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THE FRAILTY OF DISABILITY RIGHTS

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## INTRODUCTION

Whoever said pandemics were equalizers doesn't know a thing about disability legal history.<sup>1</sup> It does not take much of a pretext to rollback disability rights. This is because disability rights laws, despite enumerated principles of equal opportunity and civil rights, have always been viewed as “nice to do” and not “must do.”<sup>2</sup> Simply put, society continues to misunderstand disability—what it means, who the category includes or excludes, its relationship to impairment, its valence and construction as an identity. Moral and religious-tinged frames have trumped the perception of

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<sup>1</sup> See Vincent A. Campbell et al., *Preparing for and Responding to Pandemic Influenza: Implications for People with Disabilities*, 99 AM. J. PUB. HEALTH S294, S295 (2009) (“Few plans or guidelines provide details about how emergency planners can meet the needs of people with disabilities before, during, and after an emergency.”); Katie Savin & Laura Guidry-Grimes, *Confronting Disability Discrimination During the Pandemic*, HASTINGS CTR., BIOETHICS F., (Apr. 2, 2020), [https://www.thehastingscenter.org/confronting-disability-discrimination-during-the-pandemic/?fbclid=IwAR2ssY8aVhxj5284prI9S2WqZUM3VZvtSzJGQ6DeX4cB\\_FhqmZ7vOv9omsk](https://www.thehastingscenter.org/confronting-disability-discrimination-during-the-pandemic/?fbclid=IwAR2ssY8aVhxj5284prI9S2WqZUM3VZvtSzJGQ6DeX4cB_FhqmZ7vOv9omsk) [<https://perma.cc/L7ED-PXZT>] (“Our country has forced sterilizations of people with mental illnesses and developmental disabilities, exploited institutionalized persons with disabilities for research, and instituted routine use of prenatal genetic testing that raises concerns about devaluing and increasing hostility towards disabled people . . . .”); Stephanie Pappas, *Fighting Inequity in the Face of COVID-19*, 51.4 AMERICAN PSYCHOLOGICAL ASSOCIATION MONITOR ON PSYCHOLOGY, COVID-19 SPECIAL REPORT (June 1, 2020), <https://www.apa.org/monitor/2020/06/covid-fighting-inequity> [<https://perma.cc/RXM9-XETT>] (discussing the disparate impact of COVID-19 experienced by historically marginalized communities including people with disabilities and those with intersectional identities). For COVID-19 health disparities along racial and ethnic lines, see, for example, Justine Calma, *America Set Up Black Communities to Be Harder Hit by COVID-19*, VERGE (Apr. 8, 2020, 5:24 PM), <https://www.theverge.com/2020/4/8/21213974/african-americans-covid-19-coronavirus-race-disparities> [<https://perma.cc/37JY-JU9X>] (“The COVID-19 pandemic is piling on top of a litany of health inequalities in America to kill a disproportionate number of African Americans.”); Bethany L. Jones & Jonathan S. Jones, *Gov. Cuomo Is Wrong, Covid-19 Is Anything But an Equalizer*, WASH. POST (Apr. 5, 2020, 3:00 AM), <https://www.washingtonpost.com/outlook/2020/04/05/gov-cuomo-is-wrong-covid-19-is-anything-an-equalizer/> [<https://perma.cc/DFD7-XBED>] (arguing pandemics amplify existing inequalities, such as wealth inequality).

<sup>2</sup> For example, the Individuals with Disabilities Education Act (IDEA) includes a large underfunded mandate. Although Congress statutorily provided funding for up to 40% of the costs of educating students with disabilities, the federal government has never reached half of that percentage necessary to provide a “free appropriate public education” to all students with disabilities. 20 U.S.C. § 1400(c)(3) (2018); see also *id.* § 1411 (a)(2)(ii) (enumerating maximum funding of 40% of the average per student cost for every special education student); NAT’L COUNCIL ON DISABILITY, IDEA SERIES, BROKEN PROMISES: THE UNDERFUNDING OF IDEA (2018), [https://ncd.gov/sites/default/files/NCD\\_BrokenPromises\\_508.pdf](https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf) [<https://perma.cc/5AQX-G6WS>] (examining the historical and current state of IDEA funding and analyzing the impact of a lack of full-funding on states’ ability to meet IDEA obligations); Nat’l Educ. Ass’n, *IDEA Full Funding*, [www.nea.org/assets/docs/IDEA\\_Full\\_Funding\\_Chart\\_FY1981-2012.pdf](http://www.nea.org/assets/docs/IDEA_Full_Funding_Chart_FY1981-2012.pdf) [<https://perma.cc/T2KJ-AX7F>] (last visited June 10, 2020) (showing federal funding per year from 1981 to 2012 with the maximum funding at 18.5% in 2005, excluding the extension of additional one-time funding due to the passing of the American Recovery & Reinvestment Act by Congress in 2009).

disability as a protected class akin to race, gender, or national origin.<sup>3</sup> This view explains Congress's intent that the Americans with Disabilities Act (ADA) play not only a remedial role for disability discrimination *ex post*, but also a proactive, *ex ante* role in upending problematic social norms that treat disability and incapacity as synonymous.<sup>4</sup> Similarly, the perception of disability as a different kind of civil right helps explain the Supreme Court's interpretive missteps in the infancy and adolescence of the ADA and Congress's direct reproach and redirection of the Court in the ADA Amendments Act eighteen years later.<sup>5</sup>

Inattention to underlying social judgments about disability and the associated discrimination has caught up with us. Progressive legislation in this pandemic without requisite interventions designed to address *how* people interpret the disability laws offers precarious protections for people with disabilities. The stakes could not be higher in some areas, namely, life or death denials of health care access based on certain disabilities or biased quality of life measures.<sup>6</sup>

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<sup>3</sup> See Civil Rights Act, 42 U.S.C. § 2000d, et seq. (2018) (naming race and national origin as protected classes as they relate to federal financial assistance); see also Cendri A. Hutcherson & James J. Gross, *The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt*, 100 J. PERSONALITY & SOC. PSYCHOL. 719, 721 (2011) (finding that moral disgust and contempt last longer than anger, because they are based on assessments of a person's character or competence instead of whether that person presents an imminent threat); Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 537 (2014) ("Infused in the Court's opinion is a pitying notion . . . that one has to feel sorry for a person disabled by something he or she can't do anything about, and that legislators would and had appropriately responded with remedial legislation intended to help this group." (internal quotation omitted)).

<sup>4</sup> Congress provided that

(2) historically, society has tended to *isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem*; . . .

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and regulation to lesser services, programs, activities, benefits, jobs, or other opportunities . . . .

42 U.S.C. § 12101(a)(2), (5) (2018) (emphasis added).

<sup>5</sup> The "Sutton Trilogy" almost exclusively focused on the definition of disability for gateway standing purposes, such as the scope of coverage and determining who is a person with a disability under the ADA. See *generally* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Congress eventually directed that the Court abandon this approach with the ADA. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, (codified at 42 U.S.C. §§ 12101-12102 (2018)) (discussing Supreme Court cases about the ADA, including *Sutton*, and finding that the Supreme Court has improperly narrowed and limited "protection for many individuals whom Congress intended to protect").

<sup>6</sup> See *infra* Part I.

Disability scholars in recent weeks have largely focused on addressing why COVID-19-related rationing on the categorical basis of disability offends federal (and state) disability antidiscrimination laws as a means to ensure people with disabilities have access to life-saving medical treatment in and out of hospitals.<sup>7</sup> They persuasively apply disability laws and principles of legal and medical ethics to show why disability is an improper consideration in rationing care and resources.<sup>8</sup> The underlying problem with rationing is much larger and is slowly unfolding with respect to access and rights in other areas including education, housing, and employment. That is, the rationing problem is not just about devaluation of the lives of individuals with disabilities; it is a symptom of something much deeper. The pervasive and negative impacts of this devaluation will endure long after the immediate healthcare issues are tackled.

This Essay surfaces a broader, unresolved issue in disability law laid bare by the current pandemic—that disability rights have never had the public understanding and buy-in necessary to exercise and interpret disability laws

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<sup>7</sup> See, e.g., Samuel R. Bagenstos, *May Hospitals Withhold Ventilators from COVID-19 Patients with Pre-Existing Disabilities?*, 130 YALE L.J.F. (forthcoming 2020) (arguing that that disability-based distinctions violate the ADA, Rehabilitation Act, and the Affordable Care Act because all three laws prohibit health care providers from discriminating against qualified individuals with disabilities because of their disabilities); Govind Persad, *Why Disability Law Permits Evidence-Based Triage in a Pandemic*, 130 YALE L.J.F. 26 (June 2020), <https://ssrn.com/abstract=3571139> [<https://perma.cc/8PEV-K8MG>] (defending the use of disability-based criteria that may result in denial of life-saving medical care when based on “quantity of life” but not “quality of life” determinations); Deborah Hellman & Kate M. Nicholson, *Rationing and Disability in a State of Crisis* (Va. Pub. L. & Legal Theory Paper Series, No. 2020-33, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3570088](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3570088) [<https://perma.cc/XVV9-T98J>] (arguing that many states have adopted utilitarian approaches to making choices about how to ration scarce resources, and that these approaches fail to balance equity with utility as demanded by discrimination law); Ari Ne’eman, *When It Comes to Rationing, Disability Rights Law Prohibits More than Prejudice*, HASTINGS CTR., BIOETHICS F. (Apr. 10, 2020), <https://www.thehastingscenter.org/when-it-comes-to-rationing-disability-rights-law-prohibits-more-than-prejudice/> [<https://perma.cc/QLX6-NPRU>] (arguing that despite the fact that many states had removed blatantly discriminatory provisions from rationing protocols after the Office of Civil Rights published a bulletin with such advice, discrimination in the form of disparate impact persisted in many of the state rationing protocols and plans).

<sup>8</sup> As an example,

The ADA requires that ‘reasonable modifications’ must be made to services when necessary to accommodate a disabled person . . . . Consider how that approach would apply to a policy like that in New York which prescribes a single time frame in which all patients must demonstrate a benefit . . . . [T]his policy does not provide the ‘reasonable modification’ required by the ADA . . . .

Hellman & Nicholson, *supra* note 7, at 25; see also Ezekiel J. Emanuel et al., *Fair Allocation of Scarce Medical Resources in the Time of Covid-19*, 382 NEW ENGLAND J. MED. 2049, 2051 (2020) (providing six recommendations for the fair and consistent allocation of scarce medical resources during the COVID-19 pandemic).

in a way that would generate largescale structural reform.<sup>9</sup> As a result, when people with disabilities are seen (and treated) as unequal, deficient, and incapable, legal enforcement of antidiscrimination laws is, at best, seen as optional and aspirational, creating space for the current manifestations of disability discrimination during the coronavirus crisis. These problems are compounded when medical supplies, personnel, and time are limited.

Part I describes real-time rollbacks of disability rights in the healthcare access context that are currently unfolding, and the legal responses designed to push back on health care rationing. I then shift to a less studied area, access to education, an evolving landscape as students across the country face the realities of distance learning.<sup>10</sup> Part II argues that the current forms of discrimination expose the fundamental information deficits about disability that negatively skew legal interpretation and undermine the protections of disability laws. Part III identifies key questions and areas of concern as we contend with the virus and its aftermath.

## I. THE CASE OF COVID-19 AND THE ROLLBACK OF DISABILITY RIGHTS

COVID-19 is a perfect storm of systemic flaws with people with disabilities at its eye. Early messaging around its limited impact on older adults and those with underlying health conditions was intended to assuage public concerns by classifying those lives as “already lived” or those “not worth living.” This Part offers examples of the rollback of disability rights by public and private actors responding to COVID-19 in health care and explores emerging examples of discrimination in the provision of public education.<sup>11</sup>

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<sup>9</sup> See, e.g., Abigail Abrams, *People with Disabilities Face Challenges Campaigning for Office. This Group Wants to Change That*, TIME (June 11, 2019, 9:03 PM), <https://time.com/5604185/disabled-candidates-training/> [<https://perma.cc/W3JA-D2V7>] (discussing the effect of a disability on a person's political aspirations).

<sup>10</sup> As of April 3, 2020, Alabama, Arizona, California, Georgia, Indiana, Kansas, Michigan, New Mexico, Nebraska, Oklahoma, Virginia, and Vermont have closed public schools for the remainder of the academic year. Valerie Strauss, *Growing Number of States Say They Are Closing Schools for Rest of 2019–2020 Year*, WASH. POST (Apr. 3, 2020, 3:01 PM), <https://www.washingtonpost.com/education/2020/03/31/california-inches-closer-joining-list-states-expected-keep-schools-closed-2019-20-school-year/> [<https://perma.cc/A2QA-5PDE>].

<sup>11</sup> See Laura Meckler & Valerie Strauss, *For Parents Trying to Replicate School for Children with Disabilities, a Confounding Task*, WASH. POST (Mar. 20, 2020, 7:00 AM), [https://www.washingtonpost.com/local/education/for-parents-trying-to-replicate-school-for-children-with-disabilities-a-confounding-task/2020/03/19/8a1e2876-6940-11ea-9923-57073adce27c\\_story.html](https://www.washingtonpost.com/local/education/for-parents-trying-to-replicate-school-for-children-with-disabilities-a-confounding-task/2020/03/19/8a1e2876-6940-11ea-9923-57073adce27c_story.html) [<https://perma.cc/Y3VG-C3WR>] (describing particular barriers to distance learning experienced by students with disabilities, including difficulty providing support services remotely such as paraeducators).

### A. Access to COVID-19-Related Treatment

I tell my students that smoking gun evidence of discrimination rarely exists in contemporary antidiscrimination law. What I also tell them is that if examples appear, they will most likely be in the disability context. See Exhibit A: guidance and instructions from states to medical providers about the proper rationing framework for access to critical medical devices such as ventilators. When the COVID-19 pandemic snowballed, several states implemented (or dusted off preexisting) ventilator and ICU-bed rationing plans that either preferred nondisabled individuals for treatment, or categorically excluded certain disabled individuals from their plans.<sup>12</sup> Other plans completely ignored nonelderly disabled populations.<sup>13</sup> Disability rights lawyers and advocates quickly mobilized to challenge discriminatory policies under Title II of the Americans with Disabilities Act, Section 504 of the

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<sup>12</sup> For example, the Alabama rationing plan listed “severe or profound mental retardation,” dementia, and brain injury as among several potential reasons to be denied a ventilator in the COVID-19 pandemic. *See* ANNEX TO ESF 8 OF THE STATE OF ALABAMA EMERGENCY OPERATIONS PLAN: CRITERIA FOR MECHANICAL VENTILATOR TRIAGE FOLLOWING PROCLAMATION OF MASS-CASUALTY RESPIRATORY EMERGENCY 8 (2010), <https://int.nyt.com/data/documenthelp/6846-alabama-triage-guidelines/02cb4c58460e57ea9f05/optimized/full.pdf> [<https://perma.cc/NF3T-CNQ8>] (“[P]ersons with severe mental retardation, advanced dementia or severe traumatic brain injury may be poor candidates for ventilator support.”). Other states’ plans included similarly discriminatory language. *See, e.g.*, LA. DEP’T OF HEALTH, ESF-8 HEALTH & MEDICAL SECTION, STATE HOSPITAL CRISIS STANDARD OF CARE GUIDELINES IN DISASTERS 35 (2018), <https://int.nyt.com/data/documenthelp/6856-louisiana-triage-guidelines/d9555bb486d68f7007c/optimized/full.pdf#page=1> [<https://perma.cc/UF5T-DJK2>] (including among “exclusion criteria” for triage “[k]nown severe dementia”); TENN. ALTERED STANDARDS OF CARE WORKGROUP, GUIDANCE FOR THE ETHICAL ALLOCATION OF SCARCE RESOURCES DURING A COMMUNITY-WIDE PUBLIC HEALTH EMERGENCY AS DECLARED BY THE GOVERNOR OF TENNESSEE 8 (2016), <https://int.nyt.com/data/documenthelp/6851-tennessee-triage-guidelines/02cb4c58460e57ea9f05/optimized/full.pdf#page=1> [<https://perma.cc/ED2X-V5FL>] (“[T]here are certain medical conditions or situations where maximally aggressive care will not be able to be provided to every individual. . . . [Including t]hose who require such a large amount of resources that it is not feasible to accommodate their hospitalization in a prolonged mass-casualty situation.”).

<sup>13</sup> For example, one medical center provided the following guidance for resource allocation:

The standard construct for medical resource allocation [in Washington state] in time of scarcity is based upon a utilitarian framework, often stated as making decisions that provide the greatest good for the greatest number . . . . Greatest good . . . is generally considered maximizing survival . . . . qualified as healthy, long-term survival, recognizing that this represents weighting the survival of young otherwise healthy patients more heavily than that of older, chronically debilitated patients.

UNIV. OF WASH. MED. CTR., MATERIAL RESOURCE ALLOCATION PRINCIPLES AND GUIDELINES 1 <https://covid-19.uwmedicine.org/Screening%20and%20Testing%20Algorithms/Other%20Inpatient%20Clinical%20Guidance/Clinical%20Care%20in%20ICU/Material%20Resource%20Allocation.COVID19.docx> [<https://perma.cc/Q92T-N4R4>].

Rehabilitation Act of 1973, and Section 1557 of the Affordable Care Act.<sup>14</sup> Advocates have succeeded in getting the Office of Civil Rights of the Department of Health and Human Services to issue guidance reminding HHS-funded programs that civil rights laws, such as the ADA, prohibit rationing policies based on “stereotypes, assessments of quality of life, or judgments about a person’s relative ‘worth’ based on the presence or absence of disabilities or age.”<sup>15</sup> This, in turn, pushed certain states—recently, Alabama and Pennsylvania—to rescind or clarify facially discriminatory ventilator rationing policies that previously discriminated on the basis of certain disabilities and age.<sup>16</sup>

The reality is that health care treatment decisions have always rested with an individual professional’s medical judgment, something necessarily limited

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<sup>14</sup> See, e.g., Letter from Rhonda Brownstein, Legal Dir., Alabama Disabilities Advocacy Program, to Roger Severino, Dir., Office for Civil Rights (Mar. 24, 2020) (on file with author) (stating the Alabama ventilator rationing plan “specifically singles out and excludes certain people with intellectual disabilities from access to ventilators in the event of rationing, in direct violation of federal law”). Similar letters were sent in response to facially discriminatory rationing plans implemented in Connecticut, Kansas, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, and Washington. See *COVID-19 Medical Rationing & Hospital Visitor Policies*, CTR. FOR PUB. REPRESENTATION, <https://www.centerforpublicrep.org/covid-19-medical-rationing> [<https://perma.cc/54ZX-76TM>] (last updated June 26, 2020) (collecting administrative complaints filed with the U.S. Department of Health and Human Services against listed states). Finally, national disability rights organizations, such as the Disability Rights Education & Defense Fund, also published letters outlining the illegality of medical rationing on the basis of disability, calling for state governors to take action to ensure equitable treatment for people with disabilities. See, e.g., Letter from Susan Henderson, Exec. Dir., Disability Rights Educ. & Def. Fund, to Honorable Gavin Newsom, Governor of the State of California (Mar. 20, 2020), <https://dredf.org/wp-content/uploads/2020/03/DREDF-COVID-19-Letter-to-Gov-Newsom.pdf> [<https://perma.cc/TM6D-GBM4>] (calling for non-discrimination in medical rationing as well as continued access to services that allow people with disabilities to live in communities rather than institutional settings).

<sup>15</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS. OFFICE FOR CIVIL RIGHTS IN ACTION, CIVIL RIGHTS, HIPAA, AND THE CORONAVIRUS DISEASE 2019 (COVID-19) 1 (2020), <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf> [<https://perma.cc/N8U2-JQ8H>].

<sup>16</sup> See Press Release, U.S. Dep’t of Health & Human Servs. Office for Civil Rights, OCR Reaches Early Case Resolution with Alabama After It Removes Discriminatory Ventilator Triage Guidelines (Apr. 8, 2020), <https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html> [<https://perma.cc/Y94L-X547>] (announcing resolution of compliance review of the State of Alabama after Alabama removed ventilator rationing guidelines in response to formal complaints filed alleging discrimination on the basis of disability and age); Press Release, U.S. Dep’t of Health & Human Servs. Office for Civil Rights, OCR Resolves Civil Rights Complaint Against Pennsylvania After It Revises Its Pandemic Health Care Triage Policies to Protect Against Disability Discrimination (Apr. 16, 2020), <https://www.hhs.gov/about/news/2020/04/16/ocr-resolves-civil-rights-complaint-against-pennsylvania-after-it-revises-its-pandemic-health-care.html> [<https://perma.cc/5CWS-7HQL>] (resolving compliance review after the Pennsylvania Department of Health revised existing triage guidelines, including those that “used ‘preexisting conditions that are disabilities’ to determine a priority score”).

by an individual's education and experiences.<sup>17</sup> This is not meant to impugn those healthcare professionals who are on the front lines of this public health crisis. This Essay addresses structural issues beyond any one rationing decision. Medical schools notoriously fail to adequately acknowledge and combat students' implicit biases against people with disabilities, yet research demonstrates that doctors and other medical professionals harbor these biases in their care and treatment of disabled patients.<sup>18</sup> The existence of implicit biases and heuristics that drive decisionmaking, particularly in high stress situations requiring quick decisions, casts doubt on recent state efforts to immunize medical professionals from liability.<sup>19</sup>

Notably, the poster child of eugenic reasoning, *Buck v. Bell*,<sup>20</sup> is often portrayed as a relic of the past and reminder of the horrors and lessons of the eugenics movement in the United States. Law professors teaching this case like to amaze students with the fact that *Buck*—with an 8-1 majority authored by beloved legal jurist Justice Oliver Wendell Holmes and the support of progressive justices such as Louis Brandeis—remains intact. That is, its eugenics-based upholding of Virginia's involuntary sterilization law in the public interest, despite the law itself being no longer on the books, lives in legal databases and, more importantly, its underlying principles live on today.<sup>21</sup> While states can no longer justify facially discriminatory laws promoting compulsory sterilization of marginalized women (e.g., women of color, poor women, or disabled women) on the basis of disability, pretext prevails, as we witness in the COVID-19 legal and policy responses.

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<sup>17</sup> See Chloë FitzGerald & Samia Hurst, *Implicit Bias in Healthcare Professionals: A Systematic Review*, 18 BMC MED. ETHICS 1, 2 (2017) (describing the ample literature on implicit biases among health care professionals that "operate to the disadvantage of those who are already vulnerable [including] minority ethnic populations, immigrants, the poor, low health-literacy individuals, sexual minorities, children, women, the elderly, the mentally ill, the overweight and the disabled."). Discussion and analysis of the proper criteria for allocating COVID-19 medical treatment—quality of life, lottery system, etc.—are beyond the scope of this Essay. See *supra* note 7 (providing recent examples of the excellent literature on rationing and disability discrimination).

<sup>18</sup> See, e.g., Bagenstos, *supra* note 7, at 7-8 (explaining that doctors reveal significant biases against people with disabilities, partly because so few doctors themselves are individuals with disabilities). See also Letter from Samuel R. Bagenstos, Professor of Law, Univ. of Mich. Law School, to Honorable Gretchen Whitmer, Governor of Mich. & Honorable Dana Nessel, Att'y Gen. of Michigan (Mar. 27, 2020) (on file with author) (responding to the Michigan Guardianship Association's request for an emergency order to lower the bar for guardians to provide DNR orders for their wards who, for example, rely on ventilators that could be used to treat a nondisabled coronavirus patient).

<sup>19</sup> Jacob Gershman & Melanie Grayce West, *New York Moves to Shield Doctors from Lawsuits While Fighting Coronavirus*, WALL ST. J. (Apr. 2, 2020), <https://www.wsj.com/articles/new-york-moves-to-shield-doctors-from-lawsuits-while-fighting-coronavirus-11585868982?ns=prod/accounts-wsj> [<https://perma.cc/Y3TN-Q8SX>].

<sup>20</sup> *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>21</sup> See, e.g., Jasmine E. Harris, *Commentary: Buck v. Bell, 274 U.S. 200 (1927), in FEMINIST JUDGMENTS: REPRODUCTIVE JUSTICE REWRITTEN 15* (Kimberly M. Mutcherson ed., 2019) (offering the socio-political context of *Buck v. Bell* and arguing that its legacy continues today).

Moreover, without a strong constitutional safety net to fall back on,<sup>22</sup> disability law must rely on statutory interpretations which, in turn, rely on legal decisionmakers who often lack the requisite understanding of disability to interpret the laws in line with congressional intent.

Eugenic principles not only underwrite current state guidance to medical professionals regarding the rationing of treatment, medical equipment, and medication, but also the course of experimentation in search for treatments.<sup>23</sup> Most recently, Dr. Robin Armstrong, facility director and on-site physician at The Resort of Texas City, a nursing home in Texas, started giving hydroxychloroquine—a medication used to stave off malaria and treat autoimmune disorders such as lupus or rheumatoid arthritis—to dozens of elderly and disabled patients diagnosed with COVID-19.<sup>24</sup> However, many scientists argue that using hydroxychloroquine to treat the coronavirus lacks empirical data, and while its negative effects continue to be publicly debated,<sup>25</sup> the National Institutes of Health, United States Food and Drug Administration, and the World Health Organization recently ended active research studies and clinical trials for the drug's use to combat COVID-19.<sup>26</sup> These warnings temper the Trump Administration's continued insistence on the drug's remedial value—at one point the President touted its therapeutic value and professed his personal use of the drug as a prophylaxis<sup>27</sup>—and

<sup>22</sup> The Supreme Court held that state decisions regarding disability are subject to rational basis review, the lowest constitutional standard of review with significant deference to states. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985). *See also infra* Pt. III.

<sup>23</sup> Several states included categorical exclusions limiting access to ventilators for people with disabilities, and in response disability groups across the country filed complaints. *See* Joseph Shapiro, *Disability Groups File Federal Complaint About COVID-19 Care Rationing Plans*, NPR (Mar. 23, 2020, 4:12 PM), <https://www.npr.org/2020/03/23/820303309/disability-groups-file-federal-complaint-about-covid-19-care-rationing-plans> [<https://perma.cc/VP2J-LF8V>] (noting that several disability groups filed a complaint with the Department of Health and Human Services because doctors in Washington state were told to give ventilators to young, healthy people).

<sup>24</sup> Vanessa Romo, *COVID-19 Patients Given Unproven Drug in Texas Nursing Home In 'Disconcerting' Move*, NPR (Apr. 10, 2020, 6:16 PM), <https://www.npr.org/2020/04/10/830348837/covid-19-patients-given-unproven-drug-in-texas-nursing-home-garnering-criticism> [<https://perma.cc/X9K9-8TTM>].

<sup>25</sup> *See, e.g.*, Chris Dall, *Authors Retract Controversial Hydroxychloroquine Study*, CTR. FOR INFECTIOUS DISEASE RES. & POL'Y, U. MINN. (June 4, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/06/authors-retract-controversial-hydroxychloroquine-study> [<https://perma.cc/J4S9-MXXV>] (explaining the controversial retraction of two empirical studies on hydroxychloroquine's negative effects on the heart based on failure to discuss the underlying data set).

<sup>26</sup> Christianna Silva, *NIH Halts Hydroxychloroquine Study; Says 'Unlikely' To Help COVID-19 Patients*, NPR (June 20, 2020, 4:52 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/06/20/881260031/nih-halts-hydroxychloroquine-study-says-unlikely-to-help-covid-19-patients> [<https://perma.cc/2JAH-5QBK>].

<sup>27</sup> *See* Jane C. Timm, *Trump Says He's No Longer Taking Hydroxychloroquine*, NBC NEWS (May 25, 2020, 6:14 PM), <https://www.nbcnews.com/politics/donald-trump/trump-says-he-s-no-longer-taking-hydroxychloroquine-n1214301> [<https://perma.cc/EQ85-28K4>] (describing the President's completion of a course of the drug despite the absence of scientific studies showing its effectiveness and safety).

conservative GOP commentators like Glenn Beck and politicians like Lieutenant Governor Dan Patrick of Texas's calls for "controlled voluntary infection" strategies, akin to the one advanced by Dr. Armstrong at the nursing home.<sup>28</sup> Moreover, Dr. Armstrong's method of observation—without controls and research protocols of a formal study and with serious questions about informed consent—may run afoul of medical ethics.<sup>29</sup>

Far from "unprecedented" in the disability space, this déjà vu moment triggers recent memories of the Willowbrook State School, a now defunct state institution for people with intellectual and developmental disabilities. In the 1950s through the 1970s, medical doctors at Willowbrook charged with the wellbeing of young people with intellectual and developmental disabilities infected healthy children with a live hepatitis virus by feeding them hepatitis-contaminated feces in the name of finding a cure for the disease.<sup>30</sup> Willowbrook closed its doors in 1987 and New York City purchased and repurposed part of the campus to open the College of Staten Island in 1993.<sup>31</sup>

#### B. *Access to a Free Appropriate [and Remote] Public Education*

Public programs and services, such as libraries and schools, have responded to shelter-in-place orders that require new ways of service delivery, at least in

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<sup>28</sup> See Kathryn Olivarius, *The Dangerous History of Immunoprivilege*, N.Y. TIMES (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/opinion/coronavirus-immunity-passports.html> [https://perma.cc/7R36-URHD] (describing the strategy to build "herd immunity" as one which historically resulted in a situation in which "immunological discrimination become just one more form of bias in a region already premised on racial, ethnic, gender and financial inequality"); see, e.g., Peter Baker et al., *Trump's Aggressive Advocacy of Malaria Drug for Treating Coronavirus Divides Medical Community*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-trump-malaria-drug.html> [https://perma.cc/UST3-Q2XR].

<sup>29</sup> Romo, *supra* note 24 (reporting that Dr. Armstrong stated prescribing medications to patients without explicit consent from the patient or family members was "common" for physicians).

<sup>30</sup> Doriane Lambelet Coleman, *The Legal Ethics of Pediatric Research*, 57 DUKE L.J. 517, 531 (2007). Dr. Saul Krugman was the lead medical doctor at the Willowbrook State School. See Saul Krugman et al., *Hepatitis Virus: Effect of Heat on the Infectivity and Antigenicity of the MS-1 and MS-2 Strains*, 122 J. INFECTIOUS DISEASES 432 (1970) (describing the methods and results of the hepatitis studies at Willowbrook); Saul Krugman, *Special Article: The Willowbrook Hepatitis Studies Revisited: Ethical Aspects*, 8 REVIEWS OF INFECTIOUS DISEASES 157 (1986) (recognizing widespread criticism of his Willowbrook experiments and defending his position that such studies were "ethical and justifiable" because, among other reasons, the children, although healthy, could contract the disease in the future and their parents consented to the study). See generally DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS* 260-66 (2005) (discussing the history of the Willowbrook including Dr. Krugman's experiments and the debates surrounding them).

<sup>31</sup> Dan Gunderman, *Revisiting the Atrocities that Once Consumed the Halls of Willowbrook State School in Staten Island*, N.Y. DAILY NEWS (Apr. 9, 2017, 2:00 PM), <https://www.nydailynews.com/news/national/atrocities-consumed-halls-willowbrook-school-article-1.3030716> [https://perma.cc/5PKB-NX8P].

the short-term.<sup>32</sup> Most school-age children are no longer in classrooms—school districts kept their doors shuttered through the end of the academic year and many plan to extend remote learning for the coming academic year.<sup>33</sup> Distance learning is a new norm for a majority of public school students nationwide with great variation in the details, quality, and content of that education.<sup>34</sup> Although identification of disability discrimination in online spaces may be less apparent, the rights of an estimated seven million students with disabilities nationwide are particularly vulnerable to rollbacks, not to mention the collateral consequences of educational regression.<sup>35</sup> Several school districts initially delayed the move to distance education because they feared potential legal liability if they could not offer students with disabilities the same quality of education as their nondisabled peers, confusion attributable, in part, to an early guidance document issued by the Department of

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<sup>32</sup> See, e.g., PUB. LIBRARY ASS'N, PUBLIC LIBRARIES RESPOND TO COVID-19: SURVEY OF RESPONSE & ACTIVITIES (2020), [http://www.ala.org/pla/sites/ala.org.pla/files/content/advocacy/covid-19/PLA-Libraries-Respond-Survey\\_Aggregate-Results\\_FINAL2.pdf](http://www.ala.org/pla/sites/ala.org.pla/files/content/advocacy/covid-19/PLA-Libraries-Respond-Survey_Aggregate-Results_FINAL2.pdf) [<https://perma.cc/4HKG-SNCS>] (finding that although 98% of libraries closed to the public in response to COVID-19, they have continued online renewal policies, expanded social media and e-books, or added additional public services such as virtual programming).

<sup>33</sup> INST. FOR PUB. POLICY & SOC. RESEARCH, MICHIGAN STATE UNIV., STATE POLICIES TO ADDRESS COVID-19 SCHOOL CLOSURE, <https://ippsr.msu.edu/state-policies-address-covid-19-school-closure> [<https://perma.cc/88VD-YTCP>] (last updated Apr. 23, 2020). See Lesli A. Maxwell, *Reopening Schools: Here Are Some Districts' Plans for the Fall*, EDUC. WK.: DISTRICT DOSSIER (Jul. 13, 2020, 6:12 PM) [https://blogs.edweek.org/edweek/District\\_Dossier/2020/07/reopening\\_schools\\_district\\_plans.html](https://blogs.edweek.org/edweek/District_Dossier/2020/07/reopening_schools_district_plans.html) [<https://perma.cc/3AMD-B58S>] (offering examples of public school districts that will offer remote learning only in the fall of 2020, including Los Angeles Unified and San Diego Unified Public School Districts in California, Palm Beach County School District in Florida, and Metropolitan Nashville School District in Tennessee).

<sup>34</sup> See, e.g., Bree Dusseault & Travis Pillow, *Still No Consistent Plan for Remote Learning for Hundreds of Thousands of Students at Some of America's Biggest School Districts*, CTR. ON REINVENTING PUB. EDUC., THE LENS (May 15, 2020), <https://www.crpe.org/thelens/still-no-consistent-plan-remote-learning-hundreds-thousands-students-some-americas-biggest> [<https://perma.cc/6MA7-W3UT>] (finding that a majority of school districts reviewed provide some form of instruction but 33% of those districts—serving hundreds of thousands of students in some of the largest cities in the country—continue to operate without consistent expectations for teachers, such as requirements that teachers provide feedback on students' schoolwork); Chris Berdik, *How School Districts Are Outsmarting a Microbe*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/education/learning/coronavirus-online-class-public-schools.html> [<https://perma.cc/8XCQ-MHD4>] (describing school districts' efforts to adjust to the reality of distance learning because of the coronavirus).

<sup>35</sup> See, e.g., Laura Meckler & Valerie Strauss, *For Parents Trying to Replicate School for Children with Disabilities, a Confounding Task*, WASH. POST (Mar. 20, 2020), [https://www.washingtonpost.com/local/education/for-parents-trying-to-replicate-school-for-children-with-disabilities-a-confounding-task/2020/03/19/8a1e2876-6940-11ea-9923-57073adce27c\\_story.html](https://www.washingtonpost.com/local/education/for-parents-trying-to-replicate-school-for-children-with-disabilities-a-confounding-task/2020/03/19/8a1e2876-6940-11ea-9923-57073adce27c_story.html) [<https://perma.cc/G7WR-EKJP>]; Elissa Nadworny, *With Schools Closed, Kids with Disabilities Are More Vulnerable Than Ever*, NAT'L PUB. RADIO (Mar. 27, 2020) <https://www.npr.org/2020/03/27/821926032/with-schools-closed-kids-with-disabilities-are-more-vulnerable-than-ever> [<https://perma.cc/LL2P-69RC>].

Education's Office for Civil Rights.<sup>36</sup> A problematic trend has emerged in some states, such as New Jersey, where school districts have asked parents of children receiving special education to sign waivers promising not to sue the district in order to access online services.<sup>37</sup>

On March 27, 2020, Congress passed the CARES Act,<sup>38</sup> which required Education Secretary Betsy DeVos to prepare and submit a report to the Senate Committee on Health, Education, Labor, and Pensions and the House Committee on Appropriations regarding recommendations on any additional waivers under the Individuals with Disabilities Education Act (IDEA).<sup>39</sup> Thereafter, the Department of Education received a number of requests for "limited waivers" of IDEA provisions to allow for greater "flexibilities," opportunities to meet the needs of "all students," and avoidance of liability for non-compliance with special education requirements that could lead to litigation.<sup>40</sup> The central argument advanced by two organizational applicants

36 U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS 3 (2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf> [<https://perma.cc/B6G8-4XTS>] [hereinafter OCR FACT SHEET] ("If a school district closes its schools and does not provide any educational services to the general student population, then a school would not be required to provide services to students with disabilities during that same period of time.").

37 Rebecca Klein, *To Access Online Services, New Jersey Students with Disabilities Must Promise Not to Sue*, HUFFPOST (Apr. 25, 2020, 1:33 PM), [https://www.huffpost.com/entry/new-jersey-special-education-online-services-waiver-coronavirus\\_n\\_5ea4637ec5b6d3763590790c](https://www.huffpost.com/entry/new-jersey-special-education-online-services-waiver-coronavirus_n_5ea4637ec5b6d3763590790c) [<https://perma.cc/52TX-KV4T>].

38 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 286 (codified at 15 U.S.C. §§ 9001-80(2020)) (including \$2 trillion in aid to help individuals and businesses struggling economically in the wake of the COVID-19 pandemic).

39 See Coronavirus Aid, Relief, and Economic Security (CARES) Act, § 3511(d)(4), Pub. L. No. 116-136, 134 Stat. 286 (2020) (instructing the Secretary of the Department of Education to report to Congress no later than thirty days from the date of enactment any recommendations on waivers under education laws including the IDEA). See also Letter from Phyllis Wolfram, Exec. Dir., Council of Adm'rs of Special Educ. and John Eisenberg, Exec. Dir., Nat'l Ass'n of State Dirs. of Special Educ., to Mark Schultz, Acting Assistant Sec'y and Laurie VanderPloeg, Dir., U.S. Dep't of Educ., at 1 (March 31, 2020) [hereinafter Wolfram Letter] (on file with author) ("[T]he CARES Act . . . requires Secretary DeVos to write a report with information regarding flexibility that might be necessary during the COVID-19 pandemic."). Since Congress enacted the IDEA under its spending clause authority, states agree to implement federal special education law in exchange for federal dollars. 20 U.S.C. §§ 1451(a), (c) (2018). The IDEA allows for application to the Secretary of Education for waivers under certain circumstances. *Id.* § 1412(a)(18)(C)(i).

40 Wolfram Letter, *supra* note 39, at 1. In addition to the IDEA waivers, DeVos considered (and rejected) waivers of Section 504 of the Rehabilitation Act which provides protection from disability discrimination from public and private grantees of federal financial assistance, including public schools. See BETSY DEVOS, U.S. SEC'Y OF EDUC., RECOMMENDED WAIVER AUTHORITY UNDER SECTION 3511(D)(4) OF DIVISION A OF THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT ("CARES ACT") 11 (2020) (informing Congress that Secretary DeVos does not request waiver of "any of the core tenets" of the Rehabilitation Act); Pub. L. No. 93-112 § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794a (2018)) ("No otherwise qualified [individual with a disability] in the United States, . . . shall, solely by reason of his [or her

requesting waivers—the Council of Administrators of Special Education and the National Association of State Directors of Special Education—emphasized the absence of legal or doctrinal guidance needed to “implement a law that was not built for this situation.”<sup>41</sup> These petitioners sought waivers of certain procedural and substantive requirements of the IDEA, including the scope of free appropriate public education and data collection.<sup>42</sup> An opinion piece by one school attorney noted that “schools cannot ‘flex’ without congressional action.”<sup>43</sup> The Director of Advocacy for the National Superintendents’ Association similarly requested waivers because “meeting all the requirements in the IDEA is impossible.”<sup>44</sup> Tellingly, these calls for greater “flexibility” through waivers also tapped into concerns about limited resources and fairness, for example, that “school staff [are] stretched thin” and that, while all students face educational regression, only those with special education services have legal protections and claims to compensatory education.<sup>45</sup>

Federal special education laws and regulations consistently reinforce the applicability of civil rights protections (with built-in flexibility) even in times of national emergency.<sup>46</sup> Most recently, Secretary DeVos ratified this position in her report to Congress pursuant to the CARES Act. After considering the need for waivers of the IDEA’s provisions due to the coronavirus, Secretary

disability], be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

<sup>41</sup> Wolfram Letter, *supra* note 39, at 1, 4 (“[I]t is clear to us that the IDEA, the Rehabilitation Act, and other federal laws were not written anticipating a global pandemic that has closed a large majority of schools across the country, and for this reason we urge you to seek these specific flexibilities.”).

<sup>42</sup> *Id.* at 2-3 (outlining requested waivers of IDEA provisions).

<sup>43</sup> Miriam Kurtzig Freedman, *Special Education in the Time of Coronavirus: DeVos and Congress Need to Act*, THOMAS B. FORDHAM INST. (Apr. 14, 2020), <https://fordhaminstitute.org/national/commentary/special-education-time-coronavirus-devos-and-congress-need-act> [<https://perma.cc/3J5W-6YD5>]. *C.f.* Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 UC IRVINE L. REV. 557, 564 (2020) (finding, counterintuitively, that scarcity of coveted public resources has no effect on the degree of suspicion against people with disabilities perceived to be faking; rather, degree of “deservingness” drives suspicion).

<sup>44</sup> Michelle Diament, *DeVos Could Recommend Waiving IDEA Protections*, DISABILITY SCOOP, (Apr. 13, 2020), <https://www.disabilityscoop.com/2020/04/13/devos-could-recommend-waiving-idea-protections/28146/> [<https://perma.cc/AYR6-8295>].

<sup>45</sup> *Id.*; Freedman, *supra* note 43.

<sup>46</sup> *See, e.g.*, CONG. RESEARCH SERV. REPORT, R42881, EDUCATION-RELATED REGULATORY FLEXIBILITIES, WAIVERS, AND FEDERAL ASSISTANCE IN RESPONSE TO DISASTERS AND NATIONAL EMERGENCIES 2 (2019) (describing legislation enacted in response to the hurricanes in 2017 providing for waivers and flexibility in school funding); OCR FACT SHEET, *supra* note 36, at 2 (requiring schools that provide instruction to all students to provide special education services in accordance with students’ IEPs); *see also* Joseph F. ex rel. Andrew F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 999-1000 (2017) (requiring school districts to provide special education students with a “free appropriate public education” “reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances”); Letter from the Council of Parent Attorneys and Advocates, Inc., to Senator Lamar Alexander et al. (Apr. 13, 2020) (on file with author) (recommending several approaches to ensure IDEA protections continue despite COVID-19 burdens).

DeVos informed Congress that “[t]he Department is not requesting waiver authority for any of the core tenets of the IDEA or Section 504 of the Rehabilitation Act of 1973, most notably a free appropriate public education (FAPE) in the least restrictive environment (LRE).”<sup>47</sup> This conclusion has prompted at least one teachers union to seek emergency injunctive relief to prevent federal and state education agencies from enforcing the special education law without the waiver provider by Congress under the CARES Act.<sup>48</sup> Specifically, the Chicago Teachers Union claims that compliance with existing laws and regulations requires teachers and case managers to review and complete approximately 56,000 Individualized Education Programs (IEPs) with approximately six weeks remaining in the academic school year.<sup>49</sup>

School districts’ and administrators’ requests for statutory immunity from disability discrimination lawsuits have heightened in recent weeks as school districts plan for fall instruction. A new report from the National School Boards Association (NSBA), School Superintendents Association (AASA), and the Association of Educational Service Agencies (AESAs) calls for amnesty from litigation because “during this unprecedented pandemic, FAPE comes with tremendous costs to budgets and additional burdens on personnel that challenge school districts *trying their best* under the circumstances to meet the requirements.”<sup>50</sup> Empirical data collected from a national survey of school leaders revealed that approximately three out of four school districts determined that the most onerous service to provide during COVID-19 was “equitable education and related services for students with disabilities.”<sup>51</sup> The provision of FAPE, while certainly difficult, should not absolve school districts from compliance with existing laws. In fact, legal accountability is even more important during this period.

While the current pandemic is unprecedented *in scope*, the United States has experienced natural disasters and other national emergencies that previously raised questions about the requirements and capacity to serve

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<sup>47</sup> BETSY DEVOS, U.S. SEC’Y OF EDUC., RECOMMENDED WAIVER AUTHORITY UNDER SECTION 3511(D)(4) OF DIVISION A OF THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (“CARES ACT”), at 11 (2020), [https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=\[https://perma.cc/HNW3-WF4A\]](https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=[https://perma.cc/HNW3-WF4A]).

<sup>48</sup> Complaint ¶ 1, *Chicago Teachers Union v. Betsy DeVos*, No. 1:20-02958 (N.D. Ill., filed May 19, 2020).

<sup>49</sup> *Id.* ¶¶ 1-3.

<sup>50</sup> NAT’L SCH. BOARD ASS’N, SCH. SUPERINTENDENTS ASS’N, & ASS’N OF EDUC. SERV. AGENCIES, SCHOOL LEADER VOICES: CONCERNS AND CHALLENGES TO PROVIDING MEANINGFUL IDEA-RELATED SERVICES DURING COVID-19 7 (2020) (emphasis added), [https://www.aasa.org/uploadedFiles/AASA\\_Blog\(1\)/Advocacy%20IDEA%20White%20Paper%20FINAL.pdf](https://www.aasa.org/uploadedFiles/AASA_Blog(1)/Advocacy%20IDEA%20White%20Paper%20FINAL.pdf) [https://perma.cc/H7WF-J6P8].

<sup>51</sup> *Id.* at 9.

students with disabilities. For example, in 2017, Hurricanes Harvey, Irma, and Maria displaced students and disrupted school instruction for tens of thousands of students, including students receiving special education services through their Individualized Education Programs (IEPs).<sup>52</sup> In 2005, the combination of Hurricanes Katrina and Rita displaced over 50,000 students with disabilities.<sup>53</sup> The nature of the current public health crisis may differ from these hurricanes in scope—such as the certainty of an end point as well as the greater numbers of students affected; however, the suggestion that school districts could not possibly figure out how to meaningfully serve students with disabilities as grounds for waivers of substantive provisions of the IDEA is hyperbolic at best. In fact, federal relief legislation in prior crises specifically included funding to get students with disabilities back into routines as quickly as possible, including hiring additional teachers and support staff to reimagine service delivery without waiving the substantive rights of students under the IDEA.<sup>54</sup>

While uncertainties abound with respect to COVID-19, we can identify how past public emergencies further exacerbated the inequities in education experienced by students with disabilities during and (though not often discussed) long after these crises end.<sup>55</sup> Most damage estimates for planning or recovery purposes of past crises did not account for “indirect costs secondary

<sup>52</sup> NATIONAL FORUM ON EDUCATION STATISTICS, FORUM GUIDE TO PLANNING FOR, COLLECTING, AND MANAGING DATA ABOUT STUDENTS DISPLACED BY A CRISIS 5-6 (2019) (noting that Hurricane Maria displaced “tens of thousands of students” from Puerto Rico and that “[i]n Florida alone, over 11,000 Puerto Rican evacuees enrolled in the state’s public elementary and secondary schools within the five months following Hurricane Maria”) (citation omitted). U.S. DEP’T OF EDUC., NON-REGULATORY GUIDANCE ON FLEXIBILITY AND WAIVERS FOR GRANTEEES AND PROGRAM PARTICIPANTS IMPACTED BY FEDERALLY DECLARED DISASTERS 12-13 (2017) (“The Department currently has no legal authority to waive IDEA requirements, except for the requirement to maintain State financial support for special education and related services . . .”) (on file with author); *see also* 20 U.S.C. § 1412(a)(18)(B) (2018).

<sup>53</sup> John F. Pane et al., *Student Displacement in Louisiana After the Hurricanes of 2005: Experiences of Public Schools and Their Students*, RAND GULF STATES POLICY INSTITUTE xi (2006) (stating that Hurricanes Katrina and Rita caused the largest displacement of students in U.S. history with nearly 200,000 public school pre-K-12 students displaced in Louisiana alone). LEX FRIEDEN, NATIONAL COUNCIL ON DISABILITY, THE IMPACT OF HURRICANES KATRINA AND RITA ON PEOPLE WITH DISABILITIES: A LOOK BACK AND REMAINING CHALLENGES 19 (2006) (on file with author) (noting that Hurricane Katrina displaced approximately 247,000 students from Louisiana, 125,000 from Mississippi, and 3,000 from Alabama; Hurricane Rita displaced approximately 86,000 students from Texas).

<sup>54</sup> FRIEDEN, *supra* note 53, at 20 (describing federal relief programs designed to “help children with disabilities return to school as quickly as possible”). One key difference in those situations is that while schools in the affected areas were shuttered or destroyed, there were other schools outside of the districts and states that took in affected students and agreed to provide a FAPE to all students including those receiving special education. *Id.* at 19-20.

<sup>55</sup> *See, e.g.*, Louis Foglia, *How Katrina Changed Special Education in New Orleans*, CNN MONEY (Aug. 28, 2015), <https://money.cnn.com/2015/08/14/news/hurricane-katrina-special-education/> [<https://perma.cc/W936-Q6H7>].

to tangible loss and disruption, as these costs are less quantifiable and hidden from view.”<sup>56</sup> Post-COVID-19, indirect costs will likely include increased special education expenditures resulting from increased numbers of students eligible for and requiring special education services to access a FAPE, a rise in punitive school discipline policies and practices that result in greater contact with the criminal justice system, and overall, lost productivity to society.<sup>57</sup>

Even if the threat of waivers of some or all of the IDEA’s procedural and substantive rights disappears (directly or indirectly through requests for legal immunity) and children with disabilities are afforded some modified online education,<sup>58</sup> families of children with disabilities are without the necessary services that allow students to actually access remote education such as physical and occupational therapy, behavioral supports, one-to-one aides, as well as wrap-around socio-economic supports such as respite care or, for children on the autism spectrum, intensive in-home therapies like Applied Behavioral Analysis (also known as ABA). Education and childcare have privatized, with parents of children with disabilities (and indigent children) disproportionately disadvantaged. These families cannot simply turn on a computer and allow their children to participate in online instruction independently without support and supervision.<sup>59</sup>

When equality of opportunity becomes too onerous or costly, disability rights take a backseat in the name of broader public interests. Limited

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<sup>56</sup> Berre Burch et al., *Children and Disasters: Lessons from Hurricane Katrina*, 10 WHITTIER J. CHILD & FAM. ADVOC. 3, 4 (2010).

<sup>57</sup> *Id.*

<sup>58</sup> California parents received notice of the modifications offered by local school districts in response to covid-19. *See, e.g.*, Letter from Davis Joint Unified School District to Parent [Redacted] (attached to Apr. 17, 2020 email) (on file with author). Two problems exist. First, procedurally, the decision regarding services is being made *unilaterally* without input from the parent in the design of the proposed modifications. Parents are invited to reach out and share “concerns” about the offer of FAPE and they are provided with a copy of the procedural safeguards if they disagree with the district’s plan to serve their child. *Id.* However, families should be consulted *prior* to the decision to provide modified services to ensure the services reflect, as best as possible, not only the child’s preexisting IEP but what the child needs to access FAPE in the new learning environment. This is not an onerous requirement and reflects the IDEA’s collaborative intent. It is unrealistic to think that families who disagree with the substantive offer of services would be able to exercise their procedural rights by filing formal due process complaints and exhausting administrative procedures during the coronavirus. Second, the content of the offers of FAPE are, understandably, much less than pre-COVID-19; however, many of the offers reflect less than an hour a week of support for students with disabilities, do not account for the in-home modifications that are required to support parents who have stepped into the role of resource teachers, para-educators, and general education instructors, and will likely go unchallenged by parents and guardians overwhelmed with the new normal of COVID-19.

<sup>59</sup> *See, e.g.*, Aliyya Swaby, *Coronavirus in Texas: Special Education Students Fall Behind as Texas Schools Scramble to Adapt*, TEX. TRIB. (Apr. 10, 2020, 12:00 AM), <https://www.texastribune.org/2020/04/10/texas-schools-closed-coronavirus-struggling-special-education/> [<https://perma.cc/9WB8-U2RR>] (highlighting some of the difficulties faced by parents who are now having to oversee the education of their children who previously had access to special education services).

resources, however, are invalid justifications for differential treatment on the basis of disability. More accurately, they manifest systemic flaws in planning and proper resource allocation.<sup>60</sup> Part II explains why rollbacks of disability rights come early and often in times of public emergency.

## II. THE INSTABILITY OF DISABILITY RIGHTS

Why are disability rights so precarious? Part II argues that the ways in which disability norms evolved have made disability rights less stable and, thus, more susceptible to negotiation rather than enforcement. To be clear, disability is pervasive in society and it is one of the only identity groups everyone will become a part of as they age. Thus, while I contend there is a general information deficit about the complexities of disability stemming from the absence of meaningful access and inclusion, some of this information (or misinformation) comes from the proximity of disability in familial and other relationships, which, without contextualization, can backfire and actually further pervert social norms of disability.<sup>61</sup> Three interrelated socio-legal elements have produced a set of unstable social norms which continue to destabilize disability rights today.

### A. *Morality, Medicine, and Bad Differences*

First, disability discrimination is, at least in part, a product of early religious and private regulation of socio-economic supports. States were largely absent from providing services for people with disabilities. Responsibility for the care of people with disabilities fell to families and, later, charitable organizations often affiliated with religious institutions.<sup>62</sup> People understood, and some continue to understand, disability as a “bad-difference,”<sup>63</sup> a family burden, or a mark of immorality, divine punishment for an act of the individual or family. Interactions with people with disabilities did not result in typical relationships—rather, they were transformed into acts of care, divine obligation, benevolence, service, and pity for the “less

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<sup>60</sup> For example, until the IDEA Amendments in 2004, school districts facing a shortage of credentialed special education teachers could (and often did) waive credential requirements to staff classrooms. See generally ELAINE CARLSON ET AL., STUDY OF PERSONNEL NEEDS IN SPECIAL EDUCATION KEY FINDINGS (SPeNSE) (2002), [https://education.ufl.edu/spense/files/2013/06/Key-Findings\\_Final\\_.pdf](https://education.ufl.edu/spense/files/2013/06/Key-Findings_Final_.pdf) [<https://perma.cc/6EZ6-5C6R>].

<sup>61</sup> See, e.g., Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1388 (2012) (“The current messages about disability surrounding [key] moments [where individuals make decisions that affect whether or not they or their children might be disabled in the future] tend to be misleading and negative, rooted in the outside view of disability.”).

<sup>62</sup> See, e.g., Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. (forthcoming 2021) (on file with author) [hereinafter Harris, *Taking Disability*].

<sup>63</sup> Elizabeth Barnes, *Valuing Disability, Causing Disability*, 125 ETHICS 88, 89 (2014).

fortunate.”<sup>64</sup> This has had a profound impact on social norms of disability today. Consider why a simple hello or polite act of holding a door for a person with a more apparent disability gets elevated from ordinary etiquette (without a second thought), to an act of service, a marker of moral character, worthy of (self and public) celebration.<sup>65</sup> This early construction of disability laid the groundwork for public support for government regulation of disability through medical and rehabilitative lenses and firmly rooted disability as part of the social welfare system rather than civil rights.

### B. *Stealth Advocacy and the Absence of Public Contestation*

Second, disability rights emerged without the same degree of public contestation necessary to change underlying norms.<sup>66</sup> Consider the very public protests and national marches associated with other civil rights movements (race, gender, sexuality, as examples). While people with disabilities have organized to demand equality under the law, there have been fewer sustained televised protests.<sup>67</sup> Media coverage of the civil rights movement—including television, radio, and print—made it possible for American households to discuss and debate the sights and sounds of the struggle for racial justice.<sup>68</sup> Iconic images of African American protestors being attacked with fire hoses and police dogs, physically beaten and verbally tormented for seeking equality in education and public accommodations

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<sup>64</sup> *E.g.*, *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981) (explaining that disability discrimination “often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of . . . persons [with disabilities]”).

<sup>65</sup> This dynamic is mirrored in the parenting context where parents of children with disabilities who are devoted to their children (as are many other parents) are often lionized as sacrificing themselves or being “better” parents. *See, e.g.*, Amialya Durairaj, *Quiet Heroes: Caregivers of Children with Disabilities Face Big Pressures, Rewards*, SAN DIEGO UNION-TRIB. (Mar. 19, 2019, 11:20 AM), <https://www.sandiegouniontribune.com/caregiver/sd-he-caregiver-special-needs-20190225-story.html> [<https://perma.cc/7WE5-9NVM>] (describing the caretaking provided by parents who leave the workforce to care for a child with disabilities, one of whom stated that “[t]here are heroes walking around us every day . . . [q]uiet heroes who are taking care of a special person . . . . They give their life up to take care of them.”).

<sup>66</sup> *See, e.g.*, DAVID PETTINICCHIO, *POLITICS OF EMPOWERMENT: DISABILITY RIGHTS AND THE CYCLE OF AMERICAN POLICY REFORM* 6-7 (2019) (“[T]he genesis of disability rights policy is not rooted in the demands of a grassroots political movement . . . .”); *see also* Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 525 (2008) (“[T]he overwhelming congressional support for the [ADA] obscured a broad congressional indifference to the specifics of the legislation.”).

<sup>67</sup> This is not a criticism of the disability rights activists, rather a commentary on the priorities of media outlets and how their lack of attention denied the movement its capacity to ignite a spark and sustain a fire.

<sup>68</sup> *See, e.g.*, David Treadwell, *Journalists Discuss Coverage of Movement: Media Role in Civil Rights Era Reviewed*, L.A. TIMES (Apr. 5, 1987, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-04-05-mn-380-story.html> [<https://perma.cc/G9P3-J4T5>].

seared into the public's consciousness.<sup>69</sup> According to Representative (and civil rights giant) John Lewis, “[t]he civil rights movement would have been like a bird without wings if it hadn’t been for the news media.”<sup>70</sup>

This is not to say that disability activists were not out there fighting for disability rights. To the contrary, protests such as the sit-ins in 1977 in San Francisco and elsewhere challenging the Secretary of the U.S. Department of Health, Education, and Welfare’s (HEW) failure to issue regulations to enforce Section 504 of the Rehabilitation Act of 1973, the Capitol Crawl in 1990 challenging physical inaccessibility, or, more recently, ADAPT “die-in” in the Capitol challenging the GOP’s attempts to repeal (and replace) the Affordable Care Act (a.k.a. “Obamacare”) with legislation designed to slash Medicaid budgets, have captured public attention even if only for a moment.<sup>71</sup>

The problem was not whether people saw it, but how they processed what they were seeing. Tellingly, disability activist, Judith Heumann, recounts the initial reaction of HEW officials to the protests in San Francisco: “[O]fficials treated us with condescension, giving us cookies and punch as if we were on some kind of field trip.”<sup>72</sup> HEW officials did change their tone when they witnessed the power of the San Francisco protest and, ultimately, HEW Secretary Joseph Califano signed the Section 504 regulations.<sup>73</sup> However, the dismissive reception of disability rights advocates reflects powerful social norms of care and paternalism and stands in stark contrast to government reactions to contemporaneous peer protests in other civil rights movements.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> The sit-in in San Francisco lasted about a month, whereas those in other cities lasted only a day or two. See Andrew Grim, *Sitting-in for Disability Rights: The Section 504 Protests of the 1970s*, NAT’L MUSEUM OF AM. HIST. (July 8, 2015), <https://americanhistory.si.edu/blog/sitting-disability-rights-section-504-protests-1970s> [<https://perma.cc/28FP-MLDB>] (explaining that the sit-in in San Francisco lasted twenty-five days); S.E. Smith, *Why Disability Rights Activists Stormed Mitch McConnell’s Office*, ROLLING STONE (June 23, 2017, 3:33 PM), <https://www.rollingstone.com/politics/politics-news/why-disability-rights-activists-stormed-mitch-mcconnells-office-196423/> [<https://perma.cc/UE2V-V3Y5>] (explaining that disability rights activists staged a sit-in outside of Senate Majority Leader Mitch McConnell’s office and were arrested and removed by police the same day); Jessica Estepa, *Senate Healthcare Bill Protesters Dragged Away from ‘Die-In’ at Mitch McConnell’s Office*, USA TODAY (June 22, 2017, 12:36 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/06/22/protesters-have-sit-mitch-mcconnells-office/419748001/> [<https://perma.cc/9M69-YYDN>] (capturing video and social media links and describing the power of the ‘die-in’).

<sup>72</sup> Grim, *supra* note 71.

<sup>73</sup> *Id.* Another publicly recognized disability protest, the Capitol Crawl, occurred in 1990 in the weeks leading up to the ADA. People with physical disabilities dragged their bodies up the Capitol steps to demonstrate the lack of physical accessibility at the home of national lawmaking. See generally JOSEPH P. SHAPIRO, NO PITY 131-36 (1994) (describing the activism of ADAPT, including the Capitol Crawl, designed to change public perceptions of people with disabilities as passive, dependent recipients of pity).

The history of the ADA's promulgation offers another perspective on the dominant social norms paving the way for it and its narrow interpretation by courts. One of the reasons that the ADA may have passed so quickly through committee is that its proponents—lawmakers with direct or family connections to disability—framed the ADA as an extension of existing laws such as the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973.<sup>74</sup> A dominant moral narrative emerged framing support for the ADA as the “right thing” to do.<sup>75</sup>

Importantly, fiscal conservatives backed the ADA not because of its moral appeal but, rather, because the bill tapped into their core values of self-reliance with a move from dependency and government welfare to work. This made disability rights “politically uncontroversial—as American as apple pie.”<sup>76</sup> In fact, public opinion polls conducted after the passage of the ADA, for example, showed that 95% of those surveyed supported a general prohibition on disability discrimination and 83% of those surveyed agreed with the proposition that employers should provide reasonable accommodations to people with disabilities.<sup>77</sup> Controlled publicity in combination with a universal, politically salient message paved the way for bipartisan approval for the ADA, a comprehensive civil rights law. Consider the fact that President George H.W. Bush signed the ADA into law the same year (about three months before) he successfully vetoed another comprehensive civil rights bill, the Civil Rights Act of 1990, that sought to, among other goals, amend provisions of the Civil Rights Act of 1964 to make clear (to the Supreme Court, among others) plaintiffs’ rights to remedy employment discrimination based on theories of disparate impact and mixed-motive cases.<sup>78</sup> Ultimately, proponents on the Hill tapped into a lack of knowledge about disability among members of the public and within the government itself, which may have allowed them to shepherd the ADA through more easily but, in retrospect,

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<sup>74</sup> Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 904-07 (2003).

<sup>75</sup> See PETTINICCHIO, *supra* note 66, at 4 (“Working to provide economic opportunities and rights to people with disabilities meant *doing the morally right thing*.”).

<sup>76</sup> *Id.* at 4 (internal quotation omitted).

<sup>77</sup> Selmi, *supra* note 66, at 526 n.15.

<sup>78</sup> Civil Rights Act of 1990, H.R. 4000, 101st Cong. (2d Sess. 1990); S. 2104, 101st Cong. (2d Sess. 1990). As an example,

[T]he [Bush] Administration’s political investment in the disability rights legislation was inapposite to its investment in other civil rights issues generally, and the 1990 bill specifically. For example, presidential candidate George Bush *endorsed in principle* comprehensive disability rights legislation. In contrast, President Bush *opposed in principle* legislation to overturn the June 1989 decisions.

Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 72-73 (1993).

may have traded off against meaningful legislative and public debate and discussion about the broad scope of disability in society and what it would actually take to combat disability discrimination.<sup>79</sup>

### C. *The Difficulty of Defining Disability*

A third, related factor that has undermined the stability of disability rights is the unresolved tension between public perceptions and legal definitions of disability, a conflict that has unfolded principally in courts and places of public accommodations.<sup>80</sup> The ADA's drafters intended that it provide remedies to a broad class of people with disabilities.<sup>81</sup> However, existing social norms at the time largely reflected public understanding of people with disabilities as those who manifested a narrower set of visible and other sensory markers of disability—white canes, wheelchairs, service animals—what I have previously called the “aesthetics of disability.”<sup>82</sup> These aesthetic markers became (and continue to be) the line between the “deserving disabled” and those perpetrating fraud and attempting to game the system. Why is this problematic? Consider public adjudication of disability, that is, the ways in which the public polices disability. Those without aesthetic markers who “look fine” are perceived as able-bodied people simply faking disability for premier access to parking, shorter lines at Disneyland, or priority boarding at airports. Aesthetic markers have become the gold standard of probative, legal evidence of disability and mark the parameters of standing and scope of protection for individuals with disabilities. They lack nuance and do not reflect the actual experiences of people with disabilities who, more accurately, fall along a continuum with respect to variables such as severity, consistency, visibility, and mitigation.

This is a key difference between disability and other civil rights laws. To avail yourself of protection from disability discrimination, unlike racial or gender-based discrimination, you have to first prove the legitimacy of your disability, a

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<sup>79</sup> Selmi, *supra* note 66, at 539 (“Among advocates, the lack of legislative opposition is almost always seen as desirable because it speeds the bill’s journey through the legislature.”).

<sup>80</sup> See generally Harris, *Taking Disability*, *supra* note 62.

<sup>81</sup> Justin Dart, President Reagan’s Republican political appointee to the National Council on the Handicapped, and Robert Burgdorf, a law professor and lawyer for the National Council on the Handicapped, drafted the early versions of the ADA. PETTINICCHIO, *supra* note 66, at 11-12; see 42 U.S.C. § 12102(1) (1990) (defining “disability” as a physical or mental impairment that substantially limits one or more major life activities of an individual, a record of such an impairment, or being regarded as having such an impairment).

<sup>82</sup> Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897 (2019) [hereinafter Harris, *Aesthetics*].

legal interpretation that requires direct contention with social norms.<sup>83</sup> A person with a disability under the ADA is someone with “a physical or mental impairment that substantially limits one or more major life activities.”<sup>84</sup> An individual can meet this definition in one of three ways: showing they have an actual disability, a record of a disability (e.g., cancer in remission), or have no disability but are nevertheless “regarded as” having a disability.<sup>85</sup>

Courts struggled during the early years of the ADA to make sense of a law, in which, for example, a person must meet normative standards of disability but also be able to meet the requirements of a job designed by and for an ableist, neurotypical world.<sup>86</sup> The early doctrine in Title I was largely confined to the gateway definition of disability with defendant-employers emerging victorious at astounding rates.<sup>87</sup> Less than a decade after the ADA went into effect, the Supreme Court decided the “*Sutton* Trilogy,” a trio of cases under Title I on how courts should treat mitigating measures that can make the underlying effects of a disability better (such as medication or assistive devices) and, thus, render the person nondisabled as a statutory matter.<sup>88</sup> Plaintiffs in these cases had different degrees of severity of visual

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<sup>83</sup> Legal interpretation and application to a set of facts requires attention to existing social norms and values that underwrote applicable laws in the first place. My thesis touches on scholarly debates about modes of legal interpretation and their relationship to existing or aspirational social norms. The nuances of these debates are beyond the scope of this Essay. See, e.g., Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1358-59 (2015) (introducing the general arguments for different approaches to statutory interpretation and how they fit into the contemporary debate on statutory interpretation).

<sup>84</sup> 42 U.S.C. § 12102(1) (2018).

<sup>85</sup> 28 C.F.R. § 35.108(a)(1) (2019).

<sup>86</sup> This is known as the “double-bind.”

<sup>87</sup> See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 99, 100 (1999) (reviewing existing ADA Title I employment cases and outcomes and finding that defendants prevail at the trial level in 93% of cases and prevail in 84% of cases at the appellate level); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248-57 (2001) (examining Title I decisions from the federal appellate courts and advancing three findings: (1) the district courts found for defendants in 94% of these cases; (2) when plaintiffs appealed unfavorable district court opinions, the court of appeals reversed the lower courts in only 12% of cases; and (3) when defendants appealed unfavorable district court opinions, the courts of appeals reversed in whole or in part in 60% of cases).

<sup>88</sup> See *supra* note 5.

impairments<sup>89</sup> and high blood pressure,<sup>90</sup> impairments that if viewed as legal disabilities could bring a significant number of people—who, at the time, were not considered “disabled” by normative standards—into the protected class. Such a sweeping view of disability that included people who could successfully minimize the disabling effects of their impairments, the Court reasoned, was not what Congress intended.<sup>91</sup> Nine years later, Congress retorted with the ADA Amendments Act, replacing the *Sutton* Trilogy with clarifying language that a person’s impairment should be assessed in its unmitigated state in any determination of whether they meet the legal definition of disability, thus underscoring its intent for a broad protected class.<sup>92</sup> Despite the Amendment, social norms have not yet shifted to reflect the Congressional directive.<sup>93</sup>

The current public health crisis and the emerging forms of disability discrimination simply reinforce these problematic norms and, as a result, render disability rights expendable. Consider the language used to describe those who are “at risk” of contracting the coronavirus or experiencing the

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<sup>89</sup> For example, the plaintiffs in *Sutton* were two pilots (also twin sisters) with severe nearsightedness (myopia). With corrective lenses, they each had twenty-twenty vision but, without correction, their vision limited their ability to see, among other functional limitations such as flying a plane. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999). While the plaintiff in *Albertson’s* could not correct for his monocular vision, the Court considered whether the mere existence of an impairment could reflexively meet the statutory definition of disability. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 559 (1999).

<sup>90</sup> The plaintiff in *Murphy v. United Parcel Serv., Inc.*, a mechanic with high blood pressure, took medication to manage his hypertension. 527 U.S. 516, 521 (1999). The Court held that analysis of whether he met the threshold definition of disability required the employer to examine him in his mitigated state—that is, when medicated, did his hypertension substantially limit one or more of his major life activities? *Id.*

<sup>91</sup> For example, the Court in *Sutton* stated that,

Finally, and critically, the Congressional finding that 43 million Americans have one or more physical or mental disabilities, see § 12101(a)(1), requires the conclusion that Congress did not intend to bring under the ADA’s protection all those whose uncorrected conditions amount to disabilities. That group would include more than 160 million people. Because petitioners allege that with corrective measures their vision is 20/20 or better, they are not actually disabled under subsection (A).

*Sutton*, 527 U.S. at 472.

<sup>92</sup> In 1999, the U.S. Supreme Court heard a trio of disability cases—referred to as the “*Sutton* Trilogy”—concerning the threshold definition of “disability” under the ADA. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (lead case); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Congress made clear with the ADA Amendments that it did not agree fully with the Court’s approach to these cases. See ADA Amendments Act of 2008, § 4(a), Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. § 12101 (2020)) (providing an illustrative list of “major life activities” and clarifying that the definition of disability be construed “in favor of broad coverage,” a direct response to the *Sutton* Trilogy).

<sup>93</sup> Emens, *supra* note 61, at 1387 (“The law will not be interpreted or implemented effectively until attitudes toward disability change.”).

worst of the virus. The virus was portrayed initially as risky for a small group—older adults and people with disabilities. Federal and state officials politicized this language to offer relative comfort to most Americans and justified their inattention by falling back on problematic social norms of disability. It allowed many people to keep disability at arm's length, as do the aesthetics of disability, to see the risk as minimal to them and falling mainly on a small group of wheelchair users or people with intellectual and developmental disabilities who require support to perform daily tasks and self-care. Even when the messages expanded to include people with underlying health conditions, many continued to portray this group as different and distinct from people with disabilities when, in effect, there is tremendous overlap. As a result, these narratives further obscure the breadth and complexity of disability in society.

### III. BEYOND COVID-19

This Essay has applied a disability rights lens to the current crisis as a descriptive mechanism. I have argued that moving beyond individual instances of discrimination shows how the current pandemic is a manifestation of a much bigger problem about the frailty of disability rights. Part III argues for continued application of this disability lens to understand disability discrimination that will likely emerge beyond health rationing. We have a unique opportunity to tackle sticky norms of disability that power eugenic chants and inspire signs at recent coronavirus “liberty rallies” calling for Americans to “sacrifice the weak” for the greater good.<sup>94</sup>

A critical component of life beyond COVID-19 is to approach disability not as a byline to invoke indifference or pity because of “helplessness” or increased vulnerability, but to recognize that vulnerabilities have been created by aggregate (and deliberate) legislative and policy decisions designed to attend to an able-bodied and neurotypical world.<sup>95</sup> It would be a mistake to view reforms through the lens of charity or pity, i.e., the status quo, because it will only perpetuate where we are—with disability rights on shaky ground. Instead, an opportunity exists to see the prioritization of nondisabled lives as discrimination when we apply a disability rights lens and unpack the structural choices that have left people with disabilities more susceptible to disparate treatment and impact.

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<sup>94</sup> Chacour Koop, *'Sacrifice the Weak' and 'Give Me Liberty': Signs at Coronavirus Protests Across US*, MIAMI HERALD (Apr. 21, 2020, 10:19 PM), <https://www.miamiherald.com/news/coronavirus/article242182796.html> [https://perma.cc/K7ST-4VH8].

<sup>95</sup> Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

### A. *Identifying the Next Waves of Disability Discrimination*

Existential fears of human mortality, in large part, underwrite disability discrimination. Consider how people react when they encounter the aesthetics of disability.<sup>96</sup> For example, facial disfigurements may invoke disgust, non-normative speech or behavior anger, and amputees may invoke pity.<sup>97</sup> All three of these examples, however, are rooted, at least to some degree, in a person's fears about death, vulnerability, difference, and dependence.<sup>98</sup>

Fear will linger long after COVID-19, and may lead to greater manifestations of intentional and targeted discrimination such as recent attacks on Asian Americans, fueled, in no small part, by the President's repeated references to coronavirus as "the Chinese virus."<sup>99</sup> Racist verbal attacks have escalated, at times, to physical violence. One affected individual noted:

It's a look of disdain . . . [like] "[h]ow dare you exist in my world? You are a reminder of this disease, and you don't belong in my world" . . . It's especially hard when you grow up here and expect this world to be yours equally. But we do not live in that world anymore. That world does not exist.<sup>100</sup>

Evidence of discrimination is coming to light in housing<sup>101</sup> and employment<sup>102</sup> and may increase when states lift shelter-in-place emergency orders and more businesses reopen (or close permanently). Disability antidiscrimination laws should be critical diagnostic and prescriptive tools to understand and remedy the next waves of discrimination. However, as this Essay argues, the reach and efficacy of the law's application will continue to rely on the depth and scope of social norms of disability.

For example, the ADA, in theory, offers three broad categories of people considered "disabled" that can be used to remedy COVID-19 related

<sup>96</sup> See Harris, *Aesthetics*, *supra* note 82, at 904.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 930.

<sup>99</sup> Sabrina Tavernise & Richard A. Oppel, Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/M5ZT-TCUZ>].

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., Emily Shugerman, *Coronavirus Heroes Are Getting Tossed From Their Homes by Scared Landlords*, DAILY BEAST (Mar. 26, 2020), <https://www.thedailybeast.com/coronavirus-nurses-face-eviction-housing-discrimination-from-scared-landlords?ref=scroll> [<https://perma.cc/KXY2-P8Y8>] (describing discrimination experienced by healthcare workers who are being evicted from apartments and homes on the basis of potential exposure to COVID-19). Although this article does not make a direct connection to disability, these healthcare workers may have a claim under the ADA or FHA for disability discrimination. Under the ADA, the workers may meet the definition of disability through the "regarded as" prong.

<sup>102</sup> Doctrinal uncertainty in disability law that predated COVID-19 will be further muddled by the virus. For example, questions surrounding the gig economy and how to classify workers and employers for purposes of ADA liability or the specifics of web accessibility.

discrimination. First, for people actively fighting the virus, are they people with an actual “physical or mental impairment that substantially limits one or more life activities” pursuant to the statute?<sup>103</sup> Although the ADA excludes “transitory” impairments (and this may become a litigated issue),<sup>104</sup> COVID-19 may still qualify as an impairment for certain people for whom the effects of the virus last beyond contagion such that it affects the respiratory system and substantially limits the major life activity of breathing. Or, a person who has a compromised immune system and may be at higher risk of contracting and then experiencing complications because of COVID-19 may meet the legal definition through an analysis of the underlying health impairment and not directly through COVID-19. Second, people who have a “record of” a “physical or mental impairment” under the actual disability prong and face discrimination based on their record of the impairment may also have standing to recover.<sup>105</sup> Similar questions about the duration of COVID-19 and its severity for the individual may pose important questions of law and fact, respectively, as they will under the “actual” disability prong but may not create the same hurdles from people with underlying health conditions. Third, and perhaps the most promising avenue to combat the next waves of discrimination facing many in the COVID-19 context is the “regarded as” prong,<sup>106</sup> where a covered entity under the ADA (employer, state, municipality, place of public accommodation) treats someone who does not have COVID-19 as if they do and present safety or other risks. The “regarded as” prong, relative to the other two prongs, best addresses problematic social norms of disability that lead to discriminatory treatment against people with disabilities.<sup>107</sup>

In employment, the Equal Employment Opportunity Commission recently classified COVID-19 as a “direct threat” per se.<sup>108</sup> Employers now have greater latitude to screen job candidates either directly related to COVID-19 or particular risks associated with certain health conditions. As public health authorities learn more about correlated symptoms beyond fever, cough, and

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<sup>103</sup> 42 U.S.C. § 12102(1)(A) (2018). Legal questions may arise concerning the nuances of what constitutes “active” COVID-19, in particular, if someone has a mild or asymptomatic case, or if contagiousness lasts for a two-week period (as the research current suggests) for purposes of using the “actual” disability prong under the ADA’s disability definition.

<sup>104</sup> See *id.* § 12102(3)(B) (excluding “transitory impairment[s]” defined as those with an “actual or expected duration of 6 months or less”).

<sup>105</sup> *Id.* §§ 12102(1)(A), (B).

<sup>106</sup> *Id.* 42 U.S.C. § 12102(1)(C).

<sup>107</sup> See Harris, *Aesthetics*, *supra* note 82, at 968-70 (discussing the ways in which this approach best serves the goals of disability law in educational, employment, and public accommodation contexts).

<sup>108</sup> U.S. EQ. EMP. OPPORTUNITY COMMI’N, EEOC-NVTA-2009-3, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [<https://perma.cc/E8LC-L4YG>] (“Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard.”).

difficulty breathing, employers may have increased latitude to ask questions about nonspecific symptoms such as diarrhea or vomiting that may reveal underlying health impairments unrelated to the coronavirus. Failure to hire cases are notoriously difficult to prosecute under non-pandemic conditions because of implicit biases that make causation difficult to prove; these cases may be even harder to win in COVID or post-COVID environments.<sup>109</sup>

For existing employees who have greater protections from discrimination in the workplace including pretextual or improper discharge, invasive and unequal medical exams, and confidentiality of medical information,<sup>110</sup> COVID-19's classification as a "direct threat" may offer employers greater flexibility during this time, but disability rights laws continue to apply.<sup>111</sup> The operative question now is *how* and, as businesses reopen, inquiries should focus on returning to full enforcement and compliance with disability rights laws. Employers may create conditions precedent for employees (including timetables for transitions), to come to work, stay home, and return to work that require employees to provide HIPAA protected medical information as well as having them physically submit to onsite testing with temporal scans for fevers or blood tests. Relatedly, employers will likely have access to medical and genetic data and critical questions include what employers do with that information, how it is protected (or not) and limits on sharing (or selling) data.<sup>112</sup>

Statutory concepts in disability law such as "direct threat,"<sup>113</sup> "reasonable accommodations,"<sup>114</sup> "qualified,"<sup>115</sup> and "business

<sup>109</sup> See, e.g., *Wheeler v. Lisle-Woodridge Fire Prot. Dist.*, 804 F. Supp. 2d 759, 764 (N.D. Ill. 2011) (finding plaintiff applicant to the local fire protection district failed to show a violation of the ADA for failure to hire because there was no evidence that the district perceived the applicant as having a substantially limiting impairment).

<sup>110</sup> 42 U.S.C. § 12133 (2018); 28 C.F.R. § 35.130 (2019).

<sup>111</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and the Coronavirus*, U.S. EQ. EMP. OPPORTUNITY COMM'N (last visited Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm) [<https://perma.cc/2WWZ-AWLT>].

<sup>112</sup> Interesting questions may arise in the context of the ADA, Rehabilitation Act, Section 1557 of the ACA, Genetic Information Nondiscrimination Act, and HIPAA as public (and private) laboratories pool information about blood samples to research antibodies and to develop a vaccine, including who controls this data and how we define "public interest" usage.

<sup>113</sup> 42 U.S.C. § 12111(3) (2018) (defining "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation").

<sup>114</sup> *Id.* § 12111(9) (defining "reasonable accommodation" as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities").

<sup>115</sup> *Id.* § 12111(8) (defining "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

necessity”<sup>116</sup> will hit the mainstage and require careful analysis to avoid pretextual discrimination. Employers must manage health risks related to COVID-19 based on *individualized assessments* that look at the risk of the particular person to self or others in the workplace.<sup>117</sup> General guidance on COVID-19 or related health concerns are insufficient to justify exclusion without an assessment of how COVID-19 manifests for the person, which may be complicated as we learn more about how the virus operates and spreads, including those who are asymptomatic carriers. Similarly, questions of whether a person with a disability continues to be “qualified” to perform the “essential functions” of a job may arise as employers look to eliminate or restructure particular positions, shutter businesses, or institute layoffs to deal with economic fallout from social distancing and shelter-in-place measures.

Defenses in the ADA will become targets of judicial interpretation, for example, “undue hardship” (cost considerations) with respect to the provision of reasonable accommodations in employment, “readily achievable” with respect to duties to remove architectural barriers to access, and “fundamental alterations” of a program or service or place of public accommodation. Accommodations in employment such as the provision of job coaches to enable some people with intellectual and developmental disabilities to learn how to perform specific tasks of certain jobs may move from a “should do” to an “undue hardship” or burden for the employer and be viewed as expendable. Similarly, summer camps in some cities operated by the city departments of parks and recreation provide some children with disabilities aides to ensure access to general camps and promote inclusion. Will these cities seek to cut funding for inclusion and revert to segregated services and programs as disability law falls back on norms of benevolence rather than legal rights? Many cities have already announced furloughs and layoffs, which will further

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<sup>116</sup> *Id.* § 12112(b)(6) (permitting employers to use selection criteria that tend to screen out individuals with disabilities when those criteria are job-related and consistent with business necessity); *id.* § 12112(d)(4)(A) (permitting medical examinations of employees when the exams are job-related and consistent with business necessity).

<sup>117</sup> *See* *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (“The existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence.”); *Sch. Bd. of Nassau Cty v. Arline*, 480 U.S. 273, 287-88 (1987) (identifying four factors for determining whether a person handicapped by a contagious disease is “otherwise qualified” under Rehabilitation Act: the nature of risk; the duration of the risk; the severity of the risk; and the probability that the disease will be transmitted and will cause varying degrees of harm); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 n.5 (2002) (“[T]he EEOC has required that judgments based on the direct threat provision be made on the basis of individualized risk assessments.”).

exacerbate problems of limited resources and personnel.<sup>118</sup> Finally, as the world moves online for work, education, relationships, and entertainment, technology and web accessibility will be increasingly important.<sup>119</sup>

### B. *Reimagining Legal and Policy Interventions*<sup>120</sup>

Disability rights law mainly operates *ex post*, however, its drafters aspired to preempt discrimination by, over time, redesigning the physical world, employment, programs, services, travel, and even relationships. Generally, there is no hard-reset button for massive institutional reform; the world keeps going and we need to build around it. But that's the problem—the tension between crafting remedies sufficiently individualized to meet the needs of a particular individual with a disability (and not creating, for example, stock accommodations for all people with X diagnosis), while, at the same time, needing broader institutional reforms. In many ways, COVID-19 has created an opportunity for a hard reset in several areas. It has forced us to rethink how we live and relate to each other, prime conditions for normative and structural reforms.

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<sup>118</sup> See, e.g., Tony Romm, *Mass Layoffs Begin in Cities and States amid Coronavirus Fallout, Threatening Education, Sanitation, Health and Safety*, WASH. POST (Apr. 29, 2020, 6:02 AM), <https://www.washingtonpost.com/business/2020/04/29/cities-states-layoffs-furloughs-coronavirus/> [<https://perma.cc/A9SV-3KUM>] (“Between 300,000 and 1 million public-sector workers could soon be out of a job or sent home without pay . . .”).

<sup>119</sup> Questions of web accessibility largely focus on the “how” and not “whether” under the ADA. After announcing its position in 1996, the Department of Justice has “repeatedly affirmed the application of [T]itle III to Web sites of public accommodations.” *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460, 43464 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36). See also *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905-06 (9th Cir. 2019) (holding that the ADA applied to a restaurant chain’s website and mobile application “which connect customers to the goods and services of [its] physical restaurants”); *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368, 1376 (S.D. Fla. 2018) (“[The defendant’s] website is a place of public accommodation within the meaning of the ADA.”); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 881 (N.D. Ohio 2018) (holding that a sufficient nexus existed between the defendant’s website and its brick-and-mortar stores).

<sup>120</sup> This Essay offers a number of examples of possible legal and policy interventions to consider. I intentionally omitted a discussion of reimagining healthcare and the social safety net, not only because of page limitations, but also because these are the obvious places legislators and constituents will push for after a public health crisis. I want to draw attention to other areas outside of healthcare where we ought to be looking not only to preempt and remedy discrimination, but also to design broader structural reforms and rethink how we approach non-traditional areas such as national security where disability is ever-present but never directly addressed. See generally Jasmine E. Harris, *Disability as National Security* (unpublished manuscript) (on file with author) [hereinafter Harris, *Disability as National*] (advancing this argument).

### 1. *Olmstead* Enforcement

COVID-19 tells us about the insecurity and risks of congregate settings for those with and without disabilities, for example, jails, prisons, nursing homes, psychiatric hospitals, larger group homes, and immigrant detention centers.<sup>121</sup> This is an interesting time to think about *Olmstead* enforcement in three ways.<sup>122</sup>

First, cases where institutions failed to transition residents capable of living in community-based settings to these less restrictive environments. This is more of a traditional application of *Olmstead*.

Second, another interpretation of *Olmstead* may require constant evaluation and reevaluation of people in restrictive settings to ensure that they are in the most inclusive setting appropriate to the individual. In other words, change is required not only when the individual can be better served in the community, but also when conditions arise making institutional settings inappropriate for all people with disabilities and requiring their preemptive or

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<sup>121</sup> Gabrielle Coppola & Edvard Pettersson, *Most Likely to be Infected: The Faithful, the Jailed or the Old*, BLOOMBERG L. (Apr. 11, 2020, 7:00 AM), <https://news.bloomberglaw.com/health-law-and-business/most-likely-to-be-infected-the-faithful-the-jailed-or-the-old> [<https://perma.cc/VGR3-DCBT>]; see, e.g., Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief, *Dawson v. Asher*, No. 2:20-409 at 10 (W.D. Wash. filed Mar. 16, 2020) (“The conditions of immigration detention facilities pose a heightened public health risk for the spread of COVID-19 that is even greater than in non-carceral institutions.”). The plaintiffs in *Dawson v. Asher* suffer a variety of health conditions that put them at increased risk for severe illness or death if they were to contract COVID-19. *Id.* at 3-4 (describing conditions including advanced age, lung disease, heart disease, diabetes, autoimmune disorders, and asthma); see also Josiah Rich et al., *We Must Release Prisoners to Lessen the Spread of Coronavirus*, WASH. POST (Mar. 17, 2020, 4:01 PM), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lesser-spread-coronavirus/> [<https://perma.cc/ADG2-XS83>] (noting that COVID-19 endangers not only prisoners but also the communities surrounding these facilities). Finally, psychiatric facilities are suffering similar complexities amidst the pandemic. See Danny Hakim, *They Want to Forget Us: Psychiatric Hospital Workers Feel Exposed*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/nyregion/coronavirus-new-york-psychiatric-hospitals.html> [<https://perma.cc/T56T-UL86>] (“Psychiatric hospitals present special challenges to the strictures of social distancing, since many patients are allowed to come and go in and out of the center, and once inside they are not cloistered.”).

<sup>122</sup> *Olmstead* requires states to eliminate unnecessary segregation of individuals with disabilities, and to mandate that persons with disabilities obtain services in the most integrated setting appropriate to their respective needs. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999). To ensure the benefits of *Olmstead* are fully felt by individuals with disabilities, the United States Department of Justice “has addressed the unnecessary segregation of people with physical, mental health, or intellectual and developmental disabilities . . . in various residential and non-residential settings, nationwide,” an effort termed more broadly as *Olmstead* enforcement. *Department of Justice Celebrates 20th Anniversary of the Olmstead Supreme Court Decision Protecting the Rights of Americans with Disabilities*, U.S. DEP’T OF JUST. (June 19, 2019), <https://www.justice.gov/opa/blog/departement-justice-celebrates-20th-anniversary-olmstead-supreme-court-decision-protecting> [<https://perma.cc/A59R-H6LQ>].

emergency release.<sup>123</sup> In other words, reduction of the population of people with disabilities in congregate settings may be the only meaningful way to prevent public health emergencies from disproportionately affecting people with disabilities because social distancing or other prescriptive practices are not possible. Given the percentages of people with disabilities in jails and prisons, this could be the modern wave of deinstitutionalization litigation as we saw in the 1970s and *Olmstead* can take a doctrinal lead.<sup>124</sup>

Third, we may see a rollback of rights in areas that pre-COVID-19 had even less public buy-in, such as sexual, reproductive, and parental rights of people with disabilities. Title II of the ADA and *Olmstead* can also be used to ensure equal opportunity to access these rights.<sup>125</sup>

## 2. *Cleburne* and Rational Basis Review<sup>126</sup>

That disability antidiscrimination remedies tend to focus almost exclusively on statutory relief is largely the product of the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*<sup>127</sup> The Court in *Cleburne* held the applicable level of constitutional scrutiny of state action in the context of disability is rational basis review, which results in significant deference to states.<sup>128</sup> Justice White, writing for the majority in *Cleburne*, reasoned that people with mental disabilities have a "reduced ability to cope with and function in the everyday world" and that they are different, immutably so.<sup>129</sup> Accordingly, states have a legitimate interest in providing and caring for people with "mental disabilities," and the legislature rather than the judiciary is better situated to determine the bounds of who falls within this

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<sup>123</sup> See, e.g., Class Action Complaint ¶¶ 119-125, *Money v. Pritzker*, No. 1:20-02093 (N.D. Ill. filed Apr. 2, 2020) (alleging that the plaintiffs' continued incarceration during the COVID-19 epidemic violates the ADA); First Amended Class Action Complaint and Petition for Writ of Habeas Corpus ¶¶ 225-231, *Costa v. Bazron*, No. 1:19-03185 (D.D.C. filed Apr. 16, 2020) (same).

<sup>124</sup> See *Olmstead*, 527 U.S. at 601-02 (holding that the ADA requires states to offer community-based treatment to qualified individuals); see also Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 *CARDOZO L. REV.* 1, 50 (2012) (noting the evolving nature of battles over deinstitutionalization). This is also a clear area where intersectionality allows us to structure legal claims that disproportionately affect people of color in these congregate settings.

<sup>125</sup> See, e.g., Natalie M. Chin, *Group Homes as Sex Police and the Role of the Olmstead Integration Mandate*, 42 *N.Y.U. REV. L. & SOC. CHANGE* 379, 449 (2018) (arguing that sexuality is "an integral aspect" of the community integration mandated by *Olmstead*).

<sup>126</sup> This Essay seeks to dust off *Cleburne* and generate scholarly discussions about its potential to reinvigorate what Professor Michael Waterstone has previously called "disability constitutional law." See generally Waterstone, *supra* note 3. A full exploration of potential constitutional claims related to COVID-19 is beyond the scope of this Essay.

<sup>127</sup> 473 U.S. 432 (1985).

<sup>128</sup> *Id.* at 446.

<sup>129</sup> *Id.* at 442.

group.<sup>130</sup> Thereafter, the analysis of people with mental disabilities in *Cleburne* was extended to all people with disabilities in *Board of Trustees of the University of Alabama v. Garrett* without discussion or further examination.<sup>131</sup> These decisions have perpetuated a harmful constitutional “otherness” to the disability classification.<sup>132</sup> While *Cleburne’s* holding on rational basis may have stifled the development of a robust body of disability constitutional law to date, legal scholars have celebrated the Court’s openness in *Cleburne* to consider a “new type of equal protection review, one that is more granular” and has helped forge a pathway to equality for gay rights, for example.<sup>133</sup>

*Cleburne*, even before COVID-19, was doctrinally relevant because states and municipalities still take actions that are facially discriminatory against people with disabilities—particularly those with mental disabilities—as we see playing out right now in the case of treatment rationing.<sup>134</sup> Many areas of law persist in treating people with intellectual and developmental disabilities differently on the basis of a diagnosis—including, for example, family law, voting, civil commitment and guardianship proceedings.<sup>135</sup> When plaintiffs assert equal protection challenges to these laws, courts cite *Cleburne* and exercise virtually unlimited deference to the state’s proffered justifications as rational.<sup>136</sup>

COVID-19 examples of disability discrimination (current or future) may open the door to constitutional legal remedies. Advocates might consider disaggregating disability to take on problematic disability norms head on with respect to people with intellectual and developmental disabilities. While I do not advocate a global strategy to move away from the socio-political identity of disability, the facially discriminatory rationing policies and practices present an opportunity to return to *Cleburne* for people with intellectual and developmental disabilities.

Why disaggregate disability for purposes of constitutional arguments? Professor Michael Waterstone has persuasively argued that the foundation of

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<sup>130</sup> *Id.* at 442-43.

<sup>131</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001).

<sup>132</sup> Waterstone, *supra* note 3, at 541.

<sup>133</sup> William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621, 626-27 (2017).

<sup>134</sup> Waterstone, *supra* note 3, at 548. *See also* Cmty. Hous. Tr. v. Dep’t of Consumer & Regulatory Affairs, 257 F. Supp. 2d 208, 229 (D.D.C. 2003) (addressing a zoning ordinance that facially discriminated against people with mental disabilities); Complaint ¶¶ 52-88, *Plack v. Perry Twp.*, No. 20-01160 (N.D. Ohio filed May 27, 2020) (alleging Perry Township violated federal housing and disability discrimination laws in its application of local zoning ordinances to prevent the operation of a residential group home for older adults and people with disabilities); Bagenstos, *supra* note 7, at 2 (“[T]he crisis standards of care adopted by hospitals and state agencies often employ explicit disability-based distinctions.”); Hellman & Nicholson, *supra* note 7, at 3 (arguing that healthcare rationing protocols that consider “quality of life” violate both the ADA and “the moral commitment to the equal worth of people with disabilities”).

<sup>135</sup> Waterstone, *supra* note 3, at 548.

<sup>136</sup> *Id.* at 550.

the disability rights movement rests on successful attempts to unite people with different disabilities to advocate for independence and self-reliance.<sup>137</sup> However, “any realistic assessment of disability constitutional rights needs to acknowledge that not everyone covered by the ADA would or should align with heightened constitutional analysis.”<sup>138</sup>

It is certainly an easier lift to classify people with mental disabilities, or further disaggregated, those with intellectual and developmental disabilities, as an “insular and discrete class” with a history of unequal treatment based on stereotypes and prejudice rather than rooted in fact. Justice Marshall recognized this in *Cleburne*,<sup>139</sup> and the Court overall agreed that as applied to the zoning question in *Cleburne*, the state’s actions were “irrational.”<sup>140</sup> Constitutional challenges that return to *Cleburne*’s narrower group of people with intellectual and developmental disabilities may open up space for application of its reasoning to a broader group of people with disabilities. Justices other than White in *Cleburne* and subsequent cases have acknowledged a willingness to think more progressively about the Constitution in the realm of disability. For example, Justices Marshall, Blackmun, and Breyer (joined by Justices Souter, Ginsberg, and Stevens) have, at different times, called for a more nuanced consideration of the constitutional dimension of disability discrimination.<sup>141</sup>

### 3. Disability as National Security<sup>142</sup>

Finally, disability is a critically absent consideration in our national security law and policy. The suggestion that disability is even part of national security may, at first blush, seem odd.<sup>143</sup> How can disability antidiscrimination laws contribute to or further national security interests?

COVID-19 is a national, public health emergency that reveals significant fault lines in domestic institutions, emergency planning and preparedness, and responsiveness.

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<sup>137</sup> *Id.* at 562.

<sup>138</sup> *Id.*

<sup>139</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

<sup>140</sup> *Id.* at 450.

<sup>141</sup> Waterstone, *supra* note 3, at 559.

<sup>142</sup> See generally Harris, *Disability as National*, *supra* note 120.

<sup>143</sup> Consider the common refrain that natural disasters do not discriminate. Beyoncé’s post-Hurricane Harvey message, for example, noted: “Natural disasters don’t discriminate. They don’t see if you’re an immigrant, black or white, Hispanic or Asian, Jewish or Muslim, wealthy or poor . . . We’re all in this together.” Kevin Lui, ‘Natural Disasters Don’t Discriminate.’ *Beyoncé Makes Heartfelt Appeal for Hurricane Harvey Relief*, TIME (Sept. 13, 2017, 12:09 AM), <https://time.com/4939064/beyonce-hurricane-relief-houston-telethon> [<https://perma.cc/BT98-DLM2>].

Both bodies of law, national security and disability, regulate the construction of risk with a moral backdrop, albeit in different ways.<sup>144</sup> National security law and policy assess domestic and foreign threats to the American people, our political standing and general security,<sup>145</sup> while disability law and policy interrogates problematic norms of disability that lead to discriminatory conduct, removes structural barriers preventing equal opportunities, and creates remedies to advance disability rights in employment (including benefits and privileges of employment), public services and programs, and places of public accommodations.<sup>146</sup> When these two areas of law clash—such as in domestic responses to mass shootings, natural disasters or immigration—we are faced with increasing questions about the moral treatment of people with disabilities, their protection, and access to limited resources. The U.S. Department of Health and Human Services recently published a report stating, “[w]e must continue to strengthen U.S. public health and health care systems to effectively and swiftly confront the devastating consequences of risks,” naming chemical, radiological, and nuclear weapons, cyber warfare, infectious diseases and associated pandemics, and catastrophic natural disasters and human-caused incidents as posing the most pressing risks.<sup>147</sup>

However, these plans often group people with disabilities in the populations of at-risk individuals requiring additional planning, rather than looking to contextualize the ways disability laws seeks to mitigate and eliminate risk.<sup>148</sup> For example, Hurricane Sandy’s aftermath revealed New York’s “benign neglect” of citizens with disabilities who were stranded for days after the storm event, which was eventually found to be a violation of

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<sup>144</sup> See Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUMBIA L. REV. 1479, 1482 (2001) (discussing the tension within disability law between what the author terms “technocratic” and “democratic” approaches to risk regulation).

<sup>145</sup> For example, the U.S. Department of Homeland Security defines its risk management approach as “the process for identifying, analyzing, and communicating risk and accepting, avoiding, transferring, or controlling it to an acceptable level considering associated costs and benefits of any actions taken.” CONGRESSIONAL RES. SERV., R45812, ILLICIT DRUG FLOWS AND SEIZURES IN THE UNITED STATES: WHAT DO WE [NOT] KNOW? 15 (2019), <https://fas.org/sgp/crs/misc/R45812.pdf> [<https://perma.cc/V6MA-P8A5>].

<sup>146</sup> The literature regarding public and private management of political risk is voluminous and beyond the scope of this paper. See, e.g., THE WORLD BANK, INTERNATIONAL POLITICAL RISK MANAGEMENT: THE BRAVE NEW WORLD (Theodore H. Moran ed., 2004) (discussing risk assessment within the contemporary international political environment).

<sup>147</sup> U.S. DEP’T OF HEALTH AND HUM. SERVS., NATIONAL HEALTH SECURITY STRATEGY 2019-2022, 1, <https://www.phe.gov/Preparedness/planning/authority/nhss/Documents/NHSS-Strategy-508.pdf> [<https://perma.cc/E836-QZJR>].

<sup>148</sup> See, e.g., *id.* at 2, 19, 21.

the ADA.<sup>149</sup> This narrative is echoed in the wildfire preparedness and evacuation plans that often fail to adequately account for citizens with disabilities. California's Camp Fire witnessed disproportionate deaths of people with disabilities who were physically unable to escape, or lacked the cognition to realize escape was necessary.<sup>150</sup> From gun control to immigration and natural disasters such as wildfires and hurricanes, disability rights matter to our national security risk assessment, planning, and responses.

#### CONCLUSION

July marks the thirtieth anniversary of the Americans with Disabilities Act, the most comprehensive civil rights legislation for people with disabilities in the United States. Whether or not we remain sheltered in place, reintegrated, or something in between, we cannot (and must not) return to "business as usual." We have a unique opportunity for universal redesigns in different areas of law and society. The current pandemic has tragically surfaced unfiltered normative views of disability that will continue to undermine even the most progressive legislation unless we contend with them as a nation.

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Preferred Citation: Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29 (2020), <http://www.pennlawreview.com/online/169-UPa-L-Rev-Online-29.pdf>.

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<sup>149</sup> Marc Santora & Benjamin Weiser, *Court Says New York Neglected Disabled in Emergencies*, N.Y. TIMES (Nov. 7, 2013), <https://www.nytimes.com/2013/11/08/nyregion/new-yorks-emergency-plans-violate-disabilities-act-judge-says.html> [<https://perma.cc/2HYA-BJ3W>].

<sup>150</sup> Jill Tucker et al., *Tragic But Familiar Narrative in Camp Fire: Most Victims Were Older, Disabled*, S.F. CHRON. (Dec. 10, 2018), <https://www.sfchronicle.com/california-wildfires/article/Camp-Fire-victims-13450654.php> [<https://perma.cc/E8EM-PK2N>].