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Confronting Eugenics Means Finally Confronting Its Ableist Roots

Robyn M. Powell

CONFRONTING EUGENICS MEANS FINALLY CONFRONTING ITS ABLEIST ROOTS

ROBYN M. POWELL*

ABSTRACT

In September 2020, a whistleblower complaint was filed alleging that hysterectomies are being performed on women at an immigration detention center in alarmingly high rates. Regrettably, forced sterilizations are part of the nation's long-standing history of weaponizing reproduction to subjugate socially marginalized communities. While public outrage in response to the whistleblower complaint was swift and relentless, it largely failed to acknowledge how eugenic ideologies and practices, including compulsory sterilizations, are ongoing and deeply entrenched in ableism. Indeed, a conversation that recognizes the ways in which eugenics continues to target people with disabilities is long overdue.

This Article contextualizes how eugenics has targeted people with disabilities over time, the ways in which these ideologies and practices persist, and why analysis and advocacy concerning eugenics—including the current abuses at immigration detention centers—that do not center the experiences of people with disabilities, especially people with disabilities who are also members of other socially marginalized communities, are inadequate. First, the Article explores the evolution of eugenics and its harmful effects on people with disabilities in the United States, including contemporary examples of eugenic policies and practices. Next, it describes ableism and its relation to eugenics, highlighting how eugenics is deeply rooted in ableism. Finally, the Article concludes by suggesting a path forward that addresses the role of ableism in eugenics, specifically discussing normative legal and policy implications. It also considers opportunities for collaboration across communities.

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* Robyn M. Powell, PhD, JD is a Bruce R. Jacob Visiting Assistant Professor at Stetson University College of Law.

INTRODUCTION

> *Those who cannot remember the past are condemned to repeat it.*[1]

In September 2020, a whistleblower complaint was filed on behalf of detainees at an Immigration and Customs Enforcement (ICE) detention center and a nurse who was employed there alleging that detained women are being subjected to "mass hysterectomies" and other unsafe conditions.[2] Specifically, the whistleblower complaint documented "jarring medical neglect" within the Georgia detention center, including inadequate medical care for detainees and unsafe work practices, which likely facilitated the spread of COVID-19.[3] The whistleblower complaint further "raise[d] red flags regarding the rate at which hysterectomies are performed on immigrant women under ICE custody" at the immigration detention center.[4] The whistleblower complaint detailed several examples of women who underwent hysterectomies, with some women asserting that they did not consent to such procedures.[5]

Condemnation about the allegations by public officials, scholars, advocates, and the general public was swift and relentless.[6] Nearly

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1. GEORGE SANTAYANA, THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE 172 (Marianne S. Wokeck & Martin A. Coleman eds., 2011) (1905).

2. *See, e.g.*, Jerry Lambe, *'Like an Experimental Concentration Camp': Whistleblower Complaint Alleges Mass Hysterectomies at ICE Detention Center*, LAW & CRIME (Sept. 18, 2020, 12:11 PM), https://lawandcrime.com/high-profile/like-an-experimental-concentration-camp-whistleblower-complaint-alleges-mass-hysterectomies-at-ice-detention-center [https://perma.cc/329H-9JRS]; Rachel Treisman, *Whistleblower Alleges 'Medical Neglect,' Questionable Hysterectomies of ICE Detainees*, NAT'L PUB. RADIO (Sept. 16, 2020, 4:43 AM), https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detaine [https://perma.cc/NC3H-FPMK].

3. Letter from Project S. et al. to Joseph V. Cuffari, Inspector General, Dep't of Homeland Sec. et al. 2 (Sept. 14, 2020), https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf [https://perma.cc/3XM6-B3FC].

4. *Id.*

5. *Id.* at 18–20.

6. *See, e.g.*, Dorothy Roberts (@DorothyERoberts), TWITTER (Sept. 15, 2020, 7:36 AM), https://twitter.com/DorothyERoberts/status/1305832838403588097 ("I could predict the coercive sterilization of detained women (and kidnapping of their children) by government agents because, as I taught my students, the U.S. has a long history of inflicting these violences as political weapons against Black, Latinx, and Indigenous people."); Senator Elizabeth Warren (@ewarren), TWITTER (Sept. 16, 2020, 1:12 PM), https://twitter.com

200 Members of Congress immediately demanded an investigation by the Department of Homeland Security's Inspector General.[7] Several Members of Congress also issued striking statements denouncing the alleged abuse. For example, Speaker Nancy Pelosi said, in part, in a statement, "If true, the appalling conditions described in the whistleblower complaint—including allegations of mass hysterectomies being performed on vulnerable immigrant women—are a staggering abuse of human rights. This profoundly disturbing situation *recalls some of the darkest moments of our nation's history* . . . ."[8]

Likewise, Congressman Joaquin Castro decried the purported abuse at the detention center, saying, in part, "If true, this grotesque behavior *harkens back to some of the darkest chapters in our country's history* . . . these atrocities *must not happen again*."[9] Undoubtedly Speaker Pelosi and Congressman Castro were correct to denounce such disturbing brutalities. However, their statements ostensibly implied that forced sterilization is a relic of the past, which is unfortunately untrue.[10] The World Health Organization has affirmed that compulsory sterilization is a form of torture.[11] Nonetheless, examples of involuntary sterilization of socially marginalized communities in the United States abound. For example, in her groundbreaking book, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, Dorothy Roberts limned the nation's long history of debasing

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/ewarren/status/1306279780770369541 ("This is sickening—and reflective of the worst moments in our nation's history. Congress needs to investigate these horrific allegations and the long line of medical abuse and neglect in these facilities immediately."); Kristen Clarke (@KristenClarkeJD), TWITTER (Sept. 14, 2020, 11:59 PM), https://twitter.com/KristenClarkeJD/status/1305717753819656192 ("Mass hysterectomies have a long and ugly history."); Lydia X. Z. Brown (@autistichoya), TWITTER (Sept. 16, 2020, 3:22 AM), https://twitter.com/autistichoya/status/1306131277993701378 ("Understand this: The US has LONG targeted Black, Native, Chicanx, Boricua, and other negatively racialized people—and especially disabled BIPOC—for forced sterilizations. Justifying eugenic sterilization based on imputed criminality, sexual deviance, and mental defectiveness.").

7. Treisman, *supra* note 2; *see also* Letter from Representative Pramila Jayapal et al. to Joseph V. Cuffari, Inspector General, Dep't of Homeland Sec. (Sept. 15, 2020), http://jayapal.house.gov/wp-content/uploads/2020/09/DHS-IG-FINAL.pdf [https://perma.cc/P6RD-AJDX] (letter from 173 Members of Congress requesting an investigation).

8. Press Release, House Speaker Nancy Pelosi, Pelosi Statement on Whistleblower Complaint on Massive Health Care Abuse at ICE Detention Centers (Sept. 15, 2020) (emphasis added), https://www.speaker.gov/newsroom/91520-0 [https://perma.cc/B23A-9CP5].

9. Press Release, Congressional Hispanic Caucus, Congressional Hispanic Caucus Statement on Whistleblower Complaint of Abuse in ICE Detention Centers, Including Hysterectomies (Sept. 15, 2020) (emphasis added), https://chc.house.gov/media-center/press-releases/congressional-hispanic-caucus-statement-on-whistleblower-complaint-of [https://perma.cc/5647-SEY3].

10. *See infra* notes 12–16 and accompanying text.

11. *See* WORLD HEALTH ORG., ELIMINATING FORCED, COERCIVE AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT 1 (2014), https://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325_eng.pdf;jsessionid=476C1C79E8E2F145ECA6EC1B01A2208D?sequence=1 [https://perma.cc/22YT-C2FU].

attempts to control the lives and bodies of women of color and declared "[c]urrent government funding policy continues to encourage sterilization of poor women."[12] A 2013 investigation revealed the ongoing sterilization of female inmates in California.[13] Equally startling, in 2009, a twenty-one-year-old mother from West Virginia underwent a tubal ligation as part of her probation after pleading guilty to possession of marijuana with the intent to distribute.[14] Even more recently, in 2017, an Oklahoma woman convicted of using a counterfeit check underwent sterilization at the suggestion of a judge, who said he would consider it during her sentencing.[15] Indeed, "[t]he United States has a long history of forcibly sterilizing people, and it never really stopped."[16]

Like members of other socially marginalized communities, people with disabilities have endured a lengthy history of forced sterilization and other governmental policies to prevent them from creating and maintaining families.[17] They have experienced compulsory sterilizations, coerced abortions, barriers to accessing adequate reproductive health care services and information, and disproportionate rates of child welfare system involvement and termination of parental

12. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 97 (1997).

13. Jorge Rivas, *California Prisons Caught Sterilizing Female Inmates Without Approval*, ABC NEWS (July 8, 2013, 4:28 PM), https://abcnews.go.com/ABC_Univision/doctors-california-prisons-sterilized-female-inmates-authorizations/story?id=19610110 [https://perma.cc/YR59-ZY6M] (reporting on a 2013 investigation by the Center for Investigative Reporting that found nearly 150 female inmates were sterilized between 2006 and 2010 without approval by the state of California). In 2014, California passed a law prohibiting the sterilization of female prisoners. Hunter Schwarz, *Following Reports of Forced Sterilization of Female Prison Inmates, California Passes Ban*, WASH. POST (Sept. 26, 2014, 10:20 AM), https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/following-reports-of-forced-sterilization-of-female-prison-inmates-california-passes-ban [https://perma.cc/TWS8-N3GU].

14. Sam P.K. Collins, *Tennessee Prosecutor Insisted Woman Undergo Sterilization as Part of Plea Deal*, THINK PROGRESS (Mar. 30, 2015, 4:41 PM), https://archive.thinkprogress.org/tennessee-prosecutor-insisted-woman-undergo-sterilization-as-part-of-plea-deal-a1ad95a5e045/#:~:text=The%20defense%20attorney%20assigned%20to,would%20make%20her%20permanently%20infertile [https://perma.cc/Z647-8AEH] (describing cases where women agreed to be sterilized as part of plea deals).

15. Tom Jackman, *Judge Suggests Drug-Addicted Woman Get Sterilized Before Sentencing, and She Does*, WASH. POST (Feb. 8, 2018, 5:50 AM), https://www.washingtonpost.com/news/true-crime/wp/2018/02/08/judge-suggests-drug-addicted-woman-get-sterilized-before-sentencing-and-she-does [https://perma.cc/4J26-VNRN].

16. Lea Hunter, *The U.S. Is Still Forcibly Sterilizing Prisoners*, TALK POVERTY (Apr. 23, 2017), https://talkpoverty.org/2017/08/23/u-s-still-forcibly-sterilizing-prisoners [https://perma.cc/DE72-JFSY].

17. *See* 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, 60–68 (2016) (explaining the ways in which restrictions on sexual, reproductive, and parenting rights for people with disabilities have evolved over time and across jurisdictions).

rights.[18] Consequently, while the allegations of forced sterilization at immigration detention centers are undoubtedly horrifying and enraging, such practices are not entirely surprising to people with disabilities. Rather, disabled people have experienced firsthand the government's ongoing efforts to control them, especially by preventing them from reproducing.[19] Hence, there is an urgent need to stop the government from weaponizing reproduction to subjugate socially marginalized communities, and these efforts must include people with disabilities.

This Article contextualizes the ways in which eugenics has targeted people with disabilities over time, how such practices persist, and why analysis and advocacy concerning sterilization necessitates a recognition of ableism. Part I limns the evolution of eugenics and its harmful effects on people with disabilities in the United States, including contemporary examples of eugenic practices. Part II describes ableism and its relation to eugenics, highlighting examples of how eugenics is deeply rooted in ableism. Finally, Part III concludes by suggesting a path forward that addresses the role of ableism in eugenics, specifically discussing normative legal and policy implications. It also discusses opportunities for collaboration across communities. Above all, I contend that any efforts to address eugenics—including the current alleged abuses at detention centers—that do not center the experiences of people with disabilities, especially people with disabilities who are also members of other socially marginalized communities, are inadequate.

I. THE PERSISTENCE OF EUGENICS AND PEOPLE WITH DISABILITIES

The recent accusations of compulsory sterilizations of immigrant women in detention centers must be situated within the nation's long and appalling history of weaponizing reproduction to control socially marginalized communities. While legal scholars have extensively documented how eugenic ideologies and practices have targeted, and continue to target, women of color,[20] low-income women,[21] and

18. *Id.*

19. *See id.*

20. *See, e.g.*, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1472–76 (1991); Beverly Horsburgh, *Schrodinger'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, 555–69 (1996); Bret D. Asbury, *"Backdoor to Eugenics"? The Risks of Prenatal Diagnosis for Poor, Black Women*, 23 DUKE J. GENDER L. & POL'Y 1, 3–7 (2015).

21. *See, e.g.*, Meredith Blake, *Welfare and Coerced Contraception: Morality Implications*

incarcerated people,[22] this Part focuses on how these inequities have affected and continue to affect people with disabilities. In particular, this Part describes the ways in which laws and policies have led to the curtailment of reproductive justice[23] for people with disabilities—particularly girls and women with disabilities[24]—beginning with the eugenics movement during the nineteenth century. To that end, this Part provides a succinct overview of the eugenics movement and its widespread impact on disabled people. Thereafter, it will explore how eugenic ideologies and practices endure today for people with disabilities. Without attempting to provide a complete description of the eugenics movement, this Part highlights examples of how eugenics' ideological underpinnings have threatened reproductive justice for disabled people over time.

A. Historical Context

The United States has an appalling history of controlling people with disabilities, including imposing policies that restrict disabled people from forming and maintaining families. One prominent example is the eugenics movement, which arose in the first half of the twentieth century.[25] In particular, negative eugenics sought to limit procreation by people with disabilities and others deemed "socially inadequate."[26] Negative eugenics, including compulsory sterilization

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of State Sponsored Reproductive Control, 34 U. LOUISVILLE J. FAM. L. 311, 340–44 (1995–96); Horsburgh, *supra* note 20, at 557–60; Asbury, *supra* note 20, at 11–13.

22. *See, e.g.*, Rachel Roth & Sara L. Ainsworth, *"If They Hand You a Paper, You Sign It": A Call to End the Sterilization of Women in Prison*, 26 HASTINGS WOMEN'S L.J. 7, 13–21 (2015); Elise B. Adams, *Voluntary Sterilization of Inmates for Reduced Prison Sentences*, 26 DUKE J. GENDER L. & POL'Y 23, 27–32 (2018); Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2227–28 (2018).

23. *Reproductive Justice*, SISTERSONG, https://www.sistersong.net/reproductive-justice [https://perma.cc/X4ZL-XZEM] (defining reproductive justice as the "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").

24. Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 123–24 (1993) ("Only a few of the dozens of cases regarding involuntary sterilization involve the sterilization of males. Therefore, sterilization practice is interwoven with the issue of control of female reproductive rights and, to some extent, of female expression."). *But see In re* Guardianship of Kennedy, 845 N.W.2d 707, 708 (Iowa 2014) (appeal brought by a twenty-one-year-old man with intellectual disabilities challenging the legality of a vasectomy his guardian had arranged for him without obtaining a court order); Renu Barton-Hanson, *Sterilization of Men with Intellectual Disabilities: Whose Best Interest is it Anyway?*, 15 MEDICAL L. INT'L 49, 57–65, 72 (2015) (examining recent cases concerning sterilization of men with intellectual disabilities and noting the frequent justification as purportedly "promoting sexual freedom").

25. Horsburgh, *supra* note 20, at 541–42.

26. J.H. Landman, *The Human Sterilization Movement*, 24 AM. INST. CRIM. L. & CRIMINOLOGY 400, 400 (1934). "Negative eugenics" focused on preventing those considered

and institutionalization, targeted those deemed subordinate, such as people with disabilities, people with substance use disorders or criminal histories, people of color, and those living in poverty.[27] Negative eugenics focused on preventing people whom society deemed "unfit for parenthood" from reproducing,[28] based on the notion that their offspring would be dangerous and burdensome to society.[29]

Regrettably, eugenics gained the Supreme Court of the United States' blessing in the infamous 1927 *Buck v. Bell*[30] decision. In this case, the Court upheld Virginia's law sanctioning state institutions to condition release upon sterilization.[31] Justice Oliver Wendell Holmes, Jr., 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[,]" the Court avowed that "[t]hree generations of imbeciles are enough."[32] Similar to other state sterilization laws, Virginia's statute was based on the idea that "many defective persons . . . would likely become by the propagation of their kind a menace to society[.]"[33] More than 30 states enacted similar statutes,[34] and over 65,000 Americans, many of whom had disabilities, were sterilized by 1970.[35]

Fifteen years after *Buck v. Bell* was decided, the Supreme Court of the United States, in *Skinner v. Oklahoma*, struck down an Oklahoma law requiring that people with more than two convictions

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socially inferior from reproducing, including through restrictive marriage laws, institutionalization and sexual segregation, and involuntary sterilization. EDWARD J. LARSON, SEX, RACE, AND SCIENCE 22 (1995). Conversely, "positive eugenics" involved policies and programs that incentivized the procreation of those considered superior (e.g., upper-class, high intelligence), such as through tax rebates and contests. DANIEL J. KEVLES, IN THE NAME OF EUGENICS 91 (1995).

27. *See* Landman, *supra* note 26, at 402.

28. *See* Eric M. Jaegers, Note, *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) ("The purpose of these laws was to protect and streamline society by preventing reproduction by those deemed socially or mentally inferior.").

29. 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. 862, 865 (2004); Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 1–2 (1996).

30. 274 U.S. 200 (1927).

31. *Id.* at 208.

32. *Id.* at 207.

33. *See* Eugenical Sterilization Act, Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed 1974).

34. Lombardo, *supra* note 29, at 1–2.

35. PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 104, 116 (2008).

for felonious offenses be sterilized.[36] Although *Skinner* is often attributed as the only case to distinguish *Buck v. Bell* explicitly, the decision did not expressly overturn it.[37] While both *Skinner* and *Buck v. Bell* 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.[38] *Skinner* not only evaded addressing *Buck v. Bell* by carefully focusing on punitive sterilization, but it also applied a more significant focus on the Equal Protection Clause of the Fourteenth Amendment.[39] Whereas *Buck v. Bell* dismissed Carrie Buck's Equal Protection arguments,[40] *Skinner* concentrated principally on the Equal Protection issues presented, and the Court applied a more rigorous strict scrutiny test in its analysis of the Oklahoma statute.[41]

Laws preventing people with disabilities from marrying were another component of negative eugenics that restricted people with disabilities from forming and maintaining families.[42] Specifically, three eugenics-based rationalizations were employed to advance marriage restrictions: "the potential children must be protected; people with [disabilities] themselves must be protected; and society at large must be protected."[43] For example, a Connecticut law prohibited "epileptics, imbeciles, and feebleminded persons from marrying or having extramarital sexual relations before the age of forty-five."[44] In 1974, a study found that nearly forty states had laws forbidding people with disabilities, most commonly those with intellectual or psychiatric disabilities, from marrying.[45] The most recent systematic investigation of these laws was conducted in 1997 and found that thirty-three states still had laws limiting people with intellectual or psychiatric

36. Skinner v. Oklahoma, 316 U.S. 535, 535–36 (1942).

37. *Id.* at 538.

38. Buck v. Bell, 247 U.S. 200, 208 (1927).

39. *Skinner*, 316 U.S. at 540–41.

40. *Buck*, 247 U.S. at 207–08.

41. *Skinner*, 316 U.S. at 541. Years later, in 1985, *City of Cleburne v. Cleburne Living Center, Inc.*, the Court held that the appropriate level of constitutional scrutiny of state action in cases involving people with disabilities was rational basis review, which results in significant deference to states. 473 U.S. 432, 446 (1985). While *Cleburne* did not concern forced sterilization, the Court's analysis "created and perpetuated a harmful constitutional 'otherness' to the disability classification," which has made cases involving disability-based discrimination incredibly challenging. Michael Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 541 (2014).

42. Brooke Pietrzak, *Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment*, 17 DEV. MENTAL HEALTH L. 33, 37 (1997).

43. *Id.* at 35.

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

45. PRESIDENT'S COMM. ON MENTAL RETARDATION, SILENT MINORITY 33 (1974).

disabilities from marrying.[46] While no known recent empirical studies have examined marriage laws as they apply to people with disabilities, scholars assert that these statutes continue to exist in some states.[47] Moreover, government policies that reduce or terminate disability benefits if people with disabilities get married result in continuing marriage restrictions for many.[48]

B. Contemporary Eugenics

While support for eugenics eventually waned, sterilization of people with disabilities did not wholly cease. Although nearly all states have repealed their compulsory sterilization laws, most states still permit sterilization with prior judicial authorization.[49] 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."[50] Tellingly, in petitions to courts for approval to sterilize people with disabilities or terminate their pregnancies, parents and guardians often cite cost as a prevailing factor.[51] Indeed, in sanctioning the sterilization of disabled people, courts often raise similar 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."[52] Hence, although the "[e]ugenic rhetoric might have declined," the "eugenic motivations and eugenic laws did not."[53]

For example, in *Stump v. Sparkman,* a "somewhat retarded" woman brought a civil rights action against the judge who ordered that she undergo sterilization.[54] Notwithstanding that the judge authorized the petition 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, the Supreme Court of the United States found the judge immune

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46. Pietrzak, *supra* note 42, at 43.

47. *See, e.g.*, Waterstone, *supra* note 41, at 548–49 (2014) (describing state laws that restrict people with disabilities from marrying).

48. *Id.* at 549, n.132.

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

50. Horsburgh, *supra* note 20, at 572.

51. Cepko, *supra* note 24, at 126.

52. *Id.*

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

54. Stump v. Sparkman, 435 U.S. 349, 351–55 (1978).

from liability.[55] Thus, the Court declined the opportunity to address the substantive legal issues regarding the reproductive rights of people with disabilities, choosing to leave the decisions to the individual states and focusing only on the limits of judicial immunity in their authority.[56]

More recently, the parents of Mary Moe,[57] a thirty-two-year-old pregnant woman with a psychiatric disability, petitioned a Massachusetts court for guardianship over Moe to consent to an abortion.[58] Although Moe was "very Catholic" and did "not believe in abortion," the trial court appointed her parents as co-guardians and authorized that Moe be "coaxed, bribed, or even enticed . . . by ruse" into a hospital for an abortion.[59] Additionally, the judge ordered *sua sponte*, and without notice, that Moe be sterilized "to avoid this painful situation from recurring in the future."[60] Ultimately, the decision was reversed on appeal, with the appellate court noting in regard to the sterilization order, "[n]o party requested this measure, none of the attendant procedural requirements has been met, and the judge appears to have simply produced the requirement out of thin air."[61]

Although Moe's case had a positive outcome that was consistent with her expressed wishes, her case demonstrates how disabled girls and women experience threats to their reproductive choices even with purported judicial protections. Indeed, by ordering the abortion and sterilization, the trial court failed to follow to Massachusetts' substituted judgment doctrine, which requires the court to consider the decision Moe would have made if she were deemed competent.[62] While the court-appointed guardian ad litem determined that Moe would not have had the abortion if she were considered competent, the judge dismissed the assessment and decided that "if Moe were competent, she 'would not choose to be delusional,' and therefore would opt for an abortion."[63] Further, the sterilization order violated Moe's due process rights by depriving her of due notice, the opportunity to be heard, and the opportunity to give informed consent.[64]

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55. *Id.* at 360, 364.
56. *See id.*
57. Mary Moe is a pseudonym; Massachusetts General Law requires that informed consent proceedings for an abortion be kept confidential. MASS. GEN. LAWS ch. 112, § 12S (2021).
58. *In re* Guardianship of Mary Moe, 960 N.E.2d 350, 352–53 (Mass. App. Ct. 2012).
59. *Id.* at 353.
60. *Id.*
61. *Id.* at 355.
62. *Id.* at 354–55; MASS. GEN. LAWS ch. 190B, § 5-306A (2021).
63. *In re Guardianship of Mary Moe*, 960 N.E.2d at 353.
64. *Id.* at 354.

The "Ashley X"[65] case provides another startling example of the ways in which the reproductive rights of girls and women with disabilities are threatened. Ashley has intellectual and physical disabilities.[66] In 2004, at age six, a Washington hospital, with Ashley's parent's authorization, performed a series of procedures, including growth attenuation via hormone therapy, a hysterectomy, and bilateral breast bud removal.[67] Her physicians and family justified the permanent alteration of her body by maintaining that the procedures ensured "the best possible quality of life," by enabling her to 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."[68] With respect to the hysterectomy, Ashley's parents contended, "Ashley has no need for her uterus since she will not be bearing children."[69] Additionally, Ashley's physicians asserted that the hysterectomy benefitted both Ashley and her family because it "eliminate[d] the complications of menses."[70] Therefore, Ashley's "best interest was equated with her parents' ability to maintain her at home and being easily able to carry and move her."[71] Curiously, Ashley's parents endorsed these procedures with just the authorization of an internal ethics board and not through adjudication.[72] Years later, an investigation revealed that the hospital had violated state law in this matter.[73] Nevertheless, the "Ashley Treatment" remains accepted globally, with more than 100 families subjecting their children to similar procedures while thousands more are said to have considered it.[74]

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65. 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, 1013–17 (2006).

66. *Id.* (describing Ashley as "non-ambulatory with severe, combined developmental and cognitive disabilities").

67. *Id.*

68. *See* THE "ASHLEY TREATMENT": TOWARDS A BETTER QUALITY OF LIFE FOR "PILLOW ANGELS," http://pillowangel.org/Ashley%20Treatment.pdf [https://perma.cc/2P6X-F5KM].

69. *Id.*

70. *See* Gunther & Diekema, *supra* note 65, at 1015.

71. Marcia H. Rioux & Lora Patton, *Beyond Legal Smokescreens: Applying a Human Rights Analysis to Sterilization Jurisprudence*, *in* EMORY CRITICAL PERSPECTIVES ON HUMAN RIGHTS & DISABILITY LAW 243, 244–45 (Marcia H. Rioux, Lee Ann Basser & Melinda Jones eds., 2011).

72. *Id.*

73. Amy Burkholder, *Report: 'Pillow Angel' Surgery Broke Law*, CNN (May 8, 2007), http://www.cnn.com/2007/HEALTH/05/08/ashley.ruling/index.html [https://perma.cc/T3YV-QZWS] ("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.").

74. Ed Pikington & Karen McVeigh, *"Ashley Treatment" on the Rise Amid Concerns*

Concerns about the potential of courts to undermine the reproductive rights of people with disabilities arose in 2018 during hearings for Justice Brett Kavanaugh's confirmation to the Supreme Court of the United States.[75] Specifically, his 2007 opinion in *Does* ex rel. *Tarlow v. District of Columbia*[76] demonstrated a shocking lack of respect for people with disabilities. In this case, the D.C. Circuit Court of Appeals ruled that the District had no constitutional or legal obligation to consider the preferences of people with intellectual disabilities who were in its custody before authorizing elective surgeries, including abortions.[77] 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."[78] In addition, then-Judge Kavanaugh held that no substantive due process claims were involved because "plaintiffs have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[79] However, scholars have described then-Judge Kavanaugh's opinion as "implicitly reaffirming *Buck v. Bell*."[80]

Recent analyses of national data confirm that sterilization remains a standard procedure for many people with disabilities. For example, one study found that compared to nondisabled women, women with physical or sensory disabilities were significantly more likely to have been sterilized.[81] Another study revealed that sterilization

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from Disability Rights Groups, THE GUARDIAN (Mar. 15, 2012), http://www.guardian.co.uk/society/2012/mar/15/ashley-treatment-rise-amid-concerns [https://perma.cc/7VY5-HPXD].

75. Robyn Powell, *Judge Kavanaugh's Supreme Court Nomination Could Put the Americans With Disabilities Act in Danger*, REWIRE.NEWS (July 26, 2018, 8:55 AM), https://rewire.news/article/2018/07/26/judge-kavanaughs-supreme-court-nomination-could-put-the-americans-with-disabilities-act-in-danger [https://perma.cc/4WBV-LL74].

76. 489 F.3d 376, 377 (D.C. Cir. 2007).

77. *Id.* at 378–81.

78. *Id.* at 382.

79. *Id.* at 383. Tellingly, the case proceeded following Judge Kavanaugh's remand, and 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 batteries. Doe v. District of Columbia, 206 F. Supp. 3d 583, 614, 632 (D.D.C. 2016).

80. Mary Ann Case, *Abortion, the Disabilities of Pregnancy, and the Dignity of Risk* (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3366444 [https://perma.cc/H5SB-AZZL]; *see also* Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL'Y REV. 273, 287 (2020) (contending that the practices upheld in *Tarlow* exemplify the eugenic practice of "violently denying the reproductive rights of disabled people").

81. 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 DISABIL. & HEALTH J. 400, 403 (2017).

rates were higher among women with cognitive disabilities and physical disabilities than nondisabled women.[82] Meanwhile, another recent study found that women with cognitive disabilities had significantly higher odds of undergoing sterilization than women without disabilities, and at significantly younger ages.[83] Further, another study revealed that women with multiple disabilities had a higher risk of undergoing hysterectomies than nondisabled women.[84]

Research also indicates that family members, health care providers, or congregate care facilities or institutions often request sterilization, rather than the individuals themselves.[85] Reasons cited for these requests include intent to protect girls and women from pregnancy in the event of sexual assault, provider and caregiver beliefs that hysterectomies are an appropriate option for menstrual management, and institutional policies compelling female residents to use contraception.[86] Hence, decisions about sterilization for girls and women with disabilities may not reflect an impartial assessment of their best interests or safeguard their reproductive rights.[87] These decisions may also not be consistent with their wishes. Although sterilization should undoubtedly be an option for permanent contraception for people who choose it, given the country's history, it is not difficult to imagine that many of these sterilizations may be coerced.

Undeniably, presumptions about the fitness of people with disabilities to raise children persists. For example, Deaf parents contend with speculation that their children's language development will be delayed, while blind parents and those with physical disabilities face assumptions that they cannot safely care for their children.[88] Parents with intellectual disabilities are presumed to be unable to care for children and incapable of learning parenting tasks.[89] Meanwhile,

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82. 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, 557 (2018).

83. 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 OBSTET. GYENCOL. 559, 561 (2018).

84. Julia A. Rivera Drew, *Hysterectomy and Disability Among U.S. Women*, 45 PERSPECT. SEXUAL REPROD. HEALTH 157, 157 (2013).

85. 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) (referencing to National Survey of Family Growth (NSFG) studies).

86. *Id.*

87. *See* Robyn M. Powell, Erin E. Andrews & Kara Ayers, *RE: Menstrual Management for Adolescents with Disabilities*, 138 PEDIATRICS 3112A (2016).

88. Michael Ashley Stein, *Mommy Has a Blue Wheelchair: Recognizing the Parental Rights of Individuals with Disabilities*, 60 BROOK. L. REV. 1069, 1083 (1994).

89. Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83

parents with psychiatric disabilities experience stereotypes that they are a danger to their children.[90]

Accordingly, bias and speculation about the capabilities of parents with disabilities—mirroring those raised during the height of the eugenics movement—have led to present-day discriminatory child welfare, family law, adoption, and reproductive health care policies and practices that assume parental unfitness.[91] For example, disabled parents experience disproportionate rates of child welfare system involvement and loss of parental rights.[92] They also contend with state statutes that include disability as grounds for the termination of parental rights.[93] Family courts, likewise, often deny people with disabilities custody of or visitation with their children.[94] Meanwhile, foster care and adoption agencies regularly discriminate against prospective parents with disabilities based on presumptions that they are unfit to care for children.[95] Furthermore, people with disabilities experience substantial barriers to accessing adequate reproductive health care services and information, especially assisted reproductive

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CALIF. L. REV. 1415, 1440 (1995) ("[T]he labels of developmentally disabled and mentally retarded are often misleading because they have little, if any, predictive value regarding *individual* capability. Nonetheless, statutes and courts often use a 'diagnosis' of developmental disability or mental retardation both to explain past behavior and to predict future behavior."); *see also* Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 126, 143 (2016) ("[T]here is a belief that parents with intellectual disabilities are unable to learn the necessary skills to safely parent.").

90. Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & C.R. L. REV. 273, 291 (2003) ("Most damaging to parents involved in the child welfare system is the deeply embedded belief that individuals with mental illnesses are unpredictable and dangerous.").

91. *See* 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_0.pdf [http://perma.cc/8PHT-FA63] ("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. Examination of the impediments prospective parents with disabilities encounter when accessing assisted reproductive technologies or adopting provides further examples of the need for comprehensive protection of these rights.").

92. *Id.*

93. *Id.* at 265–300 (finding that nearly two-thirds of state dependency laws list parental disability as grounds for termination of parental rights).

94. Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 FAM. COURT REV. 37, 38 (2019) ("Indeed, parents with disabilities contend with substantial and persistent bias within the family law system, often threatening their custody and visitation rights.").

95. ROCKING THE CRADLE, *supra* note 91, at 149–66 (describing the myriad of ways people with disabilities experience discrimination within the foster care and adoption system).

technologies, because many health care providers harbor biases about disabled people and their fitness to care for children.[96] In short, parenthood remains inaccessible to many people with disabilities owing to antiquated and discriminatory beliefs about disabled people that reflect eugenic ideologies.[97]

II. THE CONVERGENCE OF ABLEISM AND EUGENICS

Ableism has always undergirded eugenic ideologies and practices. Indeed, ableist notions have been utilized to justify controlling reproduction by people with disabilities as well as those perceived to have disabilities.[98] Hence, eugenics occurs at the intersection of ableism, racism, xenophobia, classism, and other systems of oppression. This Part offers a brief description of ableism. It then explores the ways in which eugenics is deeply rooted in ableism.

A. Overview of Ableism

Broadly, ableism is a system of prejudice and discrimination that devalues and excludes people with disabilities.[99] Hence, ableism results in people with disabilities being perceived as inferior, compared to nondisabled people. According to activist and attorney Talila A. Lewis, ableism is,

> [a] system that places value on people's bodies and minds based on societally constructed ideas of normalcy, intelligence, excellence and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, colonialism and capitalism. This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person's appearance and/or their ability to satisfactorily [re]produce, excel and "behave."[100]

Further, ableist perceptions encompass 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."[101] "As a social process,

96. *Id.* at 167–83 (providing examples of barriers to assisted reproductive technologies that people with disabilities encounter).

97. *See id.* at 15.

98. *See id.*

99. *See* Fiona Kumari Campbell, *Ableism as Transformative Practice*, *in* RETHINKING ANTI-DISCRIMINATORY AND ANTI-OPPRESSIVE THEORIES FOR SOCIAL WORK PRACTICE, 78–92 (Christine Cocker & Trish Hafford-Letchfield, eds., 2014).

100. Talila A. Lewis, *Ableism 2020: An Updated Definition* (Jan. 25, 2020), https://www.talilalewis.com/blog/ableism-2020-an-updated-definition [https://perma.cc/CSH2-A6FP].

101. Wu et al., *supra* note 85, at 268.

ableism involves labeling—or pathologizing—bodies and minds as deviant, abnormal, incapable, incompetent, dependent, or impaired."[102] In other words, ableism perpetuates the idea that disability is something to be avoided at all costs.

Like other systems of oppression, ableism operates at multiple levels, including internalized, interpersonal, institutional, and structural. Thus, "[a]bleism is 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."[103] Researchers have elucidated ways in which ableism results in inequities in education,[104] health care,[105] employment,[106] and the child welfare system[107] for people with disabilities.

Internalized ableism occurs when people with disabilities internalize society's prejudices toward disabled people, thereby viewing themselves as inferior.[108] Interpersonal ableism, conversely, involves expressions of bias between people.[109] Ableism at the institutional and structural levels are particularly relevant to eugenics. Institutionalized ableism involves discrimination against people with disabilities that is embedded within an organization's policies and practices.[110] For example, ableism is present in institutional policies and practices, often restricting people with disabilities from living their lives freely.[111] Finally, structural ableism involves ableism across institutions and systems that cause inequities for people with disabilities. Specifically, structural ableism can affect people with disabilities on medical, financial, and legal levels.

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

103. *Id.* at 980.

104. *See, e.g.*, Nicole Brown & Jennifer Leigh, *Ableism in Academia: Where are all the Disabled and Ill Academics?*, 33 DISABILITY & SOC'Y 985, 988 (2018).

105. *See, e.g.*, Emily M. Lund & Kara B. Ayers, *Raising Awareness of Disabled Lives and Health Care Rationing During the COVID-19 Pandemic*, 12 PSYCH. TRAUMA: THEORY, RSCH., PRAC., & POL'Y S210, S210–11 (2020).

106. *See, e.g.*, Eline Jammaers, Patrizia Zanoni & Stefan Hardonk, *Constructing Positive Identities in Ableist Workplaces: Disabled Employees' Discursive Practices Engaging with the Discourse of Lower Productivity*, 69 HUM. RELS. 1365, 1366–68 (2016).

107. Sasha M. Albert & Robyn M. Powell, *Ableism in the Child Welfare System: Findings from a Qualitative Study*, SOC. WORK RSCH. (forthcoming 2021).

108. *See* Fiona A. Kumari Campbell, *Exploring Internalized Ableism Using Critical Race Theory*, 23 DISABILITY & SOC'Y 151, 155–59 (2008).

109. Michelle R. Nario-Redmond, Alexia A. Kemerling & Arielle Silverman, *Hostile, Benevolent, and Ambivalent Ableism: Contemporary Manifestations*, 75 J. SOC. ISSUES 726, 749 (2019).

110. Gregg D. Beratan, *Institutionalizing Inequity: Ableism, Racism, and IDEA 2004*, 26 DISABILITY STUDS. Q. (2006).

111. Morgan, *supra* note 102, at 982 (describing how institutionalized and structural ableism affects the criminal justice system).

B. Ableism and Eugenics: Long-Standing Friends

Ableism and eugenics have a long and unfortunate history.[112] Indeed, ableist notions have served as the foundation of eugenic ideologies and practices for centuries.[113] Moreover, ableism has affected not only those who have disabilities but also those perceived as disabled or otherwise inferior.[114] Eugenic practices occur at the intersection of ableism, racism, xenophobia, classism, and other systems of oppression. In other words, the reach of ableism goes far beyond those whom we understand to be disabled or those who identify as having a disability. As organizer and writer Mia Mingus explains,

> Ableism set the stage for queer and trans people to be institutionalized as mentally disabled; for communities of color to be understood as less capable, smart and intelligent, therefore "naturally" fit for slave labor; for women's bodies to be used to produce children, when, where and how men needed them; for people with disabilities to be seen as "disposable" in a capitalist and exploitative culture because we are not seen as "productive;" for immigrants to be thought of as a "disease" that we must "cure" because it is "weakening" our country; for violence, cycles of poverty, lack of resources and war to be used as systematic tools to construct disability in communities and entire countries.[115]

In *Buck v. Bell*, for example, Carrie Buck was sterilized after being institutionalized and being deemed "feeble minded."[116] However, scholars later discovered that Carrie Buck did not have a disability but rather came from a family who was poor and uneducated.[117] In fact, Carrie Buck was institutionalized as a way to hide the fact that she was pregnant because she was raped while working as a housekeeper.[118] Moreover, Carrie Buck's daughter, Vivian, also did not have an intellectual disability,[119] which rebukes Justice Holmes' proclamation that "[t]hree generations of imbeciles are enough."[120] Hence, in the *Buck v. Bell* case, ableism was manifested through classism, whereby poverty was equated with disability.

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112. *See* Powell & Stein, *supra* note 17, at 59.
113. *Id.*
114. *See id.* at 60.
115. Mia Mingus, *Moving Toward the Ugly: A Politic Beyond Desirability* (Aug. 21, 2011), https://leavingevidence.wordpress.com/2011/08/22/moving-toward-the-ugly-a-politic-beyond-desirability [https://perma.cc/QSV3-MMQ6].
116. Buck v. Bell, 274 U.S. 200, 205 (1927).
117. LOMBARDO, *supra* note 35, at 139–40.
118. *Id.*
119. *Id.* at 190 (noting that she was on her school's honor roll).
120. *Bell*, 274 U.S. at 207.

Undoubtedly, ableist beliefs that people with disabilities should not reproduce or exercise their sexual agency have endured over time. For example, rooted in ableism, people with disabilities have been forcibly sterilized because they are deemed by others to be unfit to raise children.[121] Likewise, child welfare policies and practices that are deeply rooted in ableism have led to disproportionate rates of termination of parental rights among parents with disabilities.[122] Indeed, eugenic ideologies and practices continue to manifest in governmental policies and practices to control the lives of people with disabilities because they are considered inferior and in need of care.

Ableism, presented through eugenics, has similarly served as a catalyst for the nation's restrictive and discriminatory immigration policies. Indeed, scholars have noted that eugenics informed immigration policies in the United States and "combines racism and ableism in its hierarchization of humanity."[123] For example, the Immigration Act in 1882 prohibited entry to any "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[124] The law later added people deemed "mentally or physically defective, [with] such mental or physical defect being of a nature which *may affect* the ability of such alien to earn a living" as well as "imbeciles," "idiots," and "feeble-minded persons" to the list of people prohibited from entering the United States.[125] Notably, in passing immigration laws, eugenics proponents urged Congress to pass a law that would keep "genetically inferior" people out of the country.[126] Most recently, disability advocates have been fighting the Trump Administration's proposed changes to the "public charge" policies, which would even further limit immigrants with disabilities.[127] Hence, immigration policies have been informed by eugenic ideologies that perpetuate the notion that society should be improved through the eradication of disabilities and other characteristics considered subordinate.

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121. *See* Powell & Stein, *supra* note 17, at 60.

122. *See id.* at 60–61.

123. Layli Maria Miron, *Making Visible the Nativism-Ableism Matrix: The Rhetoric of Immigrants' Comics*, 38 RHETORIC REV. 445, 448 (2019).

124. Douglas C. Baynton, *Defectives in the Land: Disability and American Immigration Policy, 1882–1924*, 24 J. AM. ETHNIC HIST. 31, 33 (2005).

125. *Id.*

126. Dorothy E. Roberts, *Who May Give Birth to Citizens? Reproduction, Eugenics, and Immigration*, 1 RUTGERS RACE & L. REV. 129, 132–33 (1998).

127. Zack Burdryk, *Disability Rights Groups Join Challenge to 'Public Charge' Rule*, THE HILL (Sept. 11, 2019, 12:17 PM), https://thehill.com/regulation/healthcare/460901-disability-rights-groups-join-challenge-to-public-charge-rule [https://perma.cc/65CJ-7XM2].

III. LOOKING AHEAD

The atrocities purportedly occurring in immigration detention centers expose long-standing reproductive injustices experienced by socially marginalized communities. Moreover, they shine a light on the urgent need for a long-overdue conversation: How does the United States finally confront its deplorable history of eugenics? As this Article demonstrates, eugenic ideologies and practices are deeply rooted in ableism. Accordingly, legal and policy efforts must recognize the ways in which eugenics endure and target socially marginalized communities—including people with disabilities. Although a complete agenda is beyond this Article's scope, this Part describes overarching principles that must be recognized by legal professionals, policymakers, activists, and scholars, and offers critical areas worthy of consideration. While the legal and policy solutions described *infra* focus on people with disabilities, comprehensive efforts are necessary to ensure that the needs of all socially marginalized communities are achieved.

A. Compliance with and Enforcement of Legal Protections

The threats to reproductive justice that people with disabilities experience warrant immediate attention by the legal profession. In particular, greater compliance with and enforcement of existing legal protections are urgently needed to ensure reproductive justice for people with disabilities. In particular, the legal profession, and especially the federal government, must enforce the three major federal laws that pertain to reproductive justice and people with disabilities: the Americans with Disabilities Act (ADA),[128] Section 504 of the Rehabilitation Act of 1973 (Section 504),[129] and Section 1557 of the Patient Protection and Affordable Care Act (Section 1557).[130]

The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to "provide clear, strong, consistent, enforceable standards addressing discrimination."[131] To that end, the ADA touches nearly every facet of disabled people's lives.

The ADA defines a person as disabled if she (1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record of such impairment, or (3) is regarded as having such

128. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.
129. Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796.
130. Patient Protection and Affordable Care Act, 42 U.S.C. § 18116(a); 45 C.F.R. §§ 92.102–105 (2021).
131. 42 U.S.C. § 12101(b)(1)–(2).

impairment.[132] Major life activities include, *inter alia*, caring for oneself, performing manual tasks, seeing, hearing, walking, speaking, breathing, learning, communicating, and working.[133] In 2008, Congress amended the ADA to explain that (1) "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active"[134] and (2) a "[d]etermination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."[135] Per the ADA and the ADA Amendments Act of 2008, the definition of disability shall be interpreted in favor of broad coverage of people with disabilities.[136] The ADA extends and expands Section 504's protections, which prohibit disability-based discrimination by federally funded programs and activities.[137]

The ADA includes five distinct titles: employment (Title I),[138] public services (Title II),[139] places of public accommodation (Title III),[140] telecommunications (Title IV),[141] and miscellaneous provisions (Title V).[142] For purposes of reproductive justice, Section 504 as well as Titles II and III of the ADA are the most relevant. Title II of the ADA prohibits discrimination against people with disabilities by local or state government agencies, departments, and instrumentalities.[143] For example, Title II applies to child welfare agencies, courts, and government-run hospitals.[144] Title III of the ADA, conversely, prohibits discrimination based on disability by places of public accommodation, such as private health care providers' offices and hospitals.[145] Section 504 applies to all entities that receive federal funding, such as hospitals, courts, and child welfare agencies.[146]

The Patient Protection and Affordable Care Act (ACA) "may [also] be understood as a disability rights law."[147] According to

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132. *Id.* § 12102(1)(A)–(C).
133. *Id.* § 12102(2)(A).
134. *Id.* § 12102(4)(D).
135. *Id.* § 12102(4)(E)(I).
136. *Id.* § 12102(4)(A).
137. 29 U.S.C. § 701(b)(2)–(5).
138. 42 U.S.C. § 12111(2).
139. *Id.* § 12112(a).
140. *Id.* § 12131(1)(A)–(C).
141. 47 U.S.C. § 225(a).
142. 42 U.S.C. § 12201.
143. *See* 42 U.S.C. § 12131(1).
144. *Id.* § 12131(1)(B).
145. *See* 42 U.S.C. § 12181(7)(F); 42 U.S.C. § 12182(a); 28 C.F.R. § Pt. 36 App'x B at 696 (2008).
146. 29 U.S.C. § 701(b); 29 U.S.C. § 794(b).
147. Jessica L. Roberts, *Health Law as Disability Rights Law*, 97 MINN. L. REV. 1963, 1964 (2013).

Jessica Roberts, "[a]lthough not yet widely recognized as such, the ACA constitutes one of the most significant civil rights victories for the disability community in recent history."[148] Section 1557 prohibits discrimination based on disability, *inter alia* by health care providers that receive federal financial assistance.[149] Like the ADA and Section 504, Section 1557 requires health care providers to provide effective communication (e.g., sign language interpreters or materials in alternative formats),[150] comply with accessibility standards,[151] ensure information and communications technology is accessible for people with disabilities,[152] and grant reasonable modifications to policies, practices, and procedures when necessary to accommodate individual needs.[153]

Collectively, the ADA, Section 504, and Section 1557 should ensure that people with disabilities can exercise their reproductive freedoms. For example, the laws should guarantee that disabled people can access reproductive health care services and information. In particular, reproductive health providers should provide services and information in accessible manners as well as offer reasonable modifications as necessary. In addition, existing laws should prohibit reproductive health providers from denying treatment based on an individual's disability. The laws should also protect parents with disabilities from being discriminated against based on bias and speculation from courts and child welfare agencies.

Nevertheless, disabled people continue to experience significant disparities in these areas, indicating a need for greater compliance with and enforcement of people with disabilities' legal protections. To that end, the United States Departments of Justice (DOJ) and Health and Human Services' Office for Civil Rights (OCR) should make the reproductive rights of disabled people a priority and investigate all allegations of violations of their rights. For example, DOJ and OCR should investigate alleged violations of disability-based discrimination by reproductive health providers and enforce cases as necessary. DOJ and OCR should also prioritize enforcement of the rights of parents and prospective parents with disabilities within the child welfare and family law systems. Additionally, DOJ must also increase its enforcement activities concerning *Olmstead v. L.C.,* which requires states to eliminate the unnecessary segregation

148. *Id.*
149. Patient Protection and Affordable Care Act 42 U.S.C. § 18116(a); 45 C.F.R. §§ 92.102–105 (2021).
150. 45 C.F.R. § 92.102(a)–(b) (2021).
151. *Id.* § 92.103(a).
152. *Id.* § 92.104(a).
153. *Id.* § 92.105.

of people with disabilities and to provide services to people with disabilities in the most integrated setting appropriate to their individual needs.[154] Far too often, family members, health care providers, and congregate care facilities or institutions make reproductive decisions for people with disabilities with little regard for their wishes. Expanded opportunities for community-based services, afforded to people with disabilities because of *Olmstead*, can assist in ensuring that people with disabilities enjoy greater bodily autonomy. Finally, attorneys must actively litigate cases where the reproductive rights of people with disabilities are threatened.

B. Justice-Based, Intersectional Approach

Although enforcement of existing legal protections is undoubtedly crucial, a justice-based, intersectional approach is imperative to addressing the origins of the reproductive inequities disabled people continue to experience. Indeed, "[r]ights-based strategies often address the symptoms of inequity but not the root. The root of disability oppression is ableism and we must work to understand it, combat it, and create alternative practices rooted in justice."[155] Additionally, intersecting identities[156] contribute to increased reproductive injustices for people with disabilities. For example, "[p]eople who exist at the intersection of race and disability experience a multidimensional form of discrimination that is continually at risk of being flattened to a single dimension—*either* race *or* disability—due to the limitations of our collective understanding of intersectionality."[157] A justice lens necessitates a normative focus on inequities.

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154. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597 (1999); *see also Department of Justice Celebrates 20th Anniversary of the Olmstead Supreme Court Decision Protecting the Rights of Americans with Disabilities*, U.S. DEP'T OF JUST. (June 19, 2019), https://www.justice.gov/opa/blog/department-justice-celebrates-20th-anniversary-olmstead-supreme-court-decision-protecting [https://perma.cc/8PTT-Z3M7] (to ensure the benefits of *Olmstead* are fully felt by people with disabilities, the DOJ "has addressed the unneces sary segregation of people with physical, mental health, or intellectual and developmental disabilities . . . in various residential and non-residential settings, nationwide").

155. SINS INVALID, SKIN, TOOTH, AND BONE—THE BASIS OF MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER 15 (2d ed., 2019) [hereinafter SINS INVALID].

156. 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 and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989). Since then, intersectionality has been used to study how people who are members of multiple socially marginalized communities experience discrimination, including people with disabilities. *See, e.g.*, Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRIT. RACE PERSP. 209, 211–22 (2010).

157. Alice Abrokwa, *"When They Enter, We All Enter": Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 MICH. J. RACE & L. 15, 20–21 (2018).

To illustrate the essential principles of a justice-based, intersectional approach, three relevant justice-based frameworks are described *infra*: disability justice, reproductive justice, and health justice.

First, the disability justice framework should be used to understand the subordination of reproductive freedom for people with disabilities, especially people with disabilities who are also members of other socially marginalized communities, and to confront the root causes of inequities. Disabled, queer, and trans, and gender nonconforming people of color have led the disability justice framework since 2005.[158] The disability justice framework distinguishes itself from the disability rights movement by calling for a holistic approach that moves beyond on focusing on specific rights but instead addresses the systems that cause inequities.[159] "At its core, the disability rights framework centers people who can achieve status, power and access through a legal or rights-based framework, which we know is not possible for many disabled people, or appropriate for all situations."[160] The disability justice framework lays out ten fundamental principles needed to achieve a truly inclusive and just society: "intersectionality . . . leadership of those most impacted . . . anti-capitalist politics . . . cross-movement solidarity . . . recognizing wholeness, sustainability . . . commitment to cross-disability solidarity . . . interdependence . . . collective access . . . [and] collective liberation."[161] Hence, disability justice aims to eliminate the causes of inequities, rather than simply enforce existing rights.[162] Moreover, disability justice recognizes that existing rights are not afforded equally to all disabled people.[163] Thus, disability rights cannot be achieved without disability justice.

Second, the reproductive justice framework also requires "an integrated approach that draws on constitutional protections and movement-based policy strategies."[164] Reproductive justice was developed by women of color and includes "(1) the right to have a child; (2) the right not to have a child; and (3) the right to parent the children we have, as well as to control our birthing options, such as midwifery."[165] Building off of intersectionality, which "illustrate[s]

158. SINS INVALID, *supra* note 155, at 16.
159. *Id.* at 14–16.
160. *Id.* at 15.
161. *Id.* at 22–26.
162. *Id.* at 19–26.
163. *Id.* at 23–26.
164. Ocen, *supra* note 22, at 2240.
165. Loretta Ross, *What Is Reproductive Justice*?, *in* REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4, https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051 [https://perma.cc/25T9-96G3].

how racial and gender oppression interact in the lives of Black women[,]"[166] reproductive justice is "based on the understanding that the impacts of race, class, gender, and sexual identity oppressions are not additive but integrative"[167] and only a holistic lens can address them. It is intersectional, focusing on "the ways in which aspects of social status and social identity (e.g., age, race/ethnicity, socioeconomic class, socioeconomic class, sexual orientation, gender identity, religion, ability) all affect and impact women's experiences."[168]

Accordingly, reproductive justice offers essential and relevant aspects for addressing the inequities experienced by people with disabilities. As Samuel Bagenstos notes, "[j]ust as 'regulating Black women's reproductive decisions has been a central aspect of racial oppression in America,' regulating disabled people's reproductive decision has been a central aspect of disability oppression in America."[169] Reproductive justice can be employed to address the myriad of oppressions that prohibit people with disabilities from enjoying their reproductive freedoms by confronting ongoing eugenic ideologies and practices.

Third, the health justice framework provides an important lens for confronting eugenics. Health justice is an emerging framework to address structural inequities that cause adverse health outcomes and experiences through law and policy.[170] The health justice framework

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166. LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 73 (2017).

167. *Id.* at 74.

168. Joan C. Chrisler, *Introduction: A Global Approach to Reproductive Justice—Psychosocial and Legal Aspects and Implications*, 20 WM. & MARY J. WOMEN & L. 1, 4 (2013).

169. Bagenstos, *supra* note 80, at 285.

170. *See, e.g.*, Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL'Y 47, 47 (2014) (building from the "reproductive justice, environmental justice, and food justice movements" as well as "the writings of political philosophers and ethicists on health justice" to discuss health justice as a framework for using law and policy to reduce health disparities); Emily Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275, 277–78 (2015) [hereinafter Benfer, *A Framework (and Call to Action)*] (explaining health justice as an emerging framework for eliminating health inequity and social injustice); Lindsay F. Wiley, *From Patient Rights to Health Justice*, 37 CARDOZO L. REV. 833, 837–38 (2016) [hereinafter Wiley, *From Patient Rights to Health Justice*] (recommending the health justice framework as an alternative to existing health law models for examining questions of health care quality and access); Lindsay F. Wiley, *Applying the Health Justice Framework to Diabetes as a Community-Managed Social Phenomenon*, 16 HOUS. J. HEALTH L. & POL'Y 191, 195–98 (2016) (applying the health justice framework to diabetes disparities); Lindsay F. Wiley, *Tobacco Denormalization, Anti-Healthism, and Health Justice*, 18 MARQUETTE BENEFITS & SOC. WELFARE L. REV. 203, 208–09 (2017) (applying the health justice framework to tobacco-related disparities); ELIZABETH TOBIN TYLER & JOEL B. TEITELBAUM, ESSENTIALS OF HEALTH JUSTICE: A PRIMER, at x (2018) (noting that the authors "settled on *health justice* [for their title] because it tends to be relatively more recognized and understood by a greater number of people [than health equity]" and

focuses on the need to address access to quality health care and the social, economic, and environmental factors that affect the health and well-being of socially marginalized communities.[171] Ultimately, health justice advances the understanding that the social, economic, cultural, educational, and other determinants of health are just as essential to an individual's health as the health care they receive.[172] Therefore, to improve reproductive health and health care outcomes, laws and policies must address the social determinants of health.

Together, the disability justice, reproductive justice, and health justice frameworks underscore the importance of addressing the roots of inequities to eliminate ongoing threats to the reproductive freedoms of people from socially marginalized communities, including disabled people. Indeed, eugenics cannot be fully confronted and eradicated without recognizing how factors such as race, disability, social status as well as existing laws and policies have been used to threaten the reproductive rights of people with disabilities and other socially marginalized communities for centuries. For example, as *Buck v. Bell* illustrated, classism and ableism has been used to promote eugenic-based policies.[173] Today, poverty continues to hinder

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"[f]urthermore, 'justice' is often linked in people's minds to the legal system," and defining health justice in terms of "laws, policies, systems, and behaviors that are evenhanded with regard to and display genuine respect for everyone's health and well-being"); Medha D. Makhlouf, *Health Justice for Immigrants*, 4 U. PA. J.L. & PUB. AFF. 235, 239–41 (2019) (applying the health justice framework to assess public commitments to health care access for immigrants); Yael Cannon, *The Kids Are Not Alright: Leveraging Existing Health Law to Attack the Opioid Crisis Upstream*, 71 FLA. L. REV. 765, 766–71 (2019) (applying the health justice framework to the opioid epidemic and how it results in adverse childhood experiences); Matthew B. Lawrence, *Against the "Safety Net"*, 72 FLA. L. REV. 49, 50 (2020) (applying the health justice framework to critique the safety net metaphor for public benefits); Angela Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 758 (2020) ("argu-[ing] that a 'civil rights of health' initiative, built on a 'health justice' framework, can help educate policymakers and the public about the health effects of subordination, create new legal tools for challenging subordination, and ultimately reduce or eliminate unjust health disparities"); Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiijah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Inequity During and After COVID-19*, 19 YALE J. HEALTH POL'Y & ETHICS 121, 125–29 (2020) [hereinafter Benfer et al., *Health Justice Strategies to Combat the Pandemic*] (applying the health justice framework to address discrimination, poverty, and health inequities during COVID-19 and beyond); 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. 101 (forthcoming 2021) (applying the health justice framework to address inequities experienced by disabled people during COVID-19 and beyond).

171. Wiley, *From Patient Rights to Health Justice*, *supra* note 170, at 881–82.

172. Benfer, *A Framework (and Call to Action)*, *supra* note 170, at 278–79 ("The social determinants of health often lead to inequities."), 279–306 (describing ways in which social determinants of health cause health inequities).

173. *See* Buck v. Bell, 274 U.S. 200, 207 (1927).

people with disabilities from enjoying their reproductive rights.[174] Accordingly, legal and policy solutions must address the causes of economic instability, which plagues people with disabilities and leads to barriers to health care access.[175]

C. Active Engagement with People with Disabilities

An essential aspect of the aforementioned justice-based approaches is "listening to, engaging, and developing affected communities."[176] This approach is consistent with the disability community's mantra, "nothing about us, without us," which emphasizes that disabled people should be actively involved in developing and implementing policies that affect them.[177] In other words, those affected by injustices must have a seat at the table and inform *all* legal and policy responses.[178]

Specifically, active engagement will require a thoughtful understanding of and respect for people with disabilities sharing their lived experiences. It will also necessitate that people with disabilities be elevated to leadership positions, rather than their participation being tokenized. Hence, people with disabilities should be viewed as experts of their lives. Collaboration will lead to legal and policy responses that are disability-competent and address the actual needs of people with disabilities.

Engagement with people with disabilities to address the United States' history of eugenics should be part of a broader effort to foster alliances and grow partnerships among the affected communities. Such collaboration will produce progress toward specific policy goals.[179] Moreover, increasing solidarity will enhance the dignity of people who can value one another's shared humanity. Practically, this means that reproductive justice and health justice advocates must make concerted efforts to include disabled people in their work. Disability rights activists, similarly, must recognize the diversity of the disability community and ensure that people with disabilities from

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174. *See, e.g.*, Benfer et al., *Health Justice Strategies to Combat the Pandemic*, *supra* note 170, at 130.

175. Powell, *supra* note 170 (describing mechanisms for addressing economic stability for people with disabilities during the COVID-19 pandemic and beyond).

176. Benfer, *A Framework (and Call to Action)*, *supra* note 170, at 338 (explaining the importance of actively engaging socially marginalized communities to address health inequities).

177. JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 3–4 (1998).

178. *See id.*

179. *See* note 170 and accompanying text.

socially marginalized communities hold leadership roles within the disability rights movement. Communities that have been subjected to the government's weaponization of reproduction have much in common and must be partners in fighting ongoing eugenic ideologies and practices.

CONCLUSION

Forced sterilization of immigrant women at detention centers is appalling and warrants immediate and robust legal and policy responses. At the same time, legal professionals, policymakers, activists, and scholars must recognize that the current brutalities are part of the nation's long-standing and persistent support of eugenic ideologies and practices which have targeted socially marginalized communities.[180] Moreover, confronting the recent abuses requires acknowledgment of the ways in which people with disabilities have endured a lengthy history of forced sterilization and other governmental policies aimed at preventing them from creating and maintaining families.[181] As such, the experiences of people with disabilities, especially people with disabilities who are also members of other socially marginalized communities, must be centered in efforts to fight the nation's ongoing eugenic ideologies and practices.

180. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927).
181. *See, e.g.*, *id.*