parent that child safely and with dignity. Above all, future fights for reproductive freedom must be fully inclusive of all people, with an intentional focus on marginalized populations, such as people with disabilities, whom have the most to lose and whom have been traditionally disregarded from these efforts. Guided by the tenets of disability justice and reproductive justice, this Article further develops jurisprudential and legislative framework for achieving and delivering reproductive justice for people with disabilities.

³³⁰ CTR. REPROD. RTS., *Women's Health Protection Act (WHPA)* (Sept. 27, 2021), <https://reproductiverights.org/the-womens-health-protection-act-federal-legislation-to-protect-the-right-to-access-abortion-care> [<https://perma.cc/JH77-HWQL>].

³³¹ *Id.*

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