Reproducing Dignity: Race, Disability, and Reproductive Controls

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INTRODUCTION

Women's reproductive rights are under widespread assault. Descriptions of this assault often focus on restraints on women's ability to access contraception or abortion — on their freedom and ability to avoid bearing children. Equally destructive of women's reproductive freedom, however, are impediments to some women's ability to bear children. Black women and women with disabilities[1] have experienced numerous constraints on their freedom to form and maintain families, as other scholars have noted. However, the parallels between the childbearing experiences of women in these two groups are rarely explored. [2] This Article fills that void. Women in these two categories

[1] This Article will explore the constraints on both women with physical disabilities and those with mental disabilities.

Language choices in writing about race and disability matter. In this Article, I generally use "Black" rather than "African American" because not all persons who experience anti-black racism are either African or American. Choices of language about disability must also be made:

> The global disability rights movement is divided on whether to use the term "disabled people" or "people with disabilities." The latter term is consistent with the "people-first" terminology adopted by the UN Convention on the Rights of Persons with Disabilities, and is generally preferred by disability rights activists in the United States. . . . However, . . . others within the disability rights movement prefer the term "disabled people" as a political identification, and feel that this terminology more accurately reflects the structural barriers to social inclusion as the main problem, rather than the impairment itself.

CTR. FOR REPROD. RIGHTS, SHIFTING THE FRAME ON DISABILITY RIGHTS FOR THE U.S. REPRODUCTIVE RIGHTS MOVEMENT 3 (2017), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Disability-Briefing-Paper-FINAL.pdf [https://perma.cc/EY5F-YZ9L]. In light of this division within the disability rights movement, this Article generally follows the preference for "people-first" terminology but also uses "disabled people" language in some instances. Finally, in recognition of the prevalence of overlapping identities, I use the phrase "Black and disabled women" to include Black women who are not disabled, disabled women who are not Black, and women who are both Black and disabled.

[2] *See, e.g.*, Ilhom Akobirshoev, Susan L. Parish, Monika Mitra & Eliana Rosenthal, *Birth Outcomes Among US Women with Intellectual and Developmental Disabilities*, 10 DISABILITY & HEALTH J. 406, 407 (2017) (discussing the lack of research about healthcare disparities for people with disabilities). Slightly more attention has been paid to women who are both Black and disabled who are already mothers. *See, e.g.*, Angela Frederick, *Visibility, Respectability, and Disengagement: The Everyday Resistance of Mothers with Disabilities*, 181 SOC. SCI. & MED. 131, 133 (2017) (suggesting that motherhood is an act of defiance against cultural assumptions of maternal role unfitness); Anna Hinton, *Making Do with What You Don't Have: Disabled Black Motherhood in Octavia E. Butler's* Parable of the Sower *and* Parable of the Talents, 12 J.

are subject to indignity in the form of intrusions on their autonomy, invasions of their bodies, and denials of their individual worth. Two stories begin to suggest the parallels the Article will examine.

Mary Moe

In 2011 the Massachusetts Department of Mental Health petitioned a court to appoint the parents of a thirty-two-year-old pregnant woman (known in court documents as "Mary Moe") as her temporary guardians because she had a psychiatric disability.[3] The medication recommended to treat Mary's condition risked harm to the developing fetus, and her parents sought authorization to consent to an abortion.[4] Despite Mary's expressed objection to abortion on religious grounds and without a hearing, the judge ordered that Mary's parents be appointed as her guardians, suggesting that they might trick her to going to the hospital for the abortion if needed.[5] But the judge did not stop there. Of her own accord and without any notice, she ordered the medical facility that performed the abortion to sterilize Mary "to avoid this painful situation from recurring in the future."[6]

Marshae Jones

In December 2018, Marshae Jones lost a pregnancy at five months. Losing a pregnancy can be profoundly difficult for a woman; a significant number of women experience depression, anxiety, or even post-traumatic stress disorder ("PTSD"), conditions that may be disabling.[7] For Jones, a Black woman, however, losing her pregnancy resulted in a manslaughter indictment. An Alabama grand jury charged her with causing the death of her own fetus after another woman shot Jones in the belly during a fight. Jones' alleged crime, for which the

LITERARY & CULTURAL DISABILITIES STUD. 441, 450-55 (2018) (connecting the "strong black woman" and "supercrip" stereotypes).

[3] *In re* Guardianship of Moe, 960 N.E.2d 350, 352 (Mass. App. Ct. 2012).

[4] *See id.* at 353.

[5] *Id.*

[6] *Id.* Mary Moe appealed the trial court's orders, and the Massachusetts appellate court reversed the order of sterilization and vacated the order that Moe undergo an abortion and remanded the case "for a proper evidentiary inquiry and decision on the issue of substituted judgment." *Id.* at 355.

[7] *See* Jessica Farren, Nicola Mitchell-Jones, Jan Y. Verbakel, Dirk Timmerman, Maria Jalmbrant & Tom Bourne, *The Psychological Impact of Early Pregnancy Loss*, 24 HUM. REPROD. UPDATE 731, 732 (2018); Danny Horesh, Malka Nukrian & Yael Bialik, *To Lose An Unborn Child: Post-Traumatic Stress Disorder and Major Depressive Disorder Following Pregnancy Loss Among Israeli Women*, 53 GEN. HOSP. PSYCHIATRY 95, 95-96 (2018).

penalty could have been years in prison, was provoking a fight with the other woman, who pulled a gun in self-defense. A local police officer summed up the rationale: "'The investigation showed that the only true victim in this was the unborn baby,' . . . 'It was the mother of the child who initiated and continued the fight which resulted in the death of her own unborn baby.'"[8] Ultimately, the district attorney decided to dismiss the case, describing it as "disturbing and heartbreaking" and concluding that prosecuting Jones would not be "in the best interest of justice."[9]

These two stories may appear to have little in common. Both accounts, though, demonstrate how the law, by giving effect to long-standing social biases, can operate to express disrespect for Black women and women with disabilities[10] who are pregnant or seeking to become mothers. They are but two examples of indignity heaped upon pregnant women[11] who deviate from ideals of motherhood — indignity in the form of intrusions on autonomy, invasions of the body, and denial of individual worth.

Many of the constraints on childbearing that this Article describes have their roots in the United States' history of overt eugenics laws, including compulsory sterilization laws and anti-miscegenation laws, which operated against both Blacks and people with disabilities. Several of the contemporary policies that I describe reflect a more covert eugenic spirit. Not only do Black women and women with disabilities face distinctive and parallel barriers to becoming pregnant, but once they achieve pregnancy, both groups face more perils associated with

[8] Carol Robinson, *Alabama Woman Loses Unborn Child After Being Shot, Gets Arrested; Shooter Goes Free*, AL.COM (June 27, 2019), https://www.al.com/news/birmingham/2019/06/woman-indicted-in-shooting-death-of-her-unborn-child-charges-against-shooter-dismissed.html [https://perma.cc/5RKD-PU76].

[9] Carol Robinson, *Marshae Jones Will Not Be Tried for Manslaughter in Unborn Baby's Death, DA Says*, AL.COM (July 3, 2019), https://www.al.com/news/birmingham/2019/07/marshae-jones-will-not-be-tried-for-manslaughter-in-unborn-babys-death-da-says.html [https://perma.cc/5YS9-5Q94].

[10] To be sure, other persons — immigrants, persons who identify as LGBTQ, and women of color more broadly — also are subjected to these indignities. By narrowing my focus, I do not mean to discount their experiences or suggest they do not parallel and intersect with in important ways the experiences of people with disabilities and Black people. I decided to examine the specific experiences of Black women and women with disabilities in order to permit some focus and because of how striking I found the parallels in their experiences. Similarly, the Article focuses on Black women, not the broader group of "women of color," because — despite sharing many concerns with women in the broader category — Black women in the United States have a distinctive history, which has generated distinctive contemporary concerns.

[11] Not all persons who can become pregnant identify as women. Transgender men and non-binary or gender nonconforming individuals may become pregnant. This Article's analysis is framed in terms of cisgender women.

pregnancy and childbirth. Finally, Black women and women with disabilities who become mothers face greater risks of losing their children to a child welfare system that views them as deficient mothers.[12]

Relying on concepts of dignity found in human rights law and United States constitutional law, this Article argues that these barriers to bearing children and forming healthy and secure families insult the dignity of Black women and women with disabilities. While the definition of "dignity" is frustratingly imprecise, its connotations are rich and multi-faceted. They provide a conceptual focus for the parallel harms experienced by women for whom law and policies make it difficult or dangerous to become a mother. These affronts to dignity are inconsistent with an understanding of Black women and women with disabilities as inherently worthy and fully human.

Although the historical and contemporary experiences of Black women and women with disabilities differ in many ways, appreciating how their experiences of childbearing constraints parallel one another may help coalesce their support for reproductive justice. The reproductive justice ("RJ") movement, which gained force in the 1990s as a movement led by feminist, activist women of color, embraces three central values: the right not to have a child (access to contraception and abortion), the right to have a child, and the right to parent that child.[13] RJ's emergence reflected the dissatisfaction of women of color with the predominantly White pro-choice movement's focus on abortion rights and liberal feminists' emphasis of autonomy-based understandings of choice.[14] In contrast, RJ attends to the historical and societal structures

[12] *See* Robyn M. Powell & Michael Ashley Stein, *Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 FRONTIERS L. CHINA 53, 58-59 (2016) ("[T]he ideology undergirding eugenic sterilization continues to curtail sexual, reproductive, and parenting rights of persons with disabilities . . . .").

[13] *See generally* JAEL SILLIMAN, MARLENE GERBER FRIED, LORETTA ROSS & ELENA R. GUTIÉRREZ, UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE (2d ed. 2016) (discussing the history of the Reproductive Justice movement); Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. SOC. SCI. 327 (2013) (citing LORETTA J. ROSS, UNDERSTANDING REPRODUCTIVE JUSTICE (2006)) (discussing the differences between the Reproductive Rights movement and the Reproductive Justice movement); Kimala Price, *What is Reproductive Justice?: How Women of Color Activists are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42 (2010) (discussing the cultural context of the Reproductive Justice movement).

[14] *See* Luna & Luker, *supra* note 13, at 335 (describing the emergence of "a critique of (middle-class) able-bodied White women's presumption that their experience adequately represented all women's experiences"). This critique, as expressed by Jael

that have denied women — particularly poor women and women of color — the political, economic, and social power and resources necessary to make decisions about reproduction and family.

In addressing the experiences of women who have been marginalized, the rhetoric of reproductive justice activists and theorists emphasizes intersectionality, a framework that takes into account the overlapping experiences and identities of people who have experienced discrimination.[15] The past three decades have witnessed the expansion of intersectional thinking as a mode of considering how the multiple facets of a person's identity interact to affect her experience, as well as illuminating how interconnected systems of power and control regulate women's lives.[16] Although intersectional theory and rhetoric sometimes encompass the role of disability, a fuller exploration of the parallels and intersections between the lived realities of women with disabilities and Black women relating to childbearing may serve to foster great solidarity.[17] Fostering alliances and growing the communities that RJ

Silliman, Marlene Gerber Fried, Loretta Ross, and Elena R. Gutiérrez, leaders in the RJ movement, emphasizes the lived context for reproductive decisions:

> A sole focus on abortion is separated from the lives and daily concerns of most women. While a low-income woman may have one or two abortions in her life, she also must deal with poor, unsafe housing, inept medical care, lack of health insurance, pay inequities, and a host of other issues on an ongoing basis. Severing abortion from these day-to-day concerns casts the pro-choice movements as overprivileged, elitist, and insensitive to the realities of many women's lives.

SILLIMAN ET AL., *supra* note 13, at 295.

[15] Kimberlé Crenshaw's original insights regarding intersectional experiences addressed the law's failure to recognize the dual and mutually reinforcing dimensions of workplace discrimination to which plaintiffs who were both female and Black were subjected. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40.

[16] *See* Luna & Luker, *supra* note 13, at 329 (describing "an interconnected system . . . [that] regulates people's reproductive futures through assessments of worthiness originating in assumptions about race, class, and disability (among other dimensions)").

[17] *See* Dara Shifrer & Angela Frederick, *Disability at the Intersections*, 13 SOC. COMPASS, 1, 1-2 (2019), https://doi.org/10.1111/soc4.12733 [https://perma.cc/4GFJ-YGJQ] (suggesting sociologists have not adequately considered disability as an axis of stratification). I am not the first to recognize the similarities, as well as the divergences, between the concerns advanced by the reproductive justice movement and those of the disability rights movement. *See* Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL'Y REV. 101 (forthcoming 2020) (manuscript at 113) ("Just as 'regulating Black women's reproductive decisions has been a central aspect of racial oppression in America,' regulating disabled people's reproductive decision has been a central aspect of disability oppression in America."); Seema Mohapatra, *Politically*

advocates for may produce progress toward specific policy and material goals. Moreover, increasing solidarity may itself enhance the dignity of women who increasingly value one another's shared humanity.

This Article focuses on the distinctive experiences of Black women and disabled women[18] as examples in order to highlight the need to examine the commonality and intersectionality of women's experiences across boundaries of identity. The history of reproduction in the United States is replete with examples of discrimination and oppression across identities. For example, eugenically inspired immigration controls in place from the early twentieth century to today have affected Latina and Asian women, and Native American women and women in Puerto Rico have also suffered involuntary sterilizations.[19] While the broadly constituted group "women of color" shares many similar experiences, specific racial and ethnic groups also have distinctive histories and face distinctive prejudices. Additionally, although this Article focuses on how Black and disabled women's ability to *have* children is controlled, that ability is only one aspect of their reproductive liberty. Equally important is the freedom to choose *not* to have children, but the freedom to avoid childbearing lies beyond this Article's scope.

This Articles taps into the rich scholarly literature on how laws, policies, and practices constrain childbearing and motherhood by Black women and women with disabilities. It explores how those constraints operate in parallel fashion and at times intersect.[20] My intent is not to compare or equate the experience of one group with another. The historical experiences or contemporary indignities endured by Black

Correct Eugenics, 12 FIU L. REV. 51, 79 (2016); Dorothy Roberts & Sujatha Jesudason, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 10 DU BOIS REV. 313, 318 (2013); Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 589 ("Reproductive justice should include a commitment to adequate funding for the programs on which disabled adults and children depend, as well as the removal of perverse legal incentives that discourage disabled Americans from taking steps that would make employment more realistic.").

[18] Despite its focus on Black women and disabled women, the Article does not claim to represent the experience of *all* Black and disabled women. Neither group is a monolith. Women's experiences are diverse. But the fact that women in these groups disproportionately experience constraints on childbearing deserves to be noted and explored.

[19] *See* ELENA R. GUTIÉRREZ, FERTILE MATTERS: THE POLITICS OF MEXICAN-ORIGIN WOMEN'S REPRODUCTION 36-39 (2008); *see also* SILLIMAN ET AL., *supra* note 13, at 16.

[20] Without question, my project depends on the work of others whose deep focus on particular instances of constraint enables me to step back and examine the landscape for similar features. More particularly, as an abled, White woman, I am deeply indebted to those scholars, advocates, and activists who are members of marginalized groups and who have brought their lived experience to bear on these issues.

women and disabled women are not the same, and comparisons to assess whose disadvantage has been worse (the "oppression Olympics") seem unlikely to advance the cause of dignity and justice for both groups. Rather, my purpose in undertaking this project is to bring together prior research and build on it to highlight the potential for greater coalition building — in the words of columnist Jonathan Capehart, to help "build a bridge of empathy, openness and awareness"[21] that could support greater solidarity.

Part I of the Article lays the foundation for this examination by describing Eugenics-era laws and policies that asserted public health justifications for preventing reproduction by certain groups. Part II explores instances where eugenically inspired barriers to childbearing by Black women and women with disabilities persist and parallel each other. It focuses particularly on biological interference (sterilization and contraception), impediments created by welfare and criminal justice policies, and barriers to accessing assisted reproduction technologies. Part II also considers the ways motherhood is devalued for Black women and women with disabilities. This devaluation is apparent in the disproportionately perilous pregnancies and precarious motherhood that women in these groups face. Part III examines the parallels in the experiences of Black women and disabled women through the lens of dignity, probing how the previously described barriers to bearing and raising children violate their dignity. Part IV sketches out how appreciating the parallels described in this Article might contribute to both theoretical vigor and enhanced social movement solidarity among advocates for reproductive justice.

I. HISTORICAL PARALLELS: EUGENICS-ERA CONTROLS ON REPRODUCTION

The contemporary infringements on the freedom to have children experienced by Black and disabled women have historic roots in the eugenics movement that flourished in the United States in the early twentieth century. Without attempting to provide a full description of the eugenics movement,[22] this Part highlights how that movement foreshadowed the situation that modern day women face.

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[21] Jonathan Capehart, *What Pete Buttigieg Really Said About Being Gay, Prejudice and Blacks*, WASH. POST (Dec. 3, 2019, 6:00 AM EST), https://www.washingtonpost.com/opinions/2019/12/03/what-mayor-pete-really-said-about-being-gay-prejudice-blacks [https://perma.cc/5LJ4-DPX3].

[22] Others have recounted the history of the Eugenics movement. *See, e.g.*, DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985) (providing a long-arc narrative history of eugenics); PAUL A. LOMBARDO, THREE

A. Sorting Stock

The eugenics movement was premised on sorting people into categories of superior and inferior stock. The basic idea was that society would be improved in a variety of ways if people of superior lineage reproduced more and people of inferior lineage reproduced less. Francis Galton originally coined the term "eugenics" to describe "the science of improving stock . . . to give to the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had."[23] In simple terms, eugenics contemplates selective mating to accelerate the process of natural selection. Galton urged the "'better classes' to mate and breed liberally," while accepting that the government might have some role to play in limiting the fertility of those on the lower rungs of society.[24]

The validity of this premise, of course, depends on a hereditarian understanding of the transmission of social problems and an ability to distinguish between "superior" and "inferior" stock. The early twentieth century Eugenicists asserted scientific bases for their theories, relying on genealogical studies from "hereditary science" of the hereditary character of traits such as poverty, criminal conduct, laziness, feeblemindedness, and sexual immorality that were found to cluster in poor families.[25] They also tapped into the emerging discipline of genetics, and the resulting "coalescing of theories of improving the human race by selective breeding with scientific discoveries in genetics had a synergistic effect on the eugenics movement."[26] Early twentieth-century Eugenicists believed that most human traits were passed from one generation to the next as a matter of genetic heredity, and this view received the endorsement of mainstream scientists and public figures.[27] These theories were subsequently discredited and now are often referred to as "pseudoscientific."[28]

GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2008) (detailing the factual and legal history of *Buck v. Bell*); ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2005) (providing an overview of the history of Eugenics and forced sterilization).

[23] Mohapatra, *supra* note 17, at 53 (citing FRANCIS GALTON, INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT 17 n.1 (Gavan Tredoux ed., 2d ed. 1907)).

[24] LOMBARDO, *supra* note 22, at 7.

[25] *See id.* at 8-9 (noting that reports were carried in such publications as *Scientific American* and *American Medical Weekly*).

[26] JUDITH DAAR, THE NEW EUGENICS: SELECTIVE BREEDING IN AN ERA OF REPRODUCTIVE TECHNOLOGIES 32 (2017).

[27] *See id.* at 33.

[28] Osagie K. Obasogie, *More Than Love: Eugenics and the Future of* Loving v. Virginia, 86 FORDHAM L. REV. 2795, 2797 (2018) (characterizing eugenics as "utter pseudoscience

B. Public Health, Prejudice, and Policy

The promises of the eugenics movement sounded laudable. The goals were to promote public health and mitigate social woes. It also, however, appealed to those who wished to rein in public responsibility for addressing social ills. In their claimed reliance on scientific bases to improve society, the Eugenicists included in their camp Progressives who sought to increase governmental efficiency by delegating the management of social welfare programs to experts.[29] But these theories, while claiming a scientific basis, also appealed to and reinforced prejudices in American society. Scientific theories of racial difference were consistent with eugenic theories: "White Americans had for over two centuries developed an understanding of the races as biologically distinct groups, marked by inherited attributes of inferiority and superiority."[30] Eugenics offered a scientific veneer to well worn discourses of racism and nativism.[31] The emerging movement struck a chord in White society that felt threatened by increasing immigration and a Black birth rate that exceeded their own. Several eugenic practices sought to isolate social groups as a way of preventing inferior traits from diluting and sullying the white gene pool.[32]

Eugenicists' theories found fertile ground in state and federal legislatures. The efforts of the Eugenicists did not stop at encouraging the citizenry to follow practices that would produce "better babies" to increase the "good stock." Instead, governments exercised their power to prevent the replenishment of the "inferior stock." Invoking the collectivist ethic of public health, states passed laws that placed burdens on those identified as bearers of unhealthy, dangerous, and societally expensive traits so that society as a whole might benefit.

The most well known were laws authorizing compulsory surgical sterilization of persons deemed "defective." Such laws, which were often accompanied by measures segregating those persons from

without merit"). Daar is more generous, but reaches the same conclusion: "While this rather simple assessment of an area as complex as human nature might strike the modern mind as wholly ill-supported and ill-advised, at the time it was enticing beyond the frailties of its own logic." DAAR, *supra* note 26, at 33.

[29] *See* LOMBARDO, *supra* note 22, at 17.

[30] DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 61 (2d ed. 2017).

[31] *See* Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 441 (2018).

[32] Obasogie, *supra* note 28, at 2797-98.

society,[33] were enacted in thirty-two states.[34] They associated social problems like poverty, lack of education, and unemployment with physical or mental traits carried by individuals, and sought to eliminate those traits by preventing those folks from reproducing. In short, they sought to cut off the propagation of hereditary lines believed to be inferior.[35] These laws applied to persons assumed to be feebleminded, degenerate, or otherwise unfit to reproduce and resulted in the surgical sterilization of approximately 65,000 people in the U.S. between 1907 and 1979.[36] Many of the persons sterilized had (or were thought to have) some kind of disability.[37] Harry Laughlin, a leading eugenicist, included in his capacious definition of "the socially inadequate classes" persons who were (using his terms) feeble-minded, insane, epileptic, diseased, blind, deaf, deformed, and crippled.[38] Although courts in a number of states initially found compulsory sterilization laws unconstitutional, the U.S. Supreme Court upheld Virginia's Eugenical Sterilization Law of 1924 in the notorious decision *Buck v. Bell*.[39] Justice Holmes' opinion in that case endorsed the Eugenicists' characterization of state-compelled sterilizations as pro-social, public health measures, analogizing the intrusion to compulsory vaccination. His conclusion still echoes today: "three generations of imbeciles are enough."[40]

The Eugenicists' conception of "fitness" was not limited to mental and physical disabilities, drunkenness, poverty, and criminality — it extended to race as well. Eugenic rationales supported the 1924 federal Immigration Restriction Act. That law responded to an influx of immigrants from southern and eastern Europe, believed to be more fertile than Americans but of inferior stock, by stemming the "rising tide of defective germ plasm."[41] President Calvin Coolidge's support of the law was frankly eugenic: "America must be kept American [because] biological laws show . . . that Nordics deteriorate when mixed with

[33] *See* DAAR, *supra* note 26, at 42-43 (providing a description of Eugenicists' measures seeking to place inferior stock in segregated custodial settings known as "colonies" to prevent their mixing with superior stock).

[34] *Id.* at 42.

[35] *See* Mohapatra, *supra* note 17, at 54.

[36] *See* DAAR, *supra* note 26, at 42.

[37] *See* LOMBARDO, *supra* note 22, at 43.

[38] *See* DAAR, *supra* note 26, at 43 (quoting HARRY LAUGHLIN, THE LEGAL STATUS OF EUGENICAL STERILIZATION 65 (2009)). It also included people who were "criminalistic," "inebriate," and "dependent." *Id.*

[39] *See* Buck v. Bell, 274 U.S. 200, 208 (1927).

[40] *See id.* at 207.

[41] Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 5 (1996).

other races."[42] Thus, Eugenicists were concerned not only about preventing the transmission of degenerate conduct or physical or mental impairment; they also saw the introduction of genes from darker skinned immigrants as threatening the superiority of the white race.

The concerns about White racial superiority and purity also produced anti-miscegenation laws in numerous states. Laws prohibiting interracial marriage were not a new product of the Eugenics era, but traced their origins to the colonial period. After Emancipation and the Reconstruction, some states had repealed their bans on interracial marriage, but a majority of states still had such laws by the mid-1920s. The flourishing eugenics movement supplied a purported public health justification for such bans and thus breathed new life into state efforts to prevent racial mixing.[43] To be clear, these laws were not simply racist attempts to prevent persons of different races from marrying and thus to enforce racial separation. They also sought to prevent the "pollution" of the White race that would result from interracial mating, so that the superior White stock might be preserved unsullied.[44] As such, they claimed public health justifications similar to those undergirdings.

Indeed, on the same day in 1924 that the involuntary sterilization law upheld in *Buck v. Bell* was enacted, the Virginia legislature also enacted the Racial Integrity Act.[45] According to Paul Lombardo, notorious "eugenic theorist[] and racial progapandist[]" Harry Laughlin consulted with the Virginia General Assembly on its 1924 revision of an existing anti-miscegenation law, arguing that "interracial mixing was dysgenic, likely to pollute the white gene pool to the detriment of future generations."[46] Virginia's law prohibited White people from marrying persons who were not White, but did not prevent intermarriage by nonwhite persons of different races. This feature of the Virginia law ultimately revealed its White supremacist motivation to the U.S.

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[42] DAAR, *supra* note 26, at 35-36 (quoting DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 97 (1985)).

[43] As Daar points out, some states had repealed their anti-miscegenation laws in the late nineteenth century, only to adopt new laws during the eugenics movement. *See id.* at 38.

[44] *See* Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 UC DAVIS L. REV. 421, 422-25 (1987) [hereinafter *Miscegenation*] (asserting that the Racial Integrity Act had a "more complex pedigree" founded on racism and employing eugenic justifications as a "respectable veneer"); Obasogie, *supra* note 28, at 2798.

[45] *See* Lombardo, *Miscegenation*, *supra* note 44, at 423-24.

[46] LOMBARDO, *supra* note 22, at 245.

Supreme Court, which held it unconstitutional in *Loving v. Virginia* a half century after its passage.[47]

Though eugenic laws authorizing involuntary sterilization of people with disabilities and anti-miscegenation laws may initially appear unrelated, they were in fact historically related and shared a eugenics ideology. Both types of laws asserted pseudoscientific public health justifications that sought to connect the social woes of poverty, criminality, and lack of education to disability and race. Both, however, actually reflected social prejudices and attempts to maintain dominance by the "fittest," namely non-disabled Whites.

Finally, beyond their legal force, eugenically inspired laws also carried an expressive value. These laws acted to devalue and dehumanize people deemed to be of inferior stock. They departed from the historical and biblical understanding of poverty (that the poor will always be with us and are fitting subjects of charity), replacing them with an understanding that associated poverty with biological inferiority, immorality, and degeneracy.[48] Thus, nondisabled Whites claimed not only physical and mental superiority over those whose proliferation they sought to contain, they also claimed moral superiority. The asserted moral degradation of lesser stock and races justified, to the minds of the scientific community, lawmakers, and the public, their segregation — both in terms of preventing marriage and creating "colonies" for the "feebleminded" and "epileptics."[49] The asserted moral superiority provided grounds for surgical invasions of the bodies of women and men, depriving them of the ability to have children and form a family. These laws also demonstrated an acceptance of "state involvement in reproductive practices,"[50] at least for some groups lacking power. Human reproduction — what we think of in our everyday lives as people having families — was treated in a purely instrumental fashion. It failed to accord value to either bodily integrity or the human desire to have children. Professors Michelle Goodwin and Erwin Chemerinsky put it powerfully: "The state tilled women's and girls' bodies like a farmer clears the land, removing offending species in

[47] *See* Obasogie, *supra* note 28, at 2798.

[48] *See* Michael B. Katz, *The Biological Inferiority of the Undeserving Poor*, *in* BEYOND BIOETHICS: TOWARD A NEW BIOPOLITICS 21, 21 (Osagie K. Obasogie & Marcy Darnovsky eds., 2018).

[49] *See, e.g.*, LOMBARDO, *supra* note 22, at 12-19 (describing the creation of the Virginia Colony for the Feebleminded and Epileptics).

[50] Obasogie, *supra* note 28, at 2796.

order to avoid their reoccurrence. In this case, snipping the fallopian tubes of little girls was taken as lightly as pruning weeds."[51]

Like a noxious weed, the notions regarding sorting stock and public health fostered by the eugenics movement have proven difficult to uproot. As the American public became aware of the Nazi regime's horrific and eugenically justified programs for the mass murder of people with disabilities and genocide of Jews, eugenic philosophy and science became discredited in the United States as an explicit basis for law and social policy. The apparent formal disavowal of eugenic policies, however, did not mean that eugenic thinking had been entirely uprooted from American political and social thinking. As Judith Daar puts it: "[e]ugenics was discredited as a matter of social, legal, and medical policy, but its extraction from the hearts and minds of those who truly believed in the certain heritability of all human traits would prove a long-term challenge."[52] The belief that some groups are less fit to reproduce or suited for parenthood persisted well into the second half of the twentieth century and the twenty-first century and continues to devalue Black and disabled women, as discussed in the next Part.

II. EUGENICS 2.0: CONTEMPORARY PARALLELS IN THE EXPERIENCES OF BLACK AND DISABLED WOMEN

"The past is never dead. It's not even past."

— William Faulkner[53]

Despite official repudiations of eugenic laws, Black women and disabled women have continued to face explicit or implicit pressures to limit their childbearing. Those pressures take varying forms, including programs of less-than-voluntary sterilizations, inducement to use contraception forms that serve societal ends rather than women's reproductive preferences, welfare policies designed to discourage childbearing, institutionalization of women with disabilities, mass incarceration of Black Americans, and limited access to assisted reproductive technologies.[54] Other scholars, like Dorothy Roberts, have

[51] Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1316 (2018).

[52] DAAR, *supra* note 26, at 46-47.

[53] WILLIAM FAULKNER, REQUIEM FOR A NUN 73 (1st Vintage Int'l ed. 2011).

[54] These types of pressure to limit childbearing have also been experienced by women in other groups, as well as by men in some instances. Women with disabilities and Black women are not the exclusive objects of the practices described below. They have disproportionately experienced them, however, to a degree not matched by other demographics.

thoroughly explored each of these topics and their connection to childbearing by Black or disabled women. Thus, I will only briefly review this work, while connecting how Black women and women with disabilities have faced these pressures. I do not mean to equate the experiences of these two groups of women,[55] but in several regards they bear some kinship.[56] Since both groups have been historically, and continue to be, devalued, disempowered, and disenfranchised, the parallels in their experiences deserve attention.

A. Persistent Stereotypes

Powerful lingering stereotypes shape the landscape in which Black and disabled women make decisions about having children. Although starkly different in some ways, these stereotypes convey a shared message. They evoke mental images that link eugenic precedents to more contemporary constraints.

Women with disabilities are commonly presumed to be uninterested or unable to engage in sexual activity,[57] incapable of fulfilling maternal roles, and, therefore, unlikely to reproduce.[58] Medical providers often share those unfounded assumptions.[59] Women with disabilities, however, are just as likely as non-disabled women to wish and plan to have children.[60] More than 160,000 women with physical disabilities

[55] Indeed, the experiences of individual women within each of these groups may vary widely. But the in-group sharing of experiences is sufficient to permit speaking of experiences shared within each group.

[56] I also am not here making the argument made in Kimani Paul-Emile, *Blackness As Disability?*, 106 GEO. L.J. 293, 293 (2018). Paul-Emile explores whether being Black in the U.S. might be considered disabling and how doing so would enable new approaches to race discrimination and structural inequality. *Id.*

[57] *See* Nicole Buonocore Porter, *Mothers with Disabilities*, 33 BERKELEY J. GENDER L. & JUST. 75, 110-11 (2018); *see also* Mary Ann McColl, Donna Forster, S.E.D. Shortt, Duncan Hunter, John Dorland, Marshall Godwin & Walter Rosser, *Physician Experiences Providing Primary Care to People with Disabilities*, 4 HEALTHCARE POL'Y 129, 143 (2008).

[58] *See* Leslie Francis, Anita Silvers & Brittany Badesch, *Women with Disabilities: Ethics of Access and Accommodation for Infertility Care*, *in* ETHICAL ISSUES IN WOMEN'S HEALTHCARE: PRACTICE & POLICY 259, 259 (2019); Lisa I. Iezzoni, Amy J. Wint, Suzanne C. Smeltzer & Jeffrey L. Ecker, *"How Did That Happen?" Public Responses to Women with Mobility Disability During Pregnancy*, 8 DISABILITY & HEALTH 380, 381-82 (2015) [hereinafter *How Did That Happen*].

[59] *See* Francis et al., *supra* note 58, at 266. As discussed below, however, people with intellectual disability are sometimes viewed as hypersexual. *See infra* text accompanying note 157.

[60] *See* Carrie L. Shandra, Dennis P. Hogan & Susan E. Short, *Planning for Motherhood: Fertility Attitudes, Desires and Intentions Among Women with Disabilities*, 46 PERSP. ON

are estimated to become pregnant annually in the United States,[61] and research indicates parallel rates of motherhood among women with and without psychiatric disabilities.[62]

If disabled women are presumed to be devoid of sexual interest or ability, Black women are often stereotyped as just the opposite. The "jezebel" and the "welfare queen" are among several stereotypes of Black American women related to sexuality and motherhood identified in a recent study.[63] Dating from when Black women were enslaved, the "jezebel" stereotype portrays Black women as "immoral, sexually promiscuous, and sexually available."[64] The "welfare queen" stereotype conjures the image of a single Black woman who is poor and uneducated and who procreates copiously to increase her welfare benefits.[65] It is of more recent vintage, but echoes a history that viewed enslaved women as "breeders."

Despite their divergence, these stereotypes of disabled women and Black women contribute to startlingly similar effects in constraining both groups' liberty to bear children. Moreover, stereotypes of both groups share a conviction that neither Black women nor disabled women are good mothers. This judgment undergirds policies infringing on their reproductive liberties, discussed in this Part. In addition, once Black or disabled women have children, it feeds the excessive willingness of child welfare agencies to remove their children from their custody, a phenomenon that Part II.C.2 highlights.[66]

SEXUAL & REPROD. HEALTH 203, 206-07 (2014). Women with disabilities, however, tended to be less certain that they would be able to have children. *See id.* at 207.

[61] Francis et al., *supra* note 58, at 260 (citing Lisa I. Iezzoni, Jun Yu, Amy J. Wint, Suzanne C. Smeltzer & Jeffrey L. Ecker, *General Health, Health Conditions, and Current Pregnancy Among U.S. Women with and Without Chronic Physical Disabilities*, 7 DISABILITY HEALTH J. 181 (2014)).

[62] Daryn H. David, Thomas Styron & Larry Davidson, *Supported Parenting to Meet the Needs and Concerns of Mothers with Severe Mental Illness*, 14 AM J. PSYCHIATRIC REHABILITATION 137, 137 (2011). Today, women with intellectual disabilities also bear children at high rates. Susan L. Parish, Monika Mitra, Esther Son, Alexandra Bonardi, Paul T. Swoboda & Leah Igdatsky, *Pregnancy Outcomes Among U.S. Women with Intellectual and Developmental Disabilities*, 120 AM. J. ON INTELL. & DEVELOPMENTAL DISABILITIES 433, 433 (2015).

[63] *See* Lisa Rosenthal & Marci Lobel, *Stereotypes of Black American Women Related to Sexuality and Motherhood*, 40 PSYCHOL. WOMEN Q. 414, 417 (2016). Rosenthal and Lobel's study finds evidence that stereotypes about Black women influence how people view Black women and that pregnancy contributes to these stereotypes. *See id.* at 418. The other stereotypes, less relevant to this Article, are the "mammy" and the "sapphire." *Id.* at 417.

[64] *Id.*

[65] *See id.*

[66] *See infra* Part II.C.2.

B. Contemporary Parallels: Interference with Childbearing

1. Biological Interference

After revelations of Nazi Germany's pursuit of racist and ableist eugenic philosophies to their logical and horrific ends, the fervor for eugenic social policies in the United States seemed to lose steam. States largely abandoned their official programs of compulsory eugenic sterilizations.[67] But eugenically inspired policies and practices persisted in state sponsorship and sanction of less overt attempts to keep Black and disabled women from having children. These included bodily intrusions to limit women's physical reproductive capacity, like sterilization, coercive contraception, and compelled abortion.

a. Black Women

In her book, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, Dorothy Roberts offers an in-depth and unsparing examination of the manifold ways that Black women have been robbed of their ability to have children or punished for actually having children.[68] She describes the shocking prevalence of sterilizations performed on Black women and girls from the 1940s through the 1970s, primarily, but by no means exclusively in the South.[69] Sterilizations performed on persons committed to state institutions reflected lingering eugenic sentiments directed to women who were both Black and deemed disabled.[70] In other cases, poor Black Medicaid enrollees who had just delivered a baby or who were receiving other medical care were subjected to hysterectomies without informed consent or medical justification.[71] These "Mississippi appendectomies," as Black women in the South dubbed them, were decried by Civil Rights leaders like Fannie Lou Hamer, who herself had been subjected to a hysterectomy without her consent.[72]

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[67] The laws authorizing those sterilizations, however, remained on the books in a majority of states into the 1970s. *See* Lisa C. Ikemoto, *Infertile by Force and Federal Complicity: The Story of* Relf v. Weinberger, *in* WOMAN AND THE LAW STORIES 179, 188 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (noting that twenty-six states had eugenics sterilization laws in 1973).

[68] ROBERTS, *supra* note 30, at 154.

[69] *Id.* Other women of color were targeted for unconsented-to sterilization in other parts of the country. *See* Ikemoto, *supra* note 67, at 196.

[70] ROBERTS, *supra* note 30, at 89-90.

[71] *Id.* at 90-91.

[72] *Id.*

Though not officially based on Eugenics-era laws, these sterilizations were the fruit of the population-control branch of eugenics philosophy that sought to diminish the economic burden it believed poor persons imposed on society. Some doctors admitted to acting on a belief that sterilizing poor women was needed to contain the growth of the welfare rolls,[73] or what Paul Lombardo called "the fiscal logic of sterilization."[74] One South Carolina doctor — the only obstetrician in his county accepting Medicaid patients — had a policy explicitly conditioning his delivery of a baby for a welfare recipient with multiple children on her sterilization following the delivery.[75] These "vigilante population control"[76] surgeries did not lie outside of mainstream policy thinking. Legislators in about a half-dozen states proposed measures permitting compulsory sterilization of women on welfare who were unmarried when they had babies.[77]

These open but officially unsanctioned sterilization practices[78] ultimately prompted a 1973 federal class action lawsuit with two sisters, Mary Alice and Minnie Relf, among the lead plaintiffs.[79] Mary Alice and Minnie were two poor Black girls; the younger sister, Minnie, was also mentally disabled. They were only fourteen and twelve years old respectively when they were sterilized by a federally funded program in Montgomery, Alabama. According to the district court opinion, Mary Alice and Minnie Relf were among 100,000 to 150,000 poor women sterilized annually by programs funded by the federal government.[80] Almost half of the women sterilized were Black,[81] and according to the court, "an indefinite number of poor people ha[d] been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless

[73] *Id.* at 92 (citing GENA COREA, THE HIDDEN MALPRACTICE: HOW AMERICAN MEDICINE TREATS WOMEN AS PATIENTS AND PROFESSIONALS 180-81 (1977)).

[74] LOMBARDO, *supra* note 22, at 247.

[75] ROBERTS, *supra* note 30, at 92; *see also* Ikemoto, *supra* note 67, at 195 (describing providers' methods of deception and coercion).

[76] Ikemoto, *supra* note 67, at 197.

[77] *See* ROBERTS, *supra* note 30, at 94.

[78] As Lisa Ikemoto notes, the unconsented-to sterilizations of the *Relf* era were not limited to welfare or Medicaid recipients. *See* Ikemoto, *supra* note 67, at 195.

[79] For a full description of the facts of the *Relf* litigation, see *id.* at 194-95.

[80] Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977). According to Lisa Ikemoto's account, "[t]he substantial majority of federally funded sterilization procedures were performed with the informed consent of competent patients." Ikemoto, *supra* note 67, at 191.

[81] ROBERTS, *supra* note 30, at 93 (citing ALLAN CHASE, THE LEGACY OF MALTHUS 16 (1976)).

they submitted to irreversible sterilization."[82] The *Relf* litigation led to regulatory changes heightening the procedural requirements required for sterilizations provided through federally funded programs, but their efficacy in ending abusive sterilizations of women of color is unclear.[83] Even at the end of the twentieth century, Black women were disproportionately likely to undergo sterilization as a form of birth control, as compared to White women.[84]

Involuntary sterilization has fallen out of favor in recent decades,[85] but some judges have still embraced an approach that restricts poor women's fertility to accomplish societal ends. In a number of reported cases, judges have pressured Black women to submit to restrictions on reproduction as a condition of probation.[86] These reports sometimes involve court-ordered sterilization.[87] More common, though, are cases like Darlene Johnson's. She was charged with child abuse in 1991 when a California judge presented her with the choice between a prison sentence of seven years or a single year in prison with a three-year probation term if she were implanted with Norplant.[88] The judge's action in Johnson's case was widely condemned, but her case was not unique. Judicial "prescriptions" for long-acting reversible contraception

[82] *Relf*, 372 F. Supp. at 1199. The court also noted that "[p]atients receiving Medicaid assistance at childbirth are evidently the most frequent target of this pressure." *Id.*

[83] *See* ROBERTS, *supra* note 30, at 96-97 ("A study conducted by the ACLU shortly after the regulations went into effect discovered that many hospitals were blatantly defying the law.").

[84] *See id.* at 97. To be sure, surgical sterilization is an effective method of family planning that should be among the choices available to a woman. Lisa C. Ikemoto, *Reproductive Rights and Justice: A Multiple Feminist Theories Account*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 249, 259 (Robin West & Cynthia Grant Bowman eds., 2019) ("Reproductive rights and women's health advocates have long supported surgical sterilization as an important family planning method."). But state-compelled or coerced sterilization, used as a method of population control or social control, is particularly troubling when it is imposed on subordinated women.

[85] Despite official disapproval, during the 2006-2010 period nearly 150 women inmates in the California prison system were sterilized without authorization. Bill Chappell, *California's Prison Sterilizations Reportedly Echo Eugenics Era*, NPR (July 9, 2013, 3:06 PM), https://www.npr.org/sections/thetwo-way/2013/07/09/200444613/californias-prison-sterilizations-reportedly-echoes-eugenics-era [https://perma.cc/FWF6-K7HU].

[86] ROBERTS, *supra* note 30, at 150-52; *see* Kimberly Mutcherson, *Reproductive Rights Without Resources or Recourse*, 47 HASTINGS CTR. REP. S12, S13 (2017).

[87] ROBERTS, *supra* note 30, at 150-52.

[88] *Id.* at 150-51. Norplant is a highly effective and long-acting, hormonal contraceptive device that is implanted in a woman's arm. A woman must seek medical assistance both to have Norplant initially inserted in her arm and to have the device removed.

("LARC") have appeared most frequently in cases where low-income minority women face a charge of child abuse or drug use during pregnancy.[89] The idea of trading reproductive freedom for physical freedom still appeals to some judges. In 2017, a Tennessee judge entered a standing order that offered inmates a thirty-day sentence reduction if they would be implanted with a long-acting contraceptive (for women) or undergo a vasectomy (for men).[90] Conditioning a woman's freedom on curtailment of her fertility resurrects the strand of eugenics thinking that viewed compulsory sterilizations as a solution to rampant criminality among the "inferior" classes.

Similarly, social policy discussions have entertained the use of LARC to reduce childbearing by poor women and girls of color ever since the Food and Drug Administration's approval of Norplant in 1990. Calls for using Norplant to address social ills followed quickly on the heels of the drug's approval, with an editorial in the *Philadelphia Inquirer* explicitly referring to the number of "Black children living in poverty" and advocating for financial incentives for welfare recipients to use the implant.[91] Outrage by Black leaders prompted a quick apology for the editorial, but the basic idea lives on. In recent years public health experts have discussed the potential value of encouraging "at risk" adolescents of color to use long-acting contraceptives like the intrauterine device ("IUD") and implants, often without mentioning that these forms of birth control, by requiring access to a physician for removal, shift control from women to physicians.[92] These discussions note not only benefits to the young women from preventing unplanned pregnancies, but also a projected reduction in Medicaid costs and welfare expenditures.[93] The idea has crossed into popular press outlets

[89] *See id.* at 195-97. See *infra* text accompanying notes 216–240, for a discussion of the criminalization of pregnancy.

[90] *See* Kalhan Rosenblatt, *Judge Offers Inmates Reduced Sentences in Exchange for Vasectomy*, NBC NEWS (July 21, 2017, 11:56 AM PDT), https://www.nbcnews.com/news/us-news/judge-offers-inmates-reduced-sentences-exchange-vasectomy-n785256 [https://perma.cc/4BFM-T6RE].

[91] ROBERTS, *supra* note 30, at 106 (quoting *Poverty and Norplant — Can Contraception Reduce the Underclass?*, PHILA. INQUIRER, Dec. 12, 1990, at A18).

[92] *Cf.* SILLIMAN ET AL., *supra* note 13, at 19 (noting skepticism of women of color regarding "provider-controlled hormonal methods of contraception whose side effects and risks were unclear").

[93] *See* Aline C. Gubrium, Emily S. Mann, Sonya Borrero, Christine Dehlendorf, Jessica Fields, Arline T. Geronimus, Anu M. Gómez, Lisa H. Harris, Jenny A. Higgins, Katrina Kimport, Kristin Luker, Zakiya Luna, Laura Mamo, Dorothy Roberts, Diana Romero & Gretchen Sisson, *Realizing Reproductive Health Equity Needs More Than Long-Acting Reversible Contraception (LARC)*, 106 AM. J. PUB. HEALTH 18, 18 (2016)

as well, producing headlines like "Can the IUD Prevent Poverty, Save Taxpayers Billions?"[94] To be sure, many providers today are committed to empowering women and girls of color to choose (or not) a method of contraception that best meets their health needs and life goals. However, continuing references to the cost-justification of LARC in terms of government expenditures avoided[95] echo the Eugenicists' "public health" justifications from a century ago.[96] Research into how women are counseled about IUDs specifically has found that providers are more likely to recommend IUDs to low-income Black and Latina women than to low-income White women.[97] Discussions about using LARC to decrease racial disparities in unintended pregnancy rates often fail to address the history of coercive reproductive control. That history, together with the paucity of doctors willing and able to remove LARC devices, have left women of color suspicious of these contraceptive methods.[98]

b. Women with Disabilities

While the contraceptive counselling received by Black women may indicate subtle eugenic influence, disabled women's contraceptive usage reflects the paradoxical views of those women as either non-sexual or unfit to reproduce. Research indicates that women with disabilities at risk of unplanned pregnancy are more likely than non-disabled women

(responding to JL Northridge & S. Coupey, *Realizing Reproductive Health Equity for Adolescents and Young Adults*, 105 AM. J. PUB. HEALTH 1284 (2015)).

94 Carrie Sheffield, *Can the IUD Prevent Poverty, Save Taxpayers Billions?*, FORBES (Oct. 5, 2014, 6:52 PM EDT), https://www.forbes.com/sites/carriesheffield/2014/10/05/can-the-iud-prevent-poverty-save-taxpayers-billions/#74f7750c3291 [https://perma.cc/2NDG-DGY5].

95 *See, e.g.*, Caitlin Parks & Jeffrey F. Peipert, *Eliminating Health Disparities in Unintended Pregnancy with Long-Acting Reversible Contraception (LARC)*, 214 AM. J. OBSTETRICS & GYNECOLOGY 681, 681 (2016) (including maternity and infant care, lost productivity, and "government benefits" among the "public health cost of births resulting from unintended pregnancies").

96 *See* Christine Dehlendorf & Kelsey Holt, Opinion, *The Dangerous Rise of the IUD as Poverty Cure*, N.Y. TIMES (Jan. 2, 2019), https://www.nytimes.com/2019/01/02/opinion/iud-implants-contraception-poverty.html [https://perma.cc/U8VX-WGU8] ("Today, this age-old idea that reproduction is to blame for societal problems has seen a resurgence in the current enthusiasm around long-acting, reversible contraception.").

97 *See id.*

98 *Compare* Parks & Peipert, *supra* note 95, at 686 (referring to the importance of "acknowledg[ing] the history of reproductive abuse in the United States and how that affects perceptions of the promotion of LARC"), *with* Gubrium et al., *supra* note 93, at 19 (addressing more fully the social context of choices by adolescents and emphasizing the history of abusive reproductive controls for poor women and women of color).

to use less effective contraception, or no contraception. In addition, they are less likely to use highly or moderately effective forms of non-permanent contraception.[99] This research suggests that women with disabilities receive inadequate support and counselling in making choices about contraceptive options best suited to their procreative plans. Inadequate family-planning counseling is unsurprising if providers think disabled women are unlikely to engage in sexual activity.[100] At the same time, high rates of sterilization cut off disabled women's potential to procreate. Recent studies have found that the prevalence of sterilization among disabled women was almost double that of non-disabled women.[101] In particular, sterilization rates are significantly higher for women with cognitive disabilities, who also underwent sterilization at a younger age than other women.[102]

[99] Researchers have made this finding with respect to both women with physical or sensory disabilities and women with intellectual or developmental disabilities. *See* Justine Wu, Jianying Zhang, Monika Mitra, Susan L. Parish & Geeth Kavya Minama Reddy, *Provision of Moderately and Highly Effective Reversible Contraception to Insured Women with Intellectual and Developmental Disabilities*, 132 OBSTETRICS & GYNECOLOGY 565, 568 (2018) (finding that women with intellectual and developmental disabilities ("IDD") were less likely to be prescribed either long-acting reversible contraception or other moderately effective forms of contraception); Justine P. Wu, Kimberly S. McKee, Michael M. McKee, Michelle A. Meade, Melissa A. Plegue & Ananda Sen, *Use of Reversible Contraceptive Methods Among U.S. Women with Physical or Sensory Disabilities*, 49 PERSP. ON SEXUAL & REPROD. HEALTH 141, 141 (2017) [hereinafter *Use of Reversible Contraceptives*] (finding that the presence of a physical or sensory disability was associated with decreased odds of a woman using highly or moderately effective methods of contraception).

[100] *See* Lori Ann Dotson, Jennifer Stinson & LeeAnn Christian, *"People Tell Me I Can't Have Sex": Women with Disabilities Share Their Personal Perspectives on Health Care, Sexuality, and Reproductive Rights*, 26 WOMEN & THERAPY 195, 196 (2003). Wu et al. suggest that women with disabilities' lower usage rates of high and moderately effective contraception may be attributable to the need to interact with a medical provider, an option that is unattractive to many women with disabilities because of the negative interactions they have had with physicians. *See* Wu et al., *Use of Reversible Contraceptives*, *supra* note 99, at 145.

[101] *See* William Mosher, Rosemary B. Hughes, Tina Bloom, Leah Horton, Ramin Mojtabai & Jeanne L. Alhusen, *Contraceptive Use by Disability Status: New National Estimates from the National Survey of Family Growth*, 97 CONTRACEPTION 552, 552 (2018); Justine P. Wu, Michael M. McKee, Kimberly S. McKee, Michael A. Meade, Melissa Plegue & Ananda Sen, *Female Sterilization is More Common Among Women with Physical and/or Sensory Disabilities than Women Without Disabilities in the United States*, 10 DISABILITY & HEALTH J. 400, 403 (2017); *see also* Powell & Stein, *supra* note 12, at 56-57 (noting that involuntary sterilization is an international phenomenon).

[102] *See* 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, 559 (2018) (comparing rates of sterilization

Of course, women with disabilities have diverse experiences. Those with intellectual disabilities are likely to face fertility-restricting interventions different from those with physical or sensory disabilities. Just as eugenic sterilization policies sought particularly to prevent "feeble-minded" women from having children,[103] today third parties often assert authority to make decisions regarding reproduction for women with intellectual disabilities, deeming those women incompetent to decide for themselves.[104] The mechanisms that constrain the childbearing freedom of intellectually disabled women are different from the constraints (discussed above) experienced by Black women without those disabilities. In many ways those two groups are not comparable. A notable parallel exists, however, in the discounting of maternal worthiness that doctors, judges, or others in power may attach to women in either group.

Whether and when family members or guardians can choose surgical sterilization for an intellectually disabled woman is a fraught question. Because the Supreme Court has neither overruled *Buck v. Bell* nor directly addressed the reproductive rights of intellectually disabled women, state courts and legislatures play the leading role in addressing these questions.[105] States typically require judicial involvement to protect disabled women from decisions irretrievably and unnecessarily depriving them of their reproductive capacity and potentially subjecting them to major surgery. Standards for approving sterilizations vary, typically imposing procedural protections and in some cases

in three groups of women: women with no disabilities, women with cognitive disabilities, and women with sensory or physical disabilities).

[103] Although the term "feeble-minded" was used with some imprecision by Eugenicists, it generally referred to the presence of some kind of mental defect that prevented a person from functioning effectively in society. It was an umbrella term that, according to one proponent, encompassed "idiots," "imbeciles," and "morons." *See* LOMBARDO, *supra* note 22, at 42-43 (describing work of Henry H. Goddard).

[104] Today, Black women are not formally deemed incompetent by virtue of their Blackness. But the failure of health care providers to listen to Black Women and take seriously their concerns and preference may flow from their assumptions of incompetence. *See supra* notes 68–98 and accompanying text.

[105] *See* MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 15 (1999). In 2001, the Eighth Circuit cited *Buck* in reasoning that the involuntary sterilization of a mentally disabled person may sometimes be constitutionally justified if appropriate procedural safeguards are in place. *See* Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001). *Vaughn*'s facts are particularly disturbing. A child welfare caseworker effectively coerced Vaughn into being sterilized by implying that her existing children would be returned to her custody if she agreed to the procedure. *See id.* at 1127-28.

substantive criteria,[106] but as recently as 2012 statutes in eleven states authorized involuntary sterilization for persons with heritable intellectual disabilities.[107] Moreover, courts persuaded that surgical sterilization is a sensible way of protecting against unwanted pregnancy may readily green light operations on women with intellectual disabilities.[108] Sterilization requests, however, may reflect assumptions about a disabled woman's ability to parent or be motivated by family members' self-interest in making care or supervision easier.[109] So too, ableist biases[110] and the stereotypes of intellectually disabled women as

[106] *See generally* FIELD & SANCHEZ, *supra* note 105, at 80-92 (describing approaches to sterilization practices); Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 809-24 (same).

[107] *See* NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 40 (2012).

[108] *See* LOMBARDO, *supra* note 22, at 267-68. Some states are more stringent in their oversight when parents seek the sterilization of minor girls with intellectual disabilities, but according to Field and Sanchez, "courts frequently approve sterilizations of minors and even twelve-year-olds." FIELD & SANCHEZ, *supra* note 105, at 107. As Samuel Bagenstos points out, some of these cases will never make it to court: "If the parents and doctors are all on board, these sorts of sterilization decisions can easily fly under the radar and evade mechanisms of legal accountability." Bagenstos, *supra* note 17 (manuscript at 117).

[109] *See* Edward B. Goldman & Elisabeth H. Quint, *Arguments Against Sterilization of Developmentally Disabled Minors*, 26 J. CHILD NEUROLOGY 654, 654 (2011) (dispelling justifications commonly offered by caregivers for sterilizing a minor with IDD); Beverly Horsburgh, *Schrodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 572 (1996) (noting that concerns that parents or guardians may become responsible for offspring of intellectually disabled women may drive sterilization decisions). A controversial case that raised these issues starkly involved parents of a young girl with profound intellectual and developmental disabilities who subjected their daughter to a hysterectomy, removal of her breast buds, and high doses of estrogen meant to stunt her growth. *See* Julia Epstein & Stephen A. Rosenbaum, *Revisiting Ashley X: An Essay on Disabled Bodily Integrity, Sexuality, Dignity, and Family Caregiving*, 35 TOURO L. REV. 197, 197 (2019); Alicia R. Ouellette, *Growth Attenuation, Parental Choice, and the Rights of Disabled Children: Lessons from the Ashley X Case*, 8 HOUS. J. HEALTH L. & POL'Y 207, 208-09 (2008). Their stated justification for these interventions was to reduce their daughter's growth and physical development in part so that the parents could continue to care for her in their home as they aged. The so-called "Ashley treatment" remains controversial, and Patricia Williams has recently explored some of the issues of gender, disability, race and class raised by the social responses to that case. *See* Patricia J. Williams, *Babies, Bodies and Buyers*, 33 COLUM. J. GENDER & L. 11, 20-23 (2016).

[110] Field and Sanchez describe at length the Pennsylvania case of *Estate of C.W.*, 640 A.2d 427 (Pa. Super. Ct. 1994), *cert. denied*, C.W. *ex rel.* McKinley v. Wasiek, 513 U.S. 1183 (1995), as "illustrat[ing] that even strict legal rules cannot and do not ensure unbiased decisionmaking." *See* FIELD & SANCHEZ, *supra* note 105, at 170; *see also* Powell & Stein, *supra* note 12, at 81.

sexually threatening and requiring professional control may influence judges' decisions.[111] As a consequence, a decision about sterilization (or even the use of non-permanent contraception[112]) for a woman with an intellectual disability may not reliably either reflect an unbiased assessment of her best interests or support her reproductive liberty.[113]

Echoes of our country's eugenic past are strongest when a state actor tramples a disabled woman's reproductive liberty. Women with intellectual disabilities, which affect both intellectual functioning, communication skills, and social and practical skills, often reside in institutional settings if their disabilities are significant; as a consequence, some are effectively in state custody. In these cases, a state agency may exercise authority to sterilize a woman or even compel an abortion without seeking the woman's input.[114] In *Does* ex rel. *Tarlow v. District of Columbia,* the D.C. Circuit Court of Appeals ruled that the District had no constitutional or legal obligation to consider the wishes of two women with significant intellectual disabilities in its custody before authorizing elective abortions of their pregnancies.[115] In an opinion written by now-Supreme Court Justice Kavanaugh, the court rejected any constitutionally based liberty interest held by the women to have their wishes considered, reasoning that "accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions. . . ."[116] Not surprisingly, in invoking "the

[111] *See* Pamela Block, *Sexuality, Fertility, and Danger: Twentieth-Century Images of Women with Cognitive Disabilities*, 18 SEXUALITY & DISABILITY 239, 239 (2000). In addition, the relative infrequency of sterilizations of intellectually disabled males suggests that gendered assumptions play a role. *See* Pedro Weisleder, *Sterilization for Individuals with Mental Disabilities: The Other Half of the Equation*, 26 J. CHILD NEUROLOGY 649, 649-50 (2011).

[112] The procedural and substantive protections that apply to third-party proposals to sterilize an intellectually disabled woman do not generally apply to decisions about non-permanent contraception use, even though the continuous administration of contraception has the same effect as sterilization. *See* FIELD & SANCHEZ, *supra* note 105, at 122.

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

[114] Field and Sanchez describe cases in which either a state agency, family members, or other guardians have obtained abortions for pregnant women with intellectual disabilities. *See* FIELD & SANCHEZ, *supra* note 105, at 142-50. According to them, in 1993, "In most states the question whether a relative or guardian can decide [to terminate a pregnancy] without judicial supervision remains unanswered." *Id.* at 151.

[115] *See* Doe *ex rel.* Tarlow v. District of Columbia, 489 F.3d 376, 382-84 (D.C. Cir. 2007).

[116] *Id.* at 382. By contrast, the district court had ruled that the District was legally required to try to determine the wishes of an incompetent patient regarding any elective

Nation's history and tradition" to reject the plaintiffs' asserted rights, the opinion did not explicitly reference the Eugenics-era program of state-compelled sterilizations of "feeble-minded" women. That history of abuse, however, is sufficiently notorious that an implicit reference may fairly be construed, leading Mary Anne Case to describe Judge Kavanaugh's opinion as "implicitly reaffirming *Buck v. Bell*."[117]

Tarlow maintains that, if medical providers deem a woman with an intellectual disability to be legally incompetent, her subjective desires to have a child, or to avoid sterilization or an abortion, are irrelevant. This stance completely strips a woman of any control, or even influence, over her body and its reproductive capacity, simply by reason of her disability. This binary approach insists that either a disabled woman must fully meet the legal standard of decisional competency or be deemed fully incompetent.[118] It reflects "a thinly disguised substantive agenda"[119] that reduces women with intellectual disabilities to objects of state decision making and disfavors their childbearing.[120] The traditional binary approach rejects a viable alternative: supported decision making.[121] By incorporating counsel from trusted family

surgery, including an abortion. *See id.* at 380; Does v. District of Columbia, 374 F. Supp. 2d 107, 112-16 (D.D.C. 2005); Does I through III v. District of Columbia, 232 F.R.D. 18, 34 (D.D.C. 2005), *rev'd in part*, *vacated in part sub nom*. The appellate court also rejected any obligation to seek input from the families of the two women.

117 Mary Ann Case, *Abortion, the Disabilities of Pregnancy, and the Dignity of Risk*, *in* DISABILITY HEALTH LAW & BIOETHICS 51, 58 (I. Glenn Cohen et al. eds., 2020); *see also* Bagenstos, *supra* note 17 (manuscript at 115) (asserting that the practices upheld in *Tarlow* exemplify the eugenic practice of "violently denying the reproductive rights of disabled people"). Discussions of abortion and disability rights more commonly focus on the implications of selective abortion following the identification of fetal defects via prenatal testing. The tension between disability rights and reproductive rights advocates around disability-selective abortions and state legislative bans on them is beyond the scope of this Article, which focuses on constraints on childbearing.

118 *Cf.* Leslie P. Francis, *Understanding Autonomy in Light of Intellectual Disability*, *in* DISABILITY AND DISADVANTAGE 200, 207 (Kimberley Brownlee & Adam Cureton eds., 2009) (making a similar point about all-or-nothing approaches to autonomy for persons with intellectual disabilities).

119 FIELD & SANCHEZ, *supra* note 105, at 160.

120 As discussed in Part II.C.2, the underlying supposition that disabled women cannot appropriately parent a child may also arise once a disabled woman has given birth. *See infra* Part II.C.2.

121 Supported decision making permits persons with cognitive disability to make decisions for themselves with trusted friends or family members helping them understand the nature and consequences of a decision. By creating a state obligation to provide support for the exercise of legal capacity, Article 12 of the Convention on the Rights of Persons with Disabilities (discussed *infra* in Part III.A.1) has created momentum behind the alternate approach of supported decision making and arguably requires its use for persons with disabilities. *See* Powell & Stein, *supra* note 12, at 76-

members or friends, supported decision making accords with the feminist theory of relational autonomy, which "views the individual as embedded within a complex set of relationships."[122] Critically, supported decision making permits the woman whose reproductive path is in question to retain and exercise her agency to the extent feasible.[123]

While women with intellectual disabilities face the gravest risk of involuntary fertility deprivations, women with physical or sensory disabilities also may feel pressure to not have children. Disability rights activist Rebecca Cokley shares the story of overhearing the anesthesiologist who attended the birth of her second baby in 2013 suggesting to her obstetrician that Cokley's tubes be tied. When Cokley, who has dwarfism, and her husband objected, the anesthesiologist responded: "Now that you've had two, you don't need to have more kids."[124] Research reveals that many disabled women report that, when they became pregnant, their family or medical providers encouraged them to terminate their pregnancy.[125] For disabled pregnant women, skepticism and hostility regarding their maternal capacity too often replace the customary congratulations and various forms of social support that non-disabled, White pregnant women receive.

78; Anna Arstein-Kerslake, Joanne Watson, Michelle Browning, Jonathan Martinis & Peter Blanck, *Future Directions in Supported Decision-Making*, DISABILITY STUD. Q. (2017), https://dsq-sds.org/article/view/5070/4549 [https://perma.cc/D8AA-FFEW].

122 Seema Mohapatra & Lindsay F. Wiley, *Feminist Perspectives in Health Law*, 47 J.L. MED. & ETHICS 103, 105 (2019).

123 *See* FIELD & SANCHEZ, *supra* note 105, at 157-58 (arguing that all persons who can communicate their preferences should be involved in making decisions about elective medical procedures and only persons "who literally cannot express their own preferences" should be subject to third-party consent); Anita Silvers & Leslie Pickering Francis, *Thinking About the Good: Reconfiguring Liberal Metaphysics (or Not) for People with Cognitive Disabilities*, 40 METAPHILOSOPHY 475, 475 (2009).

124 Joseph Shapiro, *People with Disabilities Fear Pandemic Will Worsen Medical Biases*, NPR (Apr. 15, 2020, 5:00 AM ET), https://www.npr.org/2020/04/15/828906002/people-with-disabilities-fear-pandemic-will-worsen-medical-biases [https://perma.cc/LVR2-CK25].

125 *See* Laura Hershey, *Women with Disabilities: Health, Reproduction, and Sexuality*, *in* 1 ROUTLEDGE INTERNATIONAL ENCYCLOPEDIA OF WOMEN: GLOBAL WOMEN'S ISSUES AND KNOWLEDGE 385, 388 (Cheris Kramarae & Dale Spender eds., 2000); *cf.* Carrie L. Shandra, Dennis P. Hogan & Susan E. Short, *Planning for Motherhood: Fertility Attitudes, Desires and Intentions Among Women with Disabilities*, 46 PERSP. ON SEXUAL & REPROD. HEALTH 203, 208 (2014) (reporting on studies of disabled women in Canada and Europe).

2. Interference Through Welfare and Criminal Justice Policies

The preceding discussion considers how societal expectations and state coercion or compulsion diminish the agency of Black and disabled women to choose contraceptive options that preserve their choice to have a child. Other policies also have affected the ability of women in these groups to have children. Policies signaling public unwillingness to provide financial support for low-income women who bear children or segregating women (and men) in these groups in institutions, thus limiting their ability to engage in sexual activity, are prime examples. This section considers how limitations on welfare benefits, Medicaid policies that push persons with disabilities into institutions, and the mass incarceration of Black Americans may discourage or render infeasible the choice to have children.

a. Family Cap Policies

Over their nearly 100-year history, federal-state cash welfare programs have evolved in conjunction with public attitudes toward impoverished families with children.[126] As the number of families receiving welfare payments rose in the 1960s and 1970s, policies increasingly focused on getting women receiving welfare into the workforce. In the 1980s, the Reagan administration birthed the trope of the "welfare queen" — the woman who lived high on the hog while fraudulently milking the welfare system for benefits. This portrayal of welfare as fostering dependence among its recipients by eliminating the need to work and as encouraging unmarried women to have children[127] prompted the adoption in the 1980s and 1990s of various policies seeking to rein in public spending and prune the extent and duration of welfare benefits available to impoverished women.

These policies included so-called "family cap" and "child exclusion" policies. Though they are slightly different (the former limited the total assistance a family could receive, regardless of the number of children in the family, and the latter refused to provide public assistance to a child who is born to a woman already receiving aid),[128] this Article refers to them collectively as "family cap" policies. States began adopting these policies in the early 1990s, and Congress's passage of the

[126] For this brief history of welfare, see generally Kelly J. Gastly, Note, *Why Family Cap Laws Just Aren't Getting It Done*, 46 WM. & MARY L. REV. 373 (2004). Eligibility for benefits is generally limited to families where the father was absent or unable to work.

[127] *See id.* at 381.

[128] *See* FELICIA KORNBLUH & GWENDOLYN MINK, ENSURING POVERTY: WELFARE REFORM IN FEMINIST PERSPECTIVE 15 (Univ. Pa. Press 2019).

Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA")[129] increased states' flexibility to implement them.[130] During the 1990s and early 2000s, more than twenty states adopted family cap policies.[131]

The policies' ostensible goals were to reduce poverty by discouraging impoverished women who were receiving welfare from bearing more children.[132] A recent analysis concluded that family cap policies generally failed to reduce additional births.[133] Instead, by denying women additional benefits for additional children, the policies exacerbated the poverty experienced by mothers and children, leading to increased housing and food insecurity and poor health outcomes.[134] But the impact of these policies extends beyond individual families. By perpetuating families' poverty, these policies ultimately reinforced their communities' marginal status.[135] Recognizing their adverse impact on child health, a number of states have repealed their family cap policies since 2002, but they remain in place in more than a dozen states.[136]

Most relevant to this Article, family cap policies reified an eugenic logic: namely, that decreasing public spending on poverty warrants curtailing the fertility of poor women.[137] Numerous commentators have

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[129] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996).

[130] *See* Gastly, *supra* note 126, at 382. Although PRWORA did not itself impose family cap or child exclusion policies, it effectively gave states a green light to adopt those policies. Prior to PRWORA, a state seeking to adopt a child exclusion policy had to seek a waiver from the federal government. *See id.* at 388-89.

[131] *See* Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 173 (2002).

[132] *See* ROBERTS, *supra* note 30, at xvi.

[133] *See* CTR. ON REPROD. RIGHTS & JUSTICE, BRINGING FAMILIES OUT OF 'CAP'TIVITY: THE PATH TOWARD ABOLISHING WELFARE FAMILY CAPS 17 (2016), https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-Caps_FA2.pdf [https://perma.cc/SC82-3PFK].

[134] *See id.*

[135] *See* Ikemoto, *supra* note 84, at 253.

[136] *See* Teresa Wiltz, *Family Welfare Caps Lose Favor in More States*, PEW: STATELINE (May 3, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states [https://perma.cc/9FNM-PP4T] (noting that California, Massachusetts, and New Jersey have repealed their caps since 2016).

[137] *See* Delfina Martinez-Pandiani, *Ineffective Family Cap Policies: The Misdiagnosis and Contributor to Women's Poverty*, HARV. HEALTH POL'Y REV. (Sept. 1, 2015), http://www.hhpronline.org/articles/2016/11/12/ineffective-family-cap-policies-the-misdiagnosis-and-contributor-to-womens-poverty [https://perma.cc/9BE9-KUNX]; *see also* Eric McBurney, Note, *So Long as Lawmakers Do Not Use the N-word: The Maximum Family Grant Example of How the Equal Protection Clause Protects Racially Discriminatory Laws*, 14 J. GENDER RACE & JUST. 497, 499 (2011) (tracing the history of racist welfare

pointed out that, although the large majority of welfare recipients are White, people generally imagine of a woman on welfare as being Black.[138] The stereotype of the manipulative, irresponsible, and sexually promiscuous "welfare queen" that motivated states' restrictive welfare policies had a Black face.[139] As Lisa Ikemoto writes, restrictive welfare policies effectively "pathologize Black motherhood."[140]

This racial tinge to family cap policies is not merely a supposition; it is reflected in states' policy adoption decisions. When Congress reauthorized the welfare program in 2001, it noted that states with a higher proportion of Black welfare recipients were statistically more likely to adopt a family cap policy. By contrast, states were less likely to adopt a family cap policy if their welfare recipients were mostly White.[141] States' greater ardor in embracing penalties on childbearing when Black women were involved is consistent with recent findings regarding the connection between race and states' welfare programs more generally. After analyzing variations in states' welfare spending and policies relating to the generosity of benefits, behavioral requirements for recipients, and time limits on welfare, researchers from the Urban Institute concluded that "African American people are especially and disproportionately concentrated" in states that provide less generous benefits, restrict recipients' behavior more stringently, and impose shorter time limits on the receipt of assistance.[142]

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policies and arguing that California's family cap policy reflected an unarticulated "discriminatory intent, based on a body of racist beliefs about the bestial nature of African American female sexuality, to systematically reduce the African American population").

138 *See* ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 23-24 (2004); Franklin D. Gilliam, Jr., *The 'Welfare Queen' Experiment: How Viewers React to Images of African-American Mothers on Welfare*, 53 NIEMAN REP., 1, 49-50 (1999); N. Tatiana Masters, Taryn P. Lindhorst & Marcia K. Meyers, *Jezebel at the Welfare Office: How Racialized Stereotypes of Poor Women's Reproductive Decisions and Relationships Shape Policy Implementation*, 18 J. POVERTY 109, 124 (2014).

139 *See* Goodwin & Chemerinsky, *supra* note 51, at 1300; Rosenthal & Lobel, *supra* note 63, at 416. *See generally* KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 161-68 (2011) (discussing the implicit racialization of the "welfare queen" as a Black woman). In fact, research suggests that families receiving welfare assistance have the same number of children, on average, as families in the general population. CTR. ON REPROD. RIGHTS & JUSTICE, *supra* note 133, at 2.

140 Ikemoto, *supra* note 84, at 253.

141 *See* ROBERTS, *supra* note 30, at xvi.

142 HEATHER HAHN, LAUDAN ARON, CARY LOU, ELEANOR PRATT & ADAEZE OKOLI, URBAN INST., WHY DOES CASH WELFARE DEPEND ON WHERE YOU LIVE?: HOW AND WHY STATE TANF PROGRAMS VARY 17 (2017), https://www.urban.org/sites/default/files/publication/90761/tanf_cash_welfare_0.pdf [https://perma.cc/X6J4-UXFQ]. The researchers also

For these reasons, scholars and commentators have described family caps as contemporary eugenics measures.[143] Legislators' thinking in adopting family cap policies echoed the sentiment that led physicians to condition providing maternity care to poor women on their "consent" to sterilization.[144] As in the early twentieth century, the social good of saving resources is understood to justify efforts to limit childbearing by poor women of color, without regard to the humanity and material welfare of those women and the children they bear.

b. Institutionalization of People with Disabilities

Medicaid, another public benefit program rooted in the welfare system, interferes with some disabled women's ability to have children.[145] The joint federal-state health insurance program originally covered a population that largely tracked the recipients of federal income support payments like Aid to Families with Dependent Children ("AFDC") and Supplemental Security Income ("SSI").[146] As a result, Medicaid came to be known as "welfare medicine."

analyzed the ratio of families actually receiving Temporary Assistance for Needy Families ("TANF") benefits to the number of families living in poverty in a state (what they called the TANF-to-poverty ratio). In 2014, nationwide only twenty-three families received TANF assistance for every 100 families with children in poverty. *Id.* at 1. The twenty-five states with the lowest TANF-to-poverty ratio (meaning the states that provided assistance to the lowest proportion of their families with children in poverty) were home to 56% of the Black population, but only 46% of the non-Hispanic White population. *Id.* at 7.

[143] *See* Mutcherson, *supra* note 86, at S13; Jamelle Bouie, *The Most Discriminatory Law in the Land*, SLATE (June 17, 2014, 11:47 PM), https://slate.com/news-and-politics/2014/06/the-maximum-family-grant-and-family-caps-a-racist-law-that-punishes-the-poor.html [https://perma.cc/9JTB-JM35] ("[W]hen you situate family caps in the broad history of American policy and reproductive rights, it's easy to see the connective tissue between eugenics and benefit cuts to stop 'illegitimacy.'").

[144] *See, e.g.*, *supra* text accompanying note 75.

[145] The eligibility rules for Medicaid and Supplemental Security Income (a federal cash benefit available to low-income persons with disabilities) may also create barriers to marriage for people with disabilities. These rules, like the bias towards institutional care discussed in the text, reflect an unspoken assumption that disabled people do not form families by marrying or having children. Advocates argue that the financial penalty that can result for disabled people who choose to marry represents a deprivation of marriage equality for people with disabilities. *See* Carly Stern, *Forced to Divorce: Americans with Disabilities Must Pick Marriage or Health Care*, OZY (Apr. 25, 2019) https://www.ozy.com/the-new-and-the-next/forced-to-divorce-americans-with-disabilities-must-pick-marriage-or-health-care/92284 [https://perma.cc/6862-29TB].

[146] *See* Frank J. Thompson, *Medicaid Rising: The Perils and Potential of Federalism*, *in* MEDICARE AND MEDICAID AT 50: AMERICA'S ENTITLEMENT PROGRAMS IN THE AGE OF AFFORDABLE CARE 191, 193-94 (Alan B. Cohen et al. eds., 2015).

Because it covers a broad range of needed rehabilitative and supportive services as well as medical care, Medicaid coverage is crucial for many persons with disabilities. That coverage, though, is structurally biased towards providing services in institutional, rather than community, settings. The federal Medicaid statute requires state programs to cover care that Medicaid enrollees receive in institutions. By contrast, covering home and community-based services ("HCBS") remains optional for the states.[147] Despite decades of (somewhat successful) efforts to increase opportunities for people with disabilities to live independently in community settings, the demand for accessible and affordable community-based housing for people with disabilities still far outstrips the supply.[148] And recent threats of disruptions to federal Medicaid funding raised the prospect that states might be forced to cut existing HCBS programs, forcing many back into institutions.[149]

Living in institutional or other congregate settings may severely constrain the ability of women with disabilities to engage in sexual activity, which in turn will keep them from pursuing pregnancy.[150] As Laura Hershey has explained, "[w]omen with disabilities who have access to the resources to live independently . . . can define their own sexual identity and desires. . . . On the other hand, disabled women who live in institutions, or with their parents or other family members, may

[147] *See* Mary Crossley, *Threats to Medicaid and Health Equity Intersections*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 311, 336 (2019).

[148] *See* MaryBeth Musumeci, Priya Chidambaram & Molly O'Malley, *Key Questions About Medicaid Home and Community-Based Services Waiver Waiting Lists*, KAISER FAMILY FOUNDATION (Apr. 4, 2019), https://www.kff.org/medicaid/issue-brief/key-questions-about-medicaid-home-and-community-based-services-waiver-waiting-lists/ [https://perma.cc/CGB9-KUWD] (reporting that more than 700,000 people were on waiting lists for HCBS in 2017). *See generally* Jessica Schubel, *Medicaid is Key to Implementing Olmstead's Community Integration Requirements for People with Disabilities*, CTR. ON BUDGET & POL'Y PRIORITIES (June 22, 2018, 11:00 AM), https://www.cbpp.org/blog/medicaid-is-key-to-implementing-olmsteads-community-integration-requirements-for-people-with [https://perma.cc/Q4ZK-5WCW] (discussing the role of Medicaid in providing HCBS services to disabled individuals).

[149] *See* Mary Crossley, *Community Integration of People with Disabilities: Can* Olmstead *Protect Against Retrenchment?*, 6 LAWS 1, 5 (2017).

[150] In 2011, a group of self-advocates asked to define the characteristics of an "institution" included restrictions on residents' sexual activity as one characteristic. *See* AUTISTIC SELF ADVOCACY NETWORK, KEEPING THE PROMISE: SELF ADVOCATES DEFINING THE MEANING OF COMMUNITY 8 (2011), https://autisticadvocacy.org/policy/briefs/keeping-the-promise-self-advocates-defining-the-meaning-of-community-living [https://perma.cc/FF6B-K3V6]. With assisted reproductive technologies, sexual intercourse is not a necessary precondition to achieving pregnancy, but disabled women face disproportionate barriers in accessing those technologies. *See* discussion *infra* Part II.B.3.

be severely inhibited in exploring and/or expressing their sexuality."[151] Women with cognitive disabilities, psychiatric disabilities, or severe physical disabilities are more likely to reside in an institution or some other kind of congregate setting and, thus, to experience these limits.[152] Women with intellectual disabilities have expressed frustration at how their families or agencies providing services limited their social activities with men and forbade them from displaying physical affection.[153]

According to Michael Perlin and Allison Lynch, beliefs that sexual activity by persons with mental disabilities are taboo and immoral produce a lack of respect for those persons' human right to sexual expression.[154] They describe how even professionals working in institutions for persons with mental disabilities or mental illness deny that their patients are sexual beings.[155] These uninformed and unrealistic views reflect contradictory popular stereotypes of persons with disabilities. In some contexts, persons with mental disabilities are expected not to be sexual beings.[156] But sometimes a view that they "possess[] an animalistic hypersexuality" leads to measures "to stop them from acting on these 'primitive' urges."[157] The result is institutional arrangements that act as surveillance techniques, effectively diminishing opportunities for privacy and inhibiting sexual expression.[158] Some measures may be justifiable as protecting persons

[151] Hershey, *supra* note 125, at 387. Hershey lists several ways in which institutional living may limit women's sexual freedom, including "lack of privacy; others' discomfort with disabled women's sexuality; homophobia; lack of access to information about sexuality; lack of access to sexual stimulation devices, birth control devices, or safe-sex materials; and policies which explicitly restrict sexual activity." *Id.*

[152] *See Institutions: Definitions, Populations, and Trends*, NAT'L COUNCIL ON DISABILITY, https://ncd.gov/publications/2012/Sept192012/Institutions (last visited Jan. 24, 2020) [https://perma.cc/QXM4-XPJA] ("In 2009, 469,123 people [with disabilities] received services and supports while living in state or nonstate institutions, nursing facilities, small congregate residential settings, and even in their own homes. Another 599,152 received some services and supports while living with their families.").

[153] *See* Donna J. Bernert, *Sexuality and Disability in the Lives of Women with Intellectual Disabilities*, 29 SEXUALITY & DISABILITY 129, 134 (2010) (reporting on ethnography of 14 women with an intellectual disability).

[154] *See* MICHAEL L. PERLIN & ALLISON J. LYNCH, SEXUALITY, DISABILITY, AND THE LAW: BEYOND THE LAST FRONTIER 56 (2016).

[155] *See id.* at 3.

[156] *See id.* at 27.

[157] *Id.* at 9.

[158] *See* Pierre Pariseau-Legault & Dave Holmes, *Mediated Pathways, Negotiated Identities: A Critical Phenomenological Analysis of the Experience of Sexuality in the Context of Intellectual Disability*, 22 J. RES. NURSING 599, 604 (2017) (giving doors that do not lock or rooms with only single beds as examples).

with intellectual or other disabilities from sexual predation, but others may be reflexive attempts to prevent all sexual intimacy.[159]

Critical reflection thus reveals Medicaid's continued structural bias in favor of institutional care as implicitly dismissing the procreative interests of women with disabilities. To be sure, interests in sexual activity and pursuing pregnancy are not necessarily congruent, but preventing the former will typically forestall the latter. The unstated premise of Medicaid's institutional bias is that if society is going to provide services for people with disabilities, it should do so in settings that prevent them from having sex and having children. Inadequate support for independent living for women with disabilities — whether cognitive, physical, or sensory — affects their ability to bear children. While less overt than family cap policies' explicit attempt to deter poor women from having children, Medicaid's institutional bias implicitly devalues disabled women's childbearing interests.

c. Mass Incarceration and Black Women

A different sort of institutionalization — mass incarceration — shapes Black women's ability to bear children and form families.[160] Criminal justice enforcement concentrated in urban neighborhoods of color, policing focused on drug crimes, and criminal penalties attached to drug offenses have combined to produce and perpetuate mass incarceration. Michelle Alexander's compelling examination of the mass incarceration of Black men reveals a racist and oppressive form of social control akin to Jim Crow laws.[161] Jim Crow laws shared the Eugenicists' commitment to maintaining racial separation and purity. Mass incarceration has a similar eugenic effect.[162]

High rates of incarceration of persons from disadvantaged communities may influence fertility rates in several ways. Courts have held that the constitutionally protected liberty interest in reproducing

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[159] *See* Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. REV. 480, 497-99 (2018). For some people with disabilities, legitimate questions exist as to their ability to consent to sexual activity, so that protective measures may be needed. Rates of sexual violence against people with disabilities are much higher than against non-disabled people, and persons with intellectual disabilities are particularly likely to be victims. *See id.* at 491 n.39.

[160] *See* James C. Oleson, *The New Eugenics: Black Hyper-Incarceration and Human Abatement*, 5 SOC. SCI. 1, 13-14 (2016).

[161] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (discussing mass incarceration and its limiting effects on African American agency).

[162] *Cf.* Obasogie, *supra* note 28, at 2798 (listing incarceration as an example of "negative eugenics").

is suspended during incarceration;[163] thus, a person who is incarcerated cannot claim a right to have children. Prisons are sex-segregated and may prohibit sexual contact by inmates with visitors.[164] In addition, entanglement in the justice system and incarceration often coincide with prime childbearing years.[165] Sociologist James Oleson concludes that this combination of factors, combined with disproportionately high incarceration rates for minorities, may affect reproduction rates.

> The modern phenomenon of [B]lack hyper-incarceration has much in common with the eugenic policies of America's past. Incapacitation isolates prisoners and . . . impedes their ability to procreate. Because [B]lack males are hyper-incarcerated . . . and because [B]lacks serve longer average felony sentences than whites for most crimes, overall Black reproduction rates in the non-incarcerated general population could be depressed. [B]lack hyper-incarceration operates as a contemporary iteration of an earlier eugenic logic. . . .[166]

Many discussions of mass incarceration focus on Black men, who are incarcerated at a higher rate than Black women. But in 2017 Black women's incarceration rate doubled that of White women.[167] As a consequence, Black women's ability to pursue childbearing is disproportionately limited by carceral segregation. Moreover, Black women living in the community who seek to have children with Black men face thinned ranks as a result of mass incarceration.[168] Less directly, contact with the criminal justice system — whether their own involvement or a loved one's incarceration — may operate as a

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[163] *See* Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002); Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988).

[164] *See* Oleson, *supra* note 160, at 6.

[165] *See id.* at 11.

[166] *Id.* at 15-16.

[167] *See* THE SENTENCING PROJECT, *Incarcerated Women and Girls* 2 (June 6, 2019), https://www.sentencingproject.org/publications/incarcerated-women-and-girls [https://perma.cc/JC4J-HDLZ] (stating that "the imprisonment rate for African American women (92 per 100,000) was twice the rate of imprisonment for white women (49 per 100,000)"). It is worth noting that a majority of women in jail have not been convicted of a crime, but are awaiting trial. Most of these women are not flight risks, but simply cannot afford cash bail. To the extent that Black women are disproportionately likely to have low incomes, they are more likely than White women to be able to make cash bail. *See* Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Nov. 13, 2018), https://www.prisonpolicy.org/reports/pie2018women.html [https://perma.cc/J474-FE4G].

[168] *Cf.* Oleson, *supra* note 160, at 11 (referring to a "deficit of [minority] males in the community").

significant stressor for Black women, compounding the toxic stress of interpersonal and institutional racism that contributes to high rates of Black infant mortality.[169] Dorothy Roberts puts it bluntly: "A concern for the incarceration rate of [B]lack men, . . . without attention to the control of [B]lack women's reproduction, will miss a critical technique of racial subordination."[170] In Oleson's words, "hyper-incarceration . . . could exert a eugenic double effect."[171]

d. The Eugenic Effect of Institutions

This side-by-side comparison reveals that the persistent institutionalization of persons with physical and mental disabilities and the mass incarceration of Black men and women have parallel impacts on the childbearing freedom of women in those groups. Any discussion of the impact of contemporary institutionalization should attend to its historical precursors: "Segregation and detention has always served to control those on the margins: the poor . . . minorities . . . and the disabled."[172] Recall that one aspect of the Eugenicists' program for improving and protecting the "superior stock" was to segregate persons deemed unsuitable for reproduction in "colonies," where they would be prevented from polluting the germ line of the preferred group.[173] In examining how historical policies for disabled persons shaped the growth of contemporary mass incarceration, Laura Appleman describes the view that "social problems, including insanity, dependency, and poverty, were fundamentally individual and moral in nature. Individuals suffering from such complaints . . . [could] either be cured or be isolated from society."[174] Separating women deemed unworthy of motherhood from the rest of society has a long lineage in our country. Today, disproportionately confining Black women and disabled women to institutions (whether treatment-focused or carceral) effectively curtails their freedom to have children.

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[169] *See* Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality: A Case Study in Structural Racism*, CTR. FOR AM. PROGRESS (June 5, 2018, 9:01 AM), https://www.americanprogress.org/issues/race/reports/2018/06/05/451647/mass-incarceration-stress-Black-infant-mortality [https://perma.cc/B2R9-XCNL].

[170] Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1977 (1993).

[171] Oleson, *supra* note 160, at 16.

[172] Appleman, *supra* note 31, at 419.

[173] Revisions that occurred to anti-miscegenation laws during the Eugenics era similarly sought to keep nonwhites from reproducing with White persons, but without the use of institutional segregation. *See supra* Part I.B.

[174] Appleman, *supra* note 31, at 436.

3. Barriers to Using Assisted Reproductive Technologies

Sometimes, women who want to have a baby need more than the simple ability to engage in sexual intercourse. Seeking the assistance of fertility services providers becomes necessary, either because the woman faces medical infertility or because she wants to have a baby without being sexually involved with a man. Fertility specialists are less likely to provide services to Black and disabled women who face infertility,[175] leading commentators to explore how race and disability affect access to assisted reproductive technologies ("ARTs"). In deciding whether to take on a prospective patient, fertility specialists may rely on factors that function to screen out certain groups of women (even if they do not overtly discriminate), and other provider practices and policies may have a similar effect.[176] Viewed in historical context, these decisions and practices appear disturbingly reminiscent of Eugenics policies.

a. Women with Disabilities

Women with disabilities face compounded challenges when their attempts to become pregnant are unsuccessful. Infertility is a difficult experience for women generally, and disability adds distinctive societal challenges. Adoption as an alternative to pregnancy may not be an option, as adoption agencies often screen out prospective parents with disabilities.[177] Forced to consider ART, disabled women are likely to find inexperienced and biased providers. Medical education traditionally has failed to supply training and experience involving patients with disabilities, leaving providers both technically unprepared to address any issues presented by a patient's disability and, potentially, personally uncomfortable with treating a disabled patient.[178] Providers may have concerns that pregnancy might be risky for a disabled woman and fear heightened risk of liability in the event of an adverse outcome.[179] In addition, a provider may screen out a disabled woman if

[175] *See infra* Sections II.B.3.a–b.

[176] *See generally* DAAR, *supra* note 26. As a general matter, physicians working in a private practice setting are free to decide whether or not to take on new patients. Legal prohibitions on discrimination based on race or disability, however, may constrain their ability to engage in overt discrimination by picking and choosing patients.

[177] *See* NAT'L COUNCIL ON DISABILITY, *supra* note 107, at 156 (describing discrimination).

[178] *See* Francis et al., *supra* note 58, at 10.

[179] *See id.* at 8-9 (noting that some disabling conditions may in fact increase risks to both the woman and her child, the authors also point out that the limited data existing

the provider lacks accessible medical equipment (making treatment physically inaccessible) or if the woman lacks insurance that covers fertility treatment (making treatment financially inaccessible). Because disabled women are disproportionately covered by Medicaid — which typically does not pay for ART — many may lose access for this reason.[180]

Moreover, beyond these concerns about a provider's ability to safely provide and the patient's ability to pay for ART services, a different type of worry may dissuade providers from helping a disabled woman become pregnant. Specifically, misgivings about the appropriateness of the woman having and parenting a child appropriately may feed fertility specialists' reluctance.[181] In general, fertility specialists consider it appropriate, in screening and treating patients, to take into account not only the (prospective) patient's welfare, but also the welfare of any potentially resulting child.[182] And, to the extent those providers lack training and experience in working with disabled persons, they are likely to entertain widely held biases about how hard it would be for a disabled woman to raise a child and the resulting risks to a prospective child's welfare.

Providers' concerns about helping disabled women become pregnant must be considered against a historical background of eugenic prejudice that — with the support of the law — robbed women with disabilities of their reproductive abilities. Admittedly, contemporary apprehensions about a woman's maternal suitability are less likely to be framed as concerns about trait heritability and more likely to be expressed as skepticism of her ability to perform parenting tasks. However, any assessment of parental adequacy must be situated in the context of unjust societal structures that readily offer supports useful to non-disabled parents but fail to meet the particular needs of disabled

"indicate that providers may overestimate risks of pregnancy in women with disabilities").

180 *See id.* at 4. Women with disabilities are disproportionately covered by Medicaid because of their low income, and state Medicaid programs do not cover fertility treatment. *See id.* The poverty rate for people with disabilities is almost 30%, according to Census Bureau data, and "women with disabilities have the lowest labor force participation rate of any demographic group." *See id.* at 9.

181 *See* Kimberly M. Mitcherson, *Disabling Dreams of Parenthood: The Fertility Industry, Anti-Discrimination, and Parents with Disabilities*, 27 L. & INEQ. 311, 316-17 (2009) (describing survey of screening practices of assisted reproductive technology programs).

182 *See id.* at 316.

parents.[183] In short, a provider's misgivings about a disabled woman's parental suitability likely flow from widely held, ableist assumptions about appropriate parenting and without contemplating how different approaches to parenting may encourage a child's flourishing.[184]

b. Black Women

Barriers may also impede Black women's receipt of fertility services. Research reveals stark differences along race and class lines in access to ARTs.[185] Although women of color actually experience medical infertility at rates higher than White women, they are less likely to seek medical assistance in conceiving and carrying a pregnancy.[186] Building on Roberts' earlier work,[187] Judith Daar's book *The New Eugenics: Selective Breeding in an Era of Reproductive Technologies*, explores several factors that may contribute to this disparity. Black women's care-seeking behaviors may be influenced by both economic barriers (since fertility treatment is quite expensive and often is not covered by insurance) and cultural and social factors (such as a heightened stigmatization of infertility in the Black community).[188] In addition, a history of abuses and exploitation by White doctors, particularly in the context of gynecological care,[189] engendered Blacks' continuing distrust

[183] *See* Francis et al., *supra* note 58, at 5 (noting importance of taking into account how different disabilities may affect a woman's ability to parent with supports).

[184] *See id.* at 9 (citing Adam Cureton, *Parents with Disabilities*, *in* THE OXFORD HANDBOOK OF REPRODUCTIVE ETHICS 407 (Leslie Francis ed., 2017)).

[185] *See generally* Alicia Armstrong & Torie C. Plowden, *Ethnicity and Assisted Reproductive Technologies*, 9 CLINICAL PRAC. 651 (2012) (discussing the barriers to access that underrepresented minorities in the United States face in terms of healthcare).

[186] *See* DAAR, *supra* note 26, at 79. Similarly, by some reports White women may be more likely to engage in fertility-preserving interventions like having their eggs frozen. *See* Reniqua Allen, *Is Egg Freezing Only for White Women?*, N.Y. TIMES (May 21, 2016), https://www.nytimes.com/2016/05/22/opinion/is-egg-freezing-only-for-white-women.html [https://perma.cc/M6DT-35EF].

[187] ROBERTS, *supra* note 30, at 246-93 (noting in particular the chapter titled "Race and the New Reproduction").

[188] DAAR, *supra* note 26, at 85-92; *see also* ROBERTS, *supra* note 30, at 259 ("The myth that Black people are overly fertile may make infertility especially embarrassing for Black couples.").

[189] *See* Vanessa N. Gamble, *Under the Shadow of Tuskegee: African Americans in Health Care*, 87 AM. J. PUB. HEALTH 1773, 1773 (1997) (noting that the Tuskegee syphilis study was but one of many instances of exploitation and abuse). The history of White male doctors using Black female slaves and, later, free women as unconsenting research subjects is extensive. *See generally* DIERDRE COOPER OWENS, MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY 42-72 (2017) (providing a historical narrative on experimental gynecology).

of the medical profession, which may help explain further why fewer Black women experiencing infertility employ ARTs. Evidence suggests that a woman's race may influence medical diagnoses of the causes of infertility, leading to Black women being steered away from ART.[190] For these reasons, Black women who seek fertility services tend to wait longer to do so. That delay, in turn, may factor into worse outcomes experienced by Black women who do use ARTs.[191] This disparity appears across a range of outcomes, including lower fertilization rates, lower pregnancy rates, and lower live birth rates.[192]

The fertility industry and public policy have contributed to White women's higher usage of fertility services in other ways. ART providers and policy makers have taken steps to increase the availability and attractiveness of expensive ARTs for more affluent (mostly White) women.[193] At the same time, the location, marketing, and policies of fertility clinics may all serve to dampen Black women's demand for their services. In particular, online marketing for clinics most often features pictures of White babies as the end "product" being advertised.[194] All these factors contribute to "racially stratified access to reproductive care."[195]

As with disabled women's lower use of ARTs, racial disparities must be considered in their historical and social context. As Roberts explains, White couples' enthusiasm for using ARTs reflects the importance they place on the genetic connection between parent and offspring, which itself is a cultural artifact that flows from the historical emphasis on genetic ties that sought to "preserve white supremacy through a rule of racial purity."[196] The literature on the demand for ART services often refers to couples desperate to rear a genetically related child. That this valorization of genetic connection reflects an impulse towards White

190 ROBERTS, *supra* note 30, at 255.

191 *See IVF Treatments Not as Successful in African American Women*, AM. SOC'Y FOR REPROD. MED. (Oct. 8, 2018), https://ivf.net/ivf/index.php?page=out&id=10701&print=yes [https://perma.cc/6538-C3WJ] (reporting on studies); *see also* DAAR, *supra* note 26, at 82 (noting that "time is not a friend of the infertile").

192 DAAR *supra* note 26, at 84; *see also* Molly Quinn & Victor Fujimoto, *Racial and Ethnic Disparities in Assisted Reproductive Technology Access and Outcomes*, 105 FERTILITY & STERILITY 1119, 1121 (2016).

193 ROBERTS, *supra* note 30, at 251-54. This occurs in the same society where Black women disproportionately undergo sterilizations that prevent them from having children and poor Black women disproportionately are subjected to welfare policies intended to discourage them from having children. *Id.* at 269, 285.

194 DAAR, *supra* note 26, at 97-98.

195 *Id.*

196 ROBERTS, *supra* note 30, at 267.

racial purity can be seen in lawsuits against ART providers for mix-ups leading to White parents having non-White babies.[197] By contrast, Black people tend to be "skeptical about any obsession with genes" and instead "defin[e] themselves apart from inherited traits. . . . see[ing] group membership as a political and cultural affiliation."[198] Despite this explanation for the racial disparity in the usage of ARTs, Roberts still finds it troubling, especially considered in the broader context of efforts to curtail childbearing by Black women. "What does it mean that we live in a country in which white women disproportionately undergo expensive technologies to enable them to bear children, while Black women disproportionately undergo surgery that prevents them from being able to bear any?"[199]

C. Contemporary Parallels: Devaluing Maternity

So far, we have seen how formal policies and informal practices, descended from the Eugenics movement, undermine Black and disabled women's ability to become pregnant. This subpart turns to considering parallels in their experiences when these women become pregnant and have a child. Pursuing motherhood exposes women with disabilities and Black women to greater risks than non-disabled White women and their maternal bonds to greater threats of disruption.

1. Perilous Pregnancy

Rising maternal mortality rates present a significant public health problem. As rates in other countries decline, the rate of U.S. women who die from pregnancy-related complications is the highest in the developed world and has been climbing.[200] Maternal mortality rates, however, vary among different demographic groups of women.

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[197] *See* John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 193 (Michele Bratcher Goodwin ed., 2010); *cf.* TROY DUSTER, BACKDOOR TO EUGENICS (1990). *See generally* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149 (2017) (describing lawsuits).

[198] ROBERTS, *supra* note 30, at 261; *cf.* Aziza Ahmed, *Race and Assisted Reproduction: Implications for Population Health*, 86 FORDHAM L. REV. 2801, 2802 (2018) (arguing that racially disparate access to ART could contribute to population level health disparities).

[199] ROBERTS, *supra* note 30, at 285.

[200] Nina Martin & Renee Montagne, *U.S. Has the Worst Rate of Maternal Deaths in the Developed World*, NPR (May 12, 2017), https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world [https://perma.cc/9FUH-5ZRS].

a. Women with Disabilities — Medical Risks

If public health researchers have calculated the maternal mortality rate specifically for women with disabilities, those data are difficult to find. The Centers for Disease Control and Prevention ("CDC") does indicate that an increasing number of pregnant women have chronic health conditions, such as hypertension, diabetes, and chronic heart disease, putting them at higher risk of pregnancy complications and even death.[201] Even without an overall disability-specific maternal mortality rate, evidence exists suggesting that disabled women face heightened risks associated with pregnancy and childbirth. Researchers have found that women with diverse disabilities are more likely than non-disabled women to delay prenatal care, have a preterm birth, deliver by cesarean section, suffer intimate partner violence while pregnant, and experience symptoms of postpartum depression.[202] Another study found that women with disabilities were twice as likely to smoke and more likely to experience a medical complication while pregnant.[203] While a risk of dying as a result of pregnancy is the gravest risk, these risks of avoidable complications and physical and emotional suffering matter.

This research does *not* indicate that these heightened risks are the product of disability itself, but they may be connected to the social and economic stresses that disabled women (and Black women) frequently experience, along with ableist medical biases and stereotypes. Medical ignorance attributable to the profession's relative inattention to the health needs and risk factors associated with perinatal care for disabled

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[201] *See Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 10, 2019), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-mortality-surveillance-system.htm [https://perma.cc/PP5Z-PTF2]; *cf.* Lisa I. Iezzoni, Jun Yu, Amy J. Wint, Suzanne C. Smeltzer, & Jeffrey L. Ecker, *General Health, Health Conditions, and Current Pregnancy Among U.S. Women with and Without Chronic Physical Disabilities*, 7 DISABILITY & HEALTH J. 181, 181 (2014) (survey data suggests that women with chronic physical disabilities "may have a complex mix of health problems and often experience fair or poor health"). It is also worth noting that these disabling conditions are disproportionately experienced by women of color. *See* Zahra Barnes, *8 Health Conditions that Disproportionately Affect Black Women*, SELF (Mar. 30, 2017), https://www.self.com/story/black-women-health-conditions [https://perma.cc/88SJ-V5EF].

[202] *See* Blair G. Darney, *Primary Cesarean Delivery Patterns Among Women with Physical, Sensory, or Intellectual Disabilities*, 27 WOMEN'S HEALTH ISSUES 336, 337 (2017); Wu et al., *Use of Reversible Contraceptives*, *supra* note 99, at 141.

[203] Monika Mitra, Karen M. Clements, Jianying Zhang, Lisa I. Iezzoni, Suzanne C. Smeltzer & Linda M. Long-Bellil, *Maternal Characteristics, Pregnancy Complications, and Adverse Birth Outcomes Among Women with Disabilities*, 53 MED. CARE 1027, 1030 (2015) [hereinafter *Maternal Characteristics*].

women may also create risks.[204] The obstetric providers from whom disabled pregnant women receive care likely have received no training specifically relating to providing care for women with mobility or other impairments.[205] Research into the experiences of disabled women in the perinatal period is sparse, and clinical guidelines for their maternity care are lacking.[206] Women with physical disabilities have reported that many health providers are unprepared to manage their pregnancies and deliveries (including labor pain) effectively and exhibit negative stereotypes about disabled women bearing children.[207] These negative experiences likely feed into women's hesitancy to seek care either during pregnancy or following delivery.[208]

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[204] *See* Francis et al., *supra* note 58, at 13.

[205] *See* Monika Mitra, Lauren D. Smith, Suzanne C. Smeltzer, Linda M. Long-Bellil, Nechama Sammet Moring & Lisa I. Iezzoni, *Barriers to Providing Maternity Care to Women with Physical Disabilities: Perspectives from Health Care Practitioners*, 10 DISABILITY HEALTH J. 445, 448 (2017) [hereinafter *Barriers*]; Suzanne C. Smeltzer, Monika Mitra, Linda Long-Bellil, Lisa I. Iezzoni & Lauren D. Smith, *Obstetric Clinicians' Experiences and Educational Preparation for Caring for Pregnant Women with Physical Disabilities: A Qualitative Study*, 11 DISABILITY HEALTH J. 8, 8 (2018).

[206] *See* Lorraine Byrnes & Mary Hickey, *Perinatal Care for Women with Disabilities: Clinical Considerations*, 12 J. FOR NURSE PRAC. 503, 508 (2016) (asserting that "few studies have been conducted to examine and describe the experience of women with disabilities during the perinatal period"); Francis et al., *supra* note 58, at 3 ("One of the significant problems in discussing reproductive care for women with disabilities is the limited evidence available about women with disabilities and their reproductive care."); Mitra et al., *Barriers*, *supra* note 205, at 50.

[207] *See* Monika Mitra, Linda M. Long Bellil, Suzanne C. Smeltzer & Lisa I. Iezzoni, *A Perinatal Health Framework for Women with Physical Disabilities*, 8 DISABILITY HEALTH J. 499, 510-11 (2015) (citing studies); Suzanne C. Smeltzer, Amy J. Wint, Jeffrey L. Ecker & Lisa I. Iezzoni, *Labor, Delivery, and Anesthesia Experiences of Women with Physical Disability*, 44 BIRTH 315, 317-18, 320 (2017) (more than half of the physically disabled women surveyed reported failed epidurals, which generally have a 99% success rate); *see also* Francis et al., *supra* note 58, at 3-4 (citing Iezzoni, *How Did That Happen?*, *supra* note 58). Women with disabilities have also cited the lack of access to a competent obstetrician as one reason they might be unlikely to try to have a child, even though they would like to. *See* Tina L. Bloom, William Mosher, Jeanne Alhusen, Hannah Lantos & Rosemary B. Hughes, *Fertility Desires and Intentions Among U.S. Women by Disability Status: Findings from the 2011–2013 National Survey of Family Growth*, 21 MATERNAL & CHILD HEALTH J. 1606, 1607 (2017). They may also be deterred by the inability to access disability-specific information about pregnancy and childbirth. Tracey A. LaPierre, Mary K. Zimmerman & Jean P. Hall, *"Paying the Price to Get There": Motherhood and the Dynamics of Pregnancy Deliberations Among Women with Disabilities*, 10 DISABILITY & HEALTH J. 419, 424 (2017). For an account of disabled women's experiences in Canada, see Meghan Collie, *Canada's Health-Care System Isn't Designed for Parents with Disabilities: Experts*, GLOBAL NEWS (Sept. 22, 2019, 8:00 AM), https://globalnews.ca/news/5925556/parenting-disability [https://perma.cc/8LPW-Y5K3].

[208] Mitra et al., *Maternal Characteristics*, *supra* note 203, at 1031.

b. Black Women — Maternal Mortality

The lack of knowledge and support for women with disabilities who bear children is disturbing, but the risks for pregnant Black women are both graver and more sinister. In September 2019, the CDC reported that the maternal mortality rate for Black women generally in the United States is more than three times as high as the rate for White women, and for Black women aged thirty or older, the rate is four to five times as high.[209] This disparity reflects more than the effects of poverty or low socioeconomic status disproportionately borne by Black women, as it persists across class and education levels.[210] Research indicates that numerous factors contribute to this striking disparity. Those factors include differential access to and quality of health care, as well as racial bias in the health care system. The American College of Obstetricians and Gynecologists acknowledges that stereotyping and implicit bias can affect the care that Black patients receive from providers.[211] Providers' failures to listen to Black women and respond to their concerns may play a role in high rates of maternal mortality and baby loss.[212] In her

[209] Emily E. Petersen, Nicole L. Davis, David Goodman, Shanna Cox, Carla Syverson, Kristi Seed, Carrie Shapiro-Mendoza, William M. Callaghan & Wanda Barfield, *Racial/Ethnic Disparities in Pregnancy-Related Deaths — United States, 2007–2016*, 68 MORBIDITY & MORTALITY WKLY. REP. 762, 762 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6835a3-H.pdf [https://perma.cc/9GJB-WZMV]; *see also* Cristina Novoa & Jamila Taylor, *Exploring African Americans' High Maternal and Infant Death Rates*, CTR. FOR AM. PROGRESS (Feb. 1, 2018, 9:02 AM), https://www.americanprogress.org/issues/early-childhood/reports/2018/02/01/445576/exploring-african-americans-high-maternal-infant-death-rates [https://perma.cc/NXZ3-3T7E]. In addition, babies born to Black mothers are twice as likely to die before their first birthday as babies born to non-Hispanic White mothers. *See id.*

[210] *See* Novoa & Taylor, *supra* note 209.

[211] *See* Comm. on Health Care for Underserved Women, *Committee Opinion Summary No. 649, Racial and Ethnic Disparities in Obstetrics and Gynecology*, 126 OBSTETRICS & GYNECOLOGY 1325, 1325 (2015).

[212] Some working to address high rates of maternal mortality draw a connection between the failure of doctors to listen to women and increased rates of pregnancy-related death for black women. As Dr. Stephanie Teleki put it: "Women are not being listened to . . . [b]ut black women are the least listened to and it's costing them their lives at a much higher rate." Kim Brooks, *America is Blaming Pregnant Women for Their Own Deaths*, N.Y. TIMES (Nov. 16, 2018), https://www.nytimes.com/2018/11/16/opinion/sunday/maternal-mortality-rates.html [https://perma.cc/79LF-GG9N]; *see also* Deirdre Cooper Owens & Sharla M. Fett, *Black Maternal and Infant Health: Historical Legacies of Slavery*, 109 AM. J. PUB. HEALTH 1342, 1344 (2019) (describing historical origins of Black people's precarious relationship with obstetrics and gynecology); Fran Kritz, *Doctors Often Fail to Listen to Black Mothers, Complicating Births, Survey Finds*, CAL. HEALTH REP. (Sept. 20, 2018), https://www.calhealthreport.org/2018/09/20/doctors-often-fail-listen-black-mothers-complicating-births-survey-finds [https://perma.cc/K6EW-FJGJ] (reporting survey results from California).

essay "Dying to be Competent," sociologist Tressie McMillan Cottom describes how her prematurely born baby died, after providers failed for three days to recognize her complaints as preterm labor.[213] Moreover, according to the "weathering" hypothesis, the accumulation of repeated stresses associated with being subjected to discrimination and racism contributes to poorer health for Black women, which in turn plays a role in their high maternal mortality rates.[214] Simply put, getting pregnant exposes Black women to a much higher risk of death than White women.

Risks short of death are greater too. Pregnant Black women are more likely to suffer non-lethal negative experiences associated with medical care. Compared to White women, they are more frequently subjected to verbal mistreatment or to nonconsensual or violent interventions during pregnancy, childbirth, and the postpartum period.[215]

c. Black Women — Criminalization of Pregnancy

Prosecutions of pregnant women for alleged harm to their fetuses also threatens the welfare of pregnant Black women. The umbrella phrase "criminalization of pregnancy"[216] covers prosecutions of pregnant

[213] Tressie McMillan Cottom, *Dying to be Competent*, *in* THICK: AND OTHER ESSAYS 77, 79-97 (2018).

[214] *See* Novoa & Taylor, *supra* note 209; Petersen et al., *supra* note 209, at 764.

[215] *See* Dana-Ain Davis, *Obstetric Racism: The Racial Politics of Pregnancy, Labor, and Birthing*, 38 MED. ANTHROPOLOGY 560, 568-69 (2018) (analyzing birth stories of Black women in the U.S.); Saraswathi Vedam, Kathrin Stoll, Tanya Khemet Taiwo, Nicholas Rubashkin, Melissa Cheyney, Nan Strauss, Monica McLemore, Micaela Cadena, Elizabeth Nethery, Eleanor Rushton, Laura Schummers, Eugene Declercq & the GVtM-US Steering Council, *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, 16 REPROD. HEALTH 77, 85 (2019).

[216] Amnesty International defines the phrase as "[t]he process of attaching punishments or penalties to women for actions that are interpreted as harmful to their own pregnancies . . . includ[ing] laws that punish actions during pregnancy that would not otherwise be made criminal or punishable . . . [and] other laws not specific to pregnancy . . . [that] are either applied in a discriminatory way against pregnant women and/or have a disproportionate impact on pregnant women . . . ." *See* AMNESTY INT'L, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA 5 (2017), https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf [https://perma.cc/94CF-A96Z]. This criminalization of pregnancy is but one aspect of a broader movement to place all responsibility for children's well-being on their mothers. As Linda Fentiman writes: "Mothers — and pregnant women — are increasingly seen as exclusively responsible for all aspects of their children's health and well-being. At the same time, the enormous impact of poverty, genetics, environmental toxins, fathers, government, and private institutions on children's health is largely ignored." LINDA C. FENTIMAN, BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH 3 (2017).

women for a range of behaviors. Using illegal drugs while pregnant has been the most common factual predicate, but actions such as a failure to comply with medical advice, failure to wear a seatbelt, and attempted suicide all have prompted criminal prosecutions.[217]

Marshae Jones' 2019 manslaughter indictment offers a recent notorious example of pregnancy criminalization. Jones, a Black woman, was five months pregnant when she was shot in the stomach in a fight.[218] The gunshot killed her fetus. Commenting on the case, a local police detective ignored Jones' injury, instead treating her as the insurer of her fetus' welfare: "The investigation showed that the only true victim in this was the unborn baby . . . . It was the mother of the child who initiated and continued the fight."[219] Many local residents agreed with this logic.[220] Advocates for pregnant women, by contrast, decried Alabama's willingness to arrest a woman who had been injured by gun violence and lost her pregnancy as a result.[221] The district attorney ultimately declined to prosecute the case, without disavowing its legal basis.[222] One commentator noted the implications: "If a pregnant woman . . . can be arrested because she does not, or cannot, ensure her [own] safety, then all pregnant women are endangered: from mugging victims (why were you out on that unsafe street so late?) and women who 'provoke' their partner to beat them to women who have miscarriages because of the physical demands of their jobs."[223]

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[217] *See generally* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020) (discussing the use of criminal law to police poor women's reproduction).

[218] Farah Stockman, *Alabamians Defend Arrest of Woman Whose Fetus Died in Shooting*, N.Y. TIMES (June 30, 2019), https://www.nytimes.com/2019/06/30/us/alabama-woman-marshae-jones.html [https://perma.cc/QQC4-ELDB].

[219] *Id.*

[220] *See id.*

[221] *See* Michael Brice-Saddler & Alex Horton, *A Pregnant Woman Was Shot in the Stomach. She Was Charged with the Death of the Fetus*, WASH. POST (June 28, 2019), https://www.washingtonpost.com/nation/2019/06/27/pregnant-woman-was-shot-stomach-she-was-indicted-her-babys-death [https://perma.cc/BN7K-29TD] (quoting Lynn Paltrow, head of a national advocacy organization, as saying "Alabama has indicted Ms. Jones, claiming it is a crime for a woman to be unable to protect her own life and health").

[222] *See* Farah Stockman, *Manslaughter Charge Dropped Against Alabama Woman Who Was Shot While Pregnant*, N.Y. TIMES (July 3, 2019), https://www.nytimes.com/2019/07/03/us/charges-dropped-alabama-woman-pregnant.html [https://perma.cc/5UPC-H8JQ].

[223] Katha Pollitt, *Marshae Jones is Proof Pro-Lifers Don't Care About Life*, NATION (June 28, 2019), https://www.thenation.com/article/marshae-jones-alabama-abortion-baby [https://perma.cc/K22R-8ZDQ].

Criminal prosecutions of pregnant women rest on an assortment of legal theories, including "fetal assault" or "fetal homicide" laws (which recognize fetuses as potential crime victims) and the designation of substance use during pregnancy (sometimes labeled "chemical endangerment") as a form of child abuse.[224] These prosecutions first drew public attention in the late 1980s, when prosecutors began bringing charges against women who used cocaine during their pregnancy.[225] Since then, prosecutors have pursued increasingly serious charges and draconian penalties against women,[226] and the scourge of the opioid epidemic has kept the prosecution of pregnant women in the public eye.[227] Echoing the geographic concentration of involuntary sterilizations, several Southern states have prosecuted particularly large numbers of cases.[228]

And these prosecutions have fallen disproportionately on low-income and Black women,[229] even though "[d]rug use by pregnant women transcends class and racial lines"[230] and the harmful effects of alcohol or tobacco use on the developing fetus are better established than those of illegal drug use.[231] The precise number of women prosecuted for actions relating to their pregnancy is unknown,[232] but the largest study

[224] For example, in 2014, Tennessee amended its "fetal assault" law to specifically authorize criminal charges against a woman who gave birth to an infant prenatally exposed to illegal narcotics. The law contained a sunset provision, so that it expired in July 2016. *See* TENN. CODE ANN. § 39-13-107 (repealed 2016).

[225] For a brief history of the criminalization of drug use by pregnant women, see FENTIMAN, *supra* note 216, at 126-32.

[226] *See id.* at 131-32.

[227] *See* Editorial Board, Opinion, *The Mothers Society Condemns*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-law-poverty.html [https://perma.cc/4PJN-JQ4D].

[228] *See* AMNESTY INT'L, *supra* note 216, at 8 (reporting charges against approximately 500 women in Alabama, 100 women in Tennessee, and over 100 in South Carolina); *see, e.g.*, Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES MAG. (Apr. 25, 2012), https://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html [https://perma.cc/4PJN-JQ4D] (describing Alabama's prosecution of pregnant women). Similar prosecutions, however, have occurred in a majority of states.

[229] FENTIMAN, *supra* note 216, at 114, 135 ("Almost all these defendants are poor and/or racial or ethnic minorities."); Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47 HASTINGS CTR. REP. S19, S24 (2017), https://doi.org/10.1002/hast.791 [https://perma.cc/QZD3-M4U9]; Roberts, *supra* note 170, at 1945-46.

[230] FENTIMAN, *supra* note 216, at 141.

[231] *See id.* at 124 ("In contrast to the well-documented harms of alcohol and tobacco use on fetal development, the evidence on the impact of illegal drug use is much more equivocal.").

[232] *See* AMNESTY INT'L, *supra* note 216, at 8.

of cases involving arrests and forced interventions on pregnant women found that 71% of cases involved women whose income was low enough to entitle them to indigent defense and 52% involved Black women.[233] One explanation for the exaggerated prosecutorial attention to low-income and Black pregnant women is their reliance on publicly funded prenatal care. Poor women's entanglement in public benefits systems deprives them of privacy, exposing them to closer scrutiny and greater condemnation than middle-class women, as Khiara Bridges describes.[234]

"Fetal interests" or "child welfare" is typically the stated justification for prosecuting pregnant women. Nearly three decades ago, however, Lisa Ikemoto showed how the invocation of fetal interests obscures the real impact: the subordination of women.[235] Medical and public health experts warn that criminalizing pregnancy negatively affects the health of women and their children.[236] In many of these cases, however, doctors and nurses — "hospital snitches and police informants"[237] — actively informed law enforcement of drug use by pregnant women. Awareness of such reporting produces justifiable distrust, which may discourage women from seeking prenatal care early in their pregnancy or at all, leading to worse pregnancy outcomes.[238] Providers' willingness to test pregnant women for drugs without informed consent, betray

233 *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 305, 311 (2013). The "forced interventions" counted by this study included detentions of pregnant women in hospitals, mental institutions, and treatment programs and forced medical and surgical interventions.

234 *See* BRIDGES, *supra* note 139, at 36 (concluding that "Medicaid mandates an intrusion into women's private lives and produces pregnancy as an opportunity for state supervision, management, and regulation of poor, uninsured women"); *see also* AMNESTY INT'L, *supra* note 216, at 25 ("Those receiving care through Medicaid may be screened for drug use more frequently than more wealthy women with private insurance.").

235 *See* Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1207 (1992).

236 *See* Michelle Oberman, *Thirteen Ways of Looking at* Buck v. Bell*: Thoughts Occasioned by Paul Lombardo's "Three Generations, No Imbeciles,"* 59 J. LEGAL EDUC. 357, 377-78 (2010) ("Long after being discredited on medical and public health grounds, criminal justice officials have persisted in prosecuting 'pregnant addicts,' focusing on public hospitals used disproportionally by poor women of color who use street drugs.").

237 GOODWIN, *supra* note 217, at 78-80.

238 The Amnesty International report reasons that, by deterring women from seeking prenatal care, criminalizing women's actions during pregnancy "presumably contribute to . . . disparities" in maternal and infant mortality for Black women. AMNESTY INT'L, *supra* note 216, at 61.

patient confidentiality, and align themselves with law enforcement may reflect racist and eugenic thinking.[239] As Dorothy Roberts observed in 1997: "[t]he criminal regulation of pregnancy . . . belongs to the continuing legacy of the degradation of Black motherhood. . . . The prosecutions are better understood as a way of punishing Black women for having babies rather than as a way of protecting Black fetuses."[240]

2. Precarious Motherhood

Once they have a child, Black and disabled women face heightened risks of losing custody of it to the state.[241] Either child welfare agencies or the criminal justice system may intervene and seek removal. Thus, after childbirth, concerns about the criminalization of pregnancy seamlessly morph into concerns about the criminalization of motherhood. Parenting choices that do not mirror idealized or middle-class norms — whether as a result of poverty, physical or intellectual impairment, cultural factors, or lack of social supports — may lead to a child's removal from its mother, with long-lasting impacts on both.[242]

[239] For example, court filings in Ferguson v. City of Charleston, 532 U.S. 67, 70-71 (2001), document that a nurse integrally involved in the Charleston, South Carolina medical center's program of reporting to law enforcement pregnant women who tested positive for illegal drugs expressed to others involved in the program her view that most Black women should undergo tubal ligations. Of the twenty-seven women that program referred to law enforcement, twenty-six were Black. ROBERTS, *supra* note 30, at 174-75.

[240] ROBERTS, *supra* note 30 at 154.

[241] Black women also face a significantly higher risk that their Black baby will die during its first year of life, as compared to White babies. I do not address that devastating aspect of maternal precarity in this Article, because I do not see a close parallel in the experience of disabled women who have children. One study, however, suggests that women with IDD are more likely to experience adverse birth outcomes including preterm births, low birth-weight babies, and still births. The study's author suggests that the higher rate of adverse birth outcomes may result from the intersection of disadvantage (including socioeconomic status, race, and comorbidities) that typifies many women with IDD, but that the higher risk of adverse outcomes persisted even when accounting for covariates. Akobirshoev et al., *supra* note 2, at 410; *see also* Mitra et el., *Maternal Characteristics*, *supra* note 203, at 1027, 1030 (discussing a Rhode Island study showing that women with disabilities reported a higher likelihood of having an infant die).

[242] *See* Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow*,' N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html [https://perma.cc/Y8VR-EBV9] (reporting on interviews with attorneys representing predominately low-income Black and Hispanic women); *cf.* Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 UC DAVIS L. REV. 1221, 1221-22 (2011) (arguing that incorporating "intensive parenting" practices into legal standards could increase existing biases in the child welfare system).

a. Black Women

Black mothers and Latino mothers appear more likely than White mothers to face unfair accusations of child abuse and neglect. A public defender paints a chilling picture of how differently health care workers tend to treat women of color — as compared to White mothers — when they seek care for a child's injury.[243] The attorney cites to research finding that when Black or Hispanic children are brought to an emergency room for cases of minor head trauma, they are two to four times more likely to be evaluated and reported as possible child abuse (as compared to non-Hispanic White children). These reports can cause harm and trauma to children who are unnecessarily separated from their families.[244] Child welfare agencies and police too easily cite the child's safety when criminalizing parenting choices made by low-income women (predominantly women of color), a practice advocates have nicknamed "Jane Crow."[245] The broader picture is one where "catching a case" — the common shorthand for being investigated by a child welfare agency — has become as routine, unjustified, and potentially life altering for Black mothers as police hyper-surveillance is for Black men and boys.[246]

Black parents are overrepresented in the child welfare system compared to Whites, with racial disparities existing in the decisions made at various stages of the child welfare process.[247] The reasons are complex and contested, but research indicates that socioeconomic status is the strongest predictor of child maltreatment, and Black families are disproportionately likely to have a low socioeconomic status.[248] Some scholars assert the more controversial proposition[249] that racial bias within the child welfare system plays a role in producing

[243] *See* Jessica Horan-Block, *A Child Bumps Her Head. What Happens Next Depends on Race.*, N.Y. TIMES (Aug. 24, 2019), https://www.nytimes.com/2019/08/24/opinion/sunday/child-injuries-race.html [https://perma.cc/UQ3H-8LB9]

[244] *See id.*

[245] *See* Clifford & Silver-Greenberg, *supra* note 242.

[246] *See* Collier Meyerson, *For Women of Color, the Child-Welfare System Functions Like the Criminal-Justice System*, NATION (May 24, 2018), https://www.thenation.com/article/for-women-of-color-the-child-welfare-system-functions-like-the-criminal-justice-system [https://perma.cc/E6HH-ZREP].

[247] *See* CHILDREN'S BUREAU, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 2 (2016), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [https://perma.cc/4XBP-EWQS].

[248] *Id.* at 6.

[249] *See generally* Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 221-22 (2013) (examining racial discrimination in foster care).

disparities.[250] For the Black mothers whose children are taken from them at disproportionately high rates, however, it matters little whether the proximate cause is racial bias in the system itself or in social and economic structures more broadly.

b. Women with Disabilities

Maintaining custody is similarly not a sure bet for mothers with disabilities, who "face substantial discrimination in the child welfare system."[251] Ill-informed assumptions about the capacity of a woman with a physical, psychiatric, or intellectual disability to meet the needs of a child may be reflected in legal standards questioning her fitness.[252] As with many disability-based prejudices, these assumptions view the woman's disability as the only trait relevant to her parenting ability. Parents with intellectual or psychiatric disabilities face distinctive prejudices casting them as utterly unable to acquire parenting skills (in the case of intellectual disability)[253] or as potential dangers to their children (in the case of psychiatric disability).[254] But parents with

[250] *See, e.g.*, DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 6 (2002) (explaining that the system of child welfare could easily be mistaken for a system to monitor Black families); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1477-78 (2012) (describing how operations of the prison system and foster care systems intersect to punish Black mothers). *But see* Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 879 (2009).

[251] Bagenstos, *supra* note 17 (manuscript at 118) (referring to disabled people generally); *see also* NAT'L COUNCIL ON DISABILITY, *supra* note 107, at 79. Women with disabilities face disproportionate risks as compared to both disabled men and non-disabled women. While this Article's discussion is concerned with the disproportionate risk that disabled women face of losing custody to the state in child welfare proceedings, they face a parallel risk in custody battles with their child's other parent. *See* Porter, *supra* note 57, at 116.

[252] According to the National Council on Disability's 2012 report, a majority of states listed one or more types of disabilities as grounds for terminating parental rights. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 107, at 84.

[253] *See generally* Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127 (2016) (discussing anecdotal evidence and research about a common presumption that mentally disabled parents are unfit to raise children).

[254] Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 FAM. CT. REV. 37, 39 (2019) [hereinafter *Family Law*]; *see* Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities as Parents: The ADA and the CRPD*, 57 FAM. CT. REV. 21, 26 (2019) (discussing assumptions regarding intellectual disability and parental fitness). Some courts may even deprive parents of their children based in part on a judicial prediction that a parent's psychiatric disability creates a risk of future neglect of a child. *See* Alissa Bang, *What Do Judges and Fortune*

sensory or physical disabilities must battle assumptions as well. "[D]eaf parents are thought to be incapable of effectively stimulating language skills; blind parents cannot provide adequate attention or discipline; and parents with spinal cord injuries cannot adequately supervise their children."[255] While these prejudices attach to both fathers and mothers with disabilities, gendered assumptions about mothers' primary obligation to physically care for and emotionally nurture children make them particularly destructive to disabled women's custodial rights.[256]

Custodial precarity for disabled mothers also reflects a failure by many child welfare professionals to appreciate the range of parenting supports available to assist a disabled parent. Just as non-disabled parents regularly rely on a range of supports like daycare, tutoring, and familial involvement, disabled parents can also avail themselves of various supports.[257] The seeming novelty of parenting supports valuable to disabled parents reflects the widely shared myth that people with disabilities do not become parents.[258] Linda Barclay points out how the "social organization of resources" constrains choices:

> Culturally shared schemas about the natural unfitness of disabled people to participate in work, school, families, politics and society influence the availability and distribution of resources . . . . The reduced . . . achievements of disabled people that predictably flows from lack of access further reinforces those very cultural schemas that produce a hostile and incommodious environment. It looks like a natural fact about the world, about disability, that disabled people are incapable of full participation.[259]

Tellers Have in Common? Connecticut's Predictive Neglect Doctrine as a Basis for Premature Suspension of Parental Rights, 32 QUINNIPIAC PROB. L.J. 410, 438-39 (2019).

255 Michael Ashley Stein, *Mommy Has a Blue Wheelchair: Recognizing the Parental Rights of Individuals with Disabilities*, 60 BROOK. L. REV. 1069, 1083 (1994) (reviewing JAY MATTHEWS, A MOTHER'S TOUCH: THE TIFFANY CALLO STORY (1992)) (internal citations omitted).

256 *Cf.* Porter, *supra* note 57, at 112 (noting inconsistency between women's caretaker role and disabled women's perceived neediness).

257 *See* Francis et al., *supra* note 58, at 12.

258 More overtly, laws in many states limit the rights of people with psychiatric disabilities to marry, thus limiting their ability to form culturally favored families. *See* Porter, *supra* note 57, at 116 (stating that in 1999, thirty-three states had such restrictions).

259 LINDA BARCLAY, DISABILITY WITH DIGNITY: JUSTICE, HUMAN RIGHTS AND EQUAL STATUS 137-38 (2018).

In short, the apparent relative rarity of disabled parents reinforces the naturalness of (and preference for) non-disabled parenting modes, which in turn affects the parenting that society supports.

Even as progress has been made integrating people with disabilities into the community, these prejudices against disabled mothers have remained remarkably robust. They manifest within child welfare agencies and the judicial system and have largely resisted legal challenges.[260] Litigation seeking to use the Americans with Disabilities Act of 1990 ("ADA") to compel states to modify their child welfare services to meet disabled parents' needs have had only limited success.[261] One appellate court, though, has noted child welfare agencies' "systemic discrimination"[262] against parents with disabilities and explicitly connected that discrimination with the history of eugenics.[263]

III. SHARED INDIGNITIES IN A LEGAL AND HUMAN RIGHTS FRAMEWORK

This Article has traced numerous parallels among societally erected barriers to healthy motherhood that Black women and women with disabilities have faced, both historically and today. This Part employs the concept of dignity to attach greater meaning to those parallels. It

[260] *See* Powell, *Family Law*, *supra* note 254, at 43-44. Powell considers how the ADA may be applied to some aspects of child custody and visitation disputes, specifically its applicability to individualized treatment and assessment of parents, courtroom accessibility, and the legal obligations of attorneys. *Id.* According to the National Council on Disability, "[p]arents with disabilities and their children are overly, and often inappropriately, referred to child welfare services and, once involved, are permanently separated at disproportionately high rates." NAT'L COUNCIL ON DISABILITY, *supra* note 107, at 17.

[261] *See* Francis, *supra* note 254, at 29-30.

[262] *In re* Hicks, 890 N.W.2d 696, 704 (Mich. App. 2016), *aff'd in part, vacated in part sub nom. In re* Hicks/Brown, 893 N.W.2d 637 (Mich. 2017).

[263] *See id.* (citing Buck v. Bell, 274 U.S. 200 (1927)). In its opinion on the appeal of *Hicks*, the Michigan Supreme Court found that the ADA required reasonable modifications to the services offered to disabled parents in order to reasonably accommodate their disabilities. *In re* Hicks/Brown, 893 N.W.2d 637, 640 (Mich. 2017). The Departments of Justice and Health and Human Services in the Obama administration similarly articulated a need for child welfare agencies to conduct individualized assessments of disabled parents "that are divorced from generalizations and stereotypes regarding people with disabilities." U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF JUSTICE, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT 13 (2015), https://www.hhs.gov/sites/default/files/disability.pdf [https://perma.cc/YCV6-DJZK].

briefly explores the meaning of dignity and how that concept provides a unifying framework for the many ways that Black and disabled women struggle with impediments to their ability to bear and raise children. Whether they result from state policy or private practices or simply reflect a lingering residue of historically discriminatory practices, these impediments undermine the dignity of Black and disabled women. By making the choice to be a mother unachievable, impractical, physically dangerous, or unsustainable, they corrode the dignity and equal status of these women. To be clear, I do not argue that motherhood is in any way essential to women's dignity or part of women's "nature." Instead, my claim is that women's ability to freely *choose* whether to bear children and be mothers lies at the core of equal personhood and human dignity. Although dignity enjoys no single clear meaning, the term's use in human rights documents and constitutional law offers useful insights regarding the nature of the dignitary harms described in this Article.

A. Defining Dignity

The concept of dignity is capacious, but vague. It evades attempts at precise definition. Despite (or perhaps because of) its shape-shifting nature, dignity is commonly invoked as the basis for making claims in human rights law and U.S. constitutional law.[264] The foundational documents in neither of these realms, however, clearly define what dignity means.

1. Human Rights

Since the Universal Declaration of Human Rights' assertion in 1948 that "[a]ll human beings are born free and equal in dignity and rights,"[265] dignity has been a central component of human rights discourse and law. Subsequent human rights documents — and particularly the Convention on the Rights of Persons with Disabilities ("CRPD") — have given dignity a place of central importance.[266] These

[264] Another potentially relevant context, but not the focus in this Article, is philosophy and bioethics. In addition, in some instances, individuals may also seek redress via tort law for injuries to their dignity. *See* FRANK M. MCCLELLAN, HEALTHCARE AND HUMAN DIGNITY: LAW MATTERS 18 (2020) (advocating for expanded availability of monetary damages for dignitary harms).

[265] Universal Declaration of Human Rights, G.A. Res. 217 (I) (Dec. 10, 1948).

[266] *See, e.g.*, Berta Esperanza Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, 10 NE. U. L. REV. 654, 664 (2018) (describing human rights documents as "fully center[ing] dignity"). The CRPD seeks explicitly to "promote respect for [the] inherent dignity" of all persons with disabilities. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (I), at 4 (Dec. 13, 2006).

documents seemingly treat dignity as a foundational concept without defining or explaining it.[267] Perhaps drafters of human rights documents thought it sufficient to leave the term's meaning to the "intuitive understanding"[268] of those responsible for implementing human rights obligations. However, the absence of a shared, clear understanding may sap the concept of rigor. Without clear meaning, dignity may not function effectively as a foundation for human rights.[269]

That said, widely shared conceptions of dignity seem clearly connected to the conditions necessary for human flourishing.[270] In synthesizing writings on dignity and its relevance to health, Nora Jacobson characterizes human rights documents as "view[ing] the maintenance of dignity as evidence of the successful protection and promotion of human rights."[271] Both restrictive and affirmative uses of the term appear in those documents. Restrictive uses protect human dignity from threats of various kinds, including prejudicial attitudes, demeaning acts, and discrimination. Affirmative uses, by contrast, advance human dignity by requiring that societies satisfy minimum standards for their members. The constraints on childbearing explored in this Article implicate both restrictive and affirmative uses of dignity. Moreover, reflecting on examples of indignities — instances when people have been denied dignity — may help crystallize the concept's meaning.[272] Thus, indignities endured by Black and disabled women — women like Marshae Jones and Mary Moe — may enhance our understanding of what dignity actually demands.

Indeed, the history of reproductive abuses by the medical profession that Black and disabled women have endured provides good reason for viewing infringements on childbearing through a dignity lens.[273] The idea that dignity in areas involving reproduction and family formation

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[267] Jeremy Waldron, *Is Dignity the Foundation of Human Rights?*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 117, 117 (2015).

[268] *Id.* at 118-120.

[269] *Id.*

[270] *See* Hernández-Truyol, *supra* note 266, at 661.

[271] Nora Jacobson, *Dignity and Health: A Review*, 64 SOC. SCI. & MED. 292, 295 (2007) (synthesizing literature from multiple disciplines).

[272] *See* Hernández-Truyol, *supra* note 266, at 661-62. Relying on clear counter-examples to give content to a vague concept is not unusual in the law. For example, despite the absence of a clear definition of "good faith," commercial law readily provides examples of conduct displaying bad faith to give an idea of what good faith is *not*.

[273] *See* MCCLELLAN, *supra* note 264, at 84 (suggesting that all patients have heightened dignitary concerns relating to medical care involving their "sexual organs," with African-American women having reason for special concerns).

is a matter of human rights has spread well beyond legal circles[274] to medical professionals. For example, a recent study examining women's descriptions of mistreatment they were subjected to in receiving maternity care drew the connection between "mistreatment, dignity, and freedom from human rights abuses in maternity care."[275] Similarly, the American Society of Reproductive Medicine, the leading organization of fertility specialists, describes creating a family as a human right.[276] Yet, as the parallels described in Part II demonstrate, both the state and the medical profession have played roles in perpetuating policies and practices that degrade, rather than dignify, Black and disabled women.

2. Constitutional Law

The word "dignity" is nowhere to be found in the text of the United States Constitution,[277] but it appears regularly in constitutional law decisions and discussions. According to Leslie Meltzer Henry's empirical study of the Supreme Court's use of the term, "few concepts dominate modern constitutional jurisprudence more than dignity does without appearing in the Constitution."[278] Justices have employed the concept in varying ways, without always being clear about what they are doing. As a result, dignity's constitutional relevance remains nebulous and malleable. But Henry's empirical study offers a typology of Justices' usage of the term dignity.[279] Henry views dignity as "a series of meanings that share a . . . family resemblance," rather than a single

[274] *See* Powell & Stein, *supra* note 12, at 72-75 (discussing application of CRPD Articles 23 and 25 to the reproductive and parenting rights of people with disabilities).

[275] Vedam et al., *supra* note 215, at 14.

[276] *See* Francis et al., *supra* note 58, at 10 (citing Am. Soc'y for Reprod. Med., *Disparities in Access to Effective Treatment for Infertility in the United States: An Ethics Committee Opinion*, 104 FERTILITY & STERILITY 1104 (2015).

[277] By contrast, many other countries that have ratified constitutions since the mid-twentieth century explicitly reference dignity in their constitutions. *See* Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 26 (2004).

[278] Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011).

[279] In a similar effort, Neomi Rao has suggested sorting the Supreme Court's use of the term into three categories: (1) dignity as a term describing the "inherent worth of each individual;" (2) dignity as a grounds for enforcing a variety of substantive values; and (3) dignity as a concept that demands recognition and respect from others. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 187-88 (2011).

core concept.[280] She identifies five different, but related, ways that Justices have used the term,[281] each carrying a somewhat different meaning. Henry also notes how the Justices' reliance on dignity to explain or justify their conclusions has escalated in recent decades.[282]

In particular, dignity has become a handy go-to for courts addressing socially contentious issues ranging from abortion, to same-sex intimacy and marriage, to the death penalty. In the early 1990s, the joint authors of *Planned Parenthood v. Casey* relied on dignity to affirm the central importance of a person's freedom to make certain deeply personal decisions:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.[283]

Casey provides an example of what Henry calls "dignity as liberty."[284] This usage associates human dignity with individual autonomy, a person's ability to make choices based on her understanding of right and wrong and what makes life good, and it requires respect both for the choice and the chooser. As a matter of substantive due process, the state cannot deprive a person of choices central to how she seeks to live her life, including whether to bear a child.[285] Thus, the choice of any woman to have a child, even if she is poor and receives public assistance, reflects her dignity and should be accorded respect.[286] This Kantian

[280] Henry, *supra* note 278, at 188.

[281] These include "institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity." *Id.* at 189-90 (emphasis omitted).

[282] *See id.* at 171-72.

[283] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (citing Carey v. Population Services International, 431 U.S. 678, 685 (1977)).

[284] Henry, *supra* note 278, at 210.

[285] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[286] The importance of according respect to Black women's choices to bear children should not obscure the parallel importance of providing women access to effective contraceptive options of their choice. According to the Guttmacher Institute, low-income women and women of color are among the groups experiencing the highest rates of unintended pregnancy. *See Unintended Pregnancy in the United States*,

conception of dignity, however, inheres only in persons capable of making autonomous choices — and thus may exclude persons with severe intellectual disabilities. As a consequence, reference to "dignity as liberty" may miss the mark as a description of the harm that occurs when others make choices about reproduction for a woman with a severe intellectual disability.

By contrast, "dignity as equality" — a second meaning identified by Henry that is relevant to constraints on childbearing — is both universal and permanent. Sometimes, the Justices have used "dignity" to capture the idea of human beings' equal worth.[287] As such, "dignity as equality" has an expressive component that animates the Court's equal protection jurisprudence. This meaning may acknowledge historical and contemporary hierarchies that have subordinated some groups, keeping them from fully enjoying recognition of their equal worth.

This reading of "dignity" has figured in racial discrimination cases where the Court has held that the Fourteenth Amendment prohibits segregation or anti-miscegenation laws. Because those laws express a White supremacist message, they undermine the dignity of Black people. To support this dignity-based rationale, the Court has relied on the legislative history of the Civil Rights Act, specifically the Senate Commerce Committee's statement:

> The primary purpose of . . . [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.[288]

William Carter paints a similar picture of the stigmatization and dehumanization experienced by Blacks who are subjected to racial profiling by law enforcement officials.[289] And Neomi Rao has considered the inextricable connections between "stigma and inferiority" and "the underlying harms of racial discrimination."[290]

GUTTMACHER INST. (Jan. 2019), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states [https://perma.cc/3PFV-7JMD].

[287] *See* Henry, *supra* note 278, at 202-03.

[288] Rao, *supra* note 279, at 263-64.

[289] See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 20 (2004).

[290] Rao, *supra* note 279, at 264.

Describing cases like *Brown v. Board of Education*, she argues that the Court has been sensitive to how the country's history of *de jure* discrimination and segregation affects Black people. In cases involving such ongoing social struggles, something more than formal equality may be required to promote dignity for victims of prolonged and pervasive discrimination.[291]

Dignity for people with disabilities also entails attention to equality, a point not yet fully recognized by the Court. Philosopher Linda Barclay makes the point: "Equality is not (just) a distributive ideal. . . . [It] is also an ideal that governs our relationships to one another and the way our social and political institutions treat us. In particular, it is an ideal of a society of people with equal moral worth or status, a rejection of entrenched power and status hierarchies."[292] Thus, ensuring equal dignity for disabled people goes beyond requirements of formally equal treatment or even reasonable accommodations to encompass a relational aspect. From this perspective, dignity as equality requires according people with disabilities equal social status and influence.[293] Although the Supreme Court has not fully articulated a robust "dignity as equality" approach to disability discrimination, Justice Ginsburg's concurrence in *Tennessee v. Lane*[294] appears to discern this goal among the ADA's purposes. In explaining the constitutional validity of applying the ADA to ensure equal access to state courts, she described Congress's enactment of the ADA as "consider[ing] a body of evidence showing that . . . persons with disabilities encounter access barriers to public facilities and services. That record . . . sufficed to warrant the barrier-lowering, dignity-respecting national solution. . . ."[295]

Although "dignity as liberty" and "dignity as equality" (as Henry describes those concepts) can be distinguished, they can also be compounded. In some cases involving personal choices regarding intimate relations and family formation, Justices have simultaneously deployed and integrated equal protection and substantive due process to protect individual dignity.[296] Most recently, Justice Kennedy's

[291] *See id.* at 264-65.

[292] BARCLAY, *supra* note 259, at 6-7 (2019) (internal citations omitted).

[293] *See id.* at 7 (highlighting concern with "entrenched differences in rank, power and social status").

[294] *See* Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

[295] *Id.* at 538.

[296] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing that under equal protection, "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State"); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (holding that state laws allowing compulsory sterilization of criminals is unconstitutional under equal protection).

majority opinion in *Obergefell v. Hodges*[297] relied on the concept of "equal dignity" seemingly to marry equal protection and substantive due process protections.[298] In cases involving women's reproductive freedoms, however, the Court's references to dignity have not linked liberty and equality concerns.[299] By focusing only on "dignity as liberty" (i.e., autonomy) as the basis for abortion rights, for example, the Court has stranded those rights on a small and eroding island in a sea of neoliberal assumptions about the nature of autonomy.[300] Reading the Fourteenth Amendment to protect only against affirmative government interference with women's choices is a parsimonious view of reproductive liberty and women's dignity.[301] For a woman desiring to bear and raise a child, this narrow view of dignity, unencumbered by attention to equality, means that the state has no obligation to do anything to enable that choice.[302] Moreover, other judicial invocations of dignity affirmatively undermine women's dignity. In upholding a congressional ban on abortions accomplished by intact dilation and evacuation,[303] the Court characterized the ban as "express[ing] respect for the dignity of human life."[304] This use of dignity — pushed by

[297] 135 S. Ct. 2584, 2599 (2015) (recognizing a constitutional right to enter into same-sex marriage).

[298] *See* Laurence H. Tribe, *Equal Dignity: Speaking its Name*, 129 HARV. L. REV. 16, 17 (2015).

[299] Scholars have criticized *Roe v. Wade* for its failure both to address how the inability to choose to terminate a pregnancy devalues women's equality and to tether together equality and liberty rights in its analysis. *See* Ikemoto, *supra* note 84, at 256 (describing how "the Court's analysis [in *Roe*] treated the right of privacy as a stand-alone interest. It never mentioned liberal feminism's equality goals or suggested a link between autonomy and equality").

[300] *See id.* at 257, 259 ("[T]he insidious influence of neoliberalism has changed the meaning of choice, reducing it, in many contexts, from autonomy to free market individualism.").

[301] In the context of abortion rights, this crabbed view of liberty produces cases like Harris v. McRae, 448 U.S. 297 (1980), where a majority of the Court rejected a challenge to the Hyde Amendment's banning of federal Medicaid funding for abortion services. The Court rejected the plaintiffs' argument that, as a matter of equal protection, the government could not single out abortion services as an excluded Medicaid service because Medicaid coverage of that service was essential for poor women's exercise of reproductive autonomy. *See id.* at 257 (describing *Harris* as "illustrat[ing] the strategic difficulties of relying on the privacy doctrine").

[302] *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[303] This procedure is sometime colloquially referred to as a "partial birth abortion," a non-medical term coined by anti-abortion activists.

[304] Gonzales v. Carhart, 550 U.S. 124, 157 (2007).

religious conservatives seeking to establish fetal personhood — threatens to subvert the dignity of women.[305]

B. The Dignity of Childbearing and Mothering

A more robust conception of dignity is needed to protect the procreative interests of Black and disabled women. Treating privacy rights and substantive equality separately insulates from legal challenge reproductive controls on women at the intersection of multiple axes of oppression like gender, race, disability, and class.[306] The inadequacy of neoliberal understandings of choice for advancing the interests of marginalized and resource-deprived women has led to the birth of a distinct movement for reproductive justice led by women of color.[307] This subpart considers how emphasizing dignity as a foundation for infusing equality concerns into a liberty analysis offers more promise for addressing the injustices examined in this Article.

Stated simply, policies and practices that regulate or burden childbearing by Black and disabled women undermine their dignity by expressing an implicit judgment that they are unacceptable as mothers. The constraints on reproduction described in Part II diminish the human-ness of these women, just as they have historically. Stereotypes with deep historical roots persist. Dehumanizing stereotypes of Black women trace their lineage to images of enslaved women as "breeders"[308] without claim to human relationship with their children. In his history of racist ideas, Ibram X. Kendi quotes from a South Carolina court that, in 1808, ruled that an enslaved woman stood "on the same footings as other animals" when it came to a legal claim to her children.[309] For disabled women, a presumption of asexuality and an overzealousness in finding incapacity to make their own decisions perpetuate dehumanizing practices.

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305 As Reva Siegel notes, the *Carhart* Court also relied on paternalistic justifications for limiting women's abortion decisions, contrary to a conception of dignity that respects women's autonomy. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under* Casey/Carhart, 117 YALE L.J. 1694, 1698-99 (2008).

306 *See* Ikemoto, *supra* note 84, at 262.

307 *See supra* text accompanying notes 13–17.

308 In describing the stereotypes of Black women, Rosenthal and Lobel refer to the "welfare queen" stereotype as "connected to images of Black women as 'breeders' dating back to slavery." They also note continued stereotypes of the women as "having 'animalistic' sexuality." Rosenthal & Lobel, *supra* note 63, at 416.

309 IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 136 (2016).

The point is that the stake for Black and disabled women who wish to bear children and form families is their full and equal membership in the human family, not simply respect for their autonomous decisions. The equality and liberty aspects of dignity reinforce one another in these cases. Specifically focusing on Black women, Dorothy Roberts makes this argument at some length:

> Governmental standards for procreation implicate both equality and privacy interests by denying human dignity. The right to bear children goes to the heart of what it means to be human. . . . denying someone the right to bear children — or punishing her for exercising that right — deprives her of a basic part of her humanity. When this denial is based on race, it also functions to preserve a racial hierarchy that essentially disregards Black humanity.[310]

A parallel point can be made regarding women with disabilities.[311] Certainly, the involuntary sterilization of a woman because she is disabled denies her ability to choose to have a child. It also speaks powerfully to the societal denigration of disability. Even policies and practices short of compelled sterilization infringe on both liberty and equality aspects of disabled women's dignity; just consider their segregation in institutional settings that curtail sexual privacy or the binary competency standard that silences the voices of women not deemed fully competent regarding reproductive choices.

Dignity attaches to all humans, but its particular meaning may vary for groups and individuals based on their social settings, life experiences, and capacities.[312] Dorothy Roberts makes the point that the "principle of self-definition has special significance for Black women."[313] Drawing on the work of Angela Harris, she argues that "Black women's willful self-definition is an adaptation to a history of

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[310] ROBERTS, *supra* note 30, at 305.

[311] *Cf.* Shubhangi Vaidya, *Women with Disability and Reproductive Rights: Deconstructing Discourses*, 45 SOC. CHANGE 517, 519-20 (2015) (noting the relevance of bodily integrity and personal dignity and stating: "since women with disabilities have traditionally been seen as undesirable sexual partners and incapable mothers, for them, reproductive rights also include the right to engage in consensual sexual relationships and bear and rear children").

[312] Admittedly, the liberty-based conception of dignity arguably does not attach to persons deemed incapable of autonomous choice. *See supra* Part III.A.2. But because my focus is a concept of dignity that integrates liberty/autonomy and equality understandings, I view dignity as attaching to all humans.

[313] ROBERTS, *supra* note 30, at 302.

social denigration."[314] This view sees the dignity of liberty for this group lying not simply in making choices, but in creating an identity in defiance of how slavery and its legacy have denied them full personhood. Self-definition and self-determination are similarly central commitments of the independent living movement that people with disabilities started in the 1970s. For women with disabilities, the avoidance of reproductive controls is an important strand of self-definition.[315]

Fully respecting women's dignity requires an expansive understanding of reproductive liberty that values both substantive equality and individual autonomy rights, but existing constitutional jurisprudence largely rejects arguments seeking anything more than formal equality and non-interference. Consequently, it fails to address the multiple ways that the government, the medical profession, and society more broadly all fail to act affirmatively to support healthy and freely chosen childbearing by Black and disabled women. Recognizing how these failures reflect hierarchies of race and ability, combined with hierarchies of gender and class, reveal how they constitute "illegitimate social coercion"[316] limiting women's freedom and equality.

Dignity offers a conceptual foundation for a more expansive understanding of human rights documents and the Constitution's promises of liberty and equal protection.[317] In considering the role of dignity in human rights documents, Berta Esperanza Hernández-Truyol discerns a link from political and civil rights (like liberty and equality) to economic, social, and cultural rights, which address the conditions needed for human flourishing.[318] These rights oblige a state to foster respect for marginalized groups.[319] Rhonda Magee Andrews goes further. Rejecting both color-blind and color-conscious proposals as inadequate to address the legacies of slavery and racialization in the

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[314] *Id.* at 502.

[315] *See* Frederick, *supra* note 2, at 133-34 ("[I]n the face of the imperative of childlessness, performing motherhood is an act of resistance in itself.").

[316] Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 707 (1990).

[317] For example, Dorothy Roberts argues for an understanding of liberty that "includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination." ROBERTS, *supra* note 30, at 309.

[318] *See* Hernández-Truyol, *supra* note 266, at 669.

[319] *See id.* at 666 (discussing how the Convention on the Rights of Persons with Disabilities requires states to adopt measures to "foster respect for the rights and dignity of people with disabilities").

United States, she advocates for adopting a post-racial conception of human dignity as a guiding principle in interpreting the Constitution. According to Andrews, a dignity-centered theory of justice requires "an underlying theory of humanity . . . of what it means to be human."[320] This rich vision of human dignity would address, far better than existing jurisprudence, the many indignities visited upon Black and disabled women who wish to have children.

IV. FUELING SOLIDARITY

By disparaging their worth and negatively affecting their health, decisions to have children, and ability to form families, restraints on childbearing and mothering by Black and disabled women corrode human dignity. Despite the failure of existing constitutional doctrine — with its crabbed conceptions of autonomy and formal equality — to address these indignities, appreciating the parallels described in this Article may enrich theoretical arguments attacking reproductive injustice. It may also further social movement alignments that seek to rectify injustices by bringing women with disabilities more fully into the RJ movement. Finally, the sense of solidarity arising from the recognition of connections among the reproductive injustices experienced by Black and disabled women may itself support women's dignity. This Part contemplates the potential pay-off from the Article's descriptive work.

A. Strengthening the Theoretical Germ Line

Early twentieth-century Eugenicists — and their contemporary sympathizers — argued for maintaining genetic purity in order to produce superior people. Scientists today, however, recognize that genetic diversity makes a population more resistant to disease and adaptable to changing circumstances.[321] So too with the vigor of ideas and theories. Bringing differing theoretical perspectives to bear on reproductive indignities may enhance understanding and result in more robust theoretical frameworks and arguments.[322] For decades, feminist

[320] Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 528 (2003).

[321] *See Genetic Diversity Helps Protect Against Disease*, SCI. DAILY (May 23, 2018), www.sciencedaily.com/releases/2018/05/180523133324.htm [https://perma.cc/GPM5-R4X8].

[322] *Cf.* Marie-Amélie George, *Queering Reproductive Justice*, 54 U. RICH. L. REV. 671, 673 (2020) (explaining how reproductive justice advocates might employ the LGBTQ

disability theorists have developed a rich feedback loop with both critical race theory and disability theory, informing and being informed by their attention to social construction, embodiment, and power dynamics. But while the RJ and disability rights movements "share important affinities"[323] in their attention to how social structures shape individual choices, the sharing of intellectual ammunition between critical race theorists and disability theorists has been more limited.

Bringing together critical race, disability, and feminist perspectives to address reproductive indignities helps advance an understanding of individual women's experiences and group experiences that is simultaneously more nuanced and more comprehensive than any single theoretical lens permits. Just as feminist theory describes reproductive constraints as a form of social control meant to sustain patriarchy, critical race theory views them as perpetuating White supremacy.[324] Similarly, disability theory describes how reproductive controls reflect ableist systems of power and privilege.[325] Viewing them from multiple perspectives reveals the reproductive controls described in this Article as rife with intersectionality.[326] They are the products of overlapping and intersecting systems of power and oppression that value some women's reproduction, but debase others', producing a system of "stratified reproduction."[327] Dismantling controls on childbearing and

movement's legal successes to support reproductive rights); Ikemoto, *supra* note 84, at 250-51 (explaining how a multi-theory account of reproductive justice can produce a more useful analysis and framework).

323 Bagenstos, *supra* note 17 (manuscript at 7).

324 Ikemoto, *supra* note 84, at 261 (citing Kimberlé Crenshaw, Angela Harris, and Patricia Williams as examples) ("Critical race feminists explicate the intersection of white supremacy, patriarchy, class structures and other forms of subordination.").

325 *See* Virginia Kallianes & Phyllis Rubenfeld, *Disabled Women and Reproductive Rights*, 12 DISABILITY & SOC'Y 203, 205 (1997); Mia Mingus, *Disabled Women and Reproductive Justice*, PRO-CHOICE PUB. EDUC. PROJECT, https://www.protectchoice.org/article.php?id=140 (last visited July 27, 2020) [https://perma.cc/6YYD-J4XN].

326 Even as it grows in usage, the meaning and usefulness of the term "intersectional" is debated. Despite any ambiguities, the term captures how the shared, though by no means identical, concerns about parallel experiences may provide a basis for shared understanding and activism. For a critique of how overuse of the term "intersectional" could impede progressive causes, see Eleanor Robertson, *Intersectional-What? Feminism's Problem with Jargon Is That Any Idiot Can Pick It Up and Have a Go*, GUARDIAN (Sept. 30, 2017), https://www.theguardian.com/world/2017/sep/30/intersectional-feminism-jargon [https://perma.cc/6MNZ-EPRG].

327 Lisa H. Harris & Taida Wolfe, *Stratified Reproduction, Family Planning Care and the Double Edge of History*, 26 CURRENT OPINIONS OBSTETRICS & GYNECOLOGY 539, 540 (2014).

child-rearing by Black and disabled women will require the most powerful, precisely fashioned tools available.[328]

B. Fostering Social Movement Alignments

Moving from theory to activism, recognizing parallels in the reproductive indignities suffered by Black and disabled women may catalyze coalition building. As noted above, the RJ movement seeks to advance women's liberty to have children and raise those children.[329] RJ leaders take an explicitly intersectional approach, rallying women of color, low-income women, indigenous women, immigrant women, and queer persons under the movement's banner. Its inclusion of women with disabilities, however, has been inconsistent, as some leaders within the RJ movement have acknowledged.[330] Enhanced understanding of how their experiences are similar to other marginalized women's experiences may help ensure that disabled women are not marginalized within the RJ movement.

Dorothy Roberts and Sujatha Jesudason describe an example of an RJ coalition-building effort, testing their hypothesis that an intersectional framework permits activists from different groups to first confront their differences openly and honestly, and then to identify their "similarities and common values."[331] They detail how RJ activists and disability rights leaders came together for a series of convenings and roundtable conversations that were critical to cross-movement mobilization: "Rather than erasing our identities for the sake of coalition, we learn[ed] from each other's perspective to understand how systems of privilege and disadvantage operate together and, therefore, to be better equipped to dismantle them."[332] This case study reinforces the potential value of RJ's attending to disability in both theorizing and organizing.[333] Similarly, it suggests the importance of more deliberate, thoughtful, and consistent inclusion of people of color, persons who identify as LGBTQ and members of other marginalized groups by leaders of disability rights organizations.

Cross-movement alliances working on specific issues offer several advantages. Beyond the obvious value of building strength in numbers,

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328 *Cf.* Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110-14 (2007).

329 *See supra* text accompanying notes 13–17.

330 *See* SILLIMAN ET AL., *supra* note 13, at 290.

331 Roberts & Jesudason, *supra* note 17, at 315.

332 *Id.* at 316.

333 *See id.* at 318.

coordination among movements may provide a tactical advantage by disturbing the settled expectations and tactics of those seeking to preserve entrenched power structures.[334] On a more profound level, a key lesson from Roberts' and Jesudason's work is that revealing the commonalities among people subject to interlocking systems of disadvantage — while also acknowledging and explicating the differences in their experiences — provides an opportunity to create solidarity.[335] "Only through the sharing and exchange of ideas and experiences can the needs of all women be acknowledged and addressed."[336]

The concept of solidarity as a basis for other-regarding actions has emerged in the literature regarding healthcare and bioethics[337] and provides a helpful lens for thinking about the connections between dignity and reproductive justice and the value of explicating parallel experiences. Philosopher Carol Gould has recently argued for a broad understanding of solidarity that can extend beyond a willingness to assist others whom one recognizes as being similar in a relevant respect[338] to encompass the processes by which people who share an interest on overcoming structural injustice work together to do so.[339] Its connection to justice distinguishes Gould's conception of solidarity from charity, and its action orientation distinguishes it from empathy.[340]

Gould also connects solidarity's requirements of acting in support of others — what others have referred to as "strong solidarity" — to the concept of human dignity embodied in human rights documents.[341] Her account of solidarity, linked as it is to solidarity in the labor movement and other social movements, entails not simply empathy in understanding another's plight, but action (or at least a readiness to act) in support of others to address exploitation and injustice. Solidarity

334 SHERRILYN IFILL, LORETTA LYNCH, BRYAN STEVENSON & ANTHONY C. THOMPSON, A PERILOUS PATH: TALKING RACE, INEQUALITY, AND THE LAW 79 (2018) ("[B]eing able to make the connections to the way in which oppression works similarly across different boundaries, really can allow you to do your finest work. And it confuses the enemy. It really confuses the other side."); *cf.* Luna & Luker, *supra* note 13, at 342 ("Achieving RJ would require strong coalitions that can move toward long-term change irrespective of the current political climate.").

335 *See* Roberts & Jesudason, *supra* note 17, at 313.

336 SILLIMAN ET AL., *supra* note 13, at 285.

337 The concept is also employed in other contexts, particularly in labor movements.

338 *See* Carol C. Gould, *Solidarity and the Problem of Structural Injustice in Healthcare*, 32 BIOETHICS 541, 541 (2018).

339 *See id.* at 543-44.

340 *Id.* at 543.

341 *Id.* at 544.

among groups — like among Black and disabled women — does not imply the erasure of a group's particular concerns or require absolute coordination of action. "[D]ifferent subgroups act to realize [their shared] goals in ways they themselves determine, and they liaise or link up with each other to decide how each group can best participate and contribute."[342] This description reflects the approach of the diverse groups that have been coordinating activity to promote social justice for women under the banner of reproductive justice.

This Article's explication of parallels between the childbearing injustices experienced by women with disabilities and Black women in the United States supports the fostering of solidarity in both the forms that Gould describes. Certainly, even without the parallels that I trace, Black women and women with disabilities might well share an interest in addressing the structural injustices that have subordinated women and deprived them of reproductive rights. But the illumination of experiences that, if not shared, are at least similar in a relevant respect, can bolster the formation of solidarity.

The nurturing of solidarity may itself be a practice that enhances dignity in both its human rights and constitutional dimensions.[343] Goodwin and Chemerinsky describe how contextualizing the circumstances of poor women's lives, rather than defaulting to stereotypes that have been enshrined in legal precedent, confers dignity on those women.[344] So too may understanding the shared and parallel experiences I have described. Gould describes how actions taken in solidarity can serve to solidify participants' understanding of their interdependence in pursuing goals held in common, which gives rise to a sense of reciprocity.[345] Perhaps capturing this idea the best, Magee Andrews, in arguing for human dignity as a guiding principle in interpreting the Reconstruction Amendments, describes a "notion of humanity based on our underlying interconnectedness and the indivisible commonality we share as human beings."[346]

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[342] *Id.* at 546. Gould also highlights the importance of an egalitarian commitment within and among the groups involved in a solidarity movement, in order to avoid replicating within those groups the "prevailing power formations" that they are working to overcome. *Id.* at 548.

[343] *Cf.* Rao, *supra* note 279, at 188-89 (discussing how "recognition dignity" furthers "the unique and subjective feelings of self-worth possessed by each individual and group").

[344] *See* Goodwin & Chemerinsky, *supra* note 51, at 1320.

[345] *See* Gould, *supra* note 338, at 545.

[346] Magee Andrews, *supra* note 320, at 537.

CONCLUSION

Nearly a century ago, adherents of the Eugenics movement in the United States shaped laws and policies in ways that explicitly sought to limit childbearing by persons deemed unworthy and unfit for reproduction. The heyday of the Eugenics movement can be measured in years, but its pseudoscientific philosophy tapped into centuries-old prejudices. Moreover, its judgments about the propriety of seeking to limit childbearing by "unsuitable" mothers continues to inform policies and practices today, albeit less overtly. Those policies and practices curtail the reproductive freedom and undermine the human dignity of many marginalized women. This Article has highlighted in particular the numerous ways in which the experiences of Black women and women with disabilities parallel each other. From excessive rates of sterilization and coerced use of long-acting contraception, to disincentives attached to public benefits and involuntary institutionalization, Black women, disabled women, and Black disabled women are more likely to encounter impediments to becoming pregnant than are White non-disabled women. Moreover, even when they become pregnant, these women face greater risks associated with having a child and a higher chance the state will take their child from them. And while persons from other marginalized groups may face similar obstacles to creating and maintaining a family, the similarities between Black women and disabled women are particularly striking.

Policies and practices that implicitly send the message that a woman should not have a child denigrate her humanity. Thus, these eugenically tinged infringements on reproductive freedoms undermine the human dignity of Black and disabled women. Similarities in the experiences of women in these two groups are not simply a matter of curiosity, however. Instead, they supply concrete evidence of the interlocking systems of power and privilege highlighted by the reproductive justice movement. Understanding the parallels among the reproductive indignities endured by Black and disabled women illuminates their intersectional character and thus pours a foundation for strengthening solidarity and fostering stronger alliances in support of reproductive justice.