

DISABILITY MISAPPROPRIATION

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This Article argues that disability misappropriation is a systemic problem that undermines movement toward disability justice. By disability misappropriation, this Article refers to the tendency of the political right to assert a false concern for disability issues in service of a political agenda that actually harms the disability community. This tactic has influenced the adverse treatment of disabled people in the educational, institutional, and reproductive arenas. From birth to death, it has often had an adverse influence on the lives of disabled people as they receive inadequate and coercive health care, poor education, and limited housing options. While federal law has sometimes sought to provide some legal protection against this coercion, judges have been too willing to accept limitations on those rights in the purported name of protecting disabled people. This Article argues that the disability slogan of “Nothing about us without us” must mean that disability is not appropriated merely out of service to a political agenda that harms the disability community.

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INTRODUCTION

A mantra of the disability justice movement¹ is: “Nothing About Us Without Us.”² Popularizing that mantra, disability activist James Charlton argues that people with disabilities are the experts on what is best for them; the disempowering social treatment of disabled people leads to degradation, dependency, and powerlessness.³ Paralympian and disability soccer advocate Eli Wolff and disability sports advocate

1. For a definition of “disability justice,” see Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 934 (2021) (“[T]he emergence of Disability Justice as a movement and critical frame is a contemporary example of intersectionality. Organically grown from the experiences of people with multiple marginalized identities, disability justice is a powerful antisubordination lens that ‘marks a point of departure rather than a destination.’ That is, Disability Justice is a movement away from disability-rights frames; it is about the process of reframing more than any one end product.” (footnotes omitted)).

2. See Eli A. Wolff & Mary Hums, “*Nothing About Us Without Us*”—*Mantra for a Movement*, HUFFPOST (Sept. 5, 2017), https://www.huffpost.com/entry/nothing-about-us-without-us-mantra-for-a-movement_b_59aea450e4b0c50640cd61cf [<https://perma.cc/2Z4T-2UZP>] (detailing how the “Nothing About Us Without Us” mantra fueled the disability rights movement).

3. See JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 3, 17 (1998) (asserting that people with disabilities have the experiential knowledge that is pivotal in making decisions that affect their lives, and without their input, they would remain powerless). Charlton does not claim to have invented the phrase. He said he first heard it in 1993 while visiting South Africa and that he understood that the phrase may have originated with Eastern European advocates. *Id.* at 3.

Mary Hums have similarly argued: “[W]e as people with disabilities need to be the ones whose voices must lead the way.”⁴

That mantra has a wide-ranging reach. Disabled people “need to be front and center in mainstream local, national and international organizations,”⁵ not merely leaders of disability-focused organizations. It “represents pride and power rather than stigma and pity.”⁶ It rejects the charity model of assistance because charities act as an “agency of control.”⁷ Applying that mantra, the disability justice movement seeks to create “programs and institutions that support people in their quest for independence and respect, not operate to maintain the existing relations of domination and subordination.”⁸

Many harms occur as a result of the lack of representation of disabled people in all aspects of life. Charlton identifies invisibility as one of the central harms from lack of representation:

[P]eople with disabilities are often abandoned, hidden, and shunned by their own families and communities; segregation and inaccessibility have prevented people with disabilities from conducting fully public lives; extraordinary sociocultural stigmas have been brought to bear on those who have disabilities that are not readily apparent, so that they tend to conceal these disabilities from others.⁹

While recognizing the importance of the harm of invisibility, this Article will consider some additional harms that occur because of the lack of representation of disabled people within both the legislative¹⁰ and judicial branches.¹¹ First, when the disability community is able to attain some success in the legislature, the judiciary will often

4. Wolff & Hums, *supra* note 2.

5. *Id.*

6. *Id.*

7. CHARLTON, *supra* note 3, at 93.

8. *Id.* at 97.

9. *Id.* at 84.

10. See Brooke Ellison, *The Inaccessible Office: The Missing Disabled Voice in Politics*, THE HILL (Sept. 14, 2018), <https://thehill.com/blogs/congress-blog/civil-rights/406686-the-inaccessible-office-the-missing-disabled-voice-in> [<https://perma.cc/SVL4-BZ2E>] (discussing the absence of people with disabilities in politics and government).

11. See Ayana Alexander & Madison Alder, *Judge Pick with Disability Raises Hopes for a Group Often Unseen*, BLOOMBERG L. (Oct. 7, 2022), <https://news.bloomberglaw.com/social-justice/judge-pick-with-disability-shows-biden-push-to-diversify-bench> [<https://perma.cc/9TEL-LUCX>] (reporting that only a handful of 870 federal judges have a disclosed disability).

undermine the effectiveness of those efforts by not sharing a concern to advance disability justice. Second, the judiciary or legislature will engage in disability misappropriation by claiming to be concerned about disability justice while using disabled people as tokens to advance their own conservative agenda. In the style of the Jerry Lewis Telethon,¹² disabled people are used as tokens in a way that reinforces rather than serves their interests.

While many examples of these types of harms (invisibility, undermining effectiveness, and misappropriation) exist, the Supreme Court's significant role in perpetuating these kinds of harms is a good starting point in understanding their pervasiveness and impact. The Supreme Court engaged in the invisibility harm in its 1985 decision in *City of Cleburne v. Cleburne Living Center*.¹³ The challenged legislation singled out "[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts" for adverse treatment under the city's zoning laws.¹⁴ The plaintiffs in the case wanted to operate a group home for what the Court called the "mentally retarded."¹⁵ They argued that the Court should use heightened or intermediate scrutiny to assess their claim because of the historic mistreatment of people who are considered to be intellectually disabled.¹⁶ Six members of the Court declined that request, concluding that how disabled people should "be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."¹⁷ They rejected heightened scrutiny even though the challenged legislation used openly prejudiced language, calling the residents the "insane or feeble-minded."¹⁸ This 1985 precedent continues to stand for the proposition that disabled people should be comfortable that state and local "legislators guided by qualified professionals" can determine the

12. See Mary Johnson, *A Test of Wills: Jerry Lewis, Jerry's Orphans, and the Telethon*, RAGGED EDGE ONLINE (Sept. 1992), <http://www.raggededgemagazine.com/archive/jerry92.htm> [<https://perma.cc/C8MH-SNWG>] (positing that the Telethon promotes policies promoting dependence of disabled Americans rather than their independence).

13. 473 U.S. 432 (1985).

14. *Id.* at 436.

15. *Id.* at 435.

16. See *id.* at 432 (arguing that the zoning ordinance was invalid on its face because it discriminated against the "mentally retarded," violating their equal protection rights).

17. *Id.* at 442–43.

18. *Id.* at 436.

conditions under which they can live in society.¹⁹ The Court did not even mention or consider the importance of disabled people expressing their own policy preferences.

One might disagree with that characterization of *City of Cleburne* by pointing out that the Court held that the housing ordinance at issue could not survive rational basis scrutiny.²⁰ But the narrow holding in the case reinforces the misappropriation harm identified in this Article. The Court purported to be concerned about a group of intellectually disabled people by concluding that the ordinance needed to be struck down due to it only being justified by “irrational prejudice against the mentally retarded.”²¹ But, in reality, the decision reflected the conservative agenda of the Court to narrow the groups that can receive heightened constitutional protection and, in particular, to stop disabled people from joining that group. The Court understood the request of people with intellectual disabilities to receive heightened scrutiny as a slippery slope on which all disabled people would request heightened scrutiny. It therefore feigned concern for the “mentally retarded” so that the plaintiffs could win in this one case while creating a legal doctrine that makes it nearly impossible to challenge future state action. Justice Marshall’s concurrence identifies this problem. He criticized the majority for downplaying the history of purposeful unequal treatment against people with disabilities.²² He also criticized what he described as a “narrow, as-applied remedy [that] fails to deal adequately with the overbroad presumption that lies at the heart of this case.”²³

Hidden in the case is also an attempt by the city to pretend to be concerned about the needs of the disabled residents of the group home while also turning down their request to live in the community. The City Council expressed concern “that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home.”²⁴ Despite evidence that the legislature made policy choices in conflict with the expressed preferences of the disability community, the Court concluded that

19. *Id.* at 443.

20. *See id.* at 435 (“We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.”).

21. *Id.* at 450.

22. *Id.* at 465 (Marshall, J., concurring in the judgment in part and dissenting in part).

23. *Id.* at 478.

24. *Id.* at 449 (majority opinion).

such evidence was not a basis for using heightened scrutiny in disability discrimination cases.

The Supreme Court's decision in *Board of Trustees v. Garrett*²⁵ exemplifies its complicity in the undermining effectiveness type of harm.²⁶ At issue in *Garrett* was the applicability of the employment discrimination provisions of the Americans with Disabilities Act (ADA)²⁷ to state actors.²⁸ In 2001, the Supreme Court held in *Garrett* that Congress lacked the authority under Section five of the Fourteenth Amendment to create rights and remedies when a state actor has allegedly violated the employment rights of a disabled person.²⁹ Returning to its holding from *City of Cleburne*, the Court reminds us that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled."³⁰ Thus, Congress has no authority to create remedies that would help stop the states from being "hardheaded" and "hardhearted" in its treatment of disabled people. Although some disabled people did help promote and lobby for the ADA,³¹ the judiciary narrowed the impact of that legislation by failing to acknowledge the history of degradation faced by disabled people, often at the hands of state actors.

Thus, two substantial problems stand in the way of advancing disability justice—the courts are unlikely to take seriously the history of mistreatment of disabled people so as to invoke some kind of heightened scrutiny, and if Congress seeks to provide increased statutory protection against state actors, the courts are likely to strike down such legislation as exceeding Congress's powers. The

25. 531 U.S. 356 (2001).

26. *See id.* (holding that suits brought to federal court by state employees to recover money damages for the state's failure to comply with the ADA are barred by the Eleventh Amendment).

27. 42 U.S.C. §§ 12111–12117.

28. *Garrett*, 531 U.S. at 360.

29. *Id.* at 370.

30. *Id.* at 367–68.

31. *See* Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DREDF (1992).

underrepresentation of disabled people at all levels of the legislature³² and judiciary³³ contributes to this problem.

This Article suggests a new way to tell disability justice stories. We should start with trying to understand a piece of legislation's impact on people's lived experiences, especially when the legislation was purportedly crafted to assist the disability community. One might find progressive threads within that legislation while also being mindful of language that can be harmful to advancing disability justice due to the invisibility of the disability community. Then, one might ask how the courts have interpreted that legislation. Given the judiciary's lack of concern for disability justice, we should expect to find stark examples of judicial decisions undermining the effectiveness of the statute. And, finally, we should look closely to find instances of false concern for the lives of disabled people at both the legislative and judicial level. How has disability been misappropriated to serve ends that are inconsistent with disability justice? The disability misappropriation piece has been undertheorized and should become part of our mindset in understanding the impediments to advancing disability justice.

This Article particularly seeks to elevate our understanding of the disability misappropriation type of harm. This problem is exemplified by legislators or judges who falsely express a concern for disabled people to advance their own conservative agenda. Their conservative agenda, in turn, often harms rather than advances the interests of many disabled people. Not only are disabled people not at the table when these policy decisions are made, but the larger political agenda of these conservative organizations is disability-disempowering. While ultimately focusing on the field of reproductive rights, where disability misappropriation has masterfully served a conservative agenda, this Article will make this argument with a broader brush. It will show how this approach has been used in the fields of special education in Part I

32. See Lisa Schur & Douglas Kruse, *Fact Sheet: Elected Officials with Disabilities*, RUTGERS 1, 1, https://ncil.org/wp-content/uploads/2022/08/fact_sheet_elected_officials_disabilities_2013_2017.pdf [<https://perma.cc/2HFN-2AKK>] (reporting that 10.3% of elected officials had disabilities during the 2013–2017 period).

33. See *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), <https://www.americanprogress.org/article/building-inclusive-federal-judiciary> [<https://perma.cc/45JE-8PT4>] (reporting that fewer than 7% of the American Bar Association's (ABA's) members responded "yes" to the question "do you have a disability" in a 2011 survey and that National Association for Law Placement reported in 2018 that 0.46% of associates reported having a disability and fewer than 1% of firm partners reported having a disability).

and de-institutionalization in Part II in a way that advances an agenda that harms the lives of many disabled people. Then, it will connect these arguments to the field of reproductive justice in Part III, including discussion of avoidance of forced sterilization and access to contraception and abortion. This Article will show how a conservative political agenda simultaneously ignores the possibility that some disabled people choose to get pregnant and that abortion restrictions disproportionately remove important health care decisions from many disabled people. The purported concern for eugenics does nothing to improve the actual lives of disabled people. This misappropriation of a concern for disability should not surprise us because it has a long vintage in American law.

I. EDUCATION OF DISABLED STUDENTS

The underrepresentation of people with disabilities in the legislative and judicial branches has led to the continuation of stark conditions for many disabled students despite some statutes that seemingly seek to provide them with equal opportunities to learn. Moreover, some legislators and judges have voiced a seeming concern for the education of disabled children to advance an agenda that does not serve their interests.

Education law is an area where one might argue that the disability community has engaged in some effective advocacy. The passage of the Education for All Handicapped Children Act (EHA)³⁴ in 1975 reflected a path-breaking change in educational policy in that schools could no longer exclude students because they were disabled.³⁵ Before Congress enacted the EHA, it was estimated that one in five children with disabilities, or 1.8 million children, were excluded from public school.³⁶ In 1986, Congress expanded the EHA to provide services to families of children born with disabilities starting at birth.³⁷ And, then,

34. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

35. *Id.* § 3, 89 Stat. at 774–75.

36. *A History of the Individuals with Disabilities Education Act*, U.S. DEP'T EDUC., <https://sites.ed.gov/idea/IDEA-History#1975> [<https://perma.cc/9P8N-AGU9>].

37. *See* Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, §§ 101, 303, 100 Stat. 1145, 1146, 1155, 1162 (defining “handicapped children” “infants,” and “toddlers” to include children from birth through eight years of age).

in 1990, Congress changed its name to the Individuals with Disabilities Education Act (IDEA)³⁸ to align with the language of the ADA.³⁹

The extent to which disabled people were at the table when these laws were enacted and modified is hard to evaluate. It is generally accepted that the settlements in *Pennsylvania Ass'n for Retarded Children (PARC) v. Commonwealth of Pennsylvania*⁴⁰ and *Mills v. Board of Education*⁴¹ served as a blueprint for the EHA.⁴² The lead attorney on the *PARC* case, Thomas Gilhool, also brought the case challenging the conditions at Pennhurst State School in Pennsylvania.⁴³ While Gilhool did not identify as a person with a disability, he had a brother who, at his suggestion, went to live at Pennhurst from the ages of ten to

38. 20 U.S.C. 1400.

39. See Individuals with Disabilities Education Act, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1142 (1990) (changing the name of several acts to “Individuals with Disabilities Education Act”); see also *EHA Is Out, IDEA Is In*, NAT'L FED'N BLIND (1991), <https://nfb.org/sites/default/files/images/nfb/publications/fr/fr10/issue1/f100112.html> [<https://perma.cc/P6ZT-JJKH>] (claiming that the name change from EHA to IDEA is significant because it is moving away from terminology that focuses on a condition rather than the individual).

40. 343 F. Supp. 279 (E.D. Pa. 1972).

41. 348 F. Supp. 866 (D.D.C. 1972).

42. *Pennsylvania Association for Retarded Citizens (PARC) v. Commonwealth of Pennsylvania*, PUB. INT. L. CTR., <https://pubintlaw.org/cases-and-projects/pennsylvania-association-for-retarded-citizens-parc-v-commonwealth-of-pennsylvania> [<https://perma.cc/QZY5-8P7F>]. Two court cases are considered to be the precursor of the EHA. See *Mills*, 348 F. Supp. at 871 (requiring District of Columbia to educate seven children who had been excluded from school due to their disabilities); *Pa. Ass'n for Retarded Child.*, 343 F. Supp. at 302 (requiring Pennsylvania to educate thirteen children with disabilities).

43. See Bonnie L. Cook, *Thomas K. Gilhool, Lawyer Who Fought for Rights of the Disabled, Dies at 81*, PHILA. INQUIRER (Aug. 28, 2020), <https://www.inquirer.com/obituaries/thomas-gilhool-lawyer-public-interest-philadelphia-center-parc-pennhurst-landmark-case-dies-died-obituary-20200828.html> [<https://perma.cc/25JN-SNKY>] (reflecting on Thomas K. Gilhool's life). The National Legal Aid & Defender Association (NLADA), a non-profit organization that provided free legal assistance to people who were unable to afford a lawyer, brought the *Mills* case. See Nathaniel Ross, *Mills v. Board of Education of District of Columbia (1972)*, EMBRYO PROJECT ENCYCLOPEDIA (June 14, 2022), <https://embryo.asu.edu/pages/mills-v-board-education-district-columbia-1972> [<https://perma.cc/J2NH-PPWG>] (providing background on the *Mills* case). NLADA was not a disability-related organization and may have taken the case because of both its racial and disability implications. All the named plaintiffs were Black although they represented a class of students from many different racial backgrounds. *Id.*

seventeen (before Gilhool sought to close down Pennhurst).⁴⁴ At a time when most disabled people were not even allowed to be in the public school classroom, it is hard to imagine they had a major voice in the development of federal policy. But one might think of people like Gilhool as important allies for the disability community while also recognizing that he was complicit in his brother's inhumane treatment at Pennhurst.

Despite this progressive blueprint, as one would expect, the courts rendered important decisions that narrowed the effectiveness of the EHA.⁴⁵ In 1982, in *Board of Education v. Rowley*,⁴⁶ the Court ruled that the school district did not have to provide a sign language interpreter for the deaf plaintiff Amy Rowley, because Rowley "performs better than the average child in her class and is advancing easily from grade to grade."⁴⁷ The Court concluded that Congress intended to leave "questions of methodology" to the states and that it would be inappropriate to question their educational judgments so long as the child receives adequate educational services.⁴⁸ It was alright for a child to struggle to read lips and miss most classroom instruction, so long as the child was advancing from grade to grade. In dissent, Justice White (joined by Justices Brennan and Marshall) interpreted the statute to "give handicapped children an educational opportunity commensurate with that given other children."⁴⁹ Not having access to more than half of the classroom instruction would fail to meet that standard.⁵⁰ And, that standard of equal educational opportunity was lower than the standard articulated in the EHA legislative history of enabling children to meet their "maximum potential."⁵¹

In Justice Blackmun's concurrence, he disagrees with the rule articulated by the majority (but not the outcome).⁵² In explaining his approval of a modestly higher substantive standard, he says (quoting

44. See Cook, *supra* note 43 ("Mr. Gilhool persuaded his mother to send [his brother], then 10, to Pennhurst.").

45. See RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 240, 241* (2013) (discussing ineffectiveness of the IDEA).

46. 458 U.S. 176 (1982).

47. *Id.* at 209–10.

48. *Id.* at 208.

49. *Id.* at 214 (White, J., dissenting).

50. *Id.* at 215.

51. *Id.* at 214.

52. *Id.* at 210 (Blackmun, J., concurring).

an earlier case): “[i]t seems plain to me that Congress, in enacting [this statute], intended to do more than merely set out politically self-serving but essentially meaningless language about what the [handicapped] deserve at the hands of state . . . authorities.”⁵³ His concurrence offers an honest assessment of the impact of the majority’s decision. If it was faithful to the legislative language, then Congress enacted a statute that was both politically self-serving and meaningless. Or, it enacted significant statutory protections, but the Supreme Court weakened them. Of course, even Justice Blackmun was comfortable with a result in which Rowley had little access to classroom instruction because a court should assess the situation on the record “viewed as a whole.”⁵⁴ Since Rowley had been able to succeed academically in the early grades without a sign language interpreter, there was no need to impose that requirement on the school district. Rather than wait to see how that result would play out, Rowley’s parents moved to a new school district where she would have access to a sign language interpreter.⁵⁵ But the *Rowley* decision continues to serve as the governing interpretation of the updated IDEA, leaving disabled children to a woefully low standard of educational services.

So, one plausible interpretation of the IDEA is that Congress never intended to legislate meaningful statutory protection.⁵⁶ It was simply seeking to earn some political points for seeming to care about disability issues while not imposing many requirements on states and their school districts.⁵⁷ That story is not one of disability misappropriation. It is simply a story of a weak concern about disability issues. Counterfactually, one can imagine that the statutory language may have been clearer and stronger if the disability community were

53. *Id.* at 210.

54. *Id.* at 211.

55. See generally COLKER, *supra* note 45, at 45–64 (discussing the *Rowley* case).

56. The IDEA requires that, in order for states to receive assistance under the IDEA, they have policies and procedures to ensure that “[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive . . .” 20 U.S.C. § 1412 (a) (1) (A).

57. Under this thesis, the IDEA is mostly a process-based statute rather than a substance-based statute. If school districts satisfy various procedural requirements, then they meet the statutory requirements even if the disabled student is making very little educational progress. Arguably, the Supreme Court has endorsed a low substantive standard. See *Endrew F. v. Douglas County School District RE-1*, 580 U.S. 386, 399–404 (2017) (finding that a school district has met its obligations under the IDEA if it is offering an educational plan that is reasonably calculated to enable a child to make progress in light of the child’s circumstances).

more present during the political negotiations.⁵⁸ Alternatively, the passage of the EHA in 1975 was a genuine moment where politicians came together to serve the interests of disability justice, but the courts stood in the way.⁵⁹

The disability misappropriation story comes later in the history of the enforcement of the IDEA when there are more local and national organizations working to advance the interests of disabled people that are also led by and influenced by many members of the disability community. One group that seeks to reflect a disability-centered perspective that might influence policy is the National Council on Disability.⁶⁰ It is an independent federal agency charged with making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.⁶¹ While not formally required, the members of this organization usually identify as people with disabilities.⁶² It, of course, is not the only organization focused on disability issues and primarily staffed by disabled people,⁶³ but it has had an important historical influence in this area. For example, it authored the first draft of what became the

58. See generally COLKER, *supra* note 45, at 17–43 (tracing enactment of the early special education laws).

59. The leading case in support of this theory is *Board of Education v. Rowley*, 458 U.S. 176, 200 (1982), in which the Supreme Court ruled that the special education laws did not require states to maximize the potential of each disabled student; instead, they merely needed to provide educational benefit to disabled students.

60. *About Us*, NAT'L COUNCIL ON DISABILITY, <https://www.ncd.gov/about> [<https://perma.cc/N7FT-XSSJ>].

61. *Id.*

62. See, e.g., *President Biden Announces Key Appointments to Bds. and Comm'ns*, WHITE HOUSE (Sept. 30, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/30/president-biden-announces-key-appointments-to-boards-and-commissions-9> [<https://perma.cc/H99L-LBHN>] (listing recent appointments to National Council on Disability and referring, in multiple cases, to the disability status of the appointee).

63. Another well-respected organization that is primarily run by disabled people is the Autistic Self Advocacy Network (ASAN). See *About ASAN*, AUTISTIC SELF ADVOC. NETWORK, <https://autisticadvocacy.org/about-asan> [<https://perma.cc/4GUE-M2NE>]. The motto “nothing about us without us” is central to their work. See *What We Believe*, AUTISTIC SELF ADVOC. NETWORK, <https://autisticadvocacy.org/about-asan/what-we-believe> [<https://perma.cc/83U7-54U5>] (explaining what the motto means to the organization). Another organization that emphasizes disabled people should lead the organization is the National Federation of the Blind. See *About Us*, NAT'L FED'N BLIND, <https://nfb.org/about-us> [<https://perma.cc/L2Z4-GUMU>] (“We believe in blind people because we are blind people—from our democratically elected leaders to our diverse nationwide membership.”).

ADA.⁶⁴ This Section will often cite their work in assessing the views of the disability community, which are often in contrast to those setting educational policy.

Many examples suggest that those who are not seeking to advance the interests of disabled students have increasingly undermined federal educational policy.⁶⁵ This Section will focus on one example—the school voucher movement. The school voucher movement exemplifies disability misappropriation. Voucher advocates often voiced a concern for disabled students while their actual agenda was the increased privatization of U.S. schools. Further, their political agenda harmed rather than furthered the interests of disabled children.

In 2010, in an important article on the school voucher movement, Professor Wendy Hensel illuminates this disability misappropriation.⁶⁶ She acknowledges that a parent of a disabled child often introduced voucher programs for disabled students in the state legislature with support from other parents.⁶⁷ Nonetheless, Hensel shows how these programs support what she calls the “acorn theory” of school choice:

Children with disabilities are chosen to lead the voucher charge both because of the sympathetic face they place on the debate and the nearly universal view that public education has failed this group at some level. By cracking the door open and gaining public acceptance for some funding of private school, special needs vouchers serve as the seed or “acorn” that will grow into universal school choice for all students in the state.⁶⁸

64. See NAT'L COUNCIL ON DISABILITY, *supra* note 61. The ADA became law in 1990. 104 Stat. 337, 42 U.S.C. § 12132.

65. One of the most significant examples of weakening the IDEA is the 1997 amendment that gave school districts more latitude in disciplining disabled students. See Individuals with Disabilities Education Act of 1997, Pub. L. No. 105-17, § 615, 651, 111 Stat. 37, 93-98, 123-24. For an extended discussion of the 1997 amendments, see Kelly S. Thompson, Note, *Limits on the Ability to Discipline Disabled School Children: Do the 1997 Amendments to the IDEA Go Far Enough?*, 32 IND. L. REV. 565 (1999).

66. See Wendy F. Hensel, *Voucher for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 293-94 (2010). The IDEA first became law in 1975 and today is codified at 20 U.S.C. § 1400 et seq. (2008).

67. See Hensel, *supra* note 66, at 295-96 (discussing Florida Senator John McKay's support for special education vouchers).

68. *Id.* at 296 (internal citation omitted).

Thus, it is not surprising that “in some states that have passed special needs voucher legislation, bills for universal school choice followed within a short period of the original bill’s passage.”⁶⁹

The voucher movement has received further impetus from those who want private religious schools to receive state funding. Hensel notes that “religious schools have entered the market for voucher students in Florida much more rapidly than secular schools and educate a majority of students receiving vouchers in Florida.”⁷⁰ The impetus to benefit nonpublic schools also became increasingly clear as the conditions of these voucher programs changed. While voucher programs initially required participating nonpublic schools to accept the voucher as full payment of tuition, legislatures soon eliminated that requirement, thereby making the program increasingly unhelpful to low-income students.⁷¹

While some parents of disabled children may have thought the state legislatures were acting in the interests of their children by creating voucher programs, Hensel argues otherwise. She notes that the provision of private school vouchers to students with disabilities typically offers little benefit to disabled students who enter private schools, because they receive no individualized instruction and waive their rights under the IDEA.⁷² Vouchers are also harmful to the disabled students who cannot afford these private alternatives and therefore stay in an increasingly underfunded public system. But, even more importantly, as relevant to this Article’s thesis, the political goal of these voucher programs was never to benefit disabled students. Rather, the goal of these programs was to undermine the public school system as an increasing number of students became eligible for state funds to attend private school (irrespective of their disability status), thereby lessening the money available to public schools.⁷³ Disability was merely a convenient charity pitch to further a conservative privatization agenda.

69. *Id.* at 296–97.

70. *Id.* at 297.

71. *Id.*

72. *See id.* at 293–94. The Individuals with Disabilities Education Act first became law in 1975 and today is codified at 20 U.S.C. § 1400 et seq. (2008).

73. *See, e.g., id.* at 296–97 (discussing, as an example, the absence of oversight in Florida’s original “special needs” voucher law and “laughable” accountability provisions in its amendments).

Writing in 2010, Hensel predicted that the movement from vouchers for disabled children⁷⁴ to vouchers for nearly all children would accelerate. Using Ohio as an example, her prediction has come to pass. When she authored her article, she noted that Ohio had an Autism Scholarship which was unusual in comparison to the kinds of programs offered in other states.⁷⁵ The scholarship was only available to students who have been identified as having autism, and it required the private school to provide the “education and the services outlined in the child’s individualized education program (IEP).”⁷⁶ Because the program did not require students to waive their access to an IEP, this program appeared to be more beneficial than the typical program offered in other states, as will be discussed below.

But, as Hensel predicted, the Ohio Autism Scholarship was an “acorn.” In 2012, Ohio launched the “Jon Peterson Special Needs Scholarship Program” that provides parents with some money to offset the cost of private school tuition, private therapies, and other services.⁷⁷ The average voucher in 2019-20 was \$9,887, which could not possibly cover the full cost of private school tuition. The IEP is satisfied by these payments, even if they do not cover the costs of needed services that the local school district otherwise would have had to cover. Ohio has also created vouchers for students in low-performing school districts and for students whose family income is at or below 250 percent of the federal poverty guidelines.⁷⁸ These scholarship

74. I have tried to avoid calling the education of disabled children “special education,” because disability advocates have argued that the “special” term causes disabled people to be viewed negatively. But I have not changed that language when included in quotations or titles of articles. See David Oliver, “*I Am Not Ashamed*”: Disability Advocates, Experts Implore You To Stop Saying “Special Needs”, USA TODAY, (June 11, 2021, 12:48 AM), <https://www.usatoday.com/story/life/health-wellness/2021/06/11/disabled-not-special-needs-experts-explain-why-never-use-term/7591024002> [<https://perma.cc/VK3U-7YNY>] (explaining the context and harmful nature of the term “special needs”).

75. See Hensel, *supra* note 66, at 304–06 (describing Ohio’s scholarship program).

76. See *Autism Scholarship Program*, OHIO DEP’T EDUC. <https://education.ohio.gov/Topics/Other-Resources/Scholarships/Autism-Scholarship-Program> [<https://perma.cc/ZUD3-XFUL>] (providing up to \$32,455 in FY 2022).

77. *Jon Peterson Special Needs Scholarship Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/ohio-jon-peterson-special-needs-scholarship-program> [<https://perma.cc/Z5NN-Z2EY>].

78. See *Scholarship Programs (Vouchers)*, SCH. CHOICE OHIO, <https://schoio.org/education-options/scholarship-programs> [<https://perma.cc/G9JS-NX3K>].

programs provide \$5,500 for students in K-8 and \$7,500 for high school students.⁷⁹ That amount of money is not likely to make private education affordable for low-income families but will help defray the cost of private school for middle-class families who live in many urban communities. To the extent that nonpublic schools would accept this money as full tuition, it is likely they would be religious schools.⁸⁰

In 2012, the National Council on Disability offered its views on the voucher movement, echoing many of the concerns raised by Hensel.⁸¹ Their chief concern was that “once students with disabilities use a voucher to attend a private school, they and their family relinquish rights under IDEA, including a parent’s right to participate in meetings about his or her child’s education and in hearings about how and whether a school is meeting a student’s educational needs.”⁸² Further, “the dollar amount of vouchers frequently covers only a portion of costs associated with special education, which can leave a large amount of the private school tuition unaccounted for. This may have the effect of excluding lower-income families who may not be able to supplement remaining costs.”⁸³ Finally, they note that “some private schools have policies or reputations for not accepting students with the most significant disabilities, which further marginalizes certain students with disabilities.”⁸⁴

In 2017, the Government Accountability Office (GAO) issued a report finding that “private school choice programs inconsistently provide information on changes in rights and protections under the Individuals with Disabilities Education Act (IDEA) when parents move a child with a disability from public to private school.”⁸⁵ The GAO

79. *Id.*

80. *See e.g.*, Tuition and Registration, ALL SAINTS SCH. SAINT JOHN VIANNEY, <https://allsaintssjv.org/admissions/tuition-and-registration> [<https://perma.cc/LF2G-Z38T>] (listing the net tuition for one child for K–8 at a Catholic school as \$4,950). By contrast, University School lists tuition for Junior K through grade 4 as between \$17,930 and \$30,620. Affordability at U.S., UNIV. SCH., <https://www.us.edu/admission/affordability> [<https://perma.cc/L5LS-8DMC>]. A \$5,500 scholarship would not make much of a dent in that tuition cost.

81. *See* NAT’L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT 60, 60–61 (2012).

82. *Id.* at 60.

83. *Id.*

84. *Id.*

85. U.S. GOV’T ACCOUNTABILITY OFF., PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS

encouraged states to be required to notify parents/guardians of changes in students' federal special education rights when a student with a disability is moved from a public to private school by their parent, but no action has occurred with respect to this recommendation.⁸⁶

Similarly, in 2019, the Council of Parent Attorneys and Advocates⁸⁷ worked closely with the National Council on Disability to author a report entitled: *School Choice Series: Choice and Vouchers—Implications for Students with Disabilities*.⁸⁸ This report reiterates the ways in which vouchers often fail to cover the full costs of private education and cause many parents to unknowingly give up their rights under the IDEA.⁸⁹ Further, in 2019, the Arc of the United States, the National Disability Rights Network, the Council of Parent Attorneys and Advocates, and a coalition of advocacy and legal services organizations filed a Supreme Court amicus brief in *Espinoza v. Montana Department of Revenue*⁹⁰ warning that school vouchers harm students with disabilities.⁹¹ This case demonstrates how disability has been misappropriated merely to advance the interests of privatizing education.

WITH DISABILITIES (2017), <https://www.gao.gov/products/gao-18-94> [<https://perma.cc/8YA2-4X7E>].

86. *Id.*; see U.S. DEPT. OF EDUC., OFF. OF SPECIAL EDUC. & REHAB. SERV., OFF. OF SPECIAL EDUC. PROGRAMS, QUESTIONS & ANSWERS ON SERVING CHILDREN WITH DISABILITIES PLACED BY THEIR PARENTS IN PRIVATE SCHOOL, https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf [<https://perma.cc/2U7R-246M>] (last updated Feb. 2022) (explaining how children in a private school have “no individual entitlement” to special education and related services provided by the federal government as they would if enrolled in a public school).

87. *Voucher Programs and Children with Disabilities*, COUNCIL PARENT ATT'YS & ADVOC., <https://www.copaa.org/page/Choice> [<https://perma.cc/HQF3-9JXB>].

88. NAT'L COUNCIL ON DISABILITY, SCHOOL CHOICE SERIES: CHOICE AND VOUCHERS—IMPLICATIONS FOR STUDENTS WITH DISABILITIES (2018), https://ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf [<https://perma.cc/XP6B-8AN4>].

89. *Id.* at 59.

90. 140 S. Ct. 2246 (2020).

91. Brief for Nat'l Disability Rts. Network, The Arc of the U.S., Council of Parent Att'y & Advoc., et al. as Amici Curiae Supporting Respondents, *Espinoza v. Mont. Dep't. of Revenue*, 140 S. Ct. 2246 (2020); Pam Katz, *Advoc. Groups File U.S. Supreme Court Brief Warning That Sch. Vouchers Harm Students with Disabilities*, THE ARC (Nov. 18, 2019), <https://thearc.org/blog/advocacy-groups-file-u-s-supreme-court-brief-warning-that-school-vouchers-harm-students-with-disabilities> [<https://perma.cc/LQP2-FBE3>].

While *Espinoza v. Montana Department of Revenue* was ostensibly about religious freedom, disability rights organizations understood its impact on disabled students.⁹² They saw the case as the latest example of the use of voucher or scholarship programs in ways that erode the education available to disabled students. The background to the case is a little complicated, in part reflecting the increased expansion of voucher or scholarship programs. But, as we will see, it reflects the use of the “acorn” tactic to justify such programs by pretending to care about students with disabilities.

This is the background to *Espinoza*. In 2015, Montana adopted a scholarship program for students attending private schools.⁹³ Nonprofit organizations could create a state-subsidized scholarship program, which was allocated to private schools that met certain criteria.⁹⁴ Only one scholarship organization participated in the program; it provided “scholarships to families who face financial hardship or *have children with disabilities*.”⁹⁵ “Virtually every private school in Montana” qualified to receive assistance under this program.⁹⁶ Pursuant to the Montana Constitution, however, no aid could be provided to sectarian schools.⁹⁷ Three mothers challenged the state statute because they wanted to use the scholarship funds to send their children to a private Christian school.⁹⁸ The Montana Supreme Court concluded that a potential violation of the Montana Constitution’s “no-aid” to sectarian schools provision required invalidating the entire scholarship program because the program provided no mechanism to prevent aid from flowing to religious schools.⁹⁹ The Montana Court therefore eliminated any possibility that the state was discriminating against religious schools by getting rid of the scholarship program entirely.

A consortium of advocacy and legal-service organizations committed to promoting opportunity for and protecting the rights of people with disabilities filed an important amicus brief in this case.¹⁰⁰ They asked the United States Supreme Court to uphold the decision of the

92. Katz, *supra* note 91.

93. *Espinoza*, 140 S. Ct. at 2251.

94. *Id.*

95. *Id.* (emphasis added).

96. *Id.*

97. *Id.* at 2252.

98. *Id.*

99. *Id.* at 2253.

100. See Brief for Amici Curiae Nat’l Disability Rts. Network et al., *supra* note 91.

Montana Supreme Court invalidating Montana's private school tax-credit scholarship program because, they argued, a state-supported voucher or scholarship program is harmful to students with disabilities.¹⁰¹ They argued that the scholarship program hurt disabled students by making them forfeit their federal rights and that eighty-three percent of parents of students with disabilities receive inaccurate or no information about the loss of such rights.¹⁰² Whereas Montana had tried to justify the program as helpful to disabled students, the amicus brief argued it was actually harmful.¹⁰³

Not surprisingly, in the current climate of religious favoritism and the dismantling of public schools, the Supreme Court ruled that Montana violated the Free Exercise clause by prohibiting state scholarship money from going to religious schools.¹⁰⁴ Further, the Supreme Court ruled that the Montana Supreme Court lacked the authority to eliminate the scholarship program entirely in order to avoid conflict with the state Constitution.¹⁰⁵ The Court gave no consideration to the argument advanced by the disability advocates that voucher or scholarship programs, in general, should be invalidated because of their harm to the interests of disabled children protected by federal law.¹⁰⁶ Justice Gorsuch's concurring opinion makes brief mention of disability when he notes that the scholarship program initially began as a way to help "families who were struggling financially or had children with disabilities."¹⁰⁷ This passing reference to disabled children (without consideration of what a brief on behalf of such children actually said) is a typical use of the "acorn" theory. The logic of this argument is that, if the program could help some disabled

101. *Id.* at 8–10.

102. *Id.* at 31.

103. *Id.* at 10 ("In short, voucher and tax-credit programs like Montana's redirect public funds to private entities largely unbound by the federal laws that for generations have guarded these students' rights and futures.").

104. *Espinoza*, 140 S. Ct. at 2262.

105. *Id.* ("When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation . . . Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.").

106. *See generally id.* Because the Court has never concluded that people with disabilities are entitled to heightened judicial protection under the Equal Protection clause, this argument had to be couched as a statutory rather than constitutional right.

107. *Id.* at 2274 (Gorsuch, J., concurring) (emphasis added).

children, then it should be extended to all children including those who wished to attend religious schools through a government subsidy. This is a very fertile acorn.

The Supreme Court's reasoning in *Espinoza* opened the floodgates for more public support of religious schools through its holding: "When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny."¹⁰⁸ By moving to strict scrutiny, rather than some kind of balancing test, the Court tipped the scale heavily on the side of public funding of religious schools. Any attempts to exclude schools from funding because of their "religious character" must meet the highest level of constitutional scrutiny, under which a provision is nearly always found to be unconstitutional.¹⁰⁹

Why did the Court make the leap to strict scrutiny? It found that many of these "no-aid" provisions were adopted during a time of anti-Catholic sentiment and thus should be understood as reflecting anti-Catholic animus from the 1870s.¹¹⁰ It acknowledges that Montana, like several other states, reenacted its no-aid rule in the 1970s for reasons unrelated to anti-Catholic bigotry.¹¹¹ While acknowledging that the historical record about "no-aid" provisions is "complex," the Court stuck with its determination to apply strict scrutiny.¹¹² This eagerness to apply strict scrutiny to religious bigotry claims stands in sharp contrast to the Court's reluctance to apply any form of heightened scrutiny in *City of Cleburne*, despite contemporary evidence of anti-disability bias.

The application of strict scrutiny for religious practitioners might not ring so hollow if the Court evinced an equivalent concern for disabled students. The disability amicus brief attempted to educate the Court about the historic mistreatment of disabled students and how "voucher and tax-credit programs like Montana's redirect public funds to private entities largely unbound by the federal laws that for

108. *Id.* at 2260 (quoting *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

109. *Id.*

110. *Id.* at 2259.

111. *Id.*

112. *See id.* This insistence of sticking with the 1870s historical record is in sharp contrast to how it ignored the argument in *Dobbs v. Jackson Women's Health Organization* that anti-abortion restrictions were enacted out of a desire to maintain Victorian sensibilities. 142 S. Ct. 2228, 2267 (2022).

generations have guarded these students' rights and futures."¹¹³ Thus, it argued: "While Petitioners suggest that Montana's program would aid students with disabilities, it is the Montana Supreme Court's decision that shields many students with disabilities from an earlier era's harms."¹¹⁴ The Court's concern for "earlier era's harms," however, is limited to protecting current students from an anti-Catholic bias that the record cannot demonstrate exists today.

Unfortunately, even the *Espinoza* dissenters ignore the impact of the majority's decision on disabled students.¹¹⁵ Petitioners were able to dangle an unsubstantiated interest in helping disabled students without any close investigation into whether disabled people, themselves, accept that argument.

Like *Dobbs v. Jackson Women's Health Organization*,¹¹⁶ which will be discussed later in this Article, this decision reflects the superficial nature of the interests that the Court considers relevant when deciding important constitutional decisions. In *Espinoza*, we see a strong concern for protecting today's students from a nineteenth century religious animus with no concern for the modern-day impact on disabled children. In *Dobbs*, we will see a strong concern to allow states to protect so-called potential life with no concern for the current lived experiences of pregnant people, including potentially pregnant disabled people.¹¹⁷ For a group's interests to be awarded weight, it is very helpful for the Court to identify that group as one that is entitled to strict or heightened scrutiny. Disabled people have never made that list. The repercussions are enormous.

113. See Brief for Amici Curiae Nat'l Disability Rts. Network et al., *supra* note 91, at 10.

114. *Id.*

115. See *Espinoza*, 140 S. Ct. at 2279 (Ginsburg, J., dissenting) (focusing on the law's impact on parents and students seeking to attend religious schools while failing to mention impacts on options available for disabled students); *id.* at 2291 (Breyer, J., dissenting) (focusing on the law's impact on similar state programs while failing to mention impacts on disabled students); *id.* at 2297 (Sotomayor, J., dissenting) (focusing on the "perverse" application of the Religion Clauses while failing to mention impacts on disabled students).

116. 142 S. Ct. 2228 (2022).

117. *Id.* at 2261 (acknowledging the "important concerns" raised by the dissent "about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women" while giving those concerns no constitutional weight and making no mention of particular burdens on potentially pregnant disabled people).

What would the Supreme Court have learned if it had closely read the amicus brief filed by disability justice advocacy organizations? It would have learned that many private schools, which receive state subsidies, broadcast their disinterest in serving disabled children. An Indiana school, for example, which received an annual award of \$1.5 million in voucher money stated in its admissions policy that it “may not possess the resources” to educate disabled students and that serving students with physical disabilities “would impair the learning process under normal educational conditions.”¹¹⁸ Several private schools that accept money under Milwaukee’s voucher program do not serve children “who are unable to climb stairs.”¹¹⁹ And, even schools that advertise that they serve students with disabilities often exclude children with what they perceive to be more expensive disabilities like autism.¹²⁰ Further, private schools pass on added costs to the parents of disabled children so that annual tuition and fees for disabled students range from \$40,000 to \$100,000 in a state that has capped the largest voucher award at \$13,000.¹²¹ Disabled students are also disproportionately expelled from private schools, especially if they are students of color.¹²²

These problems are systemic. Private schools have a long track record of failing to serve the needs of disabled students. Yet, advocates for voucher and scholarship programs can utter a concern for students with disabilities to help fill their coffers with taxpayer dollars while disabled students go underserved and ignored by state legislatures and the courts. In the current legal-political climate, the only group that gets close attention is the one arguing religious bias.¹²³ Anti-disability bias does not even rise to the level of heightened scrutiny.¹²⁴

118. Brief for Amici Curiae, Nat’l Disability Rts. Network et al., *supra* note 91, at 23.

119. *Id.*

120. *Id.* at 22–24.

121. *Id.* at 24–25.

122. *Id.* at 25.

123. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416, 2423–24 (2022) (employing a balancing test minimizing burdens on religious speech), *remanded to* 43 F.4th 1020 (9th Cir. 2022); Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2254–55, 2260 (2020) (giving substantial consideration to invocations of religious freedom and the Free Exercise Clause but barely mentioning to the impact on disabled students).

124. *See* Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001) (reiterating that disability-based classifications incur “only the minimum ‘rational-basis’ review applicable to general social and economic legislation”), *remanded to* 261 F.3d 1241 (11th Cir. 2001).

Thus, to truly understand the story of education for disabled children, one needs to see the full implications of disabled people not being at the table. Legislators drafted a statute with weak language that could quickly be undermined by the courts. Further, statutory proponents express concern for disabled children as a pretext to attain other goals. Those other goals often harmed rather than benefitted the disability community. Searching for disability misappropriation helps us understand the full story.

II. DE-INSTITUTIONALIZATION

Like the education arena, one can identify some important legislative gains that seemingly promoted the de-institutionalization of people with disabilities. Nonetheless, judges often undermined these gains as they borrowed disability stereotypes to weakly enforce these statutes. Moreover, some conservative organizations have purported to care about the housing and health care needs of disabled people while merely advancing their own corporate interests.

Thus, one can tell a story that suggests that Congress was interested in providing protections for disabled people who were living in institutional care. For example, in 1983, Congress created Medicaid waivers that allow states to use Medicaid funds to help pay for home or community-based care so that people can avoid institutionalized care.¹²⁵

Similarly, when Congress passed the ADA in 1990, it prohibited state actors from discriminating against disabled people and sought to provide protections against segregated and institutionalized care in determining that:

- (2) historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- (3) discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ;

125. See *Home & Community-Based Services 1915(c)*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/index.html> [<https://perma.cc/C5FS-XQKH>] (describing the general guidelines for home and community-based service waivers to meet long-term care needs).

(5) individuals with disabilities continually encounter . . . outright intentional exclusion . . . [and] segregation.¹²⁶

This Congressional decision to use federal legislation to lessen the problem of institutionalization can be attributed, in part, to increased public awareness of the horrific conditions at mental hospitals and institutions.¹²⁷ For example, journalist Geraldo Rivera exposed the mistreatment of disabled people at Willowbrook State School in Staten Island, New York in a 1972 documentary.¹²⁸ Fifteen years later, on September 17, 1987, New York State declared Willowbrook closed following community placements for its residents.¹²⁹ Thus, it is not surprising that when Congress drafted the ADA in the late 1980s, it was aware of the horrific conditions at many of these institutions and sought to make the ADA a tool to improve the lives of disabled people who lived in those congregate settings.

But, as scholar-activist Liat Ben-Moshe has noted, one needs to be careful in evaluating the effectiveness of what she terms “shock-and-awe campaigns.”¹³⁰ “Because of the sheer abjection and lack of agency presented, such exposés can further the oppression of incarcerated disabled people by viewing them as inherently incapable of life outside these carceral spaces.”¹³¹ She reminds us that these exposés “were mostly done by nondisabled (or not cognitively or psychiatrically disabled) white men.”¹³² As a consequence, she argues that these exposés can lead to calls to reform these institutions rather than abolish them.¹³³ Thus, not surprisingly, significant numbers of people with disabilities live in congregate, segregated settings such as nursing

126. 42 U.S.C. §§ 12101(a)(2)–(3), (5).

127. For an excellent discussion of this increased public awareness, see LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 46–53 (2020).

128. *Revisiting Willowbrook 50 Years Later with Reporter Geraldo Rivera*, ABC7 N.Y. (Apr. 1, 2022), <https://abc7ny.com/willowbrook-geraldo-rivera-staten-island-bill-ritter/11575075> [<https://perma.cc/W2KB-36T8>].

129. *Milestones in OMRDD’s History Related to Willowbrook*, MINN. DEP’T OF ADMIN. GOVERNOR’S COUNCIL ON DEV. DISABILITIES, <https://mn.gov/mnddc/extra/wbrook/wbrook-timeline.html> (last visited May 17, 2023).

130. BEN-MOSHE, *supra* note 127, at 52.

131. *Id.* at 52–53.

132. *Id.* at 53.

133. *Id.*

homes, often using Medicaid assistance.¹³⁴ During the COVID-19 pandemic, this lack of choice often became deadly. An estimated 33–75% of COVID deaths occurred in congregate settings in different states.¹³⁵ The inability to achieve the goal of community care has sometimes led to a deadly outcome.

One might argue that the ADA had insufficiently strong language to help end the widespread practice of congregate care for disabled people. But, also, one might argue that the Supreme Court has been too willing to downplay the harms that disabled people experience in congregate care. The Supreme Court's decision in *Olmstead v. Zimring*¹³⁶ provides the seeds for progress and retrenchment.

Atlanta Legal Aid Society lawyer Sue Jamieson spearheaded the *Olmstead* litigation.¹³⁷ She first represented Lois Curtis, who was intellectually disabled and had been diagnosed with schizophrenia.¹³⁸ Curtis was confined to a psychiatric unit in a Georgia hospital.¹³⁹ Elaine Wilson, who resided in the same psychiatric unit, soon joined the lawsuit.¹⁴⁰ Wilson was intellectually disabled and had been diagnosed with a personality disorder.¹⁴¹ The state only offered her an opportunity to leave the psychiatric unit if she was willing to live in a homeless shelter, which she rejected.¹⁴² They both had to continue living in a psychiatric unit even after their doctors agreed their needs could be met appropriately in a community-based program.¹⁴³ The state refused to find them an appropriate community placement until the *Olmstead* lawsuit was filed.¹⁴⁴

134. See *Percent of Older Adults with Disabilities Living in Nursing Homes*, AMS. WITH DISABILITIES ACT PARTICIPATION ACTION RSCH. CONSORTIUM (2020), <https://adata.org/sites/adata.org/files/files/NH%2065%20Percent%20FactSheet.pdf> [<https://perma.cc/UFL8-6YL4>] (stating that 9.2 to 14.46% of people with disabilities at the age of sixty-five or older live in nursing homes in thirteen states).

135. *Id.*

136. 527 U.S. 581 (1999), *remanded to* 198 F.3d 1259 (11th Cir. 1999).

137. *Sue Jamieson's Story Continued*, OLMSTEAD RTS., https://www.olmsteadrights.org/iamolmstead/history/item.5402-Sue_Jamiesons_Story_Continued [<https://perma.cc/TU49-9VZM>].

138. See *id.*; *Olmstead*, 527 U.S. at 593.

139. *Olmstead*, 527 U.S. at 593.

140. *Id.* at 593–94.

141. *Id.* at 593.

142. *Id.*

143. *Id.*

144. *Id.*

The legal issue in *Olmstead* was whether “[u]njustified isolation” is properly regarded as discrimination based on disability under the ADA.¹⁴⁵ In an opinion authored by liberal icon Justice Ginsburg, the Court ruled that the answer to that question was “yes,” but stated that courts also needed to recognize “the States’ need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States’ obligation to administer services with an even hand.”¹⁴⁶ That “range of facilities” included institutionalized care. The majority opinion stated that “the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk.”¹⁴⁷ Further, the Court made it clear that the state could have a “waiting list” for those seeking community care so long as it “moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated.”¹⁴⁸

In making this concession to a continuum of care and waiting lists, Justice Ginsburg nodded to the concerns expressed in Justice Kennedy’s concurrence. Kennedy quoted one author who opposed deinstitutionalization, stating:

It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.¹⁴⁹

In explaining Georgia’s decision to continue to institutionalize plaintiffs after their treatment professionals said they could live safely in the community, Justice Kennedy said: “[T]here is no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled.”¹⁵⁰ That is an unsurprising conclusion from someone whose own opinion voiced a stereotypical description of a person with mental illness that is drawn from the often discredited work of E. Fuller Torrey.¹⁵¹ Kennedy’s concurrence (and Ginsburg’s

145. *Id.* at 597.

146. *Id.*

147. *Id.* at 604.

148. *Id.* at 605–06.

149. *Id.* at 609–10 (Kennedy, J., concurring).

150. *Id.* at 611.

151. Torrey is described as “the most prominent advocate of forced psychiatric treatment in the United States today.” Thomas Szasz, *Psychiatric Fraud and Force: A Critique of E. Fuller Torrey*, 44 J. HUMANISTIC PSYCH. 416, 417 (2004). He regards the use

lip service to his views) reflect an example of disability misappropriation. The Court justifies its narrow holding and failure to end forced institutionalization by claiming that its decision benefits those with severe mental illness.

We should therefore not be surprised to learn that the Court's holding in *Olmstead* was not even immediately effective in Georgia in helping disabled people leave institutionalized care. Although the Court decided *Olmstead* in 1999, it was not until 2009 that the Department of Justice sought to improve the experience of disabled people who were living in institutionalized care in Georgia.¹⁵² The DOJ lawsuit occurred, in part, because of a series of articles published in the Atlanta Journal Constitution, called "Hidden Shame," that documented the gruesome conditions found at Georgia Regional Hospital.¹⁵³ Based in part on that investigation, the Department of Justice concluded in 2008 that Georgia was violating the ADA in its substandard treatment of care.¹⁵⁴ But to the frustration of many disability advocates, the Department of Justice was willing to enter into a consent decree that would do little to move people out of institutional care.¹⁵⁵ Various groups challenged the weak consent decree and, by 2010, the consent decree was updated to provide much more support for those seeking to leave institutionalized care.¹⁵⁶ This situation may exemplify Ben-Moshe's argument that "shock-and-awe" campaigns can mobilize public opinion while also reinforcing the stereotype that disabled people cannot live on their own. When *Olmstead* did not end institutionalization in Georgia, disability advocates were able to help generate a more effective settlement through their tireless efforts. The *Olmstead* decision's willingness to allow states to maintain segregated, institutionalized settings has made it hard to use that tool to close those institutions entirely.

of coerced therapy as so medically and socially important that it justifies deceiving the patient. *See id.* at 422 (explaining that Torrey even advocates compelling patients to be drugged with chemicals).

152. *See Sue Jamieson's Story Continued, supra* note 137 (describing DOJ's "weak settlement" with Georgia).

153. *Id.*

154. *See id.* (describing the DOJ investigation's findings of "extensive incidents of abuse and neglect at the state hospitals").

155. *See id.* (noting the lack of *Olmstead* relief created in the wake of DOJ's settlement).

156. *Id.*

Thus, we can see the first two types of problems occur—insufficiently strong legislative framework and a judiciary willing to narrow the existing law—while disability misappropriation occurs in the background. Justices Ginsburg and Kennedy likely saw themselves as protecting people with disabilities while supporting a judicial outcome that often perpetuated abuse.

There are many other contemporary examples of disability misappropriation in the institutionalization arena, particularly because of the significant dollars available to entities that run segregated settings for disabled people. Ohio's recent nursing home scandal is a great example of this misappropriation.¹⁵⁷ Following the Willowbrook exposé, there was increased attention in Ohio on the treatment of people living in congregate care. In 1979, the Ohio General Assembly heavily criticized the conditions at Ohio nursing homes: "Patient deaths from scalding hot water, roach and mice infestation, filthy rooms and toilets, sheets soiled with bodily wastes, and overcrowding were not uncommon."¹⁵⁸

Rather than close these nursing homes and seek to put more people into community-based care, Ohio generously funded privately-owned nursing homes while providing insufficient funds for home and community-based services.¹⁵⁹ Larke Recchie, CEO of the Ohio Association of Area Agencies on Aging, for example, criticized the lack of funds for home and community-based programs for 2000 Ohio residents while nursing homes are kept open with a mere 63% occupancy rate. She argued that those figures showed that "[n]ow more than ever older Ohioans want to remain in their home and avoid congregate care settings."¹⁶⁰

This inadequate legislative response to the 1979 report led one of its authors, Ohio Democratic Representative John Begala, to say that he came to regret the legislative reforms because they "basically had the consequence . . . of making that statute a gravy train for both political parties to hit the nursing home up for major contributions every year."¹⁶¹ In other words, the acorn—concern for people in

157. See Jake Zuckerman, *Nursing Homes Spent At Least \$6 Million on Ohio Politics in Five Years*, OHIO CAP. J. (Apr. 19, 2021, 1:00 AM), <https://ohiocapitaljournal.com/2021/04/19/nursing-homes-spent-at-least-6-million-on-ohio-politics-in-five-years> [<https://perma.cc/LCT4-5KEC>].

158. *Id.*

159. See *id.* (describing the need for more funding of community-based care).

160. *Id.*

161. *Id.*

institutionalized care—became fertile ground for the private sector to receive huge government subsidies while disabled people were left with services that were inconsistent with their expressed desires.

Further, Ohio residents who lived in nursing homes during the COVID-19 pandemic found it difficult to sue the nursing homes for substandard care that led to high death rates among nursing home residents. Although forty percent of Ohio's pandemic mortality occurred in long-term care facilities, Ohio law required residents to prove "gross negligence" or a "reckless disregard for the consequences .or intentional, willful or wanton misconduct" to prevail.¹⁶² The legislature protected the interests of privately-owned nursing homes over the lives of people forced to live in those institutions due to inadequate state money for community care. While the legislature responded to considerable lobbying efforts to raise reimbursement rates for nursing homes, it has taken class action litigation to get Ohio to modestly increase assistance offered to people who choose to receive services in the community.¹⁶³ Aggressive legal action is needed to attain minimal improvements for disabled people who prefer to live in community rather than congregate settings.

Thus, the institutionalization arena reflects a troubling setting in which for-profit congregate care providers seek to maximize their profits while disabled people are marooned in congregate care. Congress's modest attempt to lessen dependence on institutionalized care has led to inadequate results. State-supported nursing homes capitalize on disability misappropriation.

A recent development in New York City highlights the disability misappropriation theme in the context of institutionalized care. In November 2022, Mayor Eric Adams announced that the city would use the police to remove people from New York streets and subways and place them in institutionalized settings because of their supposed

162. *Id.*; H.B. 606, 133rd Gen. Assemb. (Ohio 2020).

163. *See, e.g.,* Karen Kasler, *State Settles Lawsuit with Disability Rights Groups over "Needlessly Institutionalized" Patients*, IDEASTREAM PUB. MEDIA (Oct. 22, 2019, 7:00 PM), <https://www.wksu.org/government-politics/2019-10-22/state-settles-lawsuit-with-disability-rights-group-over-needlessly-institutionalized-patients> [<https://perma.cc/Z3ZF-7H4G>] (reporting on a settlement that resulted in 24 million additional dollars for housing assistance and an expansion of employment and day services).

inability to care for themselves.¹⁶⁴ Police get to decide that people have severe, untreated mental illness to forcibly institutionalize them, supposedly for their own good.¹⁶⁵ But it's quite clear that the Mayor's real impetus is to reduce the crime rate in New York City under the stereotype that people who live on the city streets or subways present a marked danger to the public due to their purported mental illness. In fact, this move is in direct conflict with the recommendations to the Mayor from Jumaane D. Williams, Public Advocate for the City of New York.¹⁶⁶ Williams recommended that "the City should strive for mental health professionals as the default response for mental health crises rather than law enforcement."¹⁶⁷ Further, Williams recommended a dramatic increase in the availability of respite care centers rather than hospitalization for those in need of care, especially because New York City had recently seen a decline in the amount of respite centers available.¹⁶⁸

While the Mayor and his allies praised the new plan for helping to make New York City safer, advocates for people who are homeless or have a mental illness sharply criticized the plan. Jacquelyn Simone, policy director for the Coalition for the Homeless, criticized the plan for focusing on "involuntary removals and policing" rather than genuine health and housing assistance.¹⁶⁹ Another advocate argued that this policy will cause people to "go deeper underground" rather than seek care.¹⁷⁰ Others criticized the plan as being about the

164. Sarah Maslin Nir, *On City Streets, Fear and Hope as Mayor Pushes to Remove Mentally Ill*, N.Y. TIMES (Nov. 30, 2022), <https://www.nytimes.com/2022/11/30/nyregion/new-york-mental-illness-homeless-reaction.html> (last visited May 17, 2023).

165. *See id.* (describing the involuntary nature of the institutionalization plan).

166. *See generally* Public Letter from Jumaane D. Williams, Pub. Advoc., City of New York, to Eric L. Adams, Mayor, City of New York, *Improving New York City's Responses to Individuals in Mental Health Crisis: 2022 Update*, <https://advocate.nyc.gov/reports/improving-new-york-citys-responses-mental-health-crisis-2022> [<https://perma.cc/TT82-MXRQ>] (describing various measures to improve response to mental health crises, including reducing police involvement in mental health crisis situations).

167. *Id.* at 8.

168. *Id.* at 3.

169. Ali Bauman, *Homeless Advocates Sound off on Mayor Eric Adams' Controversial Mental Health Plan*, CBS N.Y. (Nov. 29, 2022, 11:28 PM), <https://www.cbsnews.com/newyork/news/homeless-advocates-sound-off-on-mayor-eric-adams-controversial-mental-health-plan> [<https://perma.cc/6T7F-WUV8>].

170. *Id.*

“revolving door of prison” rather than “meaningful, robust community treatment.”¹⁷¹

One of the particularly alarming features of the New York City program is that it elevates the views of one man—Fuller Torrey—over the expressed concerns of the disability community. His tiny organization, the Treatment Advocacy Center, is credited with persuading thirty states to enact laws that allow for mandatory outpatient treatment.¹⁷² “In the course of this campaign, Dr. Torrey has used statistics selectively to send a simplified message that untreated mental illnesses are a major cause of violence” even though data demonstrate about “4 percent of violent acts can be directly attributed to mental illness, and many of them are low-level assaults.”¹⁷³ Because of the lack of mental health services, even Torrey recognizes that the New York City policy might fail. Yet, he applauds this experimentation on the lives of disabled people, saying that “Adams is brave to try it” while acknowledging that he is nervous that it is going to be “difficult” and “might fail.”¹⁷⁴ Contemplating his cognitive decline due to Parkinson’s disease, Torrey comments that he “want[s] to see the results of this experiment before [he] become[s] demented.”¹⁷⁵ In other words, he openly acknowledges that New York City is using his own advocacy to experiment on New Yorkers. This is an astonishing use of the coercive power of the state.

The New York City program is an obvious example of disability misappropriation. The city institutionalizes people to keep them out of public view, like the infamous “Ugly Laws,”¹⁷⁶ without any genuine concern for the mental health needs of some people who live on the city streets or subways. When we think about the mantra “nothing about us without us,” this coercive power of the state is especially troubling. How can a policy be “about us” when we are swept out of view entirely? This latest policy, however, shows the importance of being watchful for disability misappropriation even in supposedly liberal jurisdictions like New York City. The Ugly Laws remain.

171. *Id.*

172. Ellen Barry, *Behind New York City’s Shift on Mental Health, a Solitary Quest*, N.Y. TIMES (Dec. 11, 2022), <https://www.nytimes.com/2022/12/11/health/fuller-torrey-psychois-commitment.html?searchResultPosition=1> (last visited May 17, 2023).

173. *Id.* (quoting Duke University School of Medicine sociologist, Jeff W. Swanson).

174. *Id.*

175. *Id.*

176. See SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 4 (2009) (describing laws that prevented physically disabled people from visiting public areas).

III. REPRODUCTIVE JUSTICE

Access to reproductive justice is an excellent example of all three kinds of harms discussed in this Article because disabled people have not been part of the decision making process. They are directly harmed through practices such as forced sterilization as well as unequal access to abortion services. When they can give birth to a child, they often find that the family policing system takes away their parental rights. And, when this family policing system is justified, it is characterized as good for the child's welfare, ignoring how the foster care system dramatically harms children. Justifications for family policing are a type of disability misappropriation.

Further, the political right has deployed a false concern for eugenics in the reproductive rights arena as a strong example of disability misappropriation. This false concern for eugenics has done nothing to advance the interests of disabled people and their children. Disabled people have been long subject to coercive practices in the reproductive justice space; abortion bans justified with eugenics rhetoric merely add to the list.

The Supreme Court has a history of not being concerned about reproductive justice for the disability community. The Court narrowly interpreted a judicial decision that could have advanced reproductive justice, and then, misappropriated concern for disabled people to advance the conservative agenda of ending abortions altogether. Because of the pervasiveness of disability misappropriation in this area, it is especially important to understand the arguments made by disability advocates about what kinds of policies they believe further reproductive justice.¹⁷⁷

A. *Sterilization*

The lack of concern for disabled people is starkly evident in *Buck v. Bell*,¹⁷⁸ a 1927 case in which the Supreme Court upheld a Virginia statute that allowed for the sterilization of any state hospital inmate who was "insane, idiotic, imbecile, feeble-minded or epileptic, and by the laws of heredity . . . the probable potential parent of socially

177. I have deliberately framed the issue as one of "reproductive justice," not "reproductive rights" because that approach is consistent with the disability justice movement. The issue is whether the disability community has access to reproductive choices in all their various manifestations not whether the right, as a theoretical matter, exists.

178. 274 U.S. 200 (1927).

inadequate offspring likewise afflicted.”¹⁷⁹ Eight Justices signed Justice Holmes’s opinion, in which he declared that “[t]hree generations of imbeciles are enough.”¹⁸⁰ This eugenic-style rationale led to the sterilization of hundreds of thousands of people in the United States.¹⁸¹ The Supreme Court has never formally overruled *Buck v. Bell*.¹⁸² Disabled people continue to contest their forced sterilization.¹⁸³ “More than 30 states explicitly allow the forced sterilization of disabled people,”¹⁸⁴ and “more than a dozen states allow it on disabled children.”¹⁸⁵

Carrie Buck’s story is a classic example of disability misappropriation that greatly harmed the so-called disabled person. Like many poor white people of her generation, Carrie Buck’s mother (Emma Adeline Harlowe Buck) was institutionalized at the Virginia State Colony for Epileptics and Feeble-minded after she gave birth to Carrie Buck out

179. VA. CODE ANN. § 1095i (1924).

180. *Buck v. Bell*, 274 U.S. at 207.

181. See MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 25 (2020) (“[A] lawsuit filed by the Southern Poverty Law Center on behalf of the [plaintiffs] revealed that federally funded programs sterilized 100,000 to 150,000 people each year.”).

182. See, e.g., *Poe v. Lynchburg Training Sch. & Hosp.*, 518 F. Supp. 789, 792 n.1 (W.D. Va. 1981) (refusing to reconsider the constitutionality of the Virginia sterilization law).

183. See, e.g., *In re Romero*, 790 P.2d 819, 820, 823 (Colo. 1990) (en banc) (overturning compulsory sterilization of an “incapacitated adult woman” because there was not clear and convincing evidence that the woman was incompetent to grant or withhold consent to sterilization).

184. Anagha Srikanth, *Disabled People Can Still be Forcibly Sterilized in Over Half of the US*, REWIRE NEWS GRP. (Jan. 25, 2022, 12:30 PM), <https://rewirenewsgrp.com/article/2022/01/25/disabled-people-can-still-be-forcibly-sterilized-in-over-half-of-the-us> [<https://perma.cc/UA38-AZWL>]. While it is difficult to find current statistics on the sterilization rate among disabled women, a 2018 article reports that “U.S. females with cognitive disabilities were more likely to have undergone female sterilizations and hysterectomies and at younger ages than those with other disabilities or without disabilities.” 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 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6105402/#S5title> [<https://perma.cc/ZV6G-KL58>].

185. Anagha Srikanth, *supra* note 184; see also NAT’L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 40 (2012), https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [<https://perma.cc/B3EB-WRUV>] (stating that there has been an increase in the number of families that have sterilized their children).

of wedlock.¹⁸⁶ The sole evidence of her disabled status was that she must be a “low grade moron” because she was promiscuous by having a child out of wedlock.¹⁸⁷ From the age of three, Carrie Buck was raised by foster parents, John and Alice Dobbs.¹⁸⁸ At the age of seventeen, she became pregnant, most likely by being raped by the Dobbs’ nephew, Clarence Garland.¹⁸⁹ Like her mother, Carrie Buck was presumed to be feebleminded because of her purported promiscuity and was committed to the same institution that housed her mother.¹⁹⁰ The Dobbs family took custody of her child, Vivian Alice Elaine Buck.¹⁹¹

Carrie Buck’s life up to this point was one of state-sanctioned coercion. The state forcibly placed Carrie’s mother in an institutional setting, placed Carrie in foster care, where she was raped, and then placed Carrie in an institutional setting. And, like her mother, Carrie’s child was forcibly removed from her when the state placed her in an institutional setting.

Meanwhile, the state enacted a law that allowed for the “state-enforced sterilization of those deemed genetically unfit for procreation.”¹⁹² The Virginia law was enacted during a time period in which it was commonly accepted “that genetic abnormalities were an important cause of various social problems, from low intelligence and shiftlessness to promiscuity, prostitution, and other more serious crimes.”¹⁹³ In response to this popularization of eugenics, by 1917, sixteen states enacted laws that authorized medical procedures on the institutionalized.¹⁹⁴ It was not the case that *anyone* need worry about forced sterilization. That outcome was most likely for those committed to state institutions, merely because of their purported promiscuity and feeble-mindedness.

The coercive nature of these laws was particularly evident in Carrie Buck’s case. She claimed she became pregnant as a result of rape, but

186. Brendan Wolfe, *Buck v. Bell* (1927), ENCYC. VA., <https://encyclopediavirginia.org/entries/buck-v-bell-1927> [<https://perma.cc/4WQT-NPNC>] (last updated Jan. 30, 2023).

187. *Id.*

188. PAUL LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 103 (2008).

189. *Id.* at 103, 139–40.

190. *Id.* at 103–05.

191. *Id.* at 104–05; Wolfe, *supra* note 186.

192. Wolfe, *supra* note 186.

193. *Id.*

194. *Id.* But see LOMBARDO, *supra* note 188, at 91 (explaining how several sterilization enactments were vetoed or invalidated by the courts between 1914 and 1922).

the rapist's family was able to take custody of her child.¹⁹⁵ A month after she was forcibly sterilized, she was released from the institution.¹⁹⁶ In the state's mind, she likely became less "promiscuous" and thereby less "feeble-minded" when she became unable to be pregnant. Although Carrie Buck's lawyer conceded her "feeble-minded[ness]" in his handling of the case, historians have contested whether Carrie or her daughter had any evidence of disability.¹⁹⁷

Professor Melissa Murray connects the states' use of sterilization statutes to limit the reproductive capacity of purportedly disabled people to their use of such statutes to control women of color, once welfare benefits became available to them in the 1960s and 1970s.¹⁹⁸ "Reasoning that an out-of-wedlock child reflected immorality, which in turn reflected cognitive disability, these states demanded that unmarried mothers consent to sterilization as a condition of continued receipt of public benefits."¹⁹⁹ The federal government was complicit in these sterilization efforts. In 1974, it "developed a funding scheme that provided states with more generous reimbursement for sterilizations than for abortions."²⁰⁰ Race played a significant role in these sterilization efforts. In North Carolina, for example, "Black people accounted for about 25 percent of the state's population but comprised 60 percent of those subject to state sterilization."²⁰¹

Notice the way disability misappropriation has worked in this context. Forced sterilization began as an effort to limit the ability of (white) disabled people to reproduce for their own good. "[S]ociety can prevent those who are manifestly unfit from continuing their kind" rather than "waiting to execute degenerate offspring for crime, or to let them starve for their imbecility."²⁰² But it soon was misappropriated to serve the interests of white supremacy by forcibly sterilizing many Black women. But disability misappropriation never truly disappeared.

195. LOMBARDO, *supra* note 188, at 104–05, 140–41.

196. *Id.* at 185.

197. Wolfe, *supra* note 186; *see, e.g.*, LOMBARDO, *supra* note 188, at 138–39 (explaining how Carrie Buck's lawyer failed to challenge glaring holes in the Commonwealth's case while neglecting to offer school records and other affirmative evidence that could have demonstrated Buck's lack of disability).

198. Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1620 (2022).

199. *Id.* at 1619.

200. *Id.* at 1620.

201. *Id.*

202. *Id.* at 1614 (quoting Justice Holmes in *Buck v. Bell*, 274 U.S. 200, 207 (1927)).

For example, when Alabama officials forcibly sterilized minor girls, they argued “that the girls were mentally incapable of understanding the moral and economic consequences of their budding sexuality.”²⁰³ The state-sanctioned coercive injection of Depo-Provera, which later was discontinued after studies indicated it caused cancer in lab animals,²⁰⁴ was supposedly for their own good.

The practice of forcible sterilization in the United States can therefore be understood as a practice that had its roots in state coercion of purportedly disabled white women who were often confined to institutional settings. While those forcible sterilization laws remained on the books, they soon became a tool of white supremacy to limit the number of children who might be borne by Black women and, in particular, to prevent these children from having access to state welfare resources. These are state-sponsored activities, so using the label of eugenics to criticize them is appropriate.²⁰⁵ They were state-sponsored programs designed to take away the opportunity for disabled women or women of color to choose to reproduce.²⁰⁶ And the two categories of women were often conflated, showing how disability misappropriation can be a tool of white supremacy.

Hidden in the Carrie Buck story is state coercion over families. Carrie’s mother had her child taken from her and was institutionalized because of her purported feeble-mindedness.²⁰⁷ Then, the same state-sponsored coercion occurred for Carrie Buck and her daughter, who was placed in foster care as well.²⁰⁸ These practices are part of a set of larger practices that Dorothy Roberts and others have called “family policing.”²⁰⁹ As Professor Robyn Powell has noted, even when disabled people manage to give birth to children, the state is likely to act

203. *Id.* at 1627.

204. *Id.* at 1627–28.

205. See generally Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. Times (June 8, 2022), <https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html> (last visited May 17, 2023).

206. Murray, *supra* note 198, at 1620.

207. *Supra* notes 187–89 and accompanying text.

208. *Supra* notes 191–92 and accompanying text.

209. See Dorothy Roberts, *Abolish Family Policing, Too*, DISSENT MAG. (2021), <https://www.dissentmagazine.org/article/abolish-family-policing-too> [https://perma.cc/4HSG-FXMR]; Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM 37, 43–44 (2022) (explaining the rationale for using the term “family policing system”).

coercively in their lives.²¹⁰ “Strikingly, nineteen percent of all children in foster care have disabled parents, even though children of parents with disabilities comprise only nine percent of the country’s youth.”²¹¹ Rather than provide resources to support disabled parents, the state often removes the child to the dysfunctional foster care system.²¹² In a disability misappropriation move, the state then justifies the removal as benefitting “child welfare” when, as Dorothy Roberts has long documented, it reflects family policing in a carceral state.²¹³ Robyn Powell connects this racial exploitation of Black families to the exploitation of families with a disabled parent.²¹⁴ She observes that “not including disabled parents is a significant omission from an otherwise flourishing body of scholarship” about the family policing system.²¹⁵

B. *Abortion Access*

This Section returns the discussion to the area of reproductive justice. First, this Section will discuss how the state often treats pregnant people coercively rather than empowering them to determine their own needs and aspirations. Sometimes, this state coercion is justified as pro-disability when it creates no meaningful improvements in the lives of disabled people. Second, this Section will discuss the false eugenics arguments that are made to justify abortion bans. Like coercive practices, these arguments are an example of disability misappropriation rather than a genuine concern for the well-being of disabled people. Third, this Section will discuss how *Dobbs* continued the disability misappropriation theme.

1. *Coercive Practices*

Coercive reproductive practices have become an even more serious problem as access to abortion has shrunk. Just as disabled people have often been absent from the discussion of family policing, they have also been absent from the discussion of abortion bans. Two different kinds

210. See Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 FAM. CT. REV. 37, 38 (2019) (listing policies such as discriminatory child welfare and family law, which perpetuate the belief that disabled people should not have children).

211. Powell, *supra* note 209, at 41 (internal citations omitted).

212. *Id.* at 66.

213. See Roberts, *supra* note 209 (explaining that the child welfare system governs working-class and low-income families).

214. Powell, *supra* note 209, at 61–65.

215. *Id.* at 45.

of problems have occurred: the abortion debate presumes that pregnant people are not disabled, and a supposed concern for eugenics does nothing to protect disabled pregnant people or disabled children.

This is a complicated argument to make because it is important to recognize that many disabled people personally oppose abortion, although their personal opposition to abortion does not necessarily translate into support for banning the practice itself.²¹⁶ Polling suggests that “the opinions of Americans with disabilities are largely similar to the opinions of non-disabled Americans.”²¹⁷ Just as Carrie Buck was forcibly sterilized due to a purported concern that she would be a disabled person giving birth to a disabled child, many people are concerned that disabled people are coerced into aborting a pregnancy rather than carrying it to term.²¹⁸ Further, they are concerned that pregnant people, whether disabled or not, are coerced into aborting a fetus upon a diagnosis of a fetal impairment.²¹⁹ These concerns are understandable given the history of coercive reproductive practices against disabled people. Thus, to be respectful to the disability community, it is important that the call for reproductive “justice” be a call for noncoercive practices in the reproduction context. “Choice” must mean genuine choice rather than the state using its power to act coercively in the lives of disabled people. Reproductive justice means giving Carrie Buck the opportunity to live in a society in which she is free from sexual coercion and exploitation, can choose to give birth to

216. For a nuanced discussion of abortion from a disability perspective arguing that criminalization will not prevent people from having abortions given the “systematic underresourcing of marginalized groups,” see Madison Chastain, *I’m an Anti-Abortion Disability Advocate. Overturning Roe Isn’t the Answer*, NAT’L CATHOLIC REP. (May 6, 2022), <https://www.ncronline.org/news/opinion/im-anti-abortion-disability-advocate-overturning-roe-isnt-answer> [<https://perma.cc/6DY3-69Y9>].

217. See Sara Luterman, *Exclusive: How Do People with Disabilities Feel About Abortion? New Poll Sheds Light for the First Time*, THE 19TH (May 10, 2022, 6:00 AM), <https://19thnews.org/2022/05/how-people-with-disabilities-feel-abortion> [<https://perma.cc/HN7W-AAVR>] (stating that pollsters have previously failed to account for disabled people in their questions on abortion).

218. *Id.* (highlighting the similarities between forced sterilization and abortion access in the disability community).

219. See Steven A. Holmes, *Abortion Issue Divides Advocates for Disabled*, N.Y. TIMES (July 4, 1991), http://groups.csail.mit.edu/mac/users/rauch/nvp/consistent/nyt_disabled.html [<https://perma.cc/2KYL-4AY3>] (explaining that some anti-abortion advocates have associated aborting a child with disabilities with eugenics); Luterman, *supra* note 217 (reporting the views of some disability advocates who oppose abortion access).

a child, and can attain the necessary resources from the state to raise that child on her own outside of an institutionalized environment.²²⁰ Carrie Buck experienced none of those indicia of reproductive justice.

Recently, some disability activists have grown concerned that a false concern for disability is being appropriated to justify abortion restrictions and bans. In 2019, disability activist s.e. smith wrote an essay arguing that disabled people are being used “as a rhetorical device by left and right alike” in the abortion debate.²²¹ Smith argues that selective abortion bans, which are often justified with anti-eugenics arguments, are not actually about protecting disabled people.²²² “They are crafted to restrict access to abortion and information about pregnancies, imperiling pregnant people (including, by the way, disabled pregnant people).”²²³ Similarly, disability poet and scholar Liz Bowen has noted, “[t]he anti-abortion right’s singular focus on disabled fetuses appropriates disability advocates’ real concerns about eugenics while, ironically, dismissing the possibility that disabled people can or should become pregnant.”²²⁴ They both understand abortion restrictions as part of the larger pattern of denying disabled people access to medical care while also failing to realize that disabled people even exist in the space of pregnant people.

Other disability advocates have argued that the reproductive justice discussion should focus on access rather than choice “because a legal right to abortion is meaningless if people cannot realistically access this care.”²²⁵ Like smith, they argue that so-called abortion “‘reason bans’ .

220. For an excellent description of an intersectional approach to abortion and disability that outlines how abortion laws can reinforce stigmas about disabilities, see WOMEN ENABLED INT’L, *ABORTION AND DISABILITY: TOWARDS AN INTERSECTIONAL HUMAN RIGHTS-BASED APPROACH* 5–6 (2020), <https://womenenabled.org/reports/abortion-and-disability> [<https://perma.cc/TL2Z-C2YS>].

221. s.e. smith, *Disabled People Are Tired of Being a Talking Point in the Abortion Debate*, VOX (May 29, 2019, 4:10 PM), <https://www.vox.com/first-person/2019/5/29/18644320/abortion-ban-2019-selective-abortion-ban-disability> [<https://perma.cc/2XJQ-GY4L>].

222. *Id.*

223. *Id.*

224. Liz Bowen, *The End of Roe v. Wade Will Be a Nightmare for Disabled Americans*, HASTINGS CTR. (June 24, 2022), <https://www.thehastingscenter.org/the-end-of-roe-v-wade-will-be-a-nightmare-for-disabled-americans> [<https://perma.cc/7KAX-7JQA>].

225. NAT’L P’SHIP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOC. NETWORK, *ACCESS, AUTONOMY AND DIGNITY: ABORTION CARE FOR PEOPLE WITH DISABILITIES* 3 (2021),

. . . based on a fetal diagnosis only interfere with the right to abortion care, under the false pretense of 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.”²²⁶ They note that these bans “disproportionately restrict the reproductive rights of people with heritable disabilities.”²²⁷ Not only are disabled people not at the table when abortion rights are restricted but those drafting these restrictions do not even contemplate the possibility of a disabled pregnant person.²²⁸

This emphasis on access can also provide a framework to discuss the pregnant person’s decision making after learning that the fetus has a significant disability that might impair their ability to live outside the womb. Health reporter Jennifer McLelland has written a piece describing her decision making process when she was pregnant with her son, who is now eleven years old.²²⁹ She found that her health care providers were eager to present their own view about the decision she should make not to terminate her pregnancy but were not prepared to offer any support for the health care that her child would need upon birth.²³⁰ McLelland’s doctor’s “beliefs about justified and unjustified abortions provided her with moral comfort but didn’t actually provide [McLelland] with the kind of care that would make it possible for [her]

<https://www.nationalpartnership.org/our-work/resources/health-care/repro/repro-disability-abortion.pdf> (last visited May 17, 2023).

226. *Id.* at 11; *cf. smith, supra* note 221 (“But bills like these have little to do with protecting disabled people. They are crafted to restrict access to abortion and information about pregnancies, imperiling pregnant people (including, by the way, disabled pregnant people). Using disablism to sneak past an abortion ban or put abortion advocates in an uncomfortable position is a brilliant tactic, and one advocates must not fall for.”).

227. *Id.*

228. Bowen, *supra* note 224 (explaining that the focus is on babies with disabilities, not on the disability status of pregnant people); *see also* Hannah Getahun, *I Would Die: People with Disabilities Say Abortion Bans Could Have Fatal Consequences*, INSIDER (July 31, 2022, 9:40 AM), <https://www.insider.com/maternal-mortality-morbidity-disabilities-abortion-bans-roe-v-wade-reproductive-rights-2022-7> [<https://perma.cc/2RTM-UL6E>] (explaining the consequences for disabled people of overturning *Roe*).

229. *See* Jennifer McLelland, *Analysis: We Can Talk About Abortion Without Being Ableist*, CAL. HEALTH REP. (Sept. 13, 2022), <https://www.calhealthreport.org/2022/09/13/analysis-we-can-talk-about-abortion-without-being-ableist%EF%BF%BC> [<https://perma.cc/ZAZ9-N5XH>] (reflecting on her struggles to understand her bias towards disabled adults).

230. *Id.*

son to live.”²³¹ McLelland needed to have the financial resources to travel 200 miles from her hometown in California to gain access to services that would allow her son to survive and thrive.²³² It was not enough that abortion was legally available in California.²³³ She needed health care services to make that choice a genuine one.²³⁴ She argues that “California can continue providing safe and legal access to abortion while building a wraparound system of care that values the lives and rights of people with disabilities.”²³⁵ But she recognizes her own ableism while she made the decision whether to terminate her pregnancy:

Because of institutional bias and lack of community living support for disabled adults, I had never seen anyone with disabilities like my son’s out in the community. I thought about his life as being a linear path from sickness to health. I was wrong about that—children with disabilities grow up into adults with disabilities, and it’s our job to build a world that works for them.²³⁶

McLelland’s self-reflection reveals the many personal and institutional biases that make it difficult for pregnant women to have genuine choice after a diagnosis of a disabled fetus. The reproductive justice community wants to expand those genuine choices rather than use abortion bans as a clumsy way to eliminate choices.

Disability activist Kendall Ciesemier has also written about her frustration with the ways in which abortion opponents seek to “champion my disabled ‘life’ in my mom’s womb,” when they actually put her “life and that of other disabled and chronically ill people in danger by potentially forcing us to carry a pregnancy to term even in the face of serious health consequences.”²³⁷ While recognizing that the attempt to “use disabled fetuses as pawns . . . sometimes . . . works on [her],” she also knows “this inner conflict is manufactured and sold to [her], not of [her].”²³⁸ She argues that:

231. *Id.*

232. *See id.* (explaining that her decision on whether or not to get an abortion was based on her family’s financial ability to relocate to obtain necessary medical attention).

233. *See id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *See* Kendall Ciesemier, *Leave My Disability Out of Your Anti-Abortion Propaganda*, N.Y. TIMES (July 31, 2022), <https://www.nytimes.com/2022/07/31/opinion/disability-rights-anti-abortion.html> (last visited May 17, 2023).

238. *Id.*

The loss of access to legal abortion has entirely altered the process of deciding whether to have children. It has magnified both the danger of getting pregnant and [her] fear. It is deeply ironic that the people who swore they were fighting for [her] right to exist now threaten [her] right to thrive and survive. The hypocrisy is enraging.²³⁹

What she calls “hypocrisy,” I call disability misappropriation.

2. *False Concern for Eugenics*

Within the legal system, Justice Thomas has been the biggest proponent of using eugenics arguments to curtail all abortions while doing nothing for the welfare of disabled parents or disabled children.²⁴⁰ When the state of Indiana passed a law forbidding abortion providers from knowingly providing selective abortion on the basis of sex, race, or disability, Justice Thomas issued a concurrence urging the Court to address the constitutionality of such laws soon.²⁴¹ Because Margaret Sanger’s arguments in favor of access to *contraception* had links to a eugenicist ideology, he argued that various bases for abortions should be banned because of their “potential for abortion to become a tool of eugenic manipulation.”²⁴² Justice Thomas criticized the Court’s decision in *Buck v. Bell*, although his later statement in *Dobbs* that reproductive rights issues should receive no constitutional protection hardly seems to provide a constitutional weapon to reverse *Buck v. Bell*.²⁴³ If the Constitution provides no protection from state limitations on people’s reproductive capacities, then a mandatory sterilization statute could be upheld as purportedly protecting people like Carrie Buck from reproducing. Under the version of rational basis scrutiny endorsed by the majority opinion in *Dobbs*, a state legislature

239. *Id.*

240. *See* *Box v. Planned Parenthood of Ind. & Ky. Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring) (stating that abortion can be used to further eugenics).

241. *Id.* at 1782, 1784.

242. *Id.* at 1784. *But see* Tiffany Wright, Director of the Civil Rights Clinic, Howard U. Sch. of L., Remarks During the Panel on Reproductive and Disability Justice in the Wake of *Dobbs* at the *American University Law Review* Symposium 2023: Equal Justice Under Law? (Feb. 16, 2023), <https://www.youtube.com/watch?v=pK8QCEXTSCs> [<https://perma.cc/K95C-LUP3>] (emphasizing that Black women have exercised control over their reproductive freedom through self-managed abortion for hundreds of years).

243. *Box*, 139 S. Ct. at 1786; *see also* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (“Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.”).

would merely have to believe that society is best served through forced sterilization, even if their views are based on bias against disabled people.

Professor Melissa Murray provided a scathing critique of Thomas' use of history in making the eugenics claim about the Indiana law.²⁴⁴ She argues that Thomas' version of history "overlooks the fact that neither the eugenics movement nor Margaret Sanger was preoccupied with endorsing abortion as a means of reproductive control."²⁴⁵ Further, she notes that the eugenics movement was not "unduly focused on the reproductive capacities of racial minorities."²⁴⁶

An excellent example of disability misappropriation is state laws that seek to ban abortions following a prenatal diagnosis of a disability.²⁴⁷ While the Seventh Circuit overturned an Indiana ban²⁴⁸ and the Eighth Circuit overturned an Arkansas ban,²⁴⁹ a later Ohio effort withstood constitutional review from the Sixth Circuit.²⁵⁰

The Ohio story is a perfect example of disability misappropriation. Ohio has been a leader in the national movement to require fact-based

244. Murray, *supra* note 198, at 1606.

245. *Id.* at 1606–07.

246. *Id.*

247. For discussion of these reasons bans, see Gray Sutton, Comment, *The Case Against Reason-Based Abortion Bans*, 2022 U. CHI. LEGAL F. 391, 392, 400–01 (2022), citing and discussing various reason bans, such as ARK. CODE ANN. § 20-16-2103(a)(1)–(3) (West 2023) (Down syndrome diagnosis); IND. CODE ANN. § 16-34-4-4 to -8 (West 2022) (sex-selective abortions and disability diagnoses); and OHIO REV. CODE ANN. § 2919.10(B)(1)–(3) (Down syndrome diagnosis).

248. See *Planned Parenthood of Ind. & Ky. v. Comm'r Ind. State Dep't Health*, 888 F.3d 300, 302–03 (7th Cir. 2018) (finding unconstitutional provisions of an Indiana law that prohibited a person from performing an abortion for discriminatory purposes, such as a diagnosis of Down syndrome or "any other disability"), *cert. granted in part, judgement rev'd in part sub nom*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019).

249. See *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 686, 690 (8th Cir. 2021) (upholding the lower court's injunction against a provision that would prohibit a woman from terminating her pregnancy on the basis of a Down syndrome diagnosis), *vacated*, *Rutledge v. Little Rock Fam. Plan. Servs.*, 142 S. Ct. 2894, 2894 (2022) (mem.).

250. See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 516 (6th Cir. 2021) (en banc) (upholding Ohio's law that bars doctors from performing abortions on women who chose to terminate their pregnancy because of a prenatal Down syndrome diagnosis) *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). I co-authored an amicus brief (with Samuel Bagenstos) in the Sixth Circuit opposing the Ohio law. See *Brief of Disability Rights Organizations, Advocates and Academics on Rehearing En Banc*, as Amici Curiae, *Preterm-Cleveland v. McCloud* (6th Cir. 2020) (No. 18-3329).

non-coercive counseling following a prenatal diagnosis of Down syndrome. In 2015, Ohio enacted a Down syndrome Pro-Information statute that required the Ohio Department of Health to create a Down syndrome information sheet that contains “only information that is current and based on medical evidence.”²⁵¹ For example, the fact sheet states that “[r]aising a child with Down syndrome may involve more time and commitment than raising one without” but also reports that “[r]esearch shows that the majority of adults with Down syndrome report that they are happy with their lives.”²⁵²

The Pro-Information statute is part of the reproductive *justice* agenda—to help pregnant people make non-coercive decisions about their reproductive capacity. Rather than imparting pregnant people with wildly inaccurate information when they become pregnant,²⁵³ this statute tries to provide accurate information and invite a balanced conversation. The National Down Syndrome Society supports it, and twenty-three states have adopted it.²⁵⁴

Ohio’s Down syndrome abortion ban ended this effort to further reproductive justice. Once a physician learns that a pregnant person has received a prenatal diagnosis of Down syndrome, the medical professional must end any discussion of alternatives and inform the pregnant person that the health care facility can no longer perform abortion services.²⁵⁵ Rather than informing their choices, the Down syndrome statute ends their choices. It has become part of the coercion that pregnant people routinely face in their lives.

Further, Ohio’s purported concern for people with Down syndrome is inconsistent with its actual treatment of people born with Down syndrome. Ohio has lost or settled dozens of lawsuits involving its treatment of the rights of people born with developmental disabilities,

251. OHIO REV. CODE ANN. § 3701.69(A)(2) (West 2022).

252. OHIO DEP’T HEALTH, DOWN SYNDROME FACT SHEET (2020) <https://odh.ohio.gov/know-our-programs/down-syndrome/resources/factsheet> [<https://perma.cc/4XBV-ARKV>].

253. See generally Ruth Colker, *Uninformed Consent*, 101 B.U. L. REV. 431 (2021) (surveying misinformation in states’ so-called informed consent statutes).

254. *Policy & Advocacy*, NAT’L DOWN SYNDROME SOC’Y, <https://ndss.org/advocacy> [<https://perma.cc/7E3W-LRVD>].

255. See OHIO REV. CODE ANN. § 2919.10(B)–(C) (West 2018) (prohibiting and imposing criminal liability for any abortion based, *in whole or in part*, on the diagnosis or belief of Down syndrome in the unborn fetus).

such as Down syndrome.²⁵⁶ The abortion ban does nothing to improve the education, health care, and living conditions for people born with Down syndrome. As disability-rights activist David Perry said in his opposition to this legislation: “The cynical use of my son’s disability as a wedge issue hasn’t made the world any better for him.”²⁵⁷ The fact that the state had been repeatedly sued for its mistreatment of children with Down syndrome, after they were born, was irrelevant to the state’s ability to argue it was seeking to protect children with Down syndrome by banning abortions after prenatal testing. The Sixth Circuit’s decision upholding the state’s Down syndrome abortion ban²⁵⁸ set the stage for the Supreme Court in *Dobbs* giving states full reign to ban abortions altogether with no consideration for the health or well-being of the pregnant person.

3. *Impact of Dobbs*

The assault on the lives of disabled people continued with the Supreme Court’s recent decision in *Dobbs*. With rational basis scrutiny now governing state regulation of abortion, disabled people face even more coercion in their lives with less judicial protection. To understand the scope of the harm that *Dobbs* caused, it is important to remember the Court’s central holding:

A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical

256. See, e.g., *Doe v. Ohio*, No. 2:91-cv-0464, 2020 WL 728276 (S.D. Ohio Feb. 12, 2020) (granting the final approval of a Settlement Agreement between the State Board of Education of Ohio and children with disabilities who are within the Ohio public school system and their parents), *report and recommendation adopted*, No. 2:91-CV-464, 2020 WL 996561 (S.D. Ohio Mar. 2, 2020).

257. David M. Perry, *How Ohio Is Using Down Syndrome To Criminalize Abortion*, PAC. STANDARD (Oct. 3, 2017), <https://psmag.com/social-justice/gop-using-down-syndrome-as-cynical-wedge> (last visited May 17, 2023).

258. See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 535 (6th Cir. 2021) (en banc) (holding that the state offered legitimate interests in support of its Down syndrome abortion ban), *abrogated by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.²⁵⁹

This holding is the strongest version of rational basis that the Court could cite. The legislature does not have to be right about its medical facts, such as whether the fetus can actually feel pain or whether an abortion ban promotes maternal health. It simply can “think” that a statute furthers one of the state interests listed as presumptively legitimate. And, unfortunately, when considering its “protection of maternal health and safety,” the legislature need not consider the possibility of a pregnant, disabled person.

The *Dobbs* opinion offers no mandatory exceptions from abortion bans. So, there is no reason to think that a state would have to offer an exception in the event of pregnancy arising from rape. Carrie Buck epitomizes the experience of many disabled women, in that her disempowered status made her susceptible to rape without judicial redress. U.S. Department of Justice data has found that “[t]he rate of violent victimization against persons with disabilities . . . was 2.5 times higher than the age-adjusted rate for persons without disabilities . . . in 2014.”²⁶⁰ More specifically, the rate of rape/sexual assault for persons with disabilities (1.7 per 1,000) was more than three times the rate for persons without disabilities (0.5 per 1,000).²⁶¹ Thus, disabled people are much more likely than nondisabled people to experience a pregnancy as a result of rape.

And, when disabled people become pregnant, they often face more serious morbidity or mortality outcomes than nondisabled people. Those problems are even more acute if the pregnant individual has limited access to high-quality health care, a persistent problem in the United States. Although it is difficult to quantify these health risks, a carefully done study in Ontario, Canada assessed these risks within a country that has a national health insurance system.²⁶² The study found

259. *Dobbs*, 142 S. Ct. at 2284 (internal citations omitted).

260. Erika Harrell, *Crime Against Persons with Disabilities, 2009–2014—Statistical Tables*, BUREAU OF JUSTICE STATISTICS 1 (Nov. 2016), <https://bjs.ojp.gov/content/pub/pdf/capd0919st.pdf> [<https://perma.cc/8UDL-ETYG>].

261. *Id.* at 4, tbl.2.

262. Hilary K. Brown, Joel G. Ray, Simon Chen, Astrid Guttman & Susan M. Haverkamp et al., *Association of Preexisting Disability with Severe Maternal Morbidity or Mortality in Ontario, Canada*, JAMA NETWORK OPEN 1–2 (Feb. 8, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2776018> [<https://perma.cc/BMQ8-79VN>].

that “the adjusted relative risk of severe maternal morbidity or death was 29% higher among women with a physical disability, 14% higher among women with a sensory disability, 57% higher among women with an intellectual/developmental disability, and 74% higher among women with 2 or more disabilities.”²⁶³ Consistent with an interest in reproductive justice through access to a full range of reproductive services, the authors conclude that their “findings demonstrate an urgent need to improve preconception and perinatal supports for women with disabilities to prevent these rare but devastating outcomes.”²⁶⁴ Their suggestions seek to counter the invisibility of disabled, pregnant people, not merely their misappropriation.

This documented need for better access to a full array of reproductive services, however, should also not be used in a way that furthers false assumptions about pregnancy for disabled people and their families.

It is not unusual for women whose disabilities do not affect their gynecological functions to have their pregnancies labeled high-risk and to be referred for unnecessary consultations or tests by an overanxious clinician. Caesarean sections and induction of labor may occur more frequently in women with disabilities, even in the absence of standard medical indications.²⁶⁵

On the other hand, there is some evidence that:

the use of integrated, interdisciplinary team approaches . . . could promote quality care by facilitating improved planning [T]he use of interdisciplinary teams could help to compensate in gaps in obstetrical training by facilitating a better working relationship and exchange of knowledge between the obstetrician or nurse-midwife who is the expert in perinatal care and other clinicians whose specialty is focused on the disabling condition.²⁶⁶

These interdisciplinary teams are recommended, in part, because “additional obstetric education and training in the perinatal care of women with disabilities . . . has been slow in coming.”²⁶⁷ In other

263. *Id.* at 1.

264. *Id.* at 11.

265. Anita Silvers, Leslie Francis & Brittany Badesch, *Reproductive Rights and Access to Reproductive Services for Women with Disabilities*, 18 AM. MED. ASS’N J. ETHICS 430, 432 (2016).

266. Linda Long-Bellil, Monika Mitra, Lisa I. Iezzoni, Suzanne C. Smeltzer & Lauren Smith, *The Impact of Physical Disability on Pregnancy and Childbirth*, 26 J. WOMEN’S HEALTH 878, 883 (2017).

267. *Id.*

words, medical schools also assume the pregnant person is not disabled.

When the partner of a pregnant person is disabled, these false assumptions can also permeate medical care. Health journalist Laura Dorwart provides an in-depth description of her pregnancy, which was labeled as high-risk because of the disabilities of both herself and her partner.²⁶⁸ Despite the purported concern for dealing with her supposedly higher-risk pregnancy, it was impossible for her to give birth in a delivery room where her partner, who used a wheelchair, could hold the baby.²⁶⁹ When her partner requested wheelchair access, “[t]he staff member looked at him as if he’d asked whether she could spoon-feed caviar to our newborn.”²⁷⁰ Dorwart observes:

The juxtaposition between the high-level prenatal surveillance afforded to us on the basis of a potential disability and the lack of postpartum accommodation for our own disabilities was telling; we have plenty of cultural systems in place to avoid disability, but not many to deal with it as it already is.²⁷¹

While *Dobbs* pays lip service to a legitimate state interest in protecting maternal health and the elimination of disability discrimination, it provides no tools for disabled people to seek to advance their own reproductive interests by considering abortion or receiving better healthcare. The reference to nondiscrimination likely presumes that the only potentially disabled life, which a state might want to protect, is the fetus rather than the pregnant person. Its reference to disability nondiscrimination is another example of disability misappropriation.

An example of a pregnant person with cancer illustrates this problem. Dr. Sharon Liner provided an example of this issue in Preterm-Cleveland’s challenge to Ohio’s abortion restrictions.²⁷² Dr. Sharon Liner describes a twenty-five-year-old patient who was undergoing chemotherapy for recurrent cancer.²⁷³ Because state law only valued the life of the *fetus* and not the pregnant patient, the patient was not able to obtain chemotherapy treatment until she had

268. Laura Dorwart, *The Ohio Abortion Ban’s Distortion of Disability Rights*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/opinion/ohio-abortion-disability-rights-ban.html> (last visited May 17, 2023).

269. *Id.*

270. *Id.*

271. *Id.*

272. See Affidavit of Sharon Liner at ¶ 14, Preterm-Cleveland v. Yost, No. A2203203 [available from author] (S.D. Ohio Aug. 31, 2022).

273. *Id.*

an abortion.²⁷⁴ Dr. Liner unsuccessfully tried to get a medical exemption for this patient so she could have an abortion in Ohio.²⁷⁵ When that attempt failed, the patient had to travel out of state for an abortion, further delaying her cancer treatment.²⁷⁶ Notice in this example that the medical needs of the pregnant person are not considered at all. She cannot continue with her cancer treatment while pregnant and she cannot terminate her pregnancy. Even by traveling out of state, she is forced to miss several cancer treatments. Her medical team apparently concluded that they could not lawfully continue cancer treatment while she was pregnant, even though she intended to terminate her pregnancy.²⁷⁷ Similarly, Aeran Trick, a Licensed Practical Nurse, describes a thirty-seven-year-old patient with stage III melanoma whose doctors told her that she could not receive life-saving treatment for herself so long as she was pregnant.²⁷⁸ The state mandates protection of fetal life above all other interests, including the life of a disabled patient.

The denial of abortion health care, itself, can also cause a disabling impairment. In the previous examples, remaining pregnant had disabling consequences for the pregnant patients because they could not get treatment for their cancer. For other pregnant people, the experience of being pregnant can be disabling, with abortion being the only remediation for the disabling conditions. For example, Dr. David Burkons recounts the experience of a high school student who had excessive vomiting during her pregnancy, with no medication lessening her symptoms.²⁷⁹ When she learned that Ohio law precluded her from having an abortion, she was forced to continue to experience

274. *Id.*

275. Ohio law provided that an abortion could not be performed after there is a “detectable heartbeat” unless the physician believed there was a “medical emergency necessitating the abortion.” See OHIO REV. CODE ANN. § 2919.193(A), (C)(1) (West 2022).

276. See Affidavit of Sharon Liner, *supra* note 272, at ¶ 14.

277. As a resident of Ohio, I have been receiving considerable medical treatment since abortions became unlawful in Ohio. Even though I am sixty-six years old, well past my reproductive years, I have been repeatedly asked if I might be pregnant as I have sought life-saving medical treatment. If I were pregnant, I assume that I would have been forced to value the fetus’ life over my own life.

278. See Affidavit of Aeran Trick ¶ 6, *Preterm-Cleveland v. Yost*, No. A2203203 (S.D. Ohio Aug. 26, 2022) [available from author].

279. See Affidavit of David Burkons ¶ 9, *Preterm-Cleveland v. Yost*, No. A2203303 (S.D. Ohio Sept. 2, 2022) [available from author].

her disabling conditions and had to be admitted to a hospital on suicide watch.²⁸⁰ The lack of health care treatment was itself disabling.

Another consequence of disabled people being invisible in discussions of abortion bans is that no consideration is given to the impact of these bans on nonpregnant disabled people who need access to certain medications. Some disabled women have been told by their doctors that they need to go on birth control or be sterilized if they wanted to keep taking a particular medication.²⁸¹ Neurologists from UC San Francisco have expressed concern that abortion restrictions will make it more difficult for women of childbearing age to obtain “teratogenic drugs that are linked to birth defects in the developing embryo and fetus.”²⁸² These drugs are used by women with various neurological disorders such as multiple sclerosis, migraines, and epilepsy.²⁸³ Methotrexate has been considered the “gold standard” for treatment of rheumatic illnesses since 1959, almost fifteen years before *Roe* was decided, yet doctors report that their patients are being delayed or denied this treatment following the *Dobbs* decision.²⁸⁴ “Major pharmacy chains . . . are instructing employees to make extra checks to validate that prescriptions will not be used to terminate pregnancies and delaying filling them until their intended use is confirmed.”²⁸⁵ CNN reports that Walgreens will no longer distribute the abortion medication mifepristone in twenty states following

280. *Id.*

281. Katie Shepherd & Frances Stead Sellers, *Abortion Bans Complicate Access to Drugs for Cancer, Arthritis, Even Ulcers*, WASH. POST (Aug. 8, 2022, 6:00 AM), <https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis> [<https://perma.cc/86JX-BLXZ>] (fearing criminal liability in states with strict abortion restrictions, many doctors and pharmacists are reluctant to prescribe medications that treat a variety of conditions but that also carry the risk of ending a pregnancy or causing birth defects).

282. Univ. of Cal.-S.F., *Abortion Ban May Mean Denial of Effective Drugs for Women with MS, Migraine, Epilepsy*, SCI. DAILY (July 13, 2022), <https://www.sciencedaily.com/releases/2022/07/220713163355.htm> [<https://perma.cc/YFF4-6VAH>].

283. *Id.*

284. Sonja Sharp, *Post-Roe, Many Autoimmune Patients Lose Access To ‘Gold Standard’ Drug*, L.A. TIMES (July 11, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-07-11/post-roe-many-autoimmune-patients-lose-access-to-gold-standard-drug> [<https://perma.cc/7VRC-7T8G>].

285. Shepherd & Sellers, *supra* note 281.

guidance from attorneys general in those states.²⁸⁶ These kinds of rejections from pharmacies make it difficult for OB-GYNs to provide appropriate care to their patients who are experiencing miscarriages. When pharmacies insist on a phone call with the doctor before filling a prescription, delays can occur for several days while pharmacies try to reach doctors over the weekends or after hours.²⁸⁷

Not all pregnancies, of course, are planned or intentional. Some disabled women know they are taking a medication that has harmful effects on the fetus and become pregnant unintentionally. “Going without such treatments can be dangerous . . . [T]he risk of death during pregnancy for a person with epilepsy is 10 times the risk for a person without epilepsy, partly because patients may stop taking their medication while pregnant without consulting a doctor.”²⁸⁸ Similar risks occur for people who take lithium, a drug that can be used in the treatment of bipolar disorder but which is also known to associated with risks in pregnancy. Some experts worry that being forced to go off lithium during pregnancy could cause an elevated risk of suicide or overdose in the postpartum period.²⁸⁹ Even before *Dobbs* was decided, psychiatrists considered the use of teratogenic medications as a “last resort” for women of child-bearing age because of the increased likelihood of “neural tube defects, limb and cardiac anomalies, cognitive deficits, and autism.”²⁹⁰ Some states, like Tennessee, have specifically excluded mental health from the types of bodily functions

286. Carma Hassan & Nathaniel Meyersohn, *Walgreens Will Not Distribute Abortion Pill in 20 States*, CNN (Mar. 3, 2023, 5:32 PM), <https://www.cnn.com/2023/03/03/business/abortion-pills-mifepristone-walgreens-pharmacies/index.html> [<https://perma.cc/H5BD-8RZA>].

287. Christina Cauterucci, *Abortion Bans Are Already Messing Up Access to Other Vital Meds*, SLATE (May 24, 2022, 5:45 AM), <https://slate.com/news-and-politics/2022/05/abortion-texas-pharmacies-refusing-prescriptions-misoprostol-methotrexate.html> (last visited May 17, 2023).

288. Meena Venkataramanan, *Their Medications Cause Pregnancy Issues. Post-Roe, That Could Be Dangerous*, WASH. POST (July 25, 2022, 11:39 AM), <https://www.washingtonpost.com/health/2022/07/25/disabled-people-abortion-restrictions/> [<https://perma.cc/5354-K47N>].

289. *Id.*

290. Bryan Barks, *When Medication Risks Birth Defects, Abortion Bans Force Women into an Agonizing Dilemma*, SLATE, (Aug. 31, 2022, 5:55 AM), <https://slate.com/technology/2022/08/abortion-access-mental-health-depakote-bipolar.html> [<https://perma.cc/97WD-663E>].

that can be impaired by a pregnancy, and thereby necessitate a lawful abortion for health reasons.²⁹¹

Further, it is not necessarily feasible to time the use of teratogenic medication while planning pregnancies.²⁹² “There are also neurological diseases, such as having a central nervous system neoplasm, that are not immediately life threatening, but where a delay in treatment due to pregnancy could put both the health and life of the mother at risk.”²⁹³ Neurologists, therefore, worry the restriction on the use of effective medications during pregnancy “could increase risk of morbidity, mortality, and irreversible disability accumulation for women with neurologic diseases.”²⁹⁴

Thus, the field of reproductive justice is replete with disability misappropriation. A purported concern for anti-eugenics measures does nothing to advance the interests of people who live with disabilities. When disabled people become pregnant, they may be coerced into terminating their pregnancy or receive inadequate health care to support their pregnancy. And if disabled people need to access medications that can cause harm to a fetus, they may find themselves denied treatment even if they are not pregnant. Supposed concern for a disabled fetus is merely a wedge issue to pit the disability community against the abortion rights community. That concern does nothing for the many children born with disabilities who receive inadequate state assistance throughout their lives. As increasing numbers of people come to understand the anti-abortion movement as misappropriating a concern for disabled people, a wedge issue has become a unity issue. The disability community has long understood the importance of bodily autonomy and control over healthcare issues. The reproductive justice movement has now embraced that understanding.

291. *Id.*

292. “[C]ontrolling the timing of teratogenic medication use may not be feasible in the short-term treatment of certain disorders such as medically refractory status epilepticus, infectious and autoimmune encephalitis, or vasculitis.” Sara C. LaHue, Dawn Gano & Riley Bove, *Reproductive Rights in Neurology—The Supreme Court’s Impact on All of Us*, 79 JAMA NEUROLOGY 961, 962 (2022), <https://jamanetwork.com/journals/jamaneurology/article-abstract/2794176> [<https://perma.cc/3P5T-9XDZ>].

293. *Id.*

294. *Id.*

CONCLUSION

Disability misappropriation is a systemic problem. It has influenced the adverse treatment of disabled people in the educational, institutional, and reproductive arenas. From birth to death, it has often had an adverse influence on the lives of disabled people as they receive inadequate and coercive health care, poor education, and limited housing options. While federal law has sometimes sought to provide some legal protection against this coercion, judges have been too willing to accept limitations on those rights in the purported name of disability rights. Constitutional protection continues to be largely absent from the lives of disabled people while the courts increasingly protect majoritarian religious views. “Nothing about us without us” must mean that disability is not appropriated merely out of service to a political agenda that harms the disability community.