

Wake Forest Journal  
*of*  
Law & Policy

VOLUME 13

June 2023

NUMBER 2

*Copyright © 2023 by the Wake Forest Journal of Law & Policy*

**ARTICLES**

THE RIGHT TO EDUCATION: STATES  
RECOGNIZE IT AND SO SHOULD THE  
FEDERAL GOVERNMENT

*Justin B. Lockett* 167

HOW DO WE EXPRESS OUR OUTRAGE  
AT RUSSIA?

*Paul B. Stephan* 189

DISABILITY DISPARITIES IN POST –  
SECONDARY EDUCATION: COMPARING  
CIVIL RIGHTS THEORIES WITH  
EMPIRICAL DATA ON EQUAL ACCESS

*Kendra J. Muller* 207

Wake Forest  
Journal  
*of*  
Law & Policy

VOLUME 13

2022-2023

BOARD OF EDITORS

*Editor-in-Chief*  
LANE BURBRINK

*Managing Editor*  
TYLER GILLUM

*Senior Articles Editor*  
MAYA WIEMOKLY

*Senior Executive Editor*  
HANNAH NOREM

*Senior Notes & Comments Editor*  
JESSICA TALLANT

*Articles Editor*  
VINCENT BIVONA  
AREN HENDRICKSON

*Executive Editors*  
FINLEY RIORDON  
BRUCE ROBINSON  
OCEANE TANNY

*Notes & Comments Editor*  
DYLAN SCHAFFER

*Manuscripts & Online Editor*  
CLAIRE STANELY

*Symposium Editor*  
SAM BRADY

EDITORIAL STAFF

TYLER FULLER

TYLER SPAUGH

NICHOLAS LEFEVER

STAFF

KAYLEE TILLET

ROBERT PENNINGTON

COOPER ISAKSON

SHIVANI MOTAMARRI

A. SPENCER OSBORNE

MATTHEW LANGSTON

MEGHAN DUPAY

BRYCE NOLAN

PRESTON HAUSER

ALEXIS PARKER

KATE CHILDS

EVELYN LEA

AJ FITZGERALD

BROOKE MEADOWCROFT

DAVIS SODERBERG

NICOLE CHANEY

HALEY G. POTTER

RORY HATCH

KIT KNISS

CHRISTINE ZHANG

BENJAMIN WIRZBA

ALLISON EVANS

AMANDA WILSON

ALEX SPEIR

CONNOR REID

COURTNEY HARRIS

WILL TANNER

SCHUYLER PRUIS

## **BOARD OF ADVISORS**

KEVIN JOHNSON

AIDAN WILLIAMS

MARÍA PABÓN

SHAKA MITCHELL

MELANIE JOHNSON RAUBACH, *Founder*

CHRISTOPHER SALEMME

*The Board of Editors thanks these distinguished  
members of this advisory board.*

---

## **ACKNOWLEDGEMENTS**

The Board of Editors also thanks the outgoing affiliates of this publication for their years of dedication to this *Journal*:

### **BOARD OF ADVISORS**

WILLIAM DARITY

ROGER A. FAIRFAX, JR.

PENELOPE SPRY

HON. E. NORMAN VEASEY

### **FACULTY ADVISORS**

PROFESSOR KATE IRWIN-SMILER

**WAKE FOREST JOURNAL OF LAW & POLICY**  
(ISSN 2160-4967)

The *Wake Forest Journal of Law & Policy* is generally published three times each academic year by students of Wake Forest University School of Law. The *Journal's* content may be accessed on its website, [wfulawpolicyjournal.com](http://wfulawpolicyjournal.com) or by mail at: Wake Forest Journal of Law & Policy, P.O. Box 7206, Worrell Professional Center, Winston-Salem, North Carolina 27109. Postmaster: send address changes to the *Wake Forest Journal of Law & Policy* at the mailing address listed above.

Single issue price is \$20.00. Wake Forest University School of Law alumni pay \$15.00 per issue; current School of Law students pay \$12.00 per issue. Contact the 2021-2022 Editor-in-Chief, Rory Hatch at [hatchrk21@wfu.edu](mailto:hatchrk21@wfu.edu) for ordering information.

Back issues in complete sets, volumes, or individual issues may be obtained from: William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York, 14068-1296, and may be accessed online at [www.heinonline.org](http://www.heinonline.org).

The *Journal* welcomes submissions of articles, essays, notes, comments, and empirical studies. Each manuscript should be typed, double-spaced, and in Times New Roman, 12-point typeface. The *Journal* accepts submissions via Scholastica, but it also accepts submissions directly via email to [wfulawpolicyjournal@gmail.com](mailto:wfulawpolicyjournal@gmail.com).

The author of each article appearing in the *Journal* has granted permission for copies of that article to be made available for classroom use, provided only that copies are distributed at or below cost, the author and the *Journal* are conspicuously identified, proper notice of copyright is affixed to each copy, and the user obtains permission to make such copies from the *Wake Forest Journal of Law & Policy*, or the author.

Citations in the *Journal* closely conform to *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) and *The Chicago Manual of Style* (17th ed. 2017).

The views expressed in the *Wake Forest Journal of Law & Policy* do not necessarily reflect the views and opinions of its editors.

*Copyright © 2023 by the Wake Forest Journal of Law & Policy*

# THE RIGHT TO EDUCATION: STATES RECOGNIZE IT AND SO SHOULD THE FEDERAL GOVERNMENT

JUSTIN B. LOCKETT†

## ABSTRACT

**E**ducation, without a doubt, is the proverbial gatekeeper of societal advancement for individuals of moderate means.

Furthermore, regardless of a child's socioeconomic status, each child deserves the opportunity to have a quality education. Despite education's great importance in American society, the right to education for K-12 students is poorly protected, especially at the federal level. This Article argues that the fundamental right to education can, and should be, found within the United States Constitution under either the Fifth and Fourteenth Amendment Due Process Clauses or the Equal Protection Clause.

## I. INTRODUCTION

There are few things more vital to living a worthwhile life in America than a quality education.<sup>1</sup> Not only is education a "powerful driver of prosperity," but "Americans with higher levels of education are more likely to vote, to volunteer, and to donate to charity."<sup>2</sup> Furthermore, a plethora of social science research

---

† Associate litigation lawyer at Smith, Anderson, Blount, Dorsett, Mitchell, & Jernigan, L.L.P. in Raleigh, North Carolina; JD, Campbell University School of Law, Class of 2022. The author would like to thank his father and mother, Bernard and Shelia Lockett; his sisters, India Lockett and Larissa Lockett-Benyard; and his dearest friends, Thomas Basham, Athena He-Demontaron, Tia Overway, Dr. Sean Walsh, Dr. Suzanna Geiser, Claudia Barceló, and Professor Richard Waugaman for their inspiration and endless support.

1. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (noting that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance . . .").

2. Scott Sargrad et al., *A Quality Education for Every Child: A New Agenda for Education Policy*, CTR. FOR AM. PROGRESS (July 2, 2019), <https://www.americanprogress.org/article/quality-education-every-child>.

indicates that a quality education enables lower-class individuals to transcend “gaps between social classes. Everyone would be able to have an equal chance at higher paying jobs—not just those that are already well-off.”<sup>3</sup> Not only has social science and society recognized the importance of education, but the legal system has recognized education’s importance as well.<sup>4</sup> Indeed, “[education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>5</sup>

Veneration of the importance of education is no newfound phenomenon.<sup>6</sup> America’s Founding Fathers understood the importance of education and even attempted to pass legislation in their respective states establishing public education systems.<sup>7</sup> While charter and private schools may offer enticing alternatives for K-12 students and their parents, the vast majority of K-12 students attend public schools.<sup>8</sup> Today, “[e]ach state is required by its state constitution to provide a school system whereby children may receive an education.”<sup>9</sup> In 2016, roughly ninety-one percent of students in first through twelfth grade were enrolled in a public school.<sup>10</sup> If a student’s access to a quality public education is barred or detracted from in some way, oftentimes litigation ensues.<sup>11</sup>

When a right or liberty interest is deemed to be pervasively entrenched within the fabric of American society, the Supreme

3. *Top Ten Reasons Why Education is Important*, UNIV. OF THE PEOPLE, <https://www.uopeople.edu/blog/10-reasons-why-is-education-important> (last visited Mar. 5, 2022).

4. See *Plyer v. Doe*, 457 U.S. 202, 223 (1982) (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments.”).

5. *Brown*, 347 U.S. at 493.

6. See Derek W. Black, *America’s Founders Recognized the Need for Public Education. Democracy Requires Maintaining That Commitment*, TIME MAG. (Sept. 22, 2020, 11:00 AM), <https://time.com/5891261/early-american-education-history>.

7. *Id.*

8. See *Public School Choice Programs*, NATL. CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=6> (last visited Mar. 5, 2022).

9. Legal Information Institute, *Education*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/education> (last visited Mar. 5, 2022).

10. *Public School Choice Programs*, *supra* note 8.

11. See, e.g., *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) (individuals from low-wealth school districts brought a declaratory judgment action alleging a violation of their constitutional right to equal educational opportunity); *A.C. By Waithe v. McKee*, 23 F.4th 37 (1st Cir. 2022) (public school students brought putative class action against the state of Rhode Island for failing to provide adequate civics education in its public schools).

Court has determined those rights to be “fundamental.”<sup>12</sup> The designation of a right as “fundamental” is of great significance. When a state government, through its legislature or some other form of state action, infringes upon a fundamental right, courts must apply strict scrutiny.<sup>13</sup> To survive strict scrutiny, a law must be “narrowly tailored to achieve a compelling governmental interest.”<sup>14</sup> Laws that infringe rights that are not fundamental may be subject to only intermediate or rational-basis scrutiny.<sup>15</sup> If education is not a fundamental right, this means that states will be able to infringe upon K-12 students’ ability to obtain an education while being subject to a lower level of scrutiny.

Seeing that both federal and state governments recognize the dire importance of public education, it begs the question of why a fundamental right to education under the Federal Constitution (“Constitution”) does not exist. Why should state governments be allowed to impede children’s education while not being placed under the strictest level of scrutiny? Indeed, the Supreme Court in *San Antonio Independent School District v. Rodriguez* explicitly held that such a right under the Constitution does not exist.<sup>16</sup> This should not be the case. *Rodriguez*’s nearly fifty-year reign should end, and the Court should recognize a fundamental right to education under the Constitution.

This Article will argue that a proper substantive due process analysis will yield that there should be a fundamental right to education under the Constitution. Part II will discuss the historical background of public education, including how the Founding Fathers viewed public education, state government’s recognition of the right to education, and the federal government’s lack of recognition. Part III will provide a substantive due process analysis for the right to education under both *Washington v. Glucksberg*’s “deeply rooted” test and *Obergefell v. Hodges*’s “reasoned judgment” test. Finally, Part IV will reiterate the importance of education and why it should be protected under the Constitution.

---

12. See *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (assessing whether the Second Amendment was “fundamental to our scheme of ordered liberty and system of justice”); see also *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (“The question has been asked whether a right is among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions[.]’”).

13. See *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017).

14. *Id.*

15. See *id.*

16. 411 U.S. 1, 35–39 (1973).

## II. HISTORICAL BACKGROUND ON EDUCATION

The idea of education as an important public commodity has enjoyed a long history in America.<sup>17</sup> Subsection A will discuss the Founding Fathers' perspective on education being vital to a successful nation. Subsection B will focus on the various state governments that recognize a fundamental right to education under their respective state constitutions. Subsection C will discuss the federal government's lack of recognition of a fundamental right to education under the Constitution, specifically focusing on the *Rodriguez* decision.

### A. *The Founding Fathers' View of Education*

America's Founding Fathers found public education to be a necessity for a successful nation. The most iconic Founding Father, President George Washington, stated in his final address to Congress that "the common education of a portion of our Youth from every quarter, well deserves attention."<sup>18</sup> James Madison believed that "[a] popular [g]overnment, without popular information, or the means of acquiring it, is but a [p]rologue to a [f]arce or a [t]ragedy; or, perhaps both."<sup>19</sup> Indeed he, along with the other Founding Fathers, held the maxim that "[l]earned [i]nstitutions ought to be favorite objects with every free people."<sup>20</sup> At the time of America's founding, John Adams believed that the government had a responsibility to provide education to "every rank and class of people, down to the lowest and the poorest' and pay for it at 'public expense.'"<sup>21</sup> Thomas Jefferson agreed by pointing out that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."<sup>22</sup>

---

17. See Black, *supra* note 6.

18. George Washington, *Eighth Annual Message to Congress*, MILLER CTR. (Dec. 7, 1796), <https://millercenter.org/the-presidency/presidential-speeches/december-7-1796-eighth-annual-message-congress>.

19. James Madison, *Letter to W. T. Berry*, LIBR. OF CONG. (Aug. 4, 1822), [https://www.loc.gov/resource/mjm.20\\_0155\\_0159/?sp=1&st=text#:~:text=A%20popular%20Government%2C%20without%20popular,the%20power%20which%20knowledge%20gives](https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text#:~:text=A%20popular%20Government%2C%20without%20popular,the%20power%20which%20knowledge%20gives).

20. *Id.*

21. Derek W. Black, *Old Ideas, Not New Ones, Are the Key to Education—and Democracy*, PHI DELTA KAPPAN (Jan. 25, 2021), <https://kappanonline.org/old-ideas-key-education-democracy-black>.

22. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).



The Founding Fathers' veneration for nationwide education is not only supported by their oral and written remarks but also supported by their actions. A prime example is Thomas Jefferson's drafting and attempted passing of "A Bill for the More General Diffusion of Knowledge" in his home state of Virginia.<sup>23</sup> In this bill, Jefferson explicated that one of the best ways to foster the development of a new nation and to prevent tyranny is to "illuminate, as far as practicable, the minds of the people at large."<sup>24</sup> Specifically, the bill called for every county in Virginia to elect three aldermen who would divide their respective county into hundreds "so as that they may contain a convenient number of children to make up a school, and be of such convenient size that all the children within each hundred may daily attend the school to be established therein . . . ."<sup>25</sup> The bill also set out a statewide curriculum that included "reading, writing, and common arithmetic[] . . . ."<sup>26</sup> Although the bill was not passed, it was not considered a rejection of public schools; instead, Jefferson strongly believed that the bill was enthusiastically supported and the only thing that stopped its passage was the lack of resources.<sup>27</sup>

In 1780, James Madison drafted the Massachusetts Constitution that directly addressed and accounted for the importance of public education within the state. Chapter V, Section II expressly stated that "[w]isdom, and knowledge, as well as virtue, diffused generally among the body of the people" is necessary for the preservation of "their rights and liberties . . . ."<sup>28</sup> Madison likewise stated that "it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of . . . public schools, and grammar schools in the towns . . . ."<sup>29</sup>

The statements and actions from America's Founding Fathers can only draw one logical conclusion: they vehemently believed "the future of the republic depended on an educated

---

23. Thomas Jefferson, 79. *A Bill for the More General Diffusion of Knowledge*, NAT'L ARCHIVES (June 18, 1779), <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079>.

24. *Id.*

25. *Id.*

26. *Id.*

27. Black, *supra* note 6.

28. MASS. CONST. pt. 2, ch. V, § 2.

29. *Id.*

citizenry” and “that the opportunities offered by schooling should be available to rich and poor alike.”<sup>30</sup>

*B. The State Governments’ Recognition of the Right to Education*

Along with a revered reputation provided by the Founding Fathers, the importance of education in America is further expounded upon examination of how the respective state governments have treated education in their state constitutions and high courts.

Although the Constitution does not have a provision discussing education, and in *Rodriguez*, the Court proclaimed that there is no federal right to education, “[w]ithin the constitution[s] of each of the [fifty] states, there is language that mandates the creation of a public education system.”<sup>31</sup> Furthermore, thirty-nine states contain a provision indicating how their respective public education system is to be funded.<sup>32</sup> Some states specifically detail how their K-12 public education system is to be laid out directly in their constitutions, while other states choose to leave the formatting details to the state legislature.<sup>33</sup> While all state constitutions mandate K-12 public education, thirty states go “above and beyond” by “speak[ing] to the establishment of higher education.”<sup>34</sup> Unlike the fifty states, “there is no constitutional foundation for public education in Washington, D.C.”<sup>35</sup> This, however, does not detract from the importance of education in the District of Columbia.

Separate from their mandates of a public education system, twenty-two states have recognized a fundamental right to education under their respective state constitutions.<sup>36</sup> These twenty-two states,

30. Johann N. Neem, *The Founding Fathers Made Our Schools Public. We Should Keep Them That Way.*, WASH. POST (Aug. 20, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/08/20/early-america-had-school-choice-the-founders-rejected-it>.

31. Emily Parker, *Constitutional Obligations for Public Education*, EDUC. COMM. OF THE STATES (Mar. 2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* Because Washington, D.C. is not a state, the District uses the Constitution as its own. Even the District of Columbia Home Rule Act, which most closely resembles a D.C. “Constitution,” does not specifically address public education. *See* D.C. CODE § 1-201 (1997).

36. Trish Brennan-Gac, *Educational Rights in the States*, A.B.A. (Apr. 1, 2014), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2014\\_vol\\_40/vol\\_40\\_no\\_2\\_civil\\_rights/educational\\_rights\\_states](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states).

however, have not all recognized a fundamental right to education for a terribly long time. Rather, recognition of a fundamental right to education in state constitutions is a fairly modern trend. Before 1960, only Wyoming and North Carolina recognized a fundamental right to education under their state constitutions.<sup>37</sup> Through the mid-1970s and late 1980s, although not explicitly stated in their state constitutions, several states such as California, Kentucky, Connecticut, Washington, West Virginia, Mississippi, Oklahoma, and Wisconsin all recognized a fundamental right to education under their respective state constitutions through their high courts.<sup>38</sup> In the 1990s, twelve more states joined the movement.<sup>39</sup> Finally, in 2011, South Dakota recognized a fundamental right to education in its state constitution, pushing the total up to the current twenty-two states we have today.<sup>40</sup>

Effectively, all fifty states understand that “education is more important than ever in this era of global competitiveness.”<sup>41</sup> It is also worth mentioning that twenty out of the twenty-two states which recognize a fundamental right to education recognized that right even after the Court’s *Rodriguez* decision.<sup>42</sup> The fact that all fifty states recognize the importance of education and that nearly half of those states recognize a fundamental right to education underneath their respective State constitutions post-Rodriguez indicates that the Court should reconsider whether there is a fundamental right to education under the Constitution. A close analysis of the *Rodriguez* decision proves useful in advancing this proposition.

---

37. *Id.*; see also WYO. CONST. art. 1, § 23; N.C. CONST. art. 1, § 15.

38. Brennan-Gac, *supra* note 36; see also, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 205 (Ky. 1989).

39. Brennan-Gac, *supra* note 36.

40. *Davis v. State*, 804 N.W.2d 618, 627 (S.D. 2011) (“The constitutional language and intent of the framers guarantee *the children of South Dakota a constitutional right to an education that provides them with the opportunity to prepare for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.*”) (emphasis added).

41. Brennan-Gac, *supra* note 36.

42. See *id.*

*C. The Federal Government's Lack of Recognition of the  
Right to Education*

In 1973, the Court decided in *San Antonio Independent School District v. Rodriguez* that there is no fundamental right to education under the Constitution.<sup>43</sup> The litigation in this case centered around the funding of two Texas school districts: the Edgewood Independent School District ("Edgewood") and the Alamo Heights Independent School District ("Alamo Heights").<sup>44</sup> Edgewood was the least affluent school district and Alamo Heights was the most affluent school district in Texas.<sup>45</sup> The primary complaint in *Rodriguez* was that the Texas system of financing public education was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.<sup>46</sup> The comparison between the two school districts "serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the state's impressive progress in recent years."<sup>47</sup> Indeed, Edgewood, composed of ninety percent Mexican-American residents, only received \$356 per pupil under the Texas financing system; on the contrary, Alamo Heights, composed of eighty-one percent White-American residents, received \$594 per pupil.<sup>48</sup> It is also worth noting that Edgewood serviced twenty-two thousand students while Alamo Heights only serviced five thousand students.<sup>49</sup> This statistic implies that the majority of the money allocated to public education in Texas, instead of being fairly dispersed among every school district, was centralized in small, largely white communities.

A three-judge panel from the United States District Court for the Western District of Texas rendered a per curiam opinion holding that the Texas system of financing public education was indeed unconstitutional.<sup>50</sup> Determining that Texas's financing system was infringing upon the fundamental rights of students, the district court proceeded to apply strict scrutiny when determining

---

43. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

44. *Id.*

45. *Id.*

46. *Id.* at 6.

47. *Id.* at 11.

48. *Id.* at 12-13.

49. *Id.* at 11-12.

50. *Id.* at 6.

whether Texas's plan was constitutional.<sup>51</sup> When Texas appealed the decision to the Supreme Court, the Court analyzed two questions, the first being: "whether the Texas system of financing public education . . . impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny."<sup>52</sup> If the answer to this question was yes, the Court would simply have affirmed the district court. If the answer, however, was no, the Court would inquire about the second question: "whether [Texas's financing plan] rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."<sup>53</sup> Texas admitted that its financing plan could not survive strict scrutiny.<sup>54</sup>

In its analysis of whether the right to education was fundamental under the Constitution, the Court started by stating that the district court opinion did not "reflect the novelty and complexity of the constitutional questions" raised by Rodriguez and other Edgewood students.<sup>55</sup> The district court's analysis relied upon cases concerning "the rights of indigents to equal treatment in the criminal trial and appellate processes, and on cases disapproving wealth restrictions on the right to vote."<sup>56</sup> The Court quickly brushed the district court's analysis to the side and began the fundamental right analysis anew.

While the Court noted the importance of *Brown's* observation that "education is perhaps the most important function of state and local governments,"<sup>57</sup> it did not give that observation much weight. Instead, the Court noted that the answer to whether education is "fundamental" lies not in its importance but rather "in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."<sup>58</sup>

The Court then proceeded to observe that a fundamental right to education is not explicitly or implicitly guaranteed by the Constitution.<sup>59</sup> In the process, the Court rejected Rodriguez's

---

51. *Id.* at 17–18.

52. *Id.* at 17.

53. *Id.*

54. *Id.* at 16.

55. *Id.* at 17–18.

56. *Id.* at 18.

57. *Brown*, 347 U.S. at 493.

58. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 33–34.

59. *Id.* at 35.

argument that “education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.”<sup>60</sup> The Court did not dispute the fact that education, the First Amendment, and voting are indeed intertwined; instead, it stated that it “ha[s] never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.”<sup>61</sup> The Court then shifted this task back onto “the people” by saying “[t]hese are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.”<sup>62</sup>

Finally, the Court assessed that “the logical limitations on appellees’ nexus theory are difficult to perceive.”<sup>63</sup> The Court struggled to identify how it would distinguish this case from “the significant personal interests in the basics of decent food and shelter[.]”<sup>64</sup> In other words, the Court worried that if it found education to be a fundamental right because education is necessary for a person to exercise other fundamental rights (i.e., First Amendment and voting rights), it would be unable to draw a line between education and other ancillary, non-fundamental rights that are needed to effectuate other fundamental rights.<sup>65</sup>

In the conclusion of its analysis, the Court held that it “considered each of the arguments supportive of the district court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”<sup>66</sup> Accordingly, the Court concluded that there is no fundamental right to education under the Constitution. The Court then found that Texas’s financing plan survived rational-basis scrutiny under the Equal Protection Clause of the Fourteenth Amendment.<sup>67</sup>

---

60. *Id.*

61. *Id.* at 36.

62. *Id.*

63. *Id.* at 37.

64. *Id.*

65. *Id.* (“How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.”).

66. *Id.*

67. *Id.* at 54–55.

### III. THE RIGHT TO EDUCATION SHOULD BE RECOGNIZED AS A FUNDAMENTAL RIGHT

The Court's reasoning in *Rodriguez* has flaws that when carefully parsed welcome the conclusion that *Rodriguez* was improperly decided. Further, a proper substantive due process analysis under either *Glucksberg's* "deeply rooted" test or *Obergefell's* "reasoned judgment" test will show that there should be a right to education under the Constitution. Subsection A will expound on the flaws of *Rodriguez* and why it was incorrectly decided. Subsection B will apply the first prong of *Glucksberg's* "deeply rooted" test to education and will attempt to define the right to education. Subsection C will apply the second prong of *Glucksberg's* "deeply rooted test" and will demonstrate that education is indeed deeply rooted in American history and tradition. Finally, Subsection D will apply *Obergefell's* "reasoned judgment" test to education. These analyses, along with both education's veneration from the Founding Fathers and its importance in American society, urge a right to education under the Constitution.

#### A. *Why Rodriguez is Wrongly Decided*

The Court's reasoning in *Rodriguez* has three flaws in its reasoning that collectively warrant the conclusion that *Rodriguez* was improperly decided and should be overruled. First, the Court applied the incorrect test when assessing whether there is a right to education under the Constitution. The Court stated that whether education is "fundamental" lies not in its importance but rather "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."<sup>68</sup> Even though neither the "deeply rooted" test nor the "reasoned judgment" test existed at the time *Rodriguez* was decided, the test applied by the Court is simply a false statement.

The majority in the *Rodriguez* case was simply too quick to discount *Rodriguez's* argument that education is "fundamental" because it is necessary to effectuate the fundamental rights of free speech and voting. But the Court's prior cases "stand for the proposition that 'fundamentality' is, in large measure, a function of

---

68. *Id.* at 34.

the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed."<sup>69</sup>

Furthermore, both before and after *Rodriguez*, the Court has recognized several rights as fundamental that are not "explicitly or implicitly guaranteed by the Constitution."<sup>70</sup> Indeed, there have been instances where "the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights."<sup>71</sup> In *United States v. Guest*, the Court affirmed that there was a fundamental right to travel among the several states even though "that right finds no explicit mention in the Constitution."<sup>72</sup> The Court reasoned "that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."<sup>73</sup> This is strikingly similar to how the Founding Fathers viewed education to be essential to a successful nation.<sup>74</sup>

In *Skinner v. Oklahoma*, the Court found both marriage and procreation to be fundamental rights.<sup>75</sup> Nowhere in the Constitution are fundamental rights to marriage and procreation expressly stated or even remotely implied.<sup>76</sup> The Court has also recognized a fundamental right to appeal a criminal conviction.<sup>77</sup> Once again, nowhere in the Constitution is the fundamental right to appeal a criminal conviction expressly stated or implied.<sup>78</sup> As the Court stated in *Obergefell*, the drafters of the Bill of Rights and Fourteenth Amendment "did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."<sup>79</sup> Therefore, much like Justice

---

69. *Id.* at 62 (Brennan, J., dissenting).

70. *Id.* at 34; *see also* *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010).

71. *McDonald*, 561 U.S. at 811.

72. 383 U.S. 745, 758 (1966).

73. *Id.*

74. *See* Black, *supra* note 6.

75. 316 U.S. 535, 541 (1942).

76. *See* U.S. CONST.

77. *See* *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring) ("The right to an appeal from a conviction for crime is today so established that this leads to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law.").

78. *See* U.S. CONST.

79. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).



Thurgood Marshall, “I . . . cannot accept the majority’s labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself.”<sup>80</sup>

Second, while assessing Rodriguez’s argument that education is fundamental because it is necessary to effectuate the fundamental rights of free speech and voting, the Court stated that “these are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.”<sup>81</sup> Here, the Court is worried about the federal government involving itself in an area of law that is predominately left up to the individual states. Fifty years later, however, that line of reasoning is thoroughly outdated.

The federal government has excessively entangled itself in state-level public education since the *Rodriguez* decision. It is no secret that “education is no longer solely a local concern.”<sup>82</sup> Congress has promulgated a myriad of statutes that significantly affect how public education is handled at the state level.<sup>83</sup> For example, the No Child Left Behind Act,<sup>84</sup> which requires standardized testing for grades three through eight, is an act passed by Congress that must be followed by the states or it “would result in [a] state’s loss of federal education assistance.”<sup>85</sup> Another prime example of federal government entanglement is the Individuals with Disabilities Education Act.<sup>86</sup> This statute provides a host of protections for students with disabilities and serves “to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families.”<sup>87</sup>

---

80. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

81. *Id.* at 36.

82. Michael Salerno, Note, *Reading is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 509, 538 (2007).

83. See ADAM STOLL ET AL., CONG. RSCH. SERV., IF10551, A SUMMARY OF FEDERAL EDUCATION LAWS ADMINISTERED BY THE U.S. DEPARTMENT OF EDUCATION (2022).

84. 20 U.S.C. § 6319.

85. Salerno, *supra* note 82.

86. 20 U.S.C. § 1400.

87. *Id.* § 1400(d)(2).

One important note to consider concerning the No Child Left Behind Act, the Individuals with Disabilities Education Act, and other laws entangling the federal government with state-level public education is their respective constitutional bases are all found in the Spending Clause.<sup>88</sup> It is well known that states retain a core sovereignty that Congress cannot invade and that the federal government cannot command either states or state officials to do any specific act in their official capacity.<sup>89</sup> But, the federal government may incentivize states to comply with its legislative prerogative by conditioning receipt of funding upon state compliance.<sup>90</sup> States, however, can choose to forgo those funds and not bend to the congressional will of Spending Clause legislation.<sup>91</sup> Yet this fact does not abrogate the federal government's excessive entanglement with state-level public education. The federal government knocked on the state legislatures' door, and the state legislatures welcomed it inside. It is federal government entanglement all the same.

Because Congress has already promulgated a number of statutes that excessively entangle the federal government with state-level public education, the Court no longer needs to worry about encroaching upon states by finding a fundamental right to education under the Constitution. Therefore, the *Rodriguez* Court's fear of "governmental interference" in "otherwise legitimate state activities" is both outdated and moot.

Third, the Court worried that if it found education to be a fundamental right because education is necessary for a person to exercise other fundamental rights (i.e., First Amendment and voting rights), it would be unable to draw a line between education and other ancillary, non-fundamental rights that are needed to effectuate fundamental rights.<sup>92</sup> Specifically, the Court inquired "[h]ow, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?"<sup>93</sup> This issue, however, is embarrassingly easy to resolve.

---

88. U.S. CONST. art. I, § 8, cl. 1.

89. See *New York v. United States*, 505 U.S. 144, 178 (1992); *Printz v. United States*, 521 U.S. 898, 926 (1997).

90. *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987).

91. *Id.* at 210.

92. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–36 (1973).

93. *Id.* at 37.

In this particular instance, the main delineating factor between education and food or shelter is that state governments have a responsibility to provide for the education of their citizenry.<sup>94</sup> It bears remembering that all fifty states have within their respective constitutions a mandate to establish and maintain a public education system.<sup>95</sup> Contrarily, no state constitution has any mandate or clause stating that its state government is required to provide food or shelter for its citizens. Therefore, one test the Court may use to distinguish between education and other non-fundamental rights is whether the Constitution or all the state constitutions provide for the right in question. This test would effectively close the door to the fear the *Rodriguez* majority fostered. The three aforementioned flaws in the Court's reasoning in *Rodriguez* strongly suggest that the decision was wrongly decided and that it should be overruled.

#### *B. How the Right to Education Should be Defined*

The first step in determining whether either the Fifth or Fourteenth Amendment Due Process Clause provides for a fundamental right to education under the Constitution is to first properly define the right in question.<sup>96</sup> Unfortunately, the Court has never laid down a bright-line rule on how to properly define rights for the purposes of substantive due process analysis. But two cases, *Glucksberg* and *Cruzan v. Missouri Department of Health*, are instructive on how rights are to be defined.

In *Glucksberg*, the respondents attempted to define the right in question in a myriad of ways: a few examples include a right to "determining the time and manner of one's death," a right to "control of one's final days," and "the right to choose a humane, dignified death[.]"<sup>97</sup> When deciding how to properly define the right in the case at bar, the Court reflected on its decision in *Cruzan*. The Court noted that it "ha[d] a tradition of carefully formulating the interest at stake in substantive-due-process cases."<sup>98</sup> Indeed, although *Cruzan* is commonly referred to as the "right-to-die case," the Court more precisely defined the right at issue as the

---

94. See Parker, *supra* note 31.

95. *Id.*

96. See *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

97. *Id.*

98. *Id.*

“constitutionally protected right to refuse lifesaving hydration and nutrition.”<sup>99</sup> Following its precedent in *Cruzan*, the Court determined that the right at issue in *Glucksberg* was not any of the ones proffered by the respondents above, but rather “[the] right to commit suicide which itself includes a right to assistance in doing so.”<sup>100</sup>

Taking *Glucksberg* and *Cruzan* together, it appears that it is the Court’s practice to define the right in a substantive due process analysis as narrowly as possible. If this is the case, simply calling for a right to “education” under the Constitution may be too broad a right for the Court to analyze. For example, “education” could encompass both K-12 schools and higher education. To properly narrow the right to education to a point where it would be true to the Court’s analyses in *Glucksberg* and *Cruzan*, it would be wise to look to the state supreme courts that have already defined the term. Out of the twenty-two states that have found a right to education under their respective constitutions, the Supreme Court of North Carolina offers the best definition of the right in question.

In *Leandro v. State*, the Supreme Court of North Carolina defined the right at issue as the “right to a sound basic education.”<sup>101</sup> Indeed, “[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.”<sup>102</sup> The court then explicated exactly what a right to a “sound basic education” entailed:

For purposes of our Constitution, a “sound basic education” is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s

---

99. *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990).

100. *Glucksberg*, 521 U.S. at 723.

101. 488 S.E.2d 249, 254 (N.C. 1997).

102. *Id.*

community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.<sup>103</sup>

When narrowly defining the right at issue in a substantive due process analysis under the Constitution, the Court should follow the Supreme Court of North Carolina's footsteps and define the right as a right to a "sound basic education."

*C. The Right to Education is Deeply Rooted in America's History and Tradition*

The second step in determining whether either the Fifth or Fourteenth Amendment Due Process Clause provides for a fundamental right to education under the Constitution is to see whether the right to education is "deeply rooted in this Nation's history and tradition[.]"<sup>104</sup> In other words, the Court must assess whether the right to education is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>105</sup>

Without a doubt, the right to education is deeply rooted—indeed, it is entrenched—in America's history and tradition. One would need to look no further than the Founding Fathers' heavy emphasis on the importance of education and the implementation of the right to education by the respective state governments illustrated *infra* in sections II-A and II-B of this very Article. It bears remembering that some of America's most influential figures, George Washington, James Madison, John Adams, and Thomas Jefferson all advocated that the education of America's citizenry was necessary for the success of the nation.<sup>106</sup> That advocacy can also be seen through the actions of the Founding Fathers by Jefferson attempting to pass "A Bill for the More General Diffusion of

---

103. *Id.* at 255 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

104. *Glucksberg*, 521 U.S. at 721.

105. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

106. Washington, *supra* note 18; Madison, *supra* note 19; Black, *supra* note 6; *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

Knowledge” in his home state of Virginia<sup>107</sup> and Madison expressly addressing and accounting for the importance of public education in the Massachusetts Constitution.<sup>108</sup>

All fifty states have mandated in their respective constitutions that there be a system of public education within their respective states.<sup>109</sup> Thirty-nine of those states contain a provision indicating how their respective public education system is to be funded.<sup>110</sup> Thirty states go beyond the K-12 realm and explicitly “speak to the establishment of higher education.”<sup>111</sup> But most importantly, twenty-two states expressly recognize, either in their respective state constitution or through their high court, a fundamental right to education for their K-12 students.<sup>112</sup> From the 1970s to the present, states have made it abundantly clear that education is “the most important function of state and local governments.”<sup>113</sup>

On top of education’s ample support from the Founding Fathers and state governments, social science research accurately underscore education as the biggest equalizing factor between individuals with different socioeconomic statuses.<sup>114</sup> There is no dispute that education is the proverbial gatekeeper to living a more quality life.<sup>115</sup> Undoubtedly, it is worth appreciating that social science’s recognition of the importance of equality in education is the predominant reason supporting integration and behind the fall of the “separate but equal” doctrine in America.<sup>116</sup> A close examination of the Founding Fathers’ view of education, state government’s view of education, and social science’s view of education will inevitably reveal that the right to education is deeply rooted in American history and tradition. Indeed, “Americans

---

107. Jefferson, *supra* note 23.

108. MASS. CONST. pt. 2, ch. V, § 2.

109. Parker, *supra* note 31.

110. *Id.*

111. *Id.*

112. Brennan-Gac, *supra* note 36.

113. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also* *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“Only last Term, the Court recognized that ‘[p]roviding public schools ranks at the very apex of the function of a State.’”).

114. *Top Ten Reasons Why Education is Important*, *supra* note 3.

115. Sargrad et al., *supra* note 2.

116. *Brown*, 347 U.S. at 494 n.11 (listing a litany of social science articles emphasizing the negative effects that segregation has on African-American children).

regard the public schools as a most vital civic institution for the preservation of a democratic system of government.”<sup>117</sup>

*D. Application of the Court’s “Reasoned Judgment”  
Standard in Obergefell*

The “deeply rooted” test from *Glucksberg* illustrated in sections III-B and III-C is not the only way by which the Court may find a fundamental right to education under the Constitution. In *Obergefell v. Hodges*, the Court found that there is a fundamental right to same-sex marriage under the Fourteenth Amendment Due Process and Equal Protection Clauses.<sup>118</sup> But the Court did not apply the “deeply rooted” test from *Glucksberg*; instead, the Court applied a much more lenient standard.

The *Obergefell* Court noted that protecting fundamental rights “is an enduring part of the judicial duty to interpret the Constitution.”<sup>119</sup> Determining which rights are fundamental, however, “has not been reduced to any formula.”<sup>120</sup> Instead, “it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”<sup>121</sup> Critically, the Court notes that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.”<sup>122</sup> The Court observes the importance of this facet by explicitly stating that this relaxed, “reasoned judgment” standard allows the Court to “respect[] our history and learns from it without allowing the past alone to rule the present.”<sup>123</sup> To further cement this idea of not letting history control the determination of fundamental rights, the Court observed:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals

---

117. *Sch. Dist. of Abington Twp v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

118. 576 U.S. at 675.

119. *Id.* at 663.

120. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

121. *Obergefell*, 576 U.S. at 664.

122. *Id.*

123. *Id.*

discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>124</sup>

Some legal scholars have observed that "*Obergefell* removes many of the most significant doctrinal barriers to recognizing education as a fundamental right under the Due Process and Equal Protection Clauses."<sup>125</sup> In fact, Alexis Piazza, Deputy Attorney General of California, states that "*Obergefell* prescribes an approach to the interpretation of substantive due process rights that could support more vigorous enforcement of this constitutional obligation."<sup>126</sup> This may very well be true seeing that the *Obergefell* Court expressly distinguished itself from *Glucksberg*, effectively dodging the application of the "deeply rooted" test.<sup>127</sup> Piazza has persuasively applied *Obergefell*'s "reasoned judgment" standard: "[f]irst, education preserves the autonomy of children and parents;"<sup>128</sup> "[s]econd, education helps fulfill the Constitution's anti-caste promise;"<sup>129</sup> "[t]hird, education is necessary to protect other fundamental rights;"<sup>130</sup> "[f]inally, education is a keystone of our social order."<sup>131</sup>

As illustrated in sections III-B and III-C, the fundamental right to education can be found under the Fifth Amendment Due Process Clause by using *Glucksberg*'s "deeply rooted" test. Because this "reasoned judgment" test sets a lower bar by which the Court may find a fundamental right, the fundamental right to education should also be found under this test.

#### IV. CONCLUSION

While K-12 students in twenty-two states enjoy a fundamental right to education under their respective state constitutions and high courts, K-12 students in twenty-eight states do not. Students in those twenty-eight states are devoid of an effective mechanism by which they may bring suit against a school board of education for school or school-endorsed actions that place an undue burden on their ability to receive an education that enables them to compete

---

124. *Id.*

125. Alexis M. Piazza, *The Right to Education After Obergefell*, 43 HARBINGER 62, 65 (2019).

126. *Id.*

127. *Obergefell*, 576 U.S. at 671.

128. Piazza, *supra* note 125, at 75.

129. *Id.* at 76.

130. *Id.*

131. *Id.* at 77.



in higher education and the workforce. Additionally, for those states that recognize a non-fundamental right to education, those students may have their rights infringed by state action without the benefit of strict scrutiny review. This should not be the case. The Court should grant certiorari to the next petitioner who asserts that there should be a fundamental right to education under the Fifth or Fourteenth Amendment Due Process Clause, or the Equal Protection Clause, of the Constitution. The Court may find the fundamental right either through *Glucksberg's* “deeply rooted” test or *Obergefell's* “reasoned judgment” test. Under either test, the rich history and veneration of education both by the Founding Fathers and state governments should prove that the right to education indeed deserves federal protection. The states recognize the importance of a fundamental right to education and so should the federal government.

## HOW DO WE EXPRESS OUR OUTRAGE AT RUSSIA?

PAUL B. STEPHAN†

Since Russia invaded Ukraine in 2022, the United States and its allies have searched for the best way to express their horror and dismay. At the level of values, the invasion affronts the core principle of liberal internationalism: the outlawing of wars of aggression.<sup>1</sup> In terms of state interests, the attack on Ukraine exposes much of Europe, especially the former members of the Soviet Union, to a heightened risk of military aggression. Political leaders who had preached pragmatic accommodation with the Putin regime feel betrayed and regret their willingness to rely on Russia to meet their energy needs. Outrage results.

In the modern era, states have various measures to express their outrage. The most ancient means for states to do this, and the one against which all other forms of retaliation were measured for much of history, was the use of force (“war”). States would support their armed attacks with economic measures, such as Napoleon’s Continental System (“economic sanctions”), when feasible. Another alternative was to privatize retaliation (“private sanctions”). For example, at the time of the founding of the United States, letters of marque and reprisal served as the principal means of privatizing punishment for outrageous conduct. War, either threatened or realized, remained at the center of international conflicts.

We seem to live in a different world today. The United States and its allies have avoided war and private measures while adopting robust economic sanctions against Russia and its running dog, Belarus. Several members of Congress, and not a few former government officials, have argued that these actions do not go far enough and that either war or private sanctions need to be

---

† John C. Jeffries, Jr. Distinguished Professor of Law and David H. Ibbeken ’71 Research Professor, University of Virginia School of Law, and Senior Fellow, Miller Center of Public Affairs.

1. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 117–18 (2017).

deployed as well. During the first year of the Russian invasion, however, the Biden administration and Congress focused exclusively on economic sanctions, and U.S. allies did not go further. The principal debate has been over what limits currently exist on the executive's power to employ economic measures and whether to provide the President with new authority.

This article argues that the principal object of U.S. expressions of outrage at Russia, as well as those employed by U.S. allies, should be to bring the war to a satisfactory conclusion. It leaves to others to spell out what this endpoint should look like.<sup>2</sup> It maintains, however, that two principles should apply: the human and material cost to Ukraine should be minimized, and Russia should be deterred from using force against Ukraine (as well as all of its neighbors) for the indefinite future. These principles contradict each other, as deterrence is costly and the people of Ukraine will bear the lion's share of those costs. At a minimum, though, the President and Congress should express the country's outrage against Russia in a manner that will not unnecessarily prolong the conflict. Here, "unnecessarily" means without providing a commensurate quantum of deterrence against future Russian force.

The argument proceeds in three parts. It first provides a general legal overview of war, economic sanctions, and private sanctions as instruments for expressing outrage. It then reviews the sanctions that the United States has deployed to date, the existing authority to do more, and legislative proposals to add to that authority. In the last part, the article considers whether the proposals to do more would likely satisfy the object of bringing the war to a satisfactory conclusion or not.

## I. STATE EXPRESSIONS OF OUTRAGE

Until the end of the nineteenth century, the United States went to war when that suited its purposes. Over the course of the twentieth century, it gradually shifted its attention from armed force to economic sanctions, although the deployment of the world's greatest military power never was too far off the table. At the end of the twentieth century, it reinvented private sanctions in the

---

2. E.g., Paul Poast, *The War in Ukraine Will End with a Deal, Not a White Flag*, WORLD POL. REV. (Jan. 20, 2023), <https://www.worldpoliticsreview.com/putin-war-ukraine-end-nato-russia-annex-us-aid>.

form of civil suits against designated outlaw states brought by victims of atrocities.

### *A. Armed Force*

The two world wars as well as the transformation of military violence brought about by the invention of atomic weapons led states to rethink how they would express their outrage against each other. After the creation of the United Nations, wars remained part of the international landscape, but direct conflicts between great powers (understood as states possessing a credible nuclear deterrent) pretty much disappeared. Proxy wars (Korea, Vietnam, the Middle East, the Balkans, and now Ukraine), as well as state violence deployed within a great power's sphere of influence (Hungary and Czechoslovakia for the Soviet Union, the Caribbean and Central America for the United States), continued. But since the development of atomic weapons, the world has not yet seen an armed conflict carried out on the territory of one nuclear power by another.

The Russian invasion of Ukraine occurred against the backdrop of the less-than-elegant U.S. withdrawal from its twenty-year occupation of Afghanistan and the gradual winding down of its military presence in Iraq. Russia has more nuclear weapons than does the United States, although its other military capabilities have come into question as a result of its lackluster performance in Ukraine. It has been more than a century since U.S. forces operated on Russian territory, and that was a small deployment in the Far East during the chaos of the Russian Civil War. U.S. strategic thinking generally views Russia as a potential adversary but as a lesser threat than China. Still, the existence of such military power suggests that many interests converge to promote U.S. investments in training, development, and materiel. One of these interests includes showing off U.S. military capabilities to the best advantage.

### *B. Financial*

Since World War II, the United States has developed a taste for wielding economic sanctions as an alternative, rather than a supplement, to the use of armed force. These sanctions have responded not just to actions that offend U.S. direct interests, such as terrorist attacks on U.S. nationals and the seizure of U.S.

nationals and their property, but also to government behavior that offends U.S. values, such as gross human rights violations and suppression of liberal democracy at home. The latter sources of outrage provoke responses only intermittently—important military allies such as Saudi Arabia and Turkey go unmolested—but since the end of the Cold War, the United States has shown a greater willingness to use this tool in its international relations.<sup>3</sup>

Cuba illustrates this preference. True, the Kennedy administration supported violence in a feckless attempt to oust the Castro regime in 1961. The next year it instituted an armed embargo to block Soviet efforts to install nuclear weapons there. But even before these deployments, the first foolhardy and the second perilous if ultimately successful, the United States imposed economic sanctions in response to Castro's increasing embrace of the Soviet Union. President Eisenhower first barred Cuba's access to the U.S. market for sugar. When Cuba retaliated by expropriating the assets of U.S. investors, the sanctions broadened. For more than sixty years now, U.S. firms have been barred from doing business in Cuba, and Cubans from doing business in the United States, aside from narrow exceptions for humanitarian and free-expression products. Travel between the two countries by nationals of either state also became mostly illegal, again with narrow exceptions.

Intermittent adoption of later sanctions against other states by the Johnson and Nixon administrations led Congress to restructure the legal regime for these measures. Under the old Trading with the Enemy Act, in effect since the First World War and broadened significantly just before the start of the Second, the President had almost unlimited power to take measures short of armed force once he declared an "international emergency," a largely undefined category.<sup>4</sup> In 1977, Congress adopted the International Emergency Economic Powers Act ("IEEPA") to rein in this authority.<sup>5</sup> Presidents still could impose travel bans and bar foreign states and nationals from undertaking transactions with U.S. persons or on U.S. territory. The latter produced asset freezes, which put foreign-owned assets under federal supervision so as to

---

3. See generally CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOTT & BARBARA OEGG, *ECONOMIC SANCTIONS RECONSIDERED* (3d ed. 2009).

4. Act of May 7, 1940, ch. 185, §1, 54 Stat. 179 (codified at 50 U.S.C. App. § 5(b)).

5. See generally International Emergency Economic Powers Act, Pub. L. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701-06).

bar any transactions, including changes of ownership, regarding that property. But with access to the Trading with the Enemy Act cut off, the President no longer could authorize the confiscation of foreign-owned assets unless in connection with a declared war. IEEPA also has a few exceptions, especially for expressive activities thought to be adjacent to, even if not clearly protected by, the First Amendment's guarantee of free speech.<sup>6</sup>

Not long after its enactment, IEEPA became the subject of a Supreme Court case arising from the Iranian hostage crisis.<sup>7</sup> The Carter administration responded to the seizure of the U.S. embassy and diplomats in Tehran, which the Iranian government did not prevent and then ratified, by imposing a comprehensive freeze on assets owned by Iran, Iranian state-owned companies, and most Iranians in good standing with the new regime.<sup>8</sup> It then reached an accord with the Iranian government. This treaty, the Algiers Accords, allowed for the release of some of the assets and the transfer of the remainder to a special fund for reimbursing U.S. persons with legal claims against Iranian persons, in return for the release of the hostages. A new international arbitral body, the U.S.-Iranian Claims Tribunal, had jurisdiction to address private claims against Iran as well as legal disputes between the two countries.<sup>9</sup>

U.S. persons that already had filed lawsuits in U.S. courts and attached Iranian assets in advance of judgment attacked the government's implementation of the Accords. They argued that the government lacked the authority to require litigants to transfer their claims to the new tribunal. This move, they maintained, went beyond the authority granted by IEEPA as well as effecting a taking of property in violation of the Fifth Amendment. In *Dames & Moore v. Regan*, the Court ruled unanimously that portions of the government measures fell outside of IEEPA but still were permitted due to an implicit grant of claims-settlement authority based on past congressional acquiescence in similar measures. Because the government only suspended the litigation, rather than dismissing the cases on the merits, the Court ruled that the Fifth Amendment question as to these claims was not ripe. A majority also ruled that

---

6. See *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92 (D.D.C. 2020).

7. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

8. Exec. Order No. 12170, 3 CFR 457 (1980); 31 CFR § 535.203(e) (1980).

9. Claims Settlement Declaration, Jan. 19, 1981, <https://iusct.com/wp-content/uploads/2021/02/2-Claims-Settlement-Declaration.pdf>.

the right to attach property in advance of an enforceable civil judgment did not enjoy protection under the Fifth Amendment.<sup>10</sup>

The other significant event in the life of IEEPA was the 2001 Patriot Act.<sup>11</sup> In response to the 9/11 attacks, Congress increased the executive's sanctioning authority in one narrow respect. It allowed the confiscation of assets connected to a non-state entity (Congress had al-Qaeda in mind) or a state if that actor used armed force against the United States. This provision reflects two legal understandings: first, certain acts of violence could qualify as the kind of activity that triggers a state's right to self-defense under the UN Charter (which uses the term "armed attack"); and second, this right exists not only with respect to state violence but also when a non-state actor uses force in circumstances not supporting the attribution of responsibility to a state. When these conditions were met, the executive could confiscate—rather than just freeze—property, even though such actions were considered wartime measures.

International emergencies aside, Congress has authorized the executive to impose sanctions against international criminal enterprises, terrorist support organizations, and human rights abusers. A further arrow in the economic quiver is the threat of forfeiture of assets implicated in designated criminal activity. Provisions creating a civil-law right to assume ownership of property used in or generated by crimes have been in the federal criminal code forever.<sup>12</sup> These measures do not require conviction of a crime but rather proof by preponderance of the evidence that the property was involved in designated crimes or represents the proceeds or gross receipts of those crimes. They allow the Department of Justice to confiscate property connected to specific criminal activity without having to meet the beyond-a-reasonable-doubt evidentiary standard used in criminal proceedings or to acquire jurisdiction over the property's owners. Especially stringent forfeiture rules apply to the property of persons engaged in planning or carrying out acts of international terrorism.<sup>13</sup>

---

10. *Regan*, 453 U.S. at 656.

11. USA PATRIOT Act of 2001, § 106, Pub. L. 107-56, Oct. 26, 2001, codified at 50 U.S.C. § 1702(a)(1)(B).

12. Pub. L. 99-570, title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3207, codified at 18 U.S.C. § 981.

13. *Id.* at § 981(a)(1)(G).

IEEPA by its terms forbids persons designated by the executive from engaging in property transactions, effectively freezing their assets.<sup>14</sup> One activity subject to civil forfeiture penalties is the evasion or disguise of transactions subject to an IEEPA freezing order.<sup>15</sup> Thus, if a designated person seeks to disguise ownership of property so as to generate revenue from it, the Department of Justice may confiscate that property. Absent attempts to avoid an IEEPA freeze or use it in other criminal activity, however, the frozen property continues to belong to the designated person. IEEPA anticipates a return of the property to the owner at the end of the international emergency, absent misconduct related to that property.

### C. Privatization

By the time of World War I, the United States had ceased to use letters of marque and reprisal as a means of privatizing the use of force in an international conflict. Late in the twentieth century, however, another means of privatizing outrage emerged. Prompted largely by the Lockerbie incident, a Libyan-run terror bombing of a civilian aircraft with great loss of life in the air as well as on the ground in Scotland, the Clinton administration induced Congress to amend the Foreign Sovereign Immunities Act to permit civil suits against states designated as sponsors of terror.<sup>16</sup> Before this enactment, the United States had relied on economic sanctions as a response to state support of terrorism, such as that attributed to Iran in the 1980s. In the fullness of time, Cuba, Iraq, North Korea, South Yemen, Sudan, and Syria joined Iran on the list of designated states.<sup>17</sup>

---

14. 50 U.S.C. § 1702(a)(1)(A)–(B).

15. 18 U.S.C. § 981(a)(1)(A) (covering assets involved in violation of 18 U.S.C. § 1956); 18 U.S.C. § 1956(c)(7)(D) (covering transactions intended to evade an IEEPA freezing order).

16. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (amending 28 U.S.C. § 1605(a)); Pub. L. 110-181, div. A, title X, § 1083(a)(1), Jan. 28, 2008, 122 Stat. 338 (superseding and revising 28 U.S.C. § 1605(a)), codified at 28 U.S.C. § 1605(a); see Jonathan B. Schwartz, *Dealing with a Rogue State: The Libya Precedent*, 101 AM. J. INT'L L. 553, 563 (2007) (discussing the change Congress made to the sovereign immunity statute as it applied to countries designated as supporters of terrorism).

17. Bureau of Counterterrorism, *State Sponsors of Terrorism*, U.S. DEPT OF STATE, <https://www.state.gov/state-sponsors-of-terrorism> (last visited Mar. 12, 2023) (Current designees are Cuba, Iran, North Korea, and Syria.).



Initially, this amendment only stripped a designated state of a defense that it would otherwise use to block a civil suit in a U.S. court. Congress did not create a federal cause of action to require compensation for U.S. victims of state terrorism until later.<sup>18</sup> Nor did the amendment authorize the automatic enforcement of judicial judgments against state-owned assets found within the United States.<sup>19</sup> Moreover, the loss of immunity does not, in theory, remove the right of states to mount a legal defense on other grounds.

As a practical matter, however, any state designated as a sponsor of terrorism already faces IEEPA sanctions, making it unlikely that it has people or property in the United States that could be used to satisfy a civil judgment. To the best of my knowledge, no state ever made an appearance in a civil suit coming within this exception to immunity. Accordingly, plaintiffs inevitably obtained a default judgment once they had made out a prima facie claim. A practice then emerged of lobbying Congress to designate certain assets under U.S. control, typically due to IEEPA sanctions, as a source for funding specifically designated judgments.<sup>20</sup>

Many actors, including the U.S. judge who has handled most of the claims against Iran, have attacked this process as ineffective and perverse.<sup>21</sup> In the few cases where Congress has designated foreign-state assets as available to satisfy terrorism judgments, the designation had no effect on the underlying legal obligation of the United States to return those assets to their foreign owner once the transactions freeze ended. Effectively, the designations transferred property from the United States to the judgment creditors without any material effect on the wrongdoing states. Accordingly, they do not serve as a means of reparation for or deterrence of terrorism. Moreover, the legislative process that produced these designations rests on political factors and connections, not any sense of proportional justice or U.S. policy.<sup>22</sup>

---

18. 28 U.S.C. § 1605A(c).

19. Pub. L. No. 105-277, § 117, 112 Stat. 2681-491 (codified at 28 U.S.C. § 1610(f)).

20. *See* Bank Markazi v. Peterson, 578 U.S. 212 (2016).

21. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 37 (D.D.C. 2009).

22. Saraphin Dhanani, *A Cautionary Tale: What Iran and Cuba Can Teach Us About Designating Russia a State Sponsor of Terrorism*, LAWFARE (Jan. 20, 2023), <https://www.lawfareblog.com/cautionary-tale-what-iran-and-cuba-can-teach-us-about-designating-russia-state-sponsor-terrorism>. The International Court of Justice determined that the confiscation of assets of Iran's central bank to satisfy a judgment against Iran amounted to a violation of the extant U.S.-Iran treaty because it effected an illegal expropriation. Certain

In other words, privatization of outrage through the launching of civil suits has not served U.S. international interests well. In the case that started everything—the Lockerbie victims’ suit—Libya reached a settlement with the plaintiffs that tied their compensation to the suspension of other sanctions. The regime and the plaintiffs essentially formed a joint venture opposed to U.S. policy.<sup>23</sup> No later case has cost the targeted regime anything. Congress reaps the glory of standing tough against awful regimes while hiding from voters that U.S. taxpayers, and not the wrongdoers, ultimately will pay the cost of compensating victims.

## II. U.S. MEASURES AGAINST RUSSIA

Against this background, the Russian invasion of Ukraine drove the United States to express its outrage over Russian behavior while seeking ways to both assist Ukraine in grappling with the invasion and to reach a peace that protects Ukraine’s interests. Neither the United States nor its NATO allies plan to intervene directly against Russia. Rather, they have put together a series of aid packages to keep Ukraine afloat and sanctions packages to punish Russia. Some members of Congress and other supporters of Ukraine seek to compel a designation of Russia as a state supporter of terrorism so as to open the door to civil suits.

### *A. Military Measures*

Since February 2022, the United States and its allies have rendered Ukraine substantial military assistance, including the embedding of military personnel for training and the provision of intelligence. So far, however, they have tried hard to keep Ukraine from using the weapons they provide on Russian territory (leaving open whether this includes the Ukrainian territory that Russia has purported to annex) or from having their own military resources used directly against Russia. Thus, proposals by Ukraine and some of its more ardent supporters in the West to impose a no-fly zone against Russia with respect to Ukrainian territory have not gained official favor.

---

Iranian Assets (Islamic Republic of Iran v. United States of America), Judgment, 2023 I.C.J. Doc. # 164-20230330-JUD-01-00-EN (Mar. 30).

23. Schwartz, *supra* note 16, at 568–69.

In response to pressure from the United States and its allies, the United Nations has done what it can to punish Russia, but that is not much. Russia's veto in the Security Council prevents that body—the only component of the United Nations that can impose sanctions and authorize force in response to breaches of the peace—from doing anything. The General Assembly has issued several resolutions condemning Russia and labeling it a violator of international law, but that does not provide a legal basis for anything.<sup>24</sup> Moreover, although the resolutions have passed by large votes, the states that did not approve them collectively represent the majority of the globe's population. The forty-plus states that have undertaken sanctions on their own initiative, meanwhile, account for more than half of the world's gross domestic product but only a fraction of its population.<sup>25</sup>

### *B. Economic Measures*

Besides assisting Ukraine without waging war itself, the United States' other response to the invasion has been imposing economic sanctions on Russia, Byelorussia, and their nationals. Complicating this program has been legacy sanctions resulting from human rights violations (the 2012 Magnitsky Act) and Russia's 2014 annexation of Crimea (based on IEEPA). The challenge has been to identify new targets for punishment. The main breakthrough in the 2022 sanctions was to freeze the property of Russia itself as well as that of significant state organizations, in particular the Russian Central Bank.

Shortly after the invasion, a few observers argued that the president has authority under IEEPA not only to freeze but to confiscate assets, including all the Russian state property frozen at the onset of hostilities.<sup>26</sup> Some argued that IEEPA's authorization of transfers of covered assets include the power to transfer them to the

---

24. U.N.G.A. Res. ES-1, Mar. 2, 2022.

25. PAUL B. STEPHAN, *THE GLOBAL CRISIS AND INTERNATIONAL LAW—THE KNOWLEDGE ECONOMY AND THE BATTLE FOR THE FUTURE* 2–3 (2023).

26. Philip Zelikow & Simon Johnson, *Use the Kremlin's Seized Assets to Pay for Reconstruction*, FOREIGN AFFS. (Apr. 19, 2022), [https://www.foreignaffairs.com/articles/ukraine/2022-04-19/how-ukraine-can-build-back-better?check\\_logged\\_in=1&utm\\_medium=promo\\_email&utm\\_source=lo\\_flows&utm\\_campaign=registered\\_user\\_welcome&utm\\_term=email\\_1&utm\\_content=20230217](https://www.foreignaffairs.com/articles/ukraine/2022-04-19/how-ukraine-can-build-back-better?check_logged_in=1&utm_medium=promo_email&utm_source=lo_flows&utm_campaign=registered_user_welcome&utm_term=email_1&utm_content=20230217).

United States or Ukraine.<sup>27</sup> One professor maintained that Russian-sponsored cyberattacks on U.S. targets satisfied the “armed attack” prong of IEEPA added by the Patriot Act.<sup>28</sup> Another claimed, improbably, that a UN General Assembly Resolution condemning the invasion has the same legal effect as a UN Security Council Resolution requiring confiscation, thus triggering executive powers under the UN Participation Act.<sup>29</sup> Others, me included, pushed back on these arguments. To date, the Biden administration has not claimed any such authority.<sup>30</sup>

Several bills circulating in Congress in 2022, including one that passed the House, would have expanded the confiscation power to include assets of Russian persons frozen under IEEPA in response to the invasion. The Biden administration responded with its own proposal, one that would widen the civil forfeiture authority to extend to privately owned assets derived from “corrupt dealings” with the Putin regime.<sup>31</sup> Ultimately, however, the only measure enacted, an amendment to the 2023 Consolidated Appropriations Act adopted by the lame-duck Congress, authorizes the transfer to

---

27. Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine*, LAWFARE (May 12, 2022), <https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine>; Laurence H. Tribe, *Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?*, LAWFARE (May 23, 2022), <https://www.lawfareblog.com/does-american-law-currently-authorize-president-seize-sovereign-russian-assets>.

28. Tribe, *supra* note 27.

29. Lawrence H. Summers, Philip D. Zelikow & Robert B. Zoellick, *The moral and legal case for sending Russia's frozen \$300 billion to Ukraine*, WASH. POST, Mar. 20, 2023, <https://www.washingtonpost.com/opinions/2023/03/20/transfer-russian-frozen-assets-ukraine>. They rely specifically on E.O. No. 12817, 57 Fed. Reg. 48433 (1992), which, pursuant to a Security Council resolution, ordered the seizure of frozen Iraqi assets for transfer to a UN-administered fund to pay reparations to victims of the Iraq invasion of Kuwait. The Order relied expressly on the UN Participation Act, 22 U.S.C. 287c. The Security Council, of course, has not ordered any measures against Russia in the present crisis. Moreover, the Supreme Court later cabined the President's authority under the UN Participation Act. *Medellín v. Texas*, 552 U.S. 491, 529–30 (2008).

30. See Paul B. Stephan, *Seizing Russian Assets*, 17 CAP. MKTS. L.J. 276, 276 (2022) (highlighting how U.S. and international law permits seizing of Russian assets); see also Evan Criddle, *Opinion—Rebuilding Ukraine Will Be Costly. Here's How to Pay*, POLITICO (Mar. 30, 2022), <https://www.politico.com/news/magazine/2022/03/30/rebuilding-ukraine-make-putin-pay-00021649> (addressing the expenses incurred to rebuild Ukraine); see also Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, LAWFARE (May 26, 2022), <https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets> (discussing the challenges to hurdle through international law if Russian assets are frozen).

31. See *KleptoCapture: Aiding Ukraine through Forfeiture of Russian Oligarchs' Illicit Assets: Hearing on Testimony of Adam M. Smith Before the S. Comm. on the Judiciary* (2022), <https://www.judiciary.senate.gov/meetings/kleptocapture-aiding-ukraine-through-forfeiture-of-russian-oligarchs-illicit-assets>.

Ukraine of funds confiscated under existing civil forfeiture authorities regarding the invasion.<sup>32</sup>

As things stand, then, the United States and its allies have frozen many Russian assets, totaling perhaps as much as \$300–\$500 billion in value. In the United States, some portion of the frozen property might be confiscated were the government able to connect that property to criminal activity such as sanctions evasion. In the case of property owned by Russia directly or through state-controlled legal entities such as the Central Bank, however, the likelihood of criminal activity involving that property, and therefore of forfeiture, is slight. Foreign central bank deposits in U.S. banks, for example, rarely if ever are tainted with a history of fraud or similar criminal conduct.

Another legal cloud hangs over possible civil forfeiture of property belonging to Russia or companies that it controls. In *Türkiye Halk Bankası A.S. v. United States*, the Court left open the door to according immunity to state-owned companies against criminal prosecutions.<sup>33</sup> Were that position to prevail, the courts would have to consider whether state entities also would enjoy immunity from civil forfeiture. Even though the Foreign Sovereign Immunities Act by its terms does not bar civil suits that fall its exceptions to immunity, the legal incapacity of state entities to commit crimes that are predicate to civil forfeiture might stand as a barrier.<sup>34</sup> Even if Congress were to fix the problem with an express authorization of criminal liability and related civil forfeiture for state assets, retroactive application of the fix might be problematic.<sup>35</sup>

In sum, the United States at present has only limited authority to confiscate property as part of an economics sanction program. Canada has adopted, but not yet exercised, a confiscation power for use against Russia, and some figures within the European

---

32. Consolidated Appropriations Act, 2023, Pub. L. 117–328 § 1768, 136 Stat. 4459.

33. *Türkiye Halk Bankası A.S. v. United States*, 143 S.Ct. 940, 947 (2023) (holding that the Foreign Sovereign Immunities Act does not extend to criminal prosecutions but leaving open the possibility of common-law immunity for foreign sovereigns and their agents and instrumentalities).

34. *Cf. Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) (discussing criminal immunity of state actor under FSIA bars civil claim based on predicate criminality).

35. *Compare Landgraf v. USI Film Products*, 511 U.S. 244, 267 (1994) (explaining that civil retroactivity is not per se unconstitutional) *with Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607 (2020) (acknowledging the principle of nonretroactivity as “deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic”).

Union propose to do the same.<sup>36</sup> Until these plans become operational, however, the only persons with reason to worry about asset forfeiture are private ones, such as the Russian oligarchs who also have much to fear from the Putin regime.

### *C. Weaponizing Private Litigation*

Another proposal that enjoys some support in Washington, but remains unlikely, is the designation of Russia (and perhaps Belorussia) as a state sponsor of terrorism. Under U.S. law, the President has essentially unreviewable power to make such a designation. If he were to do so, Section 1605A of the Foreign Sovereign Immunities Act would come into play.<sup>37</sup> Under this provision, any person with a claim based on death or injury caused by certain acts could sue Russia and, after obtaining a default or contested judgment, execute the judgment against any property subject to an IEEPA freeze.<sup>38</sup>

The principal legal question that would arise were the President to do this is what acts would provide a claim against Russia under this exception. Section 1605A comprises “extrajudicial killings;” another statute, the Torture Victims Protection Act, states that this term does not encompass any “killing that, under international law, is lawfully carried out under the authority of a foreign nation.”<sup>39</sup> This implies that claims based on killings constituting war crimes could be brought. Other acts prohibited by international humanitarian law, such as targeting civilians or disproportionate uses of force where death is not the outcome, might go uncovered.

The deeper policy issue, however, would be aligning payouts to successful plaintiffs against a systematic program to fund

---

36. Statutes of Canada, Ch. 10, Budget Implementation Act, 2022, No. 1, pt. 5, Div. 31 (2022); Statement by Members of the European Council, Feb. 23, 2023 (“We will also support Ukraine’s reconstruction, for which we will strive to use frozen and immobilised Russian assets in accordance with EU and international law.”), <https://www.consilium.europa.eu/en/press/press-releases/2023/02/23/statement-by-the-members-of-the-european-council>.

37. See 28 U.S.C. § 1605A (stating the covered acts include “torture, extrajudicial killing, aircraft sabotage, hostage taking”).

38. See *id.* § 1610(f)(1)(A); see also *Bank Markazi v. Peterson*, 578 U.S. 212, 218 (2016) (explaining the President’s authority under the International Emergency Economic Powers Act).

39. Torture Victims Protection Act of 1991, Pub. L. No. 102-256, § 3(a), Mar. 12, 1992, (106 Stat. 73).

Ukrainian resistance and reconstruction. The cost of putting Ukraine back on its feet will be great, and the sums available to do this are limited. Under conditions of budgetary stringency, compensation of the relatives of victims of war crimes, however compelling a cause, may not count as the top priority. Moreover, access to the U.S. civil justice system and entrepreneurial plaintiffs' attorneys might not be the most compelling criteria for deciding how to distribute reparations in the wake of the war.

### III. SANCTIONS AND PEACE

The fundamental question remains what mix of measures—military action, economic sanctions, and private actions—is most likely to bring the war to a prompt and satisfactory conclusion. On the one hand, complete capitulation by either side is unlikely. Ukraine enjoys substantial western support and regards Russia as an existential threat. It would surrender only if it lost all capacity for resistance. Russia would capitulate only as a consequence of a regime change that assessed good relations with the West as more important than any other considerations, most likely after a complete and humiliating military defeat that somehow avoids the use of nuclear weapons. Neither of these scenarios seems likely.<sup>40</sup>

Were a complete and unconditional defeat of Russia in the cards, building confiscation into the sanctions would in retrospect seem prescient. Some might argue that displays of resolve would increase the pressure on Russia to quit if not necessarily surrender. An analogy can be made to the chicken-game ploy, played by having two cars in a collision course. Supposedly, the way to win is to throw one's steering wheel out the window, demonstrating to the other driver the impossibility of winning. As many have observed, that solution works only if the other driver is not even more committed to not losing. When it comes to war, the analogy may not be a good fit.

If it becomes evident to both sides that a grinding, miserable stalemate is by far the most likely future of the conflict, the possibility of a deal becomes realistic. Minimizing the interval between the envisioning of a deal and bringing it about seems imperative, given that the alternative is senseless death and destruction. The question that follows is what kinds of sanctions

---

40. Poast, *supra* note 2.

might not make framing a deal easier but instead could delay its implementation.

The best way to analyze this problem is to suppose two alternative worlds: one where the United States and its allies have frozen significant amounts of Russian-connected assets, and the other where a substantial portion of those assets, especially those owned by Russia and its agencies and instrumentalities, have been confiscated. The first set of questions is whether confiscation will make more resources available to Ukraine than otherwise and whether Ukraine's gains will bring the parties to the bargaining table sooner. The second is whether unwinding confiscations so as to shorten the interval between envisioning a deal and realizing it will be costly and time-consuming compared to unwinding freeze orders.

One can safely assume that until a deal is on the table, Russia would be indifferent between having its assets frozen or forfeited. Either way, it would derive nothing from those assets and would have no clear expectation of getting them back. Once a deal emerges, however, Russia would want to recover as much of this property as possible. It might allow the deal to transfer some of the assets to Ukraine in return for a waiver of further liability. But assuming that Russia will let all assets go to Ukraine without some offset that Ukraine might prefer to more war seems implausible.

If Russia would be indifferent about the fate of its frozen assets in the period before a deal becomes possible, surely Ukraine would be indifferent about the source as opposed to the amount of funding. The United States and its allies might care a lot about the source, but only if at the end of the conflict, it faced no obligation to restore to Russia money previously transferred to Ukraine. Yet the baseline entitlement over which Russia would bargain is one of full recovery.

The United States and its allies could choose to lend Ukraine funds rather than make outright transfers, just as the United States did with the United Kingdom during World War II. A peace deal might include some debt forgiveness or restructuring. Ukraine would doubtlessly prefer unconditional grants, but it would choose greater aid with some risk of repayment over a lower amount with no risk.

Relevant to this calculus is the assumption that, as a matter of international law, Russia would be entitled to the return of its



property once the conflict ends.<sup>41</sup> This baseline exists because the legal justification for the confiscation of Russian assets would be the law of countermeasures. These principles, resting on general international law not codified in any treaty, although annotated by the International Law Commission, let states deploy reversible measures to induce a lawbreaking state to end its misconduct. Prominent commentators concede that confiscation might qualify as an appropriate countermeasure but only with the accompanying assumption that the confiscating state will make reparations to the lawbreaker once the latter returns to the straight and narrow. The issue, this literature posits, is reversibility, not confiscation as such.<sup>42</sup>

This brings us to the heart of the problem. How easy would it be for the United States and its allies, having confiscated Russian assets and sent them to Ukraine, to reverse these transactions? In a pure Coasean world involving private actors, the transaction costs may not be so great.<sup>43</sup> For liberal democratic states, a reversal could be very difficult. The forfeiture-and-transfer transaction would be off-budget and thus come under no fiscal limits, although the authority to carry out each leg of the transaction would have to rest on a legislative grant. But reimbursing Russia could come only out of appropriated sums. Legislators may find it easy to spend what they regard as someone else's money, even though as a legal matter the assets become the property of the United States upon forfeiture. Asking voters to tolerate disbursements in favor of a recent enemy, by contrast, would not come easily.

An even greater problem would arise were the President to designate Russia as a state sponsor of terrorism and judgment creditors then were to collect against frozen Russian assets. Reversing these collections would probably constitute a taking in violation of the new owners' rights under the Fifth Amendment. As a result, Congress would have to appropriate the money to replace the amounts collected on these judgments, in effect indemnifying

---

41. See Paul Stephan, *Response to Philip Zelikow: Confiscating Russian Assets and the Law*, LAWFARE (May 13, 2022) (discussing the President's request to Congress to expedite forfeiture of privately-owned frozen Russian assets).

42. James Crawford, *Counter-measures as Interim Measures*, 5 EUR. J. INT'L L. 65, 74-75 (1994). Crawford later was the reporter for International Law Commission, Draft articles on Responsibility of States for International Wrongful Acts, with commentaries (2001), which contains a chapter on countermeasures.

43. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 15-16 (1960) (explaining the cost of transactions).

Russia for its war crimes. Passing such a law seems challenging, to put it gently.

The main argument against confiscation as part of a sanctions package on Russia, then, is the difficulty of reversing this step. This Impediment would make it harder for Russia and Ukraine to complete a deal to end the hostilities. People might die and destruction might continue, all because of a pointless expression of outrage.

To date, the United States and its allies have not gone down this path. They have used military aid to empower Ukraine while trying, so far successfully, to avoid acts that would push Russia into a new phase of the conflict—one where Russia enters into an armed conflict with Ukraine's supporters. They have cut off Russian nationals and the Russian economy from access to the richest portion of the world, although many populous if poorer states have taken up some of the slack. Ukraine has exercised its own jurisdiction to punish war criminals that have come within its power. The International Criminal Court has just stepped in, to what effect remains a great and potentially terrible question.<sup>44</sup> The case for staying on the present course is strong unless the world changes in ways that we may imagine but not expect.

---

44. Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms. Maria Lvova-Belova, Mar. 17, 2023, <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

DISABILITY DISPARITIES IN POST-SECONDARY  
EDUCATION: COMPARING CIVIL RIGHTS THEORIES  
WITH EMPIRICAL DATA ON EQUAL ACCESS

*KENDRA J. MULLER, ESQ.*

I. INTRODUCTION: DISPARITY IN POST-SECONDARY EDUCATION.....	210
A. Application of Civil Rights Theories and A cknowledgement as Class.....	211
B. Introduction to the Study of Disability.....	213
C. Definition of Ableism.....	215
D. Definition of Disability.....	216
E. Historical Background on Classifying Disability as a Civil Rights Group.....	218
i. Origins.....	218
ii. Pre-Civil Rights.....	219
iii. Post-Civil Rights.....	221
F. The Empirical Case for Disparate Post-Secondary Education.....	226
II. DISABILITY DISPARITIES IN POST-SECONDARY EDUCATION THROUGH A TRADITIONALIST LENS.....	230
A. External Diagnosis.....	230
B. External Prescription.....	232
C. Internal Diagnosis.....	234
i. Willpower and “Faking” Disability.....	234
ii. Severe Disabilities and Uselessness.....	235
D. Internal Prescription.....	236
III. DISABILITY DISPARITIES IN POST-SECONDARY EDUCATION THROUGH A REFORMIST LENS.....	239
A. External Diagnosis.....	239
i. Disability Matters.....	239
ii. Integration is Key.....	241
B. External Prescription.....	243
C. Internal Diagnosis.....	246
D. Internal Prescription.....	249
IV. DISABILITY DISPARITIES IN POST-SECONDARY EDUCATION THROUGH A DISABILITY CRITICAL RACE THEORY LENS.....	253
A. External Diagnosis.....	253
B. External Prescription.....	257
i. Combat Systemic Discrimination: Bring Disabled Voices to Forefront.....	257

ii. Equal Access Is Not a Controversy .....	260
iii. Universal Design .....	262
C. Internal Diagnosis .....	263
D. Internal Prescription .....	264
i. Avoid Contributing to Their Own Subordination....	264
ii. ADA Enforcement .....	265
V. DISABILITY DISPARITIES IN POST-SECONDARY EDUCATION THROUGH A LIMITED SEPARATIST LENS .....	266
A. External Diagnosis .....	266
B. External Prescription .....	267
C. Internal Diagnosis .....	272
D. Internal Prescription .....	274
VI. CONCLUSION .....	278
VII. TABLES AND FIGURES .....	279

#### ABSTRACT

In recent years, the topic of disabled students and their right to equitable access has become increasingly controversial at post-secondary institutions. Partially due to high-profile cheating scandals involving the fraudulent use of disability accommodations, some individuals have sought to reduce the level of access to disability accommodations. The high dropout rate of disabled students has been well-documented, causing concern for disability equity as higher education becomes increasingly important in enabling individuals to achieve economic stability. Disabled individuals already have a much lower employment rate than non-disabled individuals, illustrating how higher education access may be key in addressing disparities in poverty and unemployment.

Using four overarching civil rights legal theories originally proposed by leading civil rights and jurisprudence theorist Dr. Roy L. Brooks, this paper seeks to take the reader on a civil rights journey through legal theory to show how each theory (1) views disability as a civil rights group, and (2) prescribes solutions for disabled students' access to education. Viewing disabled students' right to access to education through the eyes of (1) traditionalists, (2) reformists, (3) critic theorists, and (4) limited separatists. These theories both contradict and build upon one another. While there is a need to discuss theory in-depth and show the various methods and diagnoses put forth by each theory for completeness, none of the theories themselves need to be mutually exclusive.

In addition to applying the issue of disabled education access to each legal theory, the paper also includes startling scientific data on the current lack of equity in post-secondary education. Original tables and graphs located at the bottom of this article are made to be easily accessible and present disability-related data in novel ways. These can enable a better understanding of the critical need to find creative solutions that improve the disabled community's access to education.

#### AUTHOR BIOGRAPHY

Kendra J. Muller (*she/they*) is a disabled, queer attorney employed at Disability Rights California (“DRC”), the nation’s largest non-profit disability rights firm. As a part of the Civil Rights Practice Group, she assists in complex impact litigation and direct services to provide intersectional legal analysis to challenge civil rights violations and provide advocacy for historically marginalized and underserved communities, including LGBTQ+ individuals, veterans, unhoused persons, people of color, multilingual individuals, seniors, and low-income communities.

Muller’s scholarly research emphasizes synthesizing public policy, science, and law to find solutions for disability justice, public health, and human rights. Muller’s most recent publication explored the impact of COVID-19 relief laws among the disabled community, analyzing the consequential effects of laws implemented in the United States and the United Kingdom. Muller serves as a board member for Disability Rights Now—assisting disabled individuals in pursuing post-secondary education and professional careers—and an advisor to the San Diego County Bar Association’s Diversity, Equity, and Chair of the Disability Justice Group (“DJG”). With DJC, she has crafted legislative proposals regarding equal opportunity and regulations for both professionals and students in the disability community. Prior to entering the legal field, Muller founded the Equal Access & Disability Rights Commission that used the theories of her prior work on the international legal theories of truth commissions to engage students with disabilities and advocate for access solutions at higher education institutions.

#### ACKNOWLEDGMENTS

I thank Dr. Roy L. Brooks, for his integral scholarship of civil rights theoretical frameworks and jurisprudence, which guided this

research. I express my deepest appreciation for his impact and encouragement of innovative thought and discourse in his classes.

## I. INTRODUCTION: DISPARITY IN POST-SECONDARY EDUCATION

The transformative power of education has long been proven as one of the largest factors leading to greater opportunities in political and economic life,<sup>1</sup> creating social mobility,<sup>2</sup> and reducing poverty.<sup>3</sup> Those who do not attend post-secondary education make an annual median of \$34,540, bachelor's degree holders make \$60,705, and those with doctorate degrees make more than \$101,000.<sup>4</sup> Equal opportunity in post-secondary education has become increasingly vital as poverty and educational gaps for disabled individuals have increased over the years.<sup>5</sup> Four-year college graduates aged 25 to 32 have a 3.8% unemployment rate, while high school graduates in the same age bracket have a 12.2% unemployment rate.<sup>6</sup> Similarly, only 5.8% of four-year college graduates aged 25 to 32 are in poverty, compared to 21.8% of high school graduates aged 25 to 32.<sup>7</sup> These statistics prove that post-secondary education is still a vital part of economic success in the United States.

1. See David E. Campbell, *What Is Education's Impact on Civil And Social Engagement?*, MEASURING THE EFFECTS OF EDUC. ON HEALTH AND CIVIC ENGAGEMENT: PROCEEDINGS FROM THE COPENHAGEN SYMP. 25, 25 (2006).

2. See *Education Transforms Lives*, U.N. EDUC., SCI., AND CULTURAL ORG. (2013), <https://unesdoc.unesco.org/ark:/48223/pf0000223115>.

3. See generally Yusuf Sayed, *Education and Poverty Reduction/Eradiation: Omissions, Fashions and Promises*, EDUC. & POVERTY REDUCTION STRATEGIES ISSUES OF POL'Y COHERENCE: COLLOQUIUM PROCS. 53, 53 (2008); Katharine M. Broton, *Poverty in American Higher Education: The Relationship Between Housing Insecurity and Academic Attainment*, 1 J. OF POSTSECONDARY STUDENT SUCCESS 18, 20 (2021), [https://doi.org/10.33009/fsop\\_jpss129147](https://doi.org/10.33009/fsop_jpss129147).

4. *PINC-03. Educational Attainment—People 18 Years Old and Over, by Total Money Earnings, Work Experience, Age, Race, Hispanic Origin, and Sex*, U.S. CENSUS BUREAU (Aug. 17, 2022), <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-03.html>; *PINC-03. Educational Attainment—People 25 Years Old and Over, by Total Money Earnings in 2020, Work Experience in 2020, Age Race, Hispanic Origin, and Sex*, U.S. CENSUS BUREAU (2021), [https://www2.census.gov/programs-surveys/cps/tables/pinc-03/2021/pinc03\\_1\\_1\\_1\\_1.xlsx](https://www2.census.gov/programs-surveys/cps/tables/pinc-03/2021/pinc03_1_1_1_1.xlsx).

5. See Jameel Hampton, *The 1970 Chronically Sick and Disabled Persons Act—Fifty Years On*, 35 DISABILITY & SOC'Y 831, 833 (2020) (discussing the disability legislation landscape in Great Britain and how the “pay gap” and “comparatively poor opportunities and outcomes in education and employment” continue to be issues for the disabled community).

6. Paul Taylor et al., *The Rising Cost of Not Going to College*, PEW RSCH. CTR. (Feb. 11, 2014), <https://www.pewresearch.org/social-trends/2014/02/11/the-rising-cost-of-not-going-to-college>.

7. *Id.*

Although disability is now a statutorily protected civil rights class,<sup>8</sup> the full recognition of “equal access”<sup>9</sup> in post-secondary education has been a misunderstood concept for the group.<sup>10</sup> Because education is such a vital part of civil rights law, stemming from the groundbreaking case of *Brown v. Board of Education*, it has long been a vital fighting ground for all civil rights groups and will continue to be a topic of significant importance to study.<sup>11</sup> This paper will seek to provide a holistic analysis of disparities in post-secondary education for disabled Americans.

A. *Application of Civil Rights Theories and  
Acknowledgement as Class*

This paper seeks to apply the four civil rights theories as put forth by legal scholar Dr. Roy L. Brooks adapted to disabled Americans to analyze the holistic issue of disparities in post-secondary education. Although explicitly declaring that the theories originally created for Black liberation cannot entirely transfer over to different historically marginalized groups, the application of such theories is an innovative and insightful way to analyze a civil rights group.<sup>12</sup> One must begin with a “careful definition of the post-civil rights problem facing each group.”<sup>13</sup> The determined struggle for Black civil rights was an instrumental force and archetype for all other subordinated groups in America.<sup>14</sup> “Civil rights” only came about due to the groundbreaking and arduous courage of Black individuals demanding the end to horrific enslavement, legal bases of violence and discrimination in Jim Crow, and the history of

---

8. *Guide to Disability Rights*, U.S. DEP’T OF JUST., C.R. DIV. (June 16, 2022), <https://www.ada.gov/resources/disability-rights-guide> (outlining federal laws protecting the civil rights of Americans with disabilities, such as the Americans with Disabilities Act, Individuals with Disabilities Education Act, and the Rehabilitation Act).

9. ROY L. BROOKS, *RACIAL JUSTICE IN THE AGE OF OBAMA*, xiv–xv (2009) (This paper adopts the definition of “theory” as outlined by Brooks as “Modern Civil Rights Theory,” which incorporates external (outside an individual’s control) and internal (within an individual’s control) factors that impact an individual’s civil rights.).

10. See Doris Zames Fleischer & Frieda Zames, *Disability Rights: The Overlooked Civil Rights Issue*, 25 *DISABILITY STUDIES Q.* (2005), <https://dsq-sds.org/index.php/dsq/article/view/629/806> (explaining how disabled students are often overlooked in public education).

11. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (concluding “that in the field of public education the doctrine of ‘separate but equal’ has no place”).

12. See BROOKS, *supra* note 9, at 2 (limiting the application of the civil rights analysis to only one race as each group “warrant[s] separate treatment”).

13. *Id.* at 109.

14. *Id.* at 2.

compulsory segregation. The work of Black Americans broke through an indomitable society of racism to instill in America a hugely inclusive expansion of rights with the Civil Rights Act of 1964.<sup>15</sup> Brooks' application of civil rights theories seeks to disrupt the current political, social, and economic thinking in America using the framework of scholarship instead of politically charged discussions.<sup>16</sup>

Civil rights groups cannot and should not be compared directly in any meaningful or advantageous way. This paper does not seek to in any way compare them. However, civil rights *theories* can be construed to the unique needs of each marginalized group.<sup>17</sup> Because each civil rights group, including people with disabilities, has a unique historical background, one must take each group individually, closely analyzing the history and needs of the particular group.<sup>18</sup> Although this paper will focus on disability as a civil rights group, this paper acknowledges that the majority of other recognized civil rights groups also experience disparate impacts in education.<sup>19</sup> Additionally, this paper will focus on disabled individuals, acknowledging that "disability" overlaps with other marginalized groups.<sup>20</sup> To have a complete theory for disabled civil rights, one must acknowledge how the experience of race,<sup>21</sup> color, religion or

---

15. See generally *Women's Rights and the Civil Rights Act of 1964*, NAT'L ARCHIVES, <https://www.archives.gov/women/1964-civil-rights-act> (last visited Feb. 19, 2023); Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 MINN. J. OF L. & INEQ. 163, 163 (1991); *History of the Federal Sector Equal Employment Opportunity Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Feb. 19, 2023) (In 1967, sex was included in employment discrimination. In 1973, disability was included in the definition of "discrimination" after the passage of the Rehabilitation Act. By 1979, President Carter's Executive Order 12067 included "race, color, religion, sex, national origin, age, or handicap.").

16. See generally BROOKS, *supra* note 9, at xvi.

17. See *id.* at 2.

18. See *id.*

19. See generally *id.* at xiii (discussing racial education disparities).

20. See generally Ayesha Vernon, *The Dialectics of Multiple Identities and The Disabled People's Movement*, 14 DISABILITY & SOC'Y 385, 389 (1999).

21. See generally Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L. J. F. 916, 922 (2021); Brad Lomax, *Uniting the Civil Rights and Disability Rights Communities*, THE CTR. FOR LEARNER EQUITY (Feb. 12, 2021), <https://www.centerforlearnerequity.org/news/brad-lomax-uniting-the-civil-rights-and-disability-rights-communities>.



creed,<sup>22</sup> national origin or ancestry,<sup>23</sup> sex,<sup>24</sup> gender identity,<sup>25</sup> sexual orientation,<sup>26</sup> age, veteran status,<sup>27</sup> genetic information, and citizenship may affect a disabled individual's experience.<sup>28</sup> The paper also acknowledges and seeks to remedy the historical harm caused by the disability community prioritizing white, educated, cisgender, or male voices over the voices of marginalized disabled people.<sup>29</sup> Using Brooks' "theory of completeness," this paper will analyze the four civil rights theories and use disaggregation to better articulate disparities specific to those with disabilities.<sup>30</sup>

### B. Introduction to the Study of Disability

The global number of disabled individuals is conservatively estimated as 15% of the world population, or approximately one billion individuals.<sup>31</sup> Disability population estimates are contested and yield widely varying figures.<sup>32</sup> To understand an academic discussion of disability in light of "unvarnished truth," I will be including all estimates of federally accepted disability data as two different databases

22. See generally Stephen Thompson et al., *Freedom of Religious Belief and People with Disabilities: A Case Study of People with Disabilities from Religious Minorities in Chennai, India 2* (Coal. for Religious Equal. & Inclusive Dev., Working Paper No. 7, 2021).

23. See generally James Staples, *At the Intersection of Disability and Masculinity Exploring Gender and Bodily Difference in India*, 17 J. OF THE ROYAL ANTHROPOLOGICAL INST. 545, 546 (2011).

24. See generally Angel Love Miles, "Strong Black Women": African American Women with Disabilities, *Intersecting Identities, and Inequality*, 33 GENDER & SOC'Y 41, 42 (2019).

25. See generally Ashley Mog & Amanda Lock Swarr, *Threads of Commonality in Transgender and Disability Studies*, 28 DISABILITY STUD. Q. (2008), <https://dsq-sds.org/article/view/152/152>.

26. See generally Ryan A. Miller, *Toward Intersectional Identity Perspectives on Disability and LGBTQ Identities In Higher Education*, 59 J. OF COLL. STUDENT DEV. 327, 330 (2018).

27. See generally Karli Kondo et al., *Health Disparities in Veterans: A Map of the Evidence*, 55 MED. CARE, S9, S9 (Supp. 9 2017).

28. See generally Pushpa Naidu Parekh, *Gender, Disability and The Postcolonial Nexus*, 4 Wagadu J. of Transnational Women's and Gender Studies: Intersecting Gender and Disability Perspectives in Rethinking Postcolonial Identities, 142, 147 (2007).

29. See generally Angel L. Miles et al., *An Open Letter to White Disability Studies and Ableist Institutions of Higher Education*, 37 DISABILITY STUDIES Q. (2017), <https://dsq-sds.org/article/view/5997/4686>.

30. BROOKS, *supra* note 9, at 1–2.

31. *Disability Inclusion*, THE WORLD BANK, (Apr. 14, 2022), <https://www.worldbank.org/en/topic/disability#:~:text=ResultsOne%20billion%20people%2C%20or%2015%25%20of%20the%20world's%20population%2C,million%20people%2C%20experience%20significant%20disabilities>.

32. LEX FRIEDEN, *IMPROVING FED. DISABILITY DATA 4–7* (Nat'l Council on Disability 2004); Elena M. Andresen et al., *Reliability and Validity of Disability Questions for US Census 2000*, 90 AM. J. OF PUB. HEALTH 1297, 1298 (2000).

to measure disability are used interchangeably in academia.<sup>33</sup> In the United States, there are two primary estimates of the number of disabled individuals: the Centers for Disease Control and Prevention (“CDC”) reports 26.7% of Americans are disabled,<sup>34</sup> while the United States Census Bureau (“Census”) reports 18.7% of all Americans are disabled and 12.6% of Americans have a “severe” disability.<sup>35</sup> (See fig. II). The Census also indicates 16.5% of Americans ages 21–64 are disabled.<sup>36</sup> These differing statistics are due to different definitions of disability and methodologies for counting.<sup>37</sup> Other scholars have stated the actual number of disabled individuals could be higher as many disabled individuals feel they cannot self-identify as having a disability for fear of retaliation.<sup>38</sup>

Although disability is extremely common, it is still primarily seen as a negative identity trait or “unstable category.”<sup>39</sup> Regardless of differing statistics, United States law has proclaimed “[d]isability is a natural part of the human experience.”<sup>40</sup> This paper will thus

33. BROOKS, *supra* note 9, at 1 (discussing the “unvarnished truth” as something that is difficult to find and devoid of political prejudices).

34. *United States, DC & Territories: Disability Estimates*, CTDS FOR DISEASE CONTROL & PREVENTION, <https://dhds.cdc.gov/SP?LocationId=59&CategoryId=DISEST&ShowFootnotes=true&showMode=&IndicatorIds=STATTYPE,AGEIND,SEXIND,RACEIND,NETIND&pn10=Chart,false,YR4,CAT1,BO1,,,,AGEADJPREV&pn11=Chart,false,YR4,DISSTAT,,,,PREV&pn12=Chart,false,YR4,DISSTAT,,,,AGEADJPREV&pn13=Chart,false,YR4,DISSTAT,,,,AGEADJPREV&pn14=Chart,false,YR4,DISSTAT,,,,AGEADJPREV> (last visited Feb. 22, 2023) (featuring graphs of various data points for disability status in the US, including one reflecting the fact that 26.7% of American adults have a disability).

35. MATTHEW W. BRAULT, *AMS. WITH DISABILITIES: 2010*, at 4 (U.S. CENSUS BUREAU 2012), <https://www2.census.gov/library/publications/2012/demo/p70-131.pdf>. Compare U.S. CENSUS BUREAU, *AM. CMTY. SURVEY ACCURACY OF THE DATA* (2019), [https://www2.census.gov/programs-surveys/acs/tech\\_docs/accuracy/ACS\\_Accuracy\\_of\\_Data\\_2019.pdf](https://www2.census.gov/programs-surveys/acs/tech_docs/accuracy/ACS_Accuracy_of_Data_2019.pdf), with CTDS FOR DISEASE CONTROL & PREVENTION, *BEHAV. RISK FACTOR SURVEILLANCE SYS.* (2021), [https://www.cdc.gov/brfss/annual\\_data/2020/pdf/overview-2020-508.pdf](https://www.cdc.gov/brfss/annual_data/2020/pdf/overview-2020-508.pdf) (While methodologies are different, the questions used by both federal data compilations are the same. The CDC primarily collects statistical data by phone and on samples of the adult population (18+), which may be more applicable to adult students entering post-secondary education, while the Census collects statistical data by mail and in person and samples ages 0+ onward, Census data has also had serious issues with undercounts, meaning it cannot be looked at as a completely accurate total count but rather a survey.).

36. *Id.* at 4 tbl. 1.

37. Andresen et al., *supra* note 32 at 1298.

38. See Mitchell E. Loeb et al., *Approaching the Measurement of Disability Prevalence: The Case of Zambia*, 2 *ALTER* 32, 39–40 (2008); Nick Watson, *Well, I Know This Is Going to Sound Very Strange to You, But I Don't See Myself As A Disabled Person: Identity And Disability*, 17 *DISABILITY & SOC'Y* 509, 514–16 (2002).

39. *Parallels In Time: A History of Developmental Disabilities*, THE MINN. GOVERNOR'S COUNCIL ON DEV'L DISABILITIES, <https://mn.gov/mnddc/parallels/four/4b/8.html> (last visited Feb. 22, 2023) (recognizing the historic discrimination and negative narrative around the community of people with disabilities).

40. Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(1) (2018).

be framed in the way disabled communities have been studied as a civil rights group in the law as well as the perspective of the disability community itself. Statutory protections for disabled individuals are a recent concept; thus, the aspirations and identities of disabled groups are still frequently misunderstood.<sup>41</sup> Prevailing assumptions characterize disabled individuals as untalented,<sup>42</sup> unemployable,<sup>43</sup> or uneducated.<sup>44</sup>

### C. Definition of Ableism

To further explain and define the systemic oppression of disabled students, many scholars use the term “ableism” as a word to encompass the intentional or unintentional subjugation of disabled individuals. Ableism is the “discrimination or prejudice against individuals with disabilities.”<sup>45</sup> Disabled scholar and attorney Talila A. Lewis further explains ableism as:

[a] system that places value on people’s bodies and minds based on societally constructed ideas of normality, intelligence, excellence, desirability, and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, misogyny, colonialism, imperialism and capitalism. This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person’s language, appearance, religion and/or their ability to satisfactorily [re]produce, excel and “behave.” You do not have to be disabled to experience ableism.<sup>46</sup>

---

41. See generally Damon A. Young & Ruth Quibell, *Why Rights Are Never Enough: Rights, Intellectual Disability and Understanding*, 15 *DISABILITY & SOC’Y* 747, 754 (2000).

42. Joey Pagano, *Ableism Is Everywhere—Even the Paralympics*, *SYRACUSE POST-COURIER* (Sept. 17, 2021, 10:28 AM), <https://www.syracuse.com/opinion/2021/09/ableism-is-everywhere-even-the-paralympics-guest-opinion-by-joey-pagano.html>.

43. See generally Philippe T.J.H. Nelissen et al., *How and When Stereotypes Relate to Inclusive Behavior Toward People With Disabilities*, 27 *THE INT’L J. OF HUM. RES. MGMT.* 1610, 1613 (2016).

44. See generally Samantha G. Daley & Gabrielle Rappolt-Schlichtmann, *Stigma Consciousness Among Adolescents with Learning Disabilities: Considering Individual Experiences of Being Stereotyped*, 41 *LEARNING DISABILITY Q.* 200, 200 (2018).

45. *Ableism*, *MERRIAM-WEBSTER*, <https://www.merriam-webster.com/dictionary/ableism> (last visited Feb. 22, 2023).

46. Talila A. Lewis, *January 2021 Working Definition of Ableism*, *TL’S BLOG* (Jan. 1, 2021), <https://www.talilalewis.com/blog/january-2021-working-definition-of-ableism>.

Disabled individuals are often seen as an inferior group that needs a non-disabled representative to make policy decisions for the group itself.<sup>47</sup> Many well-meaning, able-bodied individuals have often spoken for the community, and the lack of research into the needs of disabled individuals has led to inaccurate perceptions of the disabled community.<sup>48</sup> Allowing disabled scholars such as Talila Lewis to inform us of the social, political, economic, and cultural norms within the insular group of disability can provide a realistic and accurate representation instead of merely “sensitizing” information to appeal to non-disabled individuals.<sup>49</sup>

#### *D. Definition of Disability*

As shown in statistics and legal arguments,<sup>50</sup> the definition of disability itself has been a contested subject; therefore, laying a groundwork is helpful to achieve a more complete understanding of the group.<sup>51</sup> Society has often separated disabled persons into two different sectors: physical or visible and mental or invisible.<sup>52</sup> Indeed, individuals with “visible” versus “invisible” disabilities often experience different types of subordination.<sup>53</sup> For example, invisible disabilities are associated with higher degrees of implicit bias,<sup>54</sup>

---

47. Gisela Schulte Agyeman, *White Researcher-Black Subjects: Exploring the Challenges of Researching The Marginalised And 'Invisible'*, 6 ELEC. J. OF BUS. RSCH. METHODS 77, 82 (2008) (discussing the importance of being able to share the perspective of the community that is central to the research or writing); see also Melanie Chapman et al., *Speaking Up About Advocacy: Findings From A Partnership Research Project*, 40 BRITISH J. OF LEARNING DISABILITIES 71, 78 (2012) (encouraging independent advocacy as most effective for disabled individuals).

48. A.J. Withers et al., ROUTLEDGE HANDBOOK OF RADICAL POL., 120, 189 (2019).

49. Lennard J. Davis, THE DISABILITY STUD. READER 5 (2006), [https://uniteyouthdublin.files.wordpress.com/2015/01/lennard\\_davis\\_the\\_disability\\_studies\\_reader\\_secbookzz-org.pdf](https://uniteyouthdublin.files.wordpress.com/2015/01/lennard_davis_the_disability_studies_reader_secbookzz-org.pdf).

50. See generally Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILLANOVA L. REV. 345, 404–05 (1997).

51. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 405–06 (2000).

52. Bruce H. Gross & Harlan Hahn, *Developing Issues in the Classification of Mental and Physical Disabilities*, 15 J. OF DISABILITY POL'Y STUD. 130, 131 (2004).

53. See Sheila Riddell & Elisabet Weedon, *Disabled Students in Higher Education: Discourses of Disability and the Negotiation of Identity*, 63 INT'L J. OF EDUC. RES. 38, 38–39 (2014).

54. Jenna A. Harder et al., *Demographic, Experiential, and Temporal Variation in Ableism*, 75 J. OF SOC. ISSUES 683, 700 (2019).

while visible disabilities are associated with higher degrees of microaggressions.<sup>55</sup>

However, from a macro perspective, these are simply examples of the overall discrimination towards disabled individuals, and both groups experience implicit bias and microaggression.<sup>56</sup> In addition, separating such a group does not take into consideration that many people with “visible” disabilities can simultaneously have “mental” or “emotional” disabilities and vice versa.<sup>57</sup> This separation does not factor in temporary disabilities, neurodiversity, developmental, and chronic disabilities—all of which may blur the lines between the two sectors.<sup>58</sup>

This paper argues that socially constructed lines between different types of disability can be traded for a holistic analysis of the disabled community as a legal civil rights group.<sup>59</sup> The historic combination of disability into one sociocultural group assisted in the passage of the Americans with Disabilities Act (“ADA”).<sup>60</sup> The passage of disability legislation has extended rights to people with all “types” of disabilities in public accommodations, employment, and other societal institutions.<sup>61</sup>

For simplicity, this paper will loosely use the international definition of disability found in the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”): “persons with disabilities include those who have long-term physical, mental,

---

55. Shanna Katz Kattari, *Development of the Ableist Microaggression Scale and Assessing the Relationship of Ableist Microaggressions with the Mental Health of Disabled Adults*, 1283 ELEC. THESES AND DISSERTATIONS 1, 88-89 (2017).

56. For example, a noticeably physically disabled person may be a target of stigma based on the visual cues others identify, denying them equal opportunity. However, someone with an invisible disability will experience the same societal stigma that interprets their lack of physical symptoms as an absence of a disability, denying them equal opportunity and resulting in the same forgone conclusion.

57. Noah Fromson, *Mental Health is an Issue for People with Spinal Cord Injury. Chronic Pain Makes It Worse*, U. OF MICH. HEALTH (Feb. 7, 2022, 2:11 PM), <https://labblog.uofmhealth.org/lab-notes/mental-health-an-issue-for-people-spinal-cord-injury-chronic-pain-makes-it-worse> (discussing the overlap of visible spinal cord injuries with invisible psychological issues such as depression and anxiety).

58. See e.g., *id.* (demonstrating chronic pain from spinal cord injuries as on such disability where visible and invisible lines are often blurred).

59. Americans With Disabilities Act Of 1990, Pub. L. No. 101-336, 104 Stat. 327, 337 (1990) (codified as amended at 42 U.S.C. § 12112) (“The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.”).

60. NAT’L COUNCIL ON DISABILITY, EQUAL. OF OPPORTUNITY: THE MAKING OF THE AMS. WITH DISABILITIES ACT 66 (2010), <https://files.eric.ed.gov/fulltext/ED512697.pdf>.

61. *Id.* at 66–67.

intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>62</sup> The CRPD has been ratified by 181 countries,<sup>63</sup> and it was crafted by global disabled leaders.<sup>64</sup> This definition is arguably the closest one can come to homogenizing “disability” as a civil rights group across a multitude of contexts.<sup>65</sup> This paper will discuss disability in accordance with this framework.

### *E. Historical Background on Classifying Disability as a Civil Rights Group*

Tracing historical events help illustrate the formation of the concept of disability and how disability became a statutorily protected class. History helps us understand why disabled students experience barriers to secondary education. Although a complete, overarching view of disability history and theory cannot be discussed in this paper, this paper seeks to provide a brief overview to establish a ground that future analysis can rest on.

#### i. Origins

The term “disability” has historically been a label of inferiority to any individual *regardless* of “actual” medical impairment.<sup>66</sup> Censuses and analyses of national and state populations historically used “disability” to categorize immigrants and criminals as “defective, dependent, and delinquent.”<sup>67</sup> Physicians used words like “disability” to identify LGBTQ+ individuals as being inferior or

62. G.A. Res. 61/106, annex, art. 1, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

63. CRPD List of Countries by Signature: Confirmation: Accession: Ratification, DISABLED WORLD, (Feb. 27, 2020), <https://www.disabled-world.com/disability/discrimination/crpd-milestone.php> (Although the CRPD was brought to the U.N. by the U.S., the U.S. is one of nine countries that is a signatory of the CRPD but not yet ratified the CRPD. A full list of countries that have signed but not ratified the CRPD includes the United States, Bhutan, Cameroon, Lebanon, Solomon Islands, St. Lucia, Tajikistan, Tonga, and Uzbekistan.).

64. Arlene S. Kanter, *Do Human Rights Treaties Matter: The Case for the United Nations Convention on the Rights of People with Disabilities*, 52 VAND. J. OF TRANSNAT'L L., 577, 609 (2019).

65. See U.N. Dep't of Econ. & Soc. Affairs, *Convention on the Rights of Persons with Disabilities (CRPD)*, UNITED NATIONS, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited Mar. 12, 2022).

66. Douglas C. Baynton, *THE DISABILITY STUD. READER* 33, 34–37 (4th ed. 2013).

67. James W. TRENT JR., *INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES* 70, 78 (1994), <http://tankona.free.fr/trent1994.pdf>.

abnormal.<sup>68</sup> During the antebellum period, the complexity of disability was doubled by the lens of “racial inferiority” and so-called “natural defectiveness” of race, where those who actually were medically disabled or became disabled as result of the horrors of slavery were labeled in terms of their economic value that “gauged the effects of disability on a slave’s value as property.”<sup>69</sup> Enslaved Black individuals were viewed as disabled not only when they were deemed “unprofitable” but also when they did not hold up to white societal expectations.<sup>70</sup> Women were seen as mentally and physically unfit compared to men, particularly in historically male jobs.<sup>71</sup> These ableist narratives continue to be preserved in the systematic racial, homophobic, xenophobic, and sexist discrimination in the United States.<sup>72</sup>

## ii. Pre-Civil Rights

Pre-civil rights, institutionalization was the primary educator for disabled Americans.<sup>73</sup> In fact, some laws made it a criminal act for parents to ask for their disabled child to be in non-disabled public schools.<sup>74</sup> Forced institutionalization in the United States has historically tried to conceal, suppress, humiliate, and isolate disability.<sup>75</sup> As the productivity of the physical body became a commodity, disabled individuals were forcefully sent away to be exhibited for other’s sport.<sup>76</sup> Later, in tandem with United States population growth, asylums and jails housed disabled individuals, subjecting them to

68. Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 566 (2015).

69. David M. Turner, *African American Slavery and Disability: Bodies, Property, and Power in The Antebellum South, 1800–1860*, 29 DISABILITY & SOC’Y 1505–06 (2014) (internal quotation marks omitted).

70. Heidi M. Hackford, *Malingering: Representations of Feigned Disease in American History, 1800–1920* (2004) (Ph.D. dissertation, American University) (on file with American University Library).

71. See J. McGrigor Allan, *On the Real Differences in the Minds Of Men and Women*, 7 J. OF THE ANTHROPOLOGICAL SOC’Y OF LONDON cxcv, cxcvii (1869).

72. See generally Baynton, *supra* note 66, at 34.

73. See generally *id.* at 21 (identifying two primary issues identified by disability rights organizations: “institutionalization and education”).

74. See Mark C. Weber, *Disability and The Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV., 889, 901 (2000).

75. See William Bronston, *Physician-Advocate for People with Cognitive and Developmental Disabilities: Exposing Conditions at Willowbrook State School in New York, Medical Director and Consultant for the State of California*, ONLINE ARCHIVE OF CAL. (2004), <https://oac.cdlib.org/view?docId=hb187001cx&brand=oac4&doc.view=entiretext>.

76. See *id.* (describing how disabled individuals were treated with less dignity than some animals, let alone humans).

inhumane conditions.<sup>77</sup> As a result, public institutionalization became commonplace, and disabled persons were isolated from their able-bodied counterparts.<sup>78</sup> This mass institutionalization in the nineteenth century dehumanized disabled persons, eventually birthing the eugenics movement.<sup>79</sup>

When speaking of eugenics, the eradication of and medical experimentation on Jewish, disabled, and LGBTQ+ individuals in Nazi Germany is the most pernicious example. But notably, the United States was the first country to implement sweeping eugenics-based sterilization laws.<sup>80</sup> Eugenics became an academic pursuit, curbing the population through sterilization of any “inferior” individuals.<sup>81</sup>

Eugenics was heavily taught in schools.<sup>82</sup> Many students were given “eugenic evaluations” to determine whether they had “unfit human traits.”<sup>83</sup> Of course, this pseudoscience defined “unfit” specifically to keep the white hegemonic society in power.<sup>84</sup> Thus, anyone that did not fit into the white, middle-class hegemonic mainstream (people of color, disabled, immigrants, LGBTQ+, and poor individuals), was determined to be “unfit.”<sup>85</sup> Traits like “feble-mindedness,” “insanity,” and “epilepsy” were specifically targeted.<sup>86</sup>

77. Jeffrey L. Geller, *Excluding Institutions for Mental Diseases from Federal Reimbursement For Services: Strategy Or Tragedy?*, 51 *PSYCHIATRIC SERV.* 1397, 1397–98 (2000) (“More than nine-thousand idiots, epileptics, and insane in these United States, destitute of appropriate care and protection. Bound with galling chains, bowed beneath fetters and heavy iron balls, attached to drag-chains, lacerated with ropes, scourged with rods, and terrified beneath storms of profane execrations and cruel blows; now subject to jibes, and scorn, and torturing tricks, now abandoned to the most loathsome necessities or subject to the vilest and most outrageous violations.”).

78. See *Parallels In Time: A History of Developmental Disabilities*, THE MINN. GOVERNOR’S COUNCIL ON DEV’L DISABILITIES, <https://mn.gov/mnddc/parallels/four/4b/8.html> (last visited Feb. 24, 2023).

79. See Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 *DUKE L. J.*, 427, 427–34 (2018); see also David Pfeiffer, *Eugenics and Disability Discrimination*, 9 *DISABILITY & SOC’Y* 481, 489–95 (1994).

80. Robert A. Wilson, *DEHUMANIZATION, DISABILITY, AND EUGENICS* 173, 174 (Maria Kronfeldner ed., 2021); see also Julian Huxley, *The Vital Importance of Eugenics*, 163 *HARPER’S MONTHLY* 324, 324–31 (1941) (providing an example of a published article displaying U.S. eugenics propaganda in the 1940s).

81. See generally Steven Selden, *Eugenics and the Social Construction of Merit, Race and Disability*, 32 *J. CURRICULUM STUD.* 235, 237–38 (2000).

82. *Id.* at 235.

83. *Id.* at 237.

84. *Id.* at 240–41.

85. See generally *id.* at 237, 241.

86. *Id.* at 242.



By the late 1800s, municipalities began banning people with disabilities from public areas.<sup>87</sup> These so-called “Ugly Laws” targeted “overlapping categories of poor, homeless, and those with visible disabilities.”<sup>88</sup> Ugly Laws were primarily enforced during the early 1900s but continued to be enforced into 1974, when the arrest of a man with visible scars on his body led to protests and the eventual overturning of the laws.<sup>89</sup>

People with visible disabilities were criminalized for going in public, but people with invisible or mental disabilities were even more isolated from society.<sup>90</sup> Institutionalization and Ugly Laws both segregated visibly disabled persons from the general public.<sup>91</sup> Although the basis for the start of institutionalization is contested by scholars, it was likely a combination of lack of economic resources combined with a moral desire to solve the horrendous conditions of makeshift, already-existing institutions.<sup>92</sup> But by the late 1800s, newly constructed institutions were overcrowded, due to the stigmatization of mentally disabled individuals.<sup>93</sup> The institutions’ missions changed from “rehabilitating patients with mental illness and sending them back to their home communities” to sequestering patients away from society.<sup>94</sup> By 1967, institutions in the United States were estimated to house 194,650 individuals.<sup>95</sup>

### iii. Post-Civil Rights

The passage of the ADA in 1990 ushered in the post-civil rights era for the disabled community.<sup>96</sup> Out of this law rose the most comprehensive disability rights law dedicated to giving equal

87. See Susan M. Schweik & Robert A. Wilson, *Ugly Laws*, EUGENICS ARCHIVES (Feb. 5, 2015), <https://eugenicsarchive.ca/discover/tree/54d39e27f8a0ea4706000009>.

88. *Id.*; Marcia Pearce Burgdorf & Robert Burgdorf Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a Suspect Class under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 863–64 (1975).

89. SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUB. 6* (2009) (explaining how the man was arrested under the guise of visible scars but was targeted for being unhoused, another stigmatized class).

90. See Appleman, *supra* note 79, at 422.

91. See *id.* at 421; see also Schweik & Wilson, *supra* note 87.

92. See generally PLINY EARLE, *THE CURABILITY OF INSANITY: A SERIES OF STUD.* (1877); Lawrence Goodheart, “*The Glamour of Arabic Numbers*”: Pliny Earle’s Challenge to Nineteenth-Century Psychiatry, 71 J. HIST. MED. & ALLIED SCI. 173, 181 (2015).

93. See Goodheart, *supra* note 92, at 183 (noting that overcrowding “undermined the premise that prompt hospitalization facilitated recovery”).

94. David L. Braddock & Susan L. Parish, *AN INST’L HIST. OF DISABILITY* (Gary L. Albrecht et al. eds., 2001), <https://omnilogos.com/institutional-history-of-disability>.

95. *Id.*

96. See *id.*

access to 20% of the United States population. The ADA is modeled after the Civil Rights Act of 1964 (*see* Table 1).<sup>97</sup> It provides that disabled individuals are:

a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>98</sup>

Similarly, the ADA addresses discrimination in all five areas originally in the Civil Rights Act.<sup>99</sup> (*See* Table 1).<sup>100</sup>

There is no doubt the ADA has changed the lives of disabled Americans. Nevertheless, the ADA still has many loopholes that permit discrimination, like the restrictions on covered disabilities,<sup>101</sup> vagueness in employment claims,<sup>102</sup> federal government agencies,<sup>103</sup> public walkways,<sup>104</sup> airline transportation,<sup>105</sup> or corporations with

97. *See generally id.*; 42 U.S.C. § 2000(d) et seq. (1964).

98. Americans with Disabilities Act, 42 U.S.C. §12101(a)(7) (1990).

99. *See* Christine J. Back, *The Civil Rights Act of 1964: Eleven Titles at a Glance*, CONG. RSCH. SERV. (Dec. 14, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11705#~:text=Title%20V%3A%20The%20U.S.%20Commission%20on%20Civil%20Rights&text=Among%20other%20operational%20matters%2C%20Title,are%20codified%20at%2042%20U.S.C.> (outlining how the Civil Rights Act addresses discrimination in voting, public accommodations, education, federal funding, and employment).

100. *See generally id.*; Richard B. Simring, *The Impact of Federal Antidiscrimination Laws on Housing for People with Mental Disabilities*, 59 GEO. WASH. L. REV. 431, 431 (1991) (discussing how the Civil Rights Act was amended to include fair housing discrimination, as reflected in Table 1).

101. Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1268 (2009).

102. Nicole Buonocore Porter, *The New ADA Backlash*, 82(1) TENN. L. REV. 1, 68, 73–75 (2014).

103. 42 U.S.C. § 12111(5)(B)(i) (The ADA does not apply to the executive branch of the federal government.).

104. Robin Paul Malloy & Sarah K. Spencer, *Sidewalks and The Americans with Disabilities Act*, 41 ZONING AND PLAN. L. REPS. 1, 2 (2018) (The ADA does not require cities to construct sidewalks in public spaces or residential neighborhoods).

105. Nondiscrimination on the Basis of Disability in Air Travel, 14 C.F.R. § 382.1 (2009); Air Carrier Access Act, 14 C.F.R. pt. 382, 49 U.S.C. § 41705 (Airlines have been exempted from the ADA, affecting disabled Americans' right to travel. Instead, the airlines

fewer than fifteen employees.<sup>106</sup> In addition, enforcement of the ADA falls to disabled individuals to bring the enforcement actions in court,<sup>107</sup> leading to a lack of civil rights implementation.<sup>108</sup> Essentially, the *only* established method to address unequal access through the ADA is a private lawsuit.<sup>109</sup> Research shows that in fiscal year 2020, only 1.7% of ADA civil rights cases litigated with the Equal Employment Opportunity Commission (“EEOC”) were successfully won by the plaintiff,<sup>110</sup> and 63.9% claims of discrimination were simply dismissed.<sup>111</sup> In educational discrimination, post-secondary institutions won 81% of the time when the students filed discrimination claims against their institution.<sup>112</sup> Discriminatory treatment cases showed an even higher institutional success rate, with the institution winning of 87.7% of the time.<sup>113</sup>

Post-civil rights, infamous law and culture stereotypes still hold the predominant narrative and perception of disabled students through eugenics,<sup>114</sup> the medical model,<sup>115</sup> and Ugly Laws.<sup>116</sup> Indeed, *Buck v. Bell*—a eugenics case involving a woman who was forcibly sterilized for being “disabled” and “inferior”—has yet to be

are subject to the Air Carrier Access Act, which was passed in 1986. Unfortunately, this law is distinct and detached from the ADA, causing disparities in flying. The Air Carrier Access Act is in need of serious updates, as shown by the colossal amount of discrimination complaints and assistive and mobility devices receiving extensive damage by airlines.).

106. 42 U.S.C. § 12111(5)(A).

107. David M. Perry, *Why Congress Is Close To Gutting A Key Provision Of The ADA*, PAC. STANDARD (Feb. 14, 2018), <https://psmag.com/social-justice/congress-is-close-to-gutting-a-key-provision-of-the-ada> (noting that “[w]hile there is a small division in the Department of Justice (DOJ) doing some oversight, the ADA generally depends on private citizens bringing complaints through damages-free lawsuits”).

108. *Id.* (noting that the limited avenues of recourse under the ADA are being threatened); Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 9–20 (2006) (noting the weak incentives to bring ADA enforcement actions).

109. *Id.* at 10 (“Because the government does not fully enforce the ADA, private enforcement is essential.”).

110. *Americans with Disabilities Act of 1990 (ADA) Charges (Charges filed with EEOC) (includes concurrent charges with Title VII, ADEA, EPA, and GINA) FY 1997–FY 2021*, EEOC, <https://www.eeoc.gov/statistics/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent> (last visited Feb. 24, 2023).

111. *Id.*

112. Margaret M. McMennamin & Perry A. Zirkel, *OCR Rulings Under Section 504 and the Americans with Disabilities Act: Higher Education Student Cases*, 16 J. POSTSECONDARY EDUC. & DISABILITY 55, 58 tbl.2 (2003).

113. *Id.*

114. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

115. Paul Harpur, *From Universal Exclusion to Universal Equality: Regulating Ableism in a Digital Age*, 40 N. KY. L. REV. 529, 534–35 (2013).

116. SCHWEIK, *supra* note 89, at 1–20.

fully overturned by the Supreme Court.<sup>117</sup> This shows a lack of priority for disabled autonomy.<sup>118</sup>

*Bell* was a case brought to the Court after a long legal battle trying to label Ms. Buck as inferior so the state of Virginia could forcefully sterilize her. Because of deeply held prejudices about preventing people deemed inferior from procreating, the Court decided Ms. Buck was “manifestly unfit” to procreate, although later information showed that the label of “feeble-mindedness” was based on the fact Buck had become pregnant out of wedlock when she was raped.<sup>119</sup> At the time, out-of-wedlock pregnancy was enough to declare she needed to be sterilized as it was considered taboo to have an “illegitimate” child.<sup>120</sup>

The Supreme Court’s 8-1 decision in *Bell* upholding a state’s right to compulsory sterilize facilitated the forceful sterilization of disabled Americans and created precedent to sanction the sterilization of Japanese women in U.S. concentration camps during World War II and a state’s right to forcefully sterilize prisoners.<sup>121</sup> Horrifi- cally, the case continues to rear its head post-civil rights, denying au- tonomy.<sup>122</sup> Many small and unknown cases, like one heard by the Iowa Supreme Court in 2014,<sup>123</sup> hold disabled individuals can still be forcefully sterilized as long as there is court approval.<sup>124</sup> In 2020, a prominent case hit the news when a whistleblower reported that medical staff performed forced sterilization while simultaneously

117. *The Right to Self-Determination: Freedom from Involuntary Sterilization*, DISABILITY JUST. (2023), <https://disabilityjustice.org/right-to-self-determination-freedom-from-involuntary-sterilization> (noting that while the case was never overturned, “state statutes such as the one upheld in *Buck v. Bell* have been repealed, and its reasoning has been undermined by a subsequent Supreme Court decision striking down a law providing for involuntary steriliza- tion of criminals”).

118. See generally Hilary Eisenberg, *The Impact of Dicta in Buck v. Bell*, 30 J. CONTEMP. HEALTH L. & POL’Y 184, 195–98 (2013) (explaining how state standards for sterilization are extremely varied, though the concept overall is disfavored).

119. Nathalie Antonios & Christina Raup, *Buck v. Bell (1927)*, EMBRYO PROJECT ENCYCLOPEDIA (2018), <http://embryo.asu.edu/handle/10776/2092>, <https://embryo.asu.edu/pages/buck-v-bell-1927#:~:text=In%201927%2C%20the%20US%20Supreme,defects%20to%20the%20next%20generation.>

120. *Id.*

121. See generally NANCY ORDOVER, AM. EUGENICS: RACE, QUEER ANATOMY, AND THE SCI. OF NAT’LISM 160 (2003) (discussing Representative Jed Johnson’s proposal “to sterilize Jap- anese-American internees” during the eugenics movement surrounding WWII).

122. See generally Eisenberg, *supra* note 118, at 195–96 (discussing *Buck v. Bell* in rela- tionship with other reproductive rights cases, such as *Roe v. Wade*).

123. *In re Guardianship of Kennedy*, 845 N.W.2d 707, 708 (Iowa 2014).

124. *Id.*

refusing necessary medical treatment of immigrants with disabilities.<sup>125</sup> Even with many sterilization laws now overturned, many of the same unfavorable attitudes remain.<sup>126</sup> This creates a persistent trope that disability equals incompetence and otherness, continuing to harm the polyethnic disabled community, especially LGBTQ+, Black, Brown, poor, migrant, indigenous, and unhoused students with disabilities.<sup>127</sup>

The blur between institutionalization and prison from the beginning of disabled history has had lasting effects in modern life.<sup>128</sup> Attitudes toward institutionalized or imprisoned disabled individuals leads to a disability invisibility.<sup>129</sup> This concept of disability invisibility is present in education; for example, students facing mental health issues are forced by post-secondary institutions into missing large amounts of school, improper treatment, or be kicked out of their programs entirely, contrary to medical advice<sup>130</sup> that deems them suitable for post-secondary education.<sup>131</sup> Another example is the school-to-prison pipeline.<sup>132</sup> In fact, the National

125. Jeremy Redmon, *Whistleblower blasts Georgia Immigration Detention Center's COVID-19 Response*, ATLANTA J.-CONST. (Sept. 14, 2020), <https://www.ajc.com/news/whistleblower-blasts-georgia-immigration-detention-centers-covid-19-response/G32IMGY3CBHRZF5G32GCNE6L5E>.

126. See Katie Eyer, *Claiming Disability*, 101 BOSTON U. L. REV. 547, 559 (2021) (discussing the widespread stigma and bias around disability).

127. See *id.* at 559–61 (discussing the damaging narrative which portrays disability as a negative characteristic).

128. See LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, *DISABILITIES REPORTED BY PRISONERS 1* (2021), <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016> (stating that 38% of prisoners self-report as having a disability).

129. See Karen P. DePauw, *The (In)Visibility of Disability Cultural Contexts and "Sporting Bodies"*, 49 QUEST 417, 424 (1997) (discussing the concept of "invisibility of disability" within the context of sports); Joy Banks, *Invisible Man: Examining the Intersectionality of Disability, Race, & Gender In An Urban Community*, 33 DISABILITY & SOC'Y 894, 901 (2018) (showing how both disability, and the intersection of disability, race, and gender or other "double jeopardy" minorities renders an individual often more invisible).

130. See e.g., Sarah Butrymowicz, *Sent Home Early: Lost Learning in Special Education*, THE HECHINGER REP. (Mar. 25, 2021), <https://hechingerreport.org/sent-home-early-lost-learning-in-special-education> (discussing how disabled children are often sent home as "discipline" for not being able to "handle full days") (internal quotations omitted).

131. See Abigail Napp & Harsha Nahata, *The Dismal Academic Record*, NYCITY NEWS SERV., <https://campusmentalhealth.nycitynewsservice.com> (last visited Feb. 25, 2023); Order Dismissing Action at \*1, *Mental Health & Wellness Coal. v. Stanford Univ.*, No. 5:18-cv-02895-NC (N.D. Cal. Oct. 29, 2019) (paying particular attention to the joint dismissal in agreement of settlement); Elena Kadvanly, *Lawsuit: Stanford Violated Students' Rights in Mental Health Response*, PALO ALTO WKLY. (May 25, 2018, 8:46 AM), <https://www.paloaltoonline.com/news/2018/05/18/lawsuit-stanford-violated-students-rights-in-mental-health-response>.

132. *BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES 5* (2015), [https://ncd.gov/sites/default/files/Documents/NCD\\_School-to-PrisonReport\\_508-PDF.pdf](https://ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf).

Council on Disability has acknowledged the school-to-prison pipeline cannot be addressed without acknowledging a disability framework as both students with disabilities and multi-marginalized students stereotyped with disabilities are much more likely to be labeled as noncompliant.<sup>133</sup> Consequently, the ADA has yet to be a cure for all discrimination.

*F. The Empirical Case for Disparate Post-Secondary Education*

Disabled people have historically possessed fewer educational opportunities.<sup>134</sup> Laws that promoted institutionalization instead of equal opportunity eliminated adequate education for people with disabilities.<sup>135</sup> Although courts have created strong precedent for K-12 equal access,<sup>136</sup> the area of higher education is still fiercely litigated across ideological and legal aisles.<sup>137</sup> Prophylactic access laws like the Individuals with Disabilities Education Act (“IDEA”)<sup>138</sup> do not apply to post-secondary education.<sup>139</sup> Thus, when students transition to college, only retroactive discrimination laws and protections apply, and one must be discriminated against before any solutions can occur.<sup>140</sup>

133. See *id.* at 6, 47–50.

134. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 774–75 (describing the purpose for the law, which is for the federal government to assist state and local governments in providing programs “to meet the educational needs of handicapped children in order to assure equal protection of the law.”).

135. *Id.* at 781 (discussing the priority to educate children with disabilities alongside all other children and ensuring that “special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”).

136. *Pennsylvania Ass’n. for Retarded Child. v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257, 1266 (E.D. Pa. 1971); *Mills v. Bd. of Educ. of District of Columbia*, 343 F. Supp. 866, 880 (D.D.C. 1972).

137. See generally *Your Rights in College*, DISABILITY RTS. N.C. (Apr. 27, 2021), <https://disabilityrightsncc.org/resources/your-rights-in-college/#:~:text=From%20High%20School%20to%20College,-Public%20elementary%2C%20middle&text=Public%20schools%20must%20also%20accommodate%20all%20students%20with%20disabilities> (explaining how access to college education is not protected by the same laws as K-12 public education; instead, colleges have “different responsibilities”).

138. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.

139. Joseph W. Madaus, *Navigating the College Transition Maze: A Guide for Students with Learning Disabilities*, 37 TEACHING EXCEPTIONAL CHILD. 32, 33 (2005) (“Thus, as with an IEP, the services outlined in a secondary-level Section 504 plan end at graduation from high school. Although colleges may use these plans in decision making, they are not obligated to follow the requirements of these plans.”).

140. See Suzanne E. Eckes & Theresa A. Ochoa, *Students with Disabilities: Transitioning from High School to Higher Education*, 33 AM. SECONDARY EDUC. 6, 8–9 (2005).

Even with lack of legal and social support when transitioning to post-secondary education, disabled students have made significant progress in attending four-year colleges.<sup>141</sup> Current data estimates around 19% of undergraduate students are disabled.<sup>142</sup> While other data state about 11.1% of undergraduate students are disabled,<sup>143</sup> these percentages are similar to the adult percentage of 19–26% of Americans who are disabled.<sup>144</sup> Unfortunately, this data does not tell the full story, as disabled students drop out at much higher rates than their non-disabled colleagues.<sup>145</sup> Other studies show students with pre-existing disabilities are less likely to enroll in college to begin with.<sup>146</sup> In educational attainment, disabled individuals trail behind their non-disabled counterparts in all states. (See Figure VI).<sup>147</sup> It is vital to examine the full complexity of degree completion. People who do not finish their degree have median annual earnings of just \$39,362, over \$20,000 less than those who receive a bachelor's degree,<sup>148</sup> limiting a disabled person's economic position.<sup>149</sup>

Only 10.9% of disabled Americans have a four-year degree, compared to 22% of the non-disabled population.<sup>150</sup> Disabled students are even less represented in post-baccalaureate programs. The largest percentage estimate found only 11.9% of post-grad students are disabled.<sup>151</sup> Graduate degree attainment of disabled students is

141. See *Fast Facts: Students with Disabilities*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=60> (last visited Mar. 13, 2022).

142. *Id.*

143. JAY TIMOTHY DOLMAGE, *ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION* 22 (2017).

144. *Disability and Health Data System (DHDS)*, CTRS. FOR DISEASE CONTROL & PREVENTION (2019), <https://dhds.cdc.gov/SP?LocationId=59&CategoryId=DISEST&ShowFootnotes=true&showMode=&IndicatorIds=STATTYPE,AGEIND,SEXIND,RACEIND,VETIND&pn10=Chart,false,YR4,CAT1,BO1,,,,AGEADJPREV&pn11=Chart,false,YR4,DISSTAT,,,,PREV&pn12=Chart,false,YR4,DISSTAT,,,,AGEADJPREV&pn13=Chart,false,YR4,DISSTAT,,,,AGEADJPREV&pn14=Chart,false,YR4,DISSTAT,,,,AGEADJPREV>; BRAULT, *supra* note 35, at 4.

145. Janet E. Rosenbaum, *Disabilities and Degrees: Identifying Health Impairments that Predict Lower Chances of College Enrollment and Graduation In A Nationally Representative Sample*, 46 *CMTY. COLL. REV.* 145, 158 (2018).

146. *Id.* at 154.

147. INST. ON DISABILITY, 2019 ANNUAL DISABILITY STAT. COMPENDIUM 140 (2020) (The data represents the civilian, noninstitutional population. The study is based on a sample and subject to sampling variability.).

148. *PINC-03. Educational Attainment-People 18 Years Old and Over, by Total Money Earnings, Work Experience, Age, Race, Hispanic Origin, and Sex*, *supra* note 4.

149. See generally *id.*

150. INST. ON DISABILITY, *supra* note 145, at 140.

151. *Fast Facts: Students with Disabilities*, *supra* note 139.

much lower than non-disabled students in every U.S. state (See Figure VII.)

Over the years, the gap between disabled and non-disabled students has increased. (See Figure IX, X, and XI for a comparison between 2010, 2015, and 2020 data sets of educational attainment). In 2010, 33% of non-disabled students received four-year degrees compared to 15% of disabled students. (See Figure IX). However, in 2020, 41% of non-disabled adults received a four-year degree compared to only 18% of disabled adults.<sup>152</sup> (See Figure XI). In addition, 20% of disabled Americans do not have a high school diploma, compared to 9.8% of the overall population (See Figure VIII).<sup>153</sup>

While on campus, 23% of disabled students report witnessing disability discrimination.<sup>154</sup> Disabled students' overall level of comfort on campus was 10% lower than their non-disabled peers.<sup>155</sup> During post-secondary education, few disabled students seek accommodations because of potential denial or because the generic list of accommodations given by disability centers are too poor of quality to truly help and may not even truly apply to one's disability.<sup>156</sup> For example, extended time or a notetaker, common accommodations, may not truly meet the needs of the disabled student but rather an amorphous approach to create some semblance of assistance.<sup>157</sup>

152. See *Total Number of Persons 25 to 64 Years Old, Number with Disabilities, and Percentage with Disabilities, by Highest Level of Educational Attainment and Other Selected Characteristics: 2010 and 2020*, NAT'L CTR. FOR EDUC. STAT. (July 2021), [https://nces.ed.gov/programs/digest/d20/tables/dt20\\_104.75.asp](https://nces.ed.gov/programs/digest/d20/tables/dt20_104.75.asp).

153. INST. ON DISABILITY, *supra* note 145, at 138 tbl.13.5.

154. WENDY S. HARBOUR & DANIEL GREENBERG, NCCSD RSCH. BRIEF: CAMPUS CLIMATE & STUDENTS WITH DISABILITIES 6 (2017), <http://files.eric.ed.gov/fulltext/ED577464.pdf>.

155. *Id.* at 5 fig.1.

156. See Barbara S. S. Hong, *Qualitative Analysis of the Barriers College Students with Disabilities Experience in Higher Education*, 56 J. COLL. STUDENT DEV. 209, 220–21 (2015); Laura Marshak et al., *Exploring Barriers to College Student Use of Disability Services and Accommodations*, 22 J. POSTSECONDARY EDUC. & DISABILITY 151, 157–58 (2010); LYNN NEWMAN ET AL., *THE POST-HIGH SCHOOL OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO 8 YEARS AFTER HIGH SCHOOL* 32 fig.10 (2011), <https://ies.ed.gov/ncser/pubs/20113005/pdf/20113005.pdf> (highlighting the issue of individuals choosing not to get accommodations, because while 87% of disabled students received accommodations in high school, only 19% of disabled students received accommodations in postsecondary education).

157. See Marshak et al., *supra* note 154, at 157; Allison R. Fleming et al., *Student Voices: Recommendations for Improving Postsecondary Experiences of Students with Disabilities*, 30 J. OF POSTSECONDARY EDUC. & DISABILITY 309, 314–15 (2017); Valérie Van Hees et al., *Higher Education Experiences of Students With Autism Spectrum Disorder: Challenges, Benefits And Support Needs*, 45 J. AUTISM DEV. DISORDERS 1673, 1682 (2015).



Education also impacts other vital life needs.<sup>158</sup> Those without a high school diploma or GED education are 4.5 times more likely to experience homelessness.<sup>159</sup> There is also some research to suggest that finishing a post-secondary degree does lead to greater likelihood of homeownership.<sup>160</sup> Notably for disabled students, students with post-secondary education have overall better health outcomes.<sup>161</sup> Education has been correlated with a less rapid onset of “functional decline.”<sup>162</sup> An analysis of the health factors indicates that education level may be an even stronger predictor of health than income level.<sup>163</sup>

Only 15% of disabled individuals are employed when they have less than a high school degree, compared with 62% of non-disabled populations (See Figure XII). Fifty-three percent of disabled individuals with a master’s, J.D., or Ph.D. are employed, but 86% of non-disabled individuals are employed with the highest degree attainment (See Figure XII). Thus, non-disabled Americans who did not finish high school are employed more than disabled people with doctorates.

Even when employed, disabled individuals make disparately less: 20.7% of non-disabled Americans make \$75,000 or more annually, compared to just 12.3% of those with disabilities.<sup>164</sup> In contrast, 15% of disabled Americans have an income of less than \$5,000 per year, but the rate is only 8.1% for non-disabled Americans.<sup>165</sup> Nearly 20% of disabled individuals have an income between \$5,000 and \$14,999.<sup>166</sup> (See Figure III). The median annual earnings of

---

158. See e.g., Broton, *supra* note 3, at 31 (discussing the relationship between housing security and educational success).

159. MATTHEW MORTON ET AL., MISSED OPPORTUNITIES: YOUTH HOMELESSNESS IN AM. 13 (2017), [https://www.chapinhall.org/wp-content/uploads/ChapinHall\\_VoYC\\_National\\_Report\\_Final.pdf](https://www.chapinhall.org/wp-content/uploads/ChapinHall_VoYC_National_Report_Final.pdf).

160. See Jamaal Abdul-Alim, *College Degree Completion and Home Ownership*, DIVERSE (Apr. 4, 2017), <https://www.diverseeducation.com/home/article/15100261/college-degree-completion-and-home-ownership>.

161. Michael Hout, *Social and Economic Returns to College Education in the United States*, 38 ANN. REV. OF SOCIO. 379, 393–94 (2012).

162. Pamela Herd et al., *Socioeconomic Position and Health: The Differential Effects Of Education Versus Income on the Onset Versus Progression of Health Problems*, 48 J. HEALTH & SOC. BEHAV. 223, 231 (2007).

163. *Id.*

164. *S1811: Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status*, U.S. CENSUS BUREAU (2019), <https://data.census.gov/cedsci/table?q=S1810%3A%20DISABILITY%20CHARACTERISTICS&tid=ACST1Y2019.S1811>.

165. *Id.*

166. *Id.*

\$37,262 drop to \$25,270 for Americans with disabilities.<sup>167</sup> (See Figure IV). Further, 19.5% of disabled Americans live below the poverty level compared with 9.7% of non-disabled Americans.<sup>168</sup> (See Figure V for complete data).

The empirical evidence of disparity in post-secondary education is undeniable; however, what factors sustain the problem, and what solutions can be given? Using empirical and sociocultural evidence through the lens of civil rights, we may be able to come closer to finding a long-term solution for disabled success in America.

## II. DISABILITY DISPARITIES IN POST-SECONDARY EDUCATION THROUGH A TRADITIONALIST LENS

### A. *External Diagnosis*

A traditionalist lens describes the dominant viewpoint still housed in the U.S., emphasizing the need for classical hierarchy, moral order, past historical and conservative values, meritocracy, and internal self-help principles. When examining the disability experience in the U.S., many traditionalists do not dispute the statistics that show disparities in education between disabled and non-disabled people.<sup>169</sup> However, they do not believe these statistics are evidence of an institutional problem of discrimination.<sup>170</sup> Although there may be some individuals who maliciously discriminate against disabled students, they are few and far between, and historical discrimination does not mean there are still current systematic lingering effects.<sup>171</sup> Thus, traditionalists like Bill O’Riley reason that because there are negligible effects from external factors, current disparities are due to individuals’ internal lack of self-reliance,<sup>172</sup> encouraged with the “explosion” of handouts to disabled individuals.<sup>173</sup> Dr. Thomas Sowell

---

167. *Id.*

168. *Id.*

169. See generally BROOKS, *supra* note 9, at 20 (discussing how most civil rights “traditionalists do not regard statistical disparity as problematic in itself” within the context of race).

170. See *id.* at 20–21, 26–27 (explaining how many traditionalists will consider non-racial factors when assessing statistical disparities within the context of civil rights).

171. See generally *id.* at 16–17, 26–27 (discussing how overt racism is less common, yet the long-lasting impact of discrimination remains).

172. See *id.* at 23–24.

173. See TRANSCRIPT: *Full Interview between President Obama and Bill O’Reilly*, FOX NEWS (Dec. 20, 2015, 7:36 PM), <https://www.foxnews.com/politics/transcript-full-interview-between-president-obama-and-bill-oreilly>.

describes these external handouts as a “war on achievement.”<sup>174</sup> George Leef makes it clear accommodations are what “keeps people from learning tough lessons.”<sup>175</sup> Indeed, traditionalists view the pro-diversity policies of many universities as discriminatory *in favor* of disabled individuals.<sup>176</sup> Policies that differentiate between disabled and non-disabled students are what traditionalists view as the primary problem exacerbating higher education disparities.<sup>177</sup> Traditionalists’ view of disparities in post-secondary education focuses on the belief that disability-neutral policies will increase educational success for all students.<sup>178</sup>

Traditionalists often argue that widespread cheating arises from allowing higher education institutions to provide accommodations.<sup>179</sup> Most traditionalists, such as Dr. John Hosterman, point to “high-stakes” testing to argue in favor of disability neutrality.<sup>180</sup> They reason that educational testing is based on merit and therefore accommodations for disabled students will provide for an unfair advantage to individuals who otherwise may not meet the test’s high standard.<sup>181</sup> Traditionalists argue that if people are not able to succeed on the standardized tests without extra help, they are “less proficient,” and by extension, not qualified for higher education.<sup>182</sup>

Contrary to the belief of many disability rights theorists, traditionalists do want “equal access” in education for disabled students.<sup>183</sup> For traditionalists, however, “equal access” is defined differently: the right for every student to enroll in classes or take standardized tests,

---

174. Thomas Sowell, *The War Against Achievement*, CREATORS (Nov. 19, 2013), <https://www.creators.com/read/thomas-sowell/11/13/the-war-against-achievement>.

175. George Leef, *Helping Hand or Unfair Advantage?*, THE JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Mar. 30, 2010), <https://www.jamesgmartin.center/2010/03/helping-hand-or-unfair-advantage>.

176. See *Rothberg v. Law Sch. Admission Council*, 102 F. Appx. 122, 127 (10th Cir. 2004) (McConnell, J., concurring) (expressing concern that a student may have “an unjustified advantage” on a test due to accommodations); Leef, *supra* note 175.

177. See generally BROOKS, *supra* note 9, at 6, 21–22 (describing why civil rights traditionalists are often anti-affirmative action).

178. See generally John Hosterman et al., *Testing Accommodations: The Perils of the Approve Everything Model*, 3 J. NAT’L COLL. TESTING ASS’N 2, 3–4 (2019) (discussing the difference between ensuring student success and student access through accommodations).

179. See generally *id.* at 9–10 (discussing how certain approaches to accommodations could lead to “serious test integrity and security challenges” such as cheating).

180. *Id.* at 3.

181. *Id.* at 2–3.

182. See generally Michelle Tenam-Zemach, Daniel R. Conn, & Paul T. PARKISON, UNRAVELING THE ASSESSMENT INDUSTRIAL COMPLEX: UNDERSTANDING HOW TESTING PERPETUATES INEQUITY AND INJUSTICE IN AM. 8–9 (2021) (discussing the “commodity value of education and efficiency of schooling”).

183. Hosterman et al., *supra* note 178, at 3.

with every student receiving the same setup and environment.<sup>184</sup> Those who are successful academically worked hard without receiving accommodations or other aids.<sup>185</sup> As Brooks states, traditionalism believes that all civil rights groups are entitled to “equal treatment” but not “special treatment.”<sup>186</sup> Extracting valid test results is the most important goal for traditionalists and one that is severely compromised by testing accommodations that they perceive as giving disabled students an unfair advantage over their able-bodied peers.<sup>187</sup>

An example of what a traditionalist would use as evidence for how accommodations ruin academic integrity is the Operation Varsity Blues scandal. Varsity Blues was an investigative finding that catapulted the idea of accommodations fraud into the media spotlight when wealthy white parents were shown to be able to bribe “high-stakes” test administrators to give accommodations to their non-disabled children.<sup>188</sup> A wiretapped phone call between a parent and a fraud facilitator showed that there was pervasive abuse of accommodations on ACT testing.<sup>189</sup> Hardworking students were devastated by the knowledge that affluent students were able to succeed by exploiting disability accommodations through fraudulent means.<sup>190</sup>

### B. External Prescription

Traditionalists are focused on internal prescriptions and do not prescribe external solutions. This is for several reasons. First, because testing accommodations are not disability-neutral, they are deemed an external prescription, which is at odds with the traditionalist theory. Second, traditionalists state accommodations can easily fail to “level the playing field,” instead giving an unfair advantage to non-disabled individuals.<sup>191</sup> In particular, traditionalists believe there can be students with “fake disabilities” or with types of

---

184. *Id.*

185. *See generally id.* (explaining the difference between equal access and equal success).

186. BROOKS, *supra* note 9, at 14.

187. *See* Hosterman et al., *supra* note 178, at 3.

188. Valerie Flugge & Nanci K. Carr, *Did You Fail to Tell Me Something, Mom? Nondisclosure Fraud in the Wake of Varsity Blues*, 46 U. DAYTON L. REV. 245, 246–48 (2021).

189. Laura Smith, *Affidavit in Support of Criminal Complaint*, DEP'T OF JUST. 1, 11, 80 (Mar. 11, 2019), <https://www.justice.gov/file/1142876/download>.

190. Nick Anderson, *Abuse of 'Extended Time' on SAT and ACT Outrages Learning Disability Community*, WASH. POST (Mar. 29, 2019, 10:00 PM), [https://www.washingtonpost.com/local/education/abuse-of-extended-time-on-sat-and-act-outrages-learning-disability-community/2019/03/29/d58de3c6-4c1f-11e9-9663-00ac73f49662\\_story.html](https://www.washingtonpost.com/local/education/abuse-of-extended-time-on-sat-and-act-outrages-learning-disability-community/2019/03/29/d58de3c6-4c1f-11e9-9663-00ac73f49662_story.html).

191. Hosterman et al., *supra* note 178, at 2–3.

disabilities traditionalists diagnose as minor should not be given accommodations, which would be an external solution which is not within the traditionalist ideology.<sup>192</sup> Although disabled students may have deficiencies, they must also compete within the same structure as others and use hard work instead of entitlement.<sup>193</sup> Traditionalists who work at post-secondary institutions have the opportunity to be vocal about their view of unfair advantages accommodations give and can deny such accommodations they deem unfair.<sup>194</sup> Traditionalist administrators may also cite the cost of accommodations as a sign that disabled students are the beneficiaries of extra spending from the institution, contributing to inequality between students.<sup>195</sup>

In addition, disabled individuals have been characterized as incompetent for many years; thus, the giving of accommodations may be the product of patronization.<sup>196</sup> This argument has a basis in the patronization and infantilization of disabled individuals,<sup>197</sup> however, research has shown that post-secondary institutions do not give out accommodations as freely or easily as the traditionalist argument would suggest.<sup>198</sup>

Many traditionalists prescribe eliminating accommodations in favor of a single method of learning that caters to the majority non-disabled population, but other traditionalists are open to prescribing

192. Richard K. Scotch, *Models of Disability and the Americans With Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 219–20 (2000).

193. See generally ABA Comm'n on Disability Rts., *Implicit Biases & People with Disabilities*, A.B.A., [https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit\\_bias](https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias) (last visited Mar. 13, 2022) (explaining how people with disabilities are often subject to implicit bias in their everyday lives).

194. George Cummings, *Professor Says Helping Disabled Student Gives Unfair 'Advantage'*, N.Y. POST (Sept. 15, 2017, 3:16 PM), <https://nypost.com/2017/09/15/professor-says-helping-disabled-student-gives-unfair-advantage>; see also *Access UChicago Now: Insights*, UNIV. OF CHI., <https://accessibility.uchicago.edu/about/insights> (last visited Mar. 13, 2022); Dalun Zhang et al., *University Faculty Knowledge, Beliefs, and Practices in Providing Reasonable Accommodations to Students With Disabilities*, 31 REMEDIAL & SPECIAL EDUC. 276, 283–84 (2010).

195. DOLMAGE, *supra* note 143, at 82; see also Tema A. Cohen et al., *College Students' Access to Academic Accommodations Varies as a Function of School Type, Selectivity, and Cost*, 4 J. EDUC. & CULTURE STUD. 130, 140 (2020).

196. See generally Carolyn L. Weaver, *Incentives Versus Controls in Federal Disability*, in *DISABILITY & WORK: INCENTIVES, RIGHTS, & OPPORTUNITIES* 3, 3–17 (Carolyn L. Weaver ed., 1991) (discussing the concept of workplace accommodations from an economic perspective).

197. *Infantilization of adults with disabilities needs to stop*, UREVOLUTION, <https://www.urevolution.com/blogs/magazine/infantilization-of-adults-with-disabilities> (last visited Feb. 27, 2023).

198. DOLMAGE, *supra* note 143, at 24–25. See generally Cheryl A. Hurtubis Sahlen & Jean P. Lehmann, *Requesting Accommodations in Higher Education*, 38 TEACHING EXCEPTIONAL CHILDREN 28, 28 (2006).

more tailored accommodations to the individual student's needs rather than a generic package of accommodations that are given to all disabled individuals, regardless of disability type.<sup>199</sup> Traditionalists who permit high-stakes testing accommodations want to flag test takers who used accommodations to allow post-secondary institutions to ensure academic honesty by knowing who used accommodations and who did not.<sup>200</sup>

### C. Internal Diagnosis

The disabled community's lack of success in higher education and subsequent employment is the primary concern in traditionalist frameworks.<sup>201</sup> Traditionalists maintain that there is a severe lack of willpower amongst disabled students that contributes to laziness.<sup>202</sup> Traditionalists view the non-disabled body as superior, stemming from the nineteenth-century medical model theory that concluded any inability to be successful was solely a deficiency of the individual.<sup>203</sup>

#### i. Willpower and "Faking" Disability

Traditionalists view certain disabilities as less severe and negligible enough in their effect, so students with these disabilities are just not adequately trying to succeed.<sup>204</sup> Traditionalists agree that "[t]he secret to getting a [] good job is education."<sup>205</sup> Thus, the lack

199. Hosterman et al., *supra* note 178, at 4–5.

200. See generally Michael Edward Slipsky, *Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 82 N.C. L. REV. 811, 811–13 (2004).

201. See generally Gabriella M. Nepomuceno et al., *The Value of Safety and Practicality: Recommendations For Training Disabled Students in the Sciences with a Focus on Blind And Visually Impaired Students in Chemistry Laboratories*, 23 J. CHEM. HEALTH & SAFETY 5, 7 (2016).

202. *Id.*; Dawn Beckley, *Gifted And Learning Disabled: Twice Exceptional Students*, THE NAT'L RSCH. CTR. ON THE GIFTED AND TALENTED (1998), <https://nrcgluconn.edu/newsletters/spring984>.

203. Lisa I. Iezzoni & Vicki A. Freedman, *Turning the Disability Tide: The Importance of Definitions*, 299 J. OF THE AM. MED. ASS'N 332, 332 (2008); Murray K. Simpson, 22 *Othering Intellectual Disability: Two Models of Classification from the 19th Century*, THEORY & PSYCH. 541, 542 (2011).

204. See generally Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L. J. 181, 181-231 (2008) (discussing the narrow legal definition of disability and the social perception of disabled persons).

205. TRANSCRIPT: *Full Interview between President Obama and Bill O'Reilly*, *supra* note 171.

of hard work put into their degree is what traditionalists argue prevents disabled students from obtaining work.<sup>206</sup>

Traditionalists argue that any equal-access tools for testing “severely undermine[]” the validity of the testing by allowing individuals with minor impairments to obtain a significant advantage through accommodations.<sup>207</sup> They also fear that an increase in disability accommodations will lead to less rigorous assessments, making the tests “a less accurate measure of intelligence.”<sup>208</sup> Thus, traditionalists are inferring that the mere existence of disability accommodations is enabling “less intelligent” disabled students to enter higher education when they would not otherwise be intellectually qualified.

#### ii. Severe Disabilities and Uselessness

In contrast to their stance on the invalidity of individuals with “less severe” disabilities, traditionalists posit that individuals they label genuinely disabled with “more severe” disabilities cannot reasonably succeed in higher education and subsequent employment due to physical impairment and/or a significant lack of intelligence.<sup>209</sup> Traditionalists argue that being able-bodied is a desirable trait for private parties<sup>210</sup> and thus, it is rational for traditionalists to discriminate against the disabled.<sup>211</sup> Furthermore, they are alarmed that “anti-discrimination laws penalize *rational* discrimination against the disabled . . . interfer[ing] with the ordinary working of the market and, bluntly put, effect a wealth transfer from able members of the population to the disabled.”<sup>212</sup> For traditionalists, there is no value in an educational system that supports individuals with severe

---

206. See generally Neeta P. Fogg et al., *The Impact of the Great Recession upon the Unemployment of Americans with Disabilities*, 33 J. OF VOCATIONAL REHABILITATION 193, 196–97 (2010) (revealing statistics that demonstrate the labor force participation rates of people with and without disabilities).

207. Craig S. Lerner, “Accommodations” for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043, 1048 (2004) (referring to Educational Testing Service’s (“ETS”) decision to stop flagging which exams were taken with accommodations).

208. *Id.*

209. See generally *id.* at 1046–47 (discussing the potential “agency costs” borne by universities that accommodate students with disabilities as they must “examine such requests carefully” to prevent “exploit[ation]” and the market impacts of employing individuals with disabilities) (Author note: Disabilities that are deemed real for traditionalists often fall to disabilities that are visible and physically noticeable, and invisible disabilities are often seen as easily overcome or even a ruse to get extra attention or help).

210. *Id.* at 1047.

211. *Id.*

212. *Id.* (emphasis added).

disabilities whom they deem unable to contribute to society when they leave the educational system.<sup>213</sup> These factors indicate to traditionalists that it is disabled Americans' medical deficiencies that cause the lack of education, not outside barriers to higher education.<sup>214</sup>

Because of both viewpoints of the traditionalist, disabled students often feel the need to "prove" they are fully capable and sufficiently competent to engage in rigorous coursework, often choosing not to disclose a disability if they know there is an underlying presumption that accommodations are an excuse to take the easy route.<sup>215</sup> The "lack of willpower" argument and the "too physically impaired" argument are still the predominant view in many post-secondary institutions.<sup>216</sup> This persistent narrative has been widely studied in students across the United States and has shown to be a major factor in the lack of disability disclosure across a meta-analysis of studies.<sup>217</sup>

#### D. Internal Prescription

Traditionalists contend that to simplify these difficult discussions, one should simply put a disability-neutral, non-accommodation policy in place.<sup>218</sup> A traditionalist lens prescribes that disability should not be considered as a factor in testing or in the classroom.<sup>219</sup> Accommodations create an unfair advantage, as each student "brings

213. See generally Robert Evert Cimera et al., *Too Disabled to Work: A Crossroad Once Thought Passed*, 39 RSCH. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 240, 240–47 (2014) (discussing the social perception of vocational rehabilitation for people with disabilities and its impact on access to services); Debbie Jolly, *A Critical Evaluation of the Contradictions for Disabled Workers Arising from the Emergence of the Flexible Labour Market in Britain*, 15 DISABILITY & SOC'Y 795, 800–01 (2000) (discussing perceptions of unemployment toward people with disabilities in the U.K.).

214. See Jolly, *supra* note 213, at 799–801.

215. Riddell, *supra* note 53, at 45.

216. See generally DOLMAGE, *supra* note 143, at 82–83.

217. See *id.* at 22–23, 82; Donna M. Korbel et al., *Collaboration Strategies to Facilitate Successful Transition of Students with Disabilities in a Changing Higher Education Environment*, DISABILITY SERV. & CAMPUS DYNAMICS 20 (Wendy S. Harbour & Joseph W. Madaus eds., 2011); Hong, *supra* note 156, at 219–20, 222; Michael Lyman et al., *What Keeps Students with Disabilities from Using Accommodations in Postsecondary Education? A Qualitative Review*, 29 J. POSTSECONDARY EDUC. & DISABILITY 123, 128, 130 (2016); Marshak et al., *supra* note 156, at 154–56, 158.

218. See generally BROOKS, *supra* note 9, at 21–22 (describing how traditionalists within the race-based civil rights context prefer internal prescription measures over racial preferences).

219. See generally *id.*; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (declining to use strict scrutiny to examine the Texas public education system despite inequalities of education due to socioeconomic status because there is no fundamental right to education).



to the table a different set of personal strengths and weaknesses as well as social advantages and disadvantages.”<sup>220</sup> When accommodations are used to single out disabled individuals, students are treated differently. To a traditionalist framework, that is not just.<sup>221</sup>

Traditionalist theory argues that the statistical disparities in educational attainment do not mean that disabled students must receive accommodations.<sup>222</sup> Instead, they argue that disabled people need to make lifestyle adjustments so they can succeed at the same level as their non-disabled counterparts.<sup>223</sup> This may come by requiring disabled students to enroll in a life skills class on how to be more assertive.<sup>224</sup> Classes and programs are available to some high-school-age students with disabilities that discuss how to be more prepared for college life with as few accommodations as possible.<sup>225</sup> This method, traditionalists argue, creates responsibility and adaptation in disabled students.<sup>226</sup> This viewpoint easily fits the larger American cultural narrative to work for what you want and not ask for handouts.<sup>227</sup>

Traditionalists encourage implementing a grueling, complex internal accommodations process so only the students with the most severe and deserving disabilities will obtain them.<sup>228</sup> Once a student personally follows the steps to receive accommodations, many traditionalists prescribe a self-help doctrine.<sup>229</sup> This ideology implies that one should help oneself through hard work and improve your

220. BROOKS, *supra* note 9, at 20 (reflecting Thomas Sowell’s traditionalist view within the context of race-based civil rights).

221. See generally Hosterman et al., *supra* note 178, at 3 (discussing how accommodations can sometimes create “an altered playing field” instead of “a level playing field”).

222. See BROOKS, *supra* note 9, at 20; Lerner, *supra* note 205, at 1060–61.

223. See Lerner, *supra* note 207, at 1123–24; BROOKS, *supra* note 9, at 21–22.

224. See M. Laxton et al., *Teaching Assertiveness Skills to People with Learning Disabilities: A Brief Report of a Training Programme*, 1 J. LEARNING DISABILITIES FOR NURSING, HEALTH, & SOCIAL CARE 71, 71 (1997).

225. See generally Alies Poetri Lintangari et al., *Are Students with Disabilities Ready for College? The Influence of College Readiness to College Engagement*, 10 INT’L J. EVALUATION & RSCH. IN EDUC. 845, 846 (2021).

226. See generally DOLMAGE, *supra* note 143, at 90–92 (discussing the initiative and responsibility required on behalf of students with a disability who attempt to navigate university disability services); Lerner, *supra* note 205, at 1123–24.

227. See generally BROOKS, *supra* note 9, at 25 (discussing this American narrative within the racial justice context).

228. Lerner, *supra* note 207, at 1061. (Author note: Disabilities which are considered “deserving” are often the most visible disabilities, while others simply less visible are also deemed “less deserving.”).

229. See generally DOLMAGE, *supra* note 143, at 92 (discussing a self-help approach to accommodations that requires students to directly inform the professor of their need for accommodations).

position in life by their own efforts to attain academic achievement. As such, traditionalists firmly believe in self-advocacy at all times in academia.<sup>230</sup> However, traditionalists look down on disabled students who self-advocate for accommodations, as this is not considered truly your own hard work and subsequent achievement but instead getting handouts or making it easier to achieve in the academic environment.<sup>231</sup> Some traditionalists remain in the middle of these two sides, encouraging students to only ask for and receive the bare minimum, touting accommodations as a sign of weakness and instead encourage students to adapt to their environment.<sup>232</sup>

Other traditionalists who cite the rising cases of learning disabilities to support their stance state that accommodations should not be given at all.<sup>233</sup> These traditionalists believe that it sends the wrong message to disabled students: they are inferior to students without disabilities.<sup>234</sup> Students with this mindset will not make any real attempts to solve their problems and will engage in the “Cult of Victimology” if they know they are going to get accommodations, or as traditionalists believe, “handouts.”<sup>235</sup> Giving accommodations in higher education creates “infantilization” of disabled students, traditionalists argue, and creates a mentality where lack of effort is accepted.<sup>236</sup> Psychological and cognitive disabilities are hardest hit by this mindset, because in traditionalists’ view, these disabilities can and should be overcome.<sup>237</sup> If individuals have not yet overcome these kinds of disabilities, it is viewed as a sign that they have a lack of willpower.<sup>238</sup> These same students frequently appear non-disabled

230. See generally BROOKS, *supra* note 9, at 27–28 (discussing how the traditionalist approach to racial justice favors internal prescription where the “onus is on the individual”).

231. See DOLMAGE, *supra* note 143, at 92; Lyman et al., *supra* note 215, at 128, 130.

232. See generally DOLMAGE, *supra* note 143, at 24, 74–75, 80, 91; Jack Trammell & Melissa Hathaway, *Help-Seeking Patterns in College Students with Disabilities*, 20 J. POSTSECONDARY EDUC. & DISABILITY 5, 6–7 (2007); Lerner, *supra* note 205, at 1123–24.

233. See generally Benjamin J. Lovett, *Educational Accommodations for Students with Disabilities: Two Equity-Related Concerns* 6 FRONTIERS IN EDUC. 1, 1–2 (2021); *Teachers Weigh-In: Do We Over Accommodate? Join the Debate...*, THE WRIGHTSLAW WAY (Apr. 11, 2012), <https://www.wrightslaw.com/blog/teachers-weigh-in-do-we-over-accommodate-join-the-debate>.

234. See generally Hong, *supra* note 155, at 214 (providing examples of students feeling inferior after disclosing their disability or requesting accommodations).

235. BROOKS, *supra* note 9, at 25 (explaining the “Cult of Victimology” within the context of racial justice).

236. *Id.*

237. See generally Julio Arboleda-Flórez, *Considerations on the Stigma of Mental Illness*, 48 CANADIAN J. OF PSYCHIATRY 645, 646 (2003).

238. *Id.* at 647.

and therefore may never receive needed accommodations, causing them to potentially drop out of higher education as a result.<sup>239</sup>

### III. DISABILITY DISPARITIES IN POST-SECONDARY EDUCATION THROUGH A REFORMIST LENS

#### A. *External Diagnosis*

A reformist lens seeks to resolve disparities by upholding incorporating minority groups into the majority of society, in other words, integration. This theoretical framework is prominently seen within the ADA's legislative vision to "integrat[e] people with disabilities into society" in general and economic life.<sup>240</sup> Reformists, such as well-known deaf scholar Dr. Douglas Baynton, have applied comparative theories from prior civil rights groups to show the basis for disability to be included within the mainstream civil rights conversation.<sup>241</sup> Dr. Baynton argues that like in "mainstream" civil rights groups, external discrimination against disabled individuals is directly due to historic societal dehumanization and out-casting, and social, economic, financial, and employment disparities.<sup>242</sup> By exhibiting the subordination of a marginalized group through historical and current disparities, reformists seek to use such information to effectively persuade stakeholders that these barriers contribute to the post-secondary disparities.

#### i. Disability Matters

Reformists reject the traditionalist catch phrase "focus on ability, not disability" that creates the narrative of using the non-disabled body as the cultural default.<sup>243</sup> Instead, reformists argue

239. See generally Hong, *supra* note 155, at 214 (providing an example of a disabled student who was entitled to flexible attendance yet still had to drop courses in multiple instances where professors were not accommodating).

240. See Elizabeth Clark Morin, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189, 189–90 (1990).

241. Baynton, *supra* note 66, at 39–40.

242. *Id.* at 34–35.

243. See generally David Pfeiffer, *Eugenics and Disability Discrimination*, 9 DISABILITY & SOC'Y 481, 495–96 (1994); BROOKS, *supra* note 9, at xvii–xviii (discussing the damaging narrative that requires black individuals to conform to white culture or advocates for colorblindness); Morgan E. PettyJohn et al., *Therapeutic Utility of Discussing Therapist/Client Intersectionality in Treatment: When and How?*, 59 FAMILY PROCESS 313, 315 (2020) (provides a simplified visual of current culture and identities that are the default in this article (white, male, heterosexual, cisgender, able-bodied, upper middle class, English-speaking, U.S. citizen, etc.)).

disability matters, and focusing on the experiences of disabled individuals is vital.<sup>244</sup>

Disability matters because disabled students come to higher education with a systematic disadvantage—they are not part of the cultural norm of non-disabled individuals. Focusing on disability as a real and valid identity assists in the acknowledgement and analysis of discrimination.<sup>245</sup> Once barriers are analyzed and acknowledged, reformists believe support and resources can enable disabled individuals to succeed in post-secondary education and subsequent employment.<sup>246</sup> Acknowledging a disabled student may have external barriers to education helps that disabled student get the support they need.<sup>247</sup> This is what reformists argue will achieve progress for the disabled community.<sup>248</sup>

Reformists argue there are correlations between the lack of post-secondary degree attainment and further success in the economy.<sup>249</sup> Reformist theorists contend that the huge disparity between disabled students earning a post-secondary degree may be helped through affirmative action measures.<sup>250</sup> This approach is in direct contrast with traditionalists, who argue that affirmative action is unnecessary because there are plenty of disabled students who are already in four-year programs.<sup>251</sup> Instead, reformists point to a wider range of statistics that show lower percentages of success for disabled

---

244. See generally Pfeiffer, *supra* note 243, at 495–96; BROOKS, *supra* note 9 at 35–36 (discussing how a reformist approach to racial justice advocates that “race still matters”).

245. See generally Pfeiffer, *supra* note 243, at 481–82.

246. See generally Trammell & Hathaway, *supra* note 232, at 6–8, 11 (researching help-seeking behaviors among students with disabilities and barriers to accessing accommodations).

247. See generally Dorothy F. Garrison-Wade & Jean Lehmann, *A Conceptual Framework for Understanding Students' with Disabilities Transition to Community College*, 33 CMTY. COLL. J. RSCH. & PRAC. 417, 424 (2009) (researching barriers faced by disabled students in the transition to post-secondary education in order to create a conceptual framework to improve institutional supports).

248. See generally *id.*

249. See generally *id.* at 418 (discussing the lower community college enrollment and completion rates among students with disabilities and the impact that has on their financial independence).

250. See generally Ann M. Beaton & Francine Tougas, *Reactions to Affirmative Action: Group Membership and Social Justice*, 14 SOCIAL JUST. RSCH. 61, 74 (2001) (discussing how affirmative action programs benefiting people with disabilities are more likely to be supported than other affirmative action programs); BROOKS, *supra* note 9 at 48 (explaining that within the context of racial justice “[r]ace-based affirmative action is the principal reformist prescription”).

251. See *Fast Facts: Students with Disabilities*, *supra* note 141 (evidencing that 19.4% of undergraduate students identify as having a disability); BROOKS, *supra* note 9 at 21, 27 (presenting the traditionalist perspective as opposed to affirmative action within the racial justice context).

students. According to one study, only 4% of 25–64-year-olds had completed a four-year degree, and only 27% of disabled Americans within this age group are employed.<sup>252</sup> Reformists argue that post-secondary education is a vital factor in obtaining further employment;<sup>253</sup> thus, disparities between non-disabled and disabled students show that there is unequal access while in school and after graduation.<sup>254</sup> As such, their prescriptions focus on acknowledging and combating disability discrimination in post-secondary institutions so students could complete their degrees. To do this, additional accommodations are needed to further integrate disabled individuals into post-secondary education.<sup>255</sup>

## ii. Integration is Key

A second prong of the reformist lens is integration,<sup>256</sup> a concept that was at the heart of the ADA's passage.<sup>257</sup> The ADA directly proclaimed 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. . . [in] critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.<sup>258</sup>

Reformists believe that integration in all these areas is key to advancing the civil rights of disabled individuals.<sup>259</sup> For reformists, barriers to disabled students' access to post-secondary education are related to the forced institutionalization and segregation that continues in the United States to this day.<sup>260</sup> As segregated educational institutions have been shown to severely abuse and dehumanize

252. JOEL MCFARLAND ET AL., *THE CONDITION OF EDUCATION 2017* 32–33 (2017).

253. *See generally id.* at 35 (providing data that educational attainment correlates with employment).

254. *See id.* at 38.

255. *See generally* DOLMAGE, *supra* note 143, at 90–93 (discussing the barriers to accessing accommodations in post-secondary education).

256. *See* Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 917 (2019) (discussing the role of integration within disability rights).

257. *Id.* at 921.

258. 42 U.S.C. § 12101(a)(2)–(3).

259. *See* Harris, *supra* note 256, at 916.

260. *See generally* Gi Lee & David Cohen, *Incidence of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 PSYCHIATRIC SERV. 61, 61 (2021) (discussing involuntary psychiatric detention in the U.S.); *DRC Helps Ofelia Stay Out of a Nursing Home*, DISABILITY RTS. CAL. (Oct. 2, 2018), <https://www.disabilityrightscalifornia.org/post/drc-helps-ofelia-stay-out-of-a-nursing-home>.

disabled persons,<sup>261</sup> reformists primarily argue that education integrating both disabled and non-disabled students is important to solving disparity.<sup>262</sup>

Willowbrook State School, one of the hundreds of disability-segregated “schools” in the United States, remains one of the most oft-cited examples showing the importance of integration.<sup>263</sup> At one point in its history, Willowbrook was the world’s largest institution housing disabled individuals.<sup>264</sup> Journalist Geraldo Rivera exposed atrocities the school was committing against disabled children and published a whistleblower video revealing the horrific conditions documented during a covert visit.<sup>265</sup> Rivera found dehumanizing conditions: dark, filthy, and empty rooms filled with naked disabled individuals. The institution “smelled of death.”<sup>266</sup> Over three hundred patients who had only been deemed “physically disabled” were banned from leaving the institution and were required to aid the employees in caring for mentally disabled patients without compensation.<sup>267</sup> Representative Mario Biaggi visited and said:

the children of many of our citizens, [are] subjected to what appears to be the worst possible conditions I’ve ever seen in my life. I’ve visited penal institutions all over the country. I’ve visited hospitals all over the country. I’ve visited the worst brigs in the military. I’ve never seen anything like it.<sup>268</sup>

---

261. See generally *N.Y. State Ass’n for Retarded Child., Inc. v. Carey*, 466 F. Supp. 487, 490–92 (E.D.N.Y. 1978); *Wyatt v. Aderholt*, 503 F.2d 1305, 1310, 1311 n.6 (5th Cir. 1974); *Wyatt v. Stickney*, 344 F. Supp. 373, 374 (M.D. Ala. 1972).

262. See Harris, *supra* note 256, at 917.

263. *Id.* at 917–18.

264. *Geraldo Rivera’s 1972 Expose of Willowbrook State School*, PENNHURST MEM’L & PRESERVATION ALL., <http://www.preservepennhurst.org/default.aspx?pg=1642> (last visited Mar. 1, 2023) (featuring a video of WABC-TV’s Channel 7 New York television broadcast from February 2, 1972).

265. *Id.*

266. *Id.* (Death from pneumonia was common by force-feeding individuals; further, 100% of residents contracted Hepatitis A after being in the institution for six months.).

267. *Id.*

268. *Id.* (Quoted language can be found in the embedded video at 12 minutes, 4 seconds. The New York State Mental Hygiene Commissioner, Dr. Alan Miller, infamously stated that the exposé documentary was overly harmful to Willowbrook, and that this was the first and only time such conditions had been observed. Of the documentary he said, “it certainly doesn’t tell the whole story. . . . if the public eye leaves Willowbrook and . . . perhaps if you were to come back a year from now and look at it, and you might see that we’d made headway.” Reporters did come back and reported no change.)

Although Willowbrook is the most well-known example, many institutions at this time were shown to have inhumane and unfathomable conditions.<sup>269</sup> Reformists see these documented instances of discrimination as proof that disabled schools will be made to look presentable; however, they will be inadequate as negative disability stigmas will funnel greater educational funds to non-disabled students.<sup>270</sup>

Reformists may also cite the fact that in 2022, investigations of institutions are still showing abuse and neglect and that instances of forced institutionalization are increasing in many states.<sup>271</sup> Willowbrook alumni themselves reported continued allegations of abuse and neglect in 2020.<sup>272</sup> Reformists are strongly for integration especially in schools because forced separation has long had a direct connection to higher education institutions.<sup>273</sup> Universities were often the founders of institutions so they could acquire disabled research subjects or in other words, so “one group of humans could be held and studied by another.”<sup>274</sup> Arguably, higher education institution research is one of the most historically problematic examples of disabled segregation and dehumanization.<sup>275</sup>

### B. External Prescription

Through a reformist lens, accommodations help integrate students into post-secondary education.<sup>276</sup> Reformists contend that accommodations will not only achieve academic equity but also

269. See e.g., *Wyatt v. Aderholt*, 503 F.2d 1305, 1310, 1311 n.6 (5th Cir. 1974).

270. See generally Mei-lan E. Wong, *The Implications of School Choice for Children with Disabilities*, 103 YALE L.J. 827, 850 (1993).

271. Lee & Cohen, *supra* note 260, at 65 fig.2; Susan K. Livio & Ted Sherman, *Judge Grants Disability Advocates Access to N.J. Nursing Home Residents to Investigate Abuse, Neglect*, N.J. ADVANCE MEDIA (Mar. 12, 2022, 9:43 AM), <https://www.nj.com/coronavirus/2022/03/judge-grants-disability-advocates-access-to-nj-nursing-home-residents-to-investigate-abuse-neglect.html>.

272. Benjamin Weiser, *Beatings, Burns and Betrayal: The Willowbrook Scandal's Legacy*, N.Y. TIMES (Feb. 21, 2020), <https://www.nytimes.com/2020/02/21/nyregion/willowbrook-state-school-staten-island.html>.

273. DOLMAGE, *supra* note 143, at 50 (discussing the historic sorting of individuals in post-secondary education, which led to “cognitive homogamy”).

274. *Id.*

275. See generally Doe West, *Radiation Experiments on Children at the Fernald and Wrentham Schools: Lessons for Protocols in Human Subject Research*, 6 ACCOUNTABILITY IN RSCH. 103, 104 (1998); Emmanuel Thomas & T. Jake Liang, *Experimental Models of Hepatitis B and C—New Insights and Progress*, 13 NATURE REV. GASTROENTEROLOGY & HEPATOLOGY 362, 364 (2016).

276. See Hong, *supra* note 156, at 210, 224 (discussing how integration improves outcomes for students and how those accommodations can help students integrate into post-secondary education life).

integrate disabled students.<sup>277</sup> Instead of segregating disabled students in their own rooms or institutions, accommodations give disabled students the tools they need while learning side-by-side with non-disabled students.<sup>278</sup> Reformists argue that rigorous enforcement of accommodations at post-secondary institutions and litigation of disability discrimination cases can help ensure discriminatory practices are not tolerated at universities.<sup>279</sup>

In response to traditionalists who say accommodations are unfair, reformists would argue that accommodations are given to non-disabled students every day although they are not formally recognized as such.<sup>280</sup> For example, buildings have specifically designed lighting structures so sighted people can adequately use the facilities, while blind people do not need this accommodation.<sup>281</sup> Desks with chairs are provided in every classroom for able-bodied students, although wheelchair users have no need for these extra accommodations.<sup>282</sup> Teaching methods are catered to non-disabled access.<sup>283</sup> Non-disabled students regularly benefit from such informal accommodations that ensure they will have complete access to all aspects of higher education.<sup>284</sup> Most of the world is set up for a particular type

---

277. See Xiangling Zhang et al., *Accessibility within Open Educational Resources and Practices for Disabled Learners: A Systematic Literature Review*, 7 SMART LEARNING ENV'TS. 1, 3 (2020) (discussing how accommodations are needed to achieve academic equity); Hong, *supra* note 156, at 210, 223 (discussing the need for integration and how integration is needed to equalize education outcomes for disabled and non-disabled students).

278. See generally Hong, *supra* note 156, at 209–10.

279. See generally Micah Barry, Comment, *Disabled Learning: Academic Deference in Post-Secondary Education*, 46 U. TOL. L. REV. 590 (2015) (discussing the challenges disabled students face in post-secondary education, the discriminatory practices of universities, and why disability rights law must be properly applied to correct those discriminatory practices and enforce necessary accommodations).

280. Northwest Health Foundation, *Confronting our Ableism*, MEDIUM (May 17, 2016), <https://medium.com/striving-for-disability-equity/confronting-our-ableism-5afbe437040e>.

281. *Id.*

282. See *id.*

283. See generally Hong, *supra* note 156, at 209 (describing the need for special accommodations for disabled students and the hesitance of many professors to adopt them, meaning that the teaching methods used generally cater to non-disabled students).

284. See generally Rioloriri, *Able-Bodied Privilege Checklist*, ARIZ. STATE UNIV., <https://projecthumanities.asu.edu/content/able-bodied-privilege-checklist> (last visited Feb. 12, 2023) (providing students with examples of how being non-disabled means they benefit from many informal accommodations that make life easier and mean they do not experience the same struggles as their disabled peers).



of body; thus, non-disabled students can take for granted that the school and classrooms are designed for them.<sup>285</sup>

Reformists believe that disabled students should similarly have full access to higher education through whatever accommodations they might need.<sup>286</sup> Labeling disabled students' needs as "special" lowers their importance, and according to a 2016 study creates more negative perceptions as compared to simply stating students have a disability.<sup>287</sup> Reformists argue more tailored accommodations to the individual's disability are needed for true integration, which may calm traditionalist concerns of accommodation unfairness.<sup>288</sup> Reformists also argue for less degradation of equal access as disabled students often are seen as asking for too much when discussing the course or classroom that is not set up in a universal way.<sup>289</sup> In contrast, when non-disabled students request design changes such as whiteboards, better technology, and updated restrooms, they are not seen as upsetting and burdening the school.<sup>290</sup> Disabled student accommodations should be seen as benefits that improve the school similarly to the benefits of installation of better facilities for non-disabled students. Improvements in disability access will also help future disabled students down the line and attract them to the school, further encouraging integration.<sup>291</sup>

---

285. See generally S. Kay Toombs, *The Lived Experience of Disability*, 18 HUM. STUD. 9, 12 (1995) (describing how the world is set up for a particular type of body); David R. Jones, *Reclaiming Disabled Creativity: How Cultural Models Make Legible the Creativity of People with Disabilities*, 28 CULTURE & PSYCH. 491, 496–97 (2022) (explaining how those with disabilities see the world differently).

286. See Zhang et al., *supra* note 277, at 3 (stating that "the learning experience . . . should be adjusted according to students' needs, including their disabilities").

287. See Morton Ann Gernsbacher et al., "Special Needs" Is an Ineffective Euphemism, 1 COGN. RSCH. 1, 3 (2016); David Oliver, 'I Am Not Ashamed': Disability Advocates, Experts Implore You To Stop Saying 'Special Needs', USA TODAY (June 11, 2021, 12:48 PM), <https://www.usatoday.com/story/life/health-wellness/2021/06/11/disabled-not-special-needs-experts-explain-why-never-use-term/7591024002>.

288. See Allison R. Fleming et al., *Student Voices: Recommendations for Improving Postsecondary Experiences of Students with Disabilities*, 30 J. POSTSECONDARY EDUC. & DISABILITY 311, 315 (2017) (discussing the wishes of students for resources to be tailored to their needs and perceptions of unfairness).

289. See Lyman et al., *supra* note 217, at 128.

290. See generally Northwest Health Foundation, *supra* note 280 (stating that changes requested by the able-bodied are not seen as burdensome, in contrast to changes requested by the disabled).

291. See generally Clark Edwards, *Integration of Disabled Students in Classroom with New Technology: Reasonable Accommodations Will Enrich Mass Media*, 47 JOURNALISM EDUCATOR 85, 86–87 (1992) (describing the necessity of role models and evidence of implementing the requirements of the ADA in achieving more integrated classrooms).

### C. Internal Diagnosis

Reformists would diagnose internal problems of disabled individual's disparities as being buoyed by structural barriers to education.<sup>292</sup> Of course, reformists acknowledge that internal values like self-determination, hard work, and self-advocacy are necessary to the success of disabled students.<sup>293</sup> However, reformists argue against the traditionalist notion that disparities are *solely* due to a failure of internal resilience.<sup>294</sup>

Reformists look to empirical research to rebut traditionalists' argument. Reformists see statistical disparities differently than traditionalists, citing them as proof full integration has yet to be achieved.<sup>295</sup> (See fig. VI, VII, & VIII). Overall, only 42% of disabled individuals who obtain four-year degrees get a job compared to 83% of non-disabled populations, showing that even when disabled individuals commit to what traditionalists require of them, they still do not have equal opportunity.<sup>296</sup>

Notably, even when disabled students complete college, proving that they are capable, employable, and intelligent, they earn much less than their non-disabled counterparts.<sup>297</sup> Additionally, recent research has shown those labeled with "more severe" disabilities, whom traditionalists posit will never contribute to the socioeconomic society,<sup>298</sup> have actually proven to be fully employable.<sup>299</sup> Scholars have also found that some students considered mentally disabled in

292. See generally BROOKS, *supra* note 9, at 52–53 (explaining how reformists within the racial justice context identify structures and systems as primary barriers and internal problems as secondary).

293. See generally Garrison-Wade & Lehmann, *supra* note 247, at 431 (explaining the importance of skills like self-determination and self-advocacy).

294. See generally *id.* at 420–21 (recognizing that disabled students face other challenges that lead to disparities in educational outcomes).

295. See generally INST. ON DISABILITY, *supra* note 147, at 139–41 (providing data on education level by disability status).

296. See *Total Number of Persons 25 to 64 Years Old, Number with Disabilities, and Percentage with Disabilities, by Highest Level of Educational Attainment and Other Selected Characteristics: 2010 and 2020*, *supra* note 152.

297. See MICHELLE YIN ET AL., AN UNEVEN PLAYING FIELD: THE LACK OF EQUAL PAY FOR PEOPLE WITH DISABILITIES 3–4 (2014), [https://www.air.org/sites/default/files/2021-06/Lack%20of%20Equal%20Pay%20for%20People%20with%20Disabilities\\_Dec%2014.pdf](https://www.air.org/sites/default/files/2021-06/Lack%20of%20Equal%20Pay%20for%20People%20with%20Disabilities_Dec%2014.pdf) (noting that people with disabilities earn much less than their counterparts despite identical education levels).

298. See David Mank et al., *Employment Outcomes for People With Severe Disabilities: Opportunities for Improvement*, 36 MENTAL RETARDATION 205, 205 (1998).

299. See *id.* at 206.

academic studies are then considered “normal” outside the academic environment.<sup>300</sup>

Furthermore, a groundbreaking research study sought to confirm whether the lack of success of those with disabilities is indeed due to a lack of effort.<sup>301</sup> According to national research, almost 70% of those with disabilities were actively striving to participate in the economy by obtaining a job, suggesting that laziness is not as diagnostic as traditionalists expect.<sup>302</sup> Across the board, no matter the level of educational attainment, the employment rate for disabled individuals is *at least* 33% lower than the rate for able-bodied individuals.<sup>303</sup> Fifty-three percent of disabled master’s and Ph.D. holders are employed compared with 62% of non-disabled individuals who have less than a high school diploma.<sup>304</sup> Reformists argue that disabled students can be just as successful as their non-disabled peers if they receive the appropriate accommodations.<sup>305</sup> Because a degree itself is a societal signifier of employment readiness, if a disabled student does obtain an advanced degree, it should be held to the same societal assumption that they are employable. Holding a degree as a non-disabled individual does not necessarily display that one is employment ready; however, societal norms still treat it as a marker of such. This, this marker of success should be present for disabled degree holders as well.<sup>306</sup> However, data displays there are still wide disparities between non-disabled and disabled degree holders.

---

300. See generally PRESIDENT’S COMMITTEE ON MENTAL RETARDATION, *THE SIX-HOUR RETARDED CHILD* 15 (1969), <https://files.eric.ed.gov/fulltext/ED038827.pdf> (discussing how a more holistic assessment of behavior in non-academic settings would likely prevent disability-related labels that are often attributed based solely on a test score).

301. See Vidya Sundar et al., *Striving to Work and Overcoming Barriers: Employment Strategies and Successes of People With Disabilities*, 48 J. VOCATIONAL REHAB. 93, 94 (2018).

302. *Id.* at 99–100.

303. PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2021, at 7 tbl.1 (U.S. Dep’t of Lab. 2022), <https://www.bls.gov/news.release/pdf/disabl.pdf>.

304. *Id.*

305. See Hawa Allarakhia, *Academic Accommodations: They Do Make a Difference*, J. TEACHING DISABILITY STUD. (2017), <https://jtds.common.gc.cuny.edu/academic-accommodations-they-do-make-a-difference> (finding that disability accommodations positively impact academic performance).

306. See generally *Persons With a Disability: Labor Force Characteristics—2021*, *supra* note 303, at 6–7 (showing a positive correlation between employment rate and educational attainment among both disabled and non-disabled groups).

In 2021, 19.1% of disabled individuals were employed<sup>307</sup> compared with 63.7% of non-disabled individuals.<sup>308</sup> Although this low statistic is often dismissed as a result of retired elderly disabled Americans artificially inflating such numbers, across all ages, high unemployment for disabled individuals is essentially a given.<sup>309</sup> Moreover, when only studying people 16 to 64 years of age, research has found unemployment actually *decreases* as disabled individuals' age rises.<sup>310</sup>

Although reformists focus on external factors affecting student dropout rates, such as barriers to accommodations, patronizing or combative administration and faculty, and fellow student hostility, reformist theory acknowledges the internal self-hatred toward being a disabled person. Reformist theory recognizes that disabled students can often feel that they are “less than” and therefore have harmful internalized ableism toward themselves that can also contribute to a lack of success for disabled students.<sup>311</sup> One aspect of this internalized ableism is the feeling of burdening others by using accommodations.<sup>312</sup> Empirical studies show many disabled students “choose not to use accommodations that would have helped, rather than put an extra burden on others.”<sup>313</sup> Internalized ableism can also cause disabled students to gatekeep whether they thought other disabled individuals were “disabled enough,”<sup>314</sup> causing oppression within their own community.<sup>315</sup>

307. *Id.* at 1, 6 (This definition includes any work and any number of hours getting paid.).

308. *Id.* at 1.

309. *Id.* at 1, 7 tbl.1; *Table 1. Employment Status of the Civilian Noninstitutional Population by Disability Status and Selected Characteristics, 2021 Annual Averages*, U.S. BUREAU OF LAB. STAT. (Feb. 24, 2022), <https://www.bls.gov/news.release/disabl.t01.htm>.

310. Neeta P. Fogg et al., *supra* note 206, at 197 tbl.5 (For example, 22.2% of disabled individuals aged 20–24 are unemployed, compared with 12.9% of non-disabled individuals of the same age. The unemployment rate of disabled individuals declines to 9% by ages 55–64, compared with 5.2% of non-disabled individuals. The difference in unemployment between the two groups is only 3.8% at the age of early retirement.); PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2021, *supra* note 303, at 6 (In addition, the statistics do not count individuals temporarily absent from the workforce due to illness).

311. See Jason Olsen et al., *Reporting from The Margins: Disabled Academics Reflections on Higher Education*, 22 SCANDINAVIAN J. DISABILITY RSCH. 265, 269, 271 (2020).

312. Lyman et al., *supra* note 217, at 128.

313. *Id.*

314. Shanna K. Kattari et al., “You Look Fine!”: Ableist Experiences by People With Invisible Disabilities, 33 AFFILIA: J. WOMEN & SOC. WORK 477, 485 (2018).

315. See generally BROOKS, *supra* note 9, at 53 (discussing how racial oppression can create “angst, rage, and despair,” which leads marginalized individuals to “lash out at others within their own communities”).

### D. Internal Prescription

Reformists would prescribe community support and self-help as interventions to address internal ableism and nihilism.<sup>316</sup> Students who feel they are burdensome and have no right to receive accommodations will likely drop out.<sup>317</sup> Because the national rate of disabled student dropouts is more than twice the rate of non-disabled students (34.5% vs. 15.9%), there must be supports in place for disabled students to succeed.<sup>318</sup> Instead of lectures from non-disabled mentors on how disabled students should pull themselves up by their bootstraps,<sup>319</sup> disabled students can get survival skills from other disabled students or recent graduates.<sup>320</sup>

To assist disabled students who feel they are unintelligent or not worthy of accommodations,<sup>321</sup> alumni and recent graduates can create a sense of loving one's self, including their disability.<sup>322</sup> For young disabled women, "participation in [a support group] boosted the[ir] self-concept and helped them fend off the internalization of others' negative attitudes and beliefs."<sup>323</sup> As disabled students support each other and receive guidance from more experienced peers who have already experienced college, it will increase their self-confidence and help them "communicate their newfound self-

316. See generally Norma J. Mejias et al., *Influence of a Support Group for Young Women With Disabilities on Sense of Belonging*, 61 J. COUNSELING PSYCH. 208, 214 (2014) (discussing the impact that peer support groups for young women with disabilities had on the participants' self-confidence and senses of identity); BROOKS, *supra* note 9, at 36 (noting that racial reformists direct self-help programs at "internal factors of bad behavior and bad values").

317. See generally Common Core of Data, *Table 1. Public High School 4-Year Adjusted Cohort Graduation Rate (ACGR), by Race/Ethnicity and Selected Demographic Characteristics for the United States, the 50 States, and the District of Columbia: School Year 2015–16*, NAT'L CTR. FOR EDUC. STAT. (Oct. 25, 2017), [https://nces.ed.gov/ccd/tables/ACGR\\_RE\\_and\\_characteristics\\_2015-16.asp](https://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2015-16.asp) (showing a lower graduation rate for students with disabilities).

318. See *id.* (These numbers reflect the inverse of graduation rates among non-disabled and disabled students that were 84.1% and 65.5%, respectively.).

319. See generally Steven Perkel, Paul J. Tobin, & James Weisman, *Disability Wrongs, Disability Rights*, 24 JURY EXPERT 1, 1 (2012) (discussing how "pulling yourself up by your own bootstraps" is both a "mainstay of American culture" and a "myth of self-sufficiency that exemplifies an ableist ideology").

320. See Syreeta L. Nolan, *The Compounded Burden of Being a Black and Disabled Student During the Age Of COVID-19*, 37 DISABILITY & SOC'Y 148, 152 (2022) (explaining the usefulness of peer advocates within the disabled student community).

321. See Mimi Corcoran, *OPINION: Fearful That They Will Be Seen As 'Lazy' or 'Unintelligent,' Most College Students With Disabilities Don't Seek Accommodation*, HECHINGER REP. (Nov. 28, 2017), <https://hechingerreport.org/opinion-fearful-will-be-seen-lazy-unintelligent-college-students-disabilities-dont-see-accommodation>.

322. See generally Mejias et al., *supra* note 316, at 208–20 (revealing how peer support can create a sense of disability pride).

323. *Id.* at 217.

perception to others around them and to claim their place in the world.”<sup>324</sup>

Reformists insist that disabled individuals are best situated to help other disabled students understand how to navigate university life, including the process for receiving accommodations and the skills needed to combat negative disability commentary that might affect students’ self-esteem.<sup>325</sup> A glance through non-disabled advice to disabled students reveals a general discussion of things like attending class, arriving on time, and turning in neat assignments, advice that would likely feel patronizing to a disabled student who may follow all of these tips and still encounter barriers to their education goals.<sup>326</sup>

In contrast to this well-meaning but generic and non-targeted advice, disabled alumni are better able to talk about the specific issues facing disabled students.<sup>327</sup> For example, they could discuss methods of advocacy with administrators regarding a broken mobility device or acquiring blind supports for advanced levels of math.<sup>328</sup> Organizations like Disability Rights, Education, Activism, and Mentoring (“DREAM”) are post-secondary networking sites where individuals can find peer support for specific issues regarding denial of accommodations, innovative accommodations in higher-level classes, and classroom discussion of disability that educates and eliminates bias.<sup>329</sup>

Attitudinal change in institutions will also need to take place to provide disabled students with an environment that is not rife with backstage discrimination. Because academia has long been seen as

---

324. *Id.*

325. *See generally id.*; BROOKS, *supra* note 9, at 36 (describing how racial reformists promote self-help programs that “draw[] heavily upon the black middle class for support”).

326. *See How Can a Student with a Disability Develop College Survival Skills?*, UNIV. OF WASH. (Apr. 9, 2021), <https://www.washington.edu/doit/how-can-student-disability-develop-college-survival-skills> (One non-disabled source providing advice to disabled students listed the following as points of advice: “1. Develop strategies, study skills, and a network of support. 2. Always attend class. 3. Arrive on time, pay attention, and participate in class discussions and activities. 4. Talk to the instructor. Ask questions. 5. Complete and check all work. Turn in neat and clear assignments. 6. Monitor their own progress. If they begin to fall behind, they should ask for help.”).

327. *See generally 10 Students with a Disability Talk about the Difficulties of Accessing Inclusive Education in the USA*, GLOB. EDUC. MONITORING REP. (Apr. 6, 2022), <https://world-education-blog.org/2019/12/03/10-students-with-a-disability-talk-about-the-difficulties-of-accessing-inclusive-education-in-the-usa> (providing an example of how graduates with disabilities are better able to talk about specific issues relating to accessing education).

328. *Id.*

329. *DREAM: Disability Rights, Education, Activism, and Mentoring*, ASS’N ON HIGHER EDUC. & DISABILITY (June 18, 2011), <https://www.dreamcollegedisability.org>.

the sole domain of the “hyper-able” individuals, disabled students are essentially the antithesis of the status quo.<sup>330</sup> Educating institutions is vital to creating a healthy environment.<sup>331</sup> There are many resources that can be given to administration and faculty to better explain important concepts such as ableism, the harm of condescending attitudes, the importance of accommodations as equal opportunity devices, and the fact that medical appointments and surgeries may cause absences that are not the fault of the student.<sup>332</sup>

Lastly, although traditionalists may continue to state that many people are using accommodations to cheat,<sup>333</sup> empirical evidence shows that it is very difficult to get an accommodation because of attitudinal,<sup>334</sup> economic,<sup>335</sup> and bureaucratic<sup>336</sup> barriers. The Varsity Blues scandal was shocking, but the fraud was only successful due to the wealth that enabled the extremely high payments. The vast majority of individuals do not have the resources to pay thousands of dollars for accommodations; thus, regular students must go through the normal protocol to receive accommodations, which has procedures to prevent cheating.<sup>337</sup> The accommodation process itself is arduous, as accommodations that the student received in high school may not be approved in post-secondary

330. DOLMAGE, *supra* note 143, at 7, 9–10, 53, 84.

331. See generally *National Council on Independent Living, Disability Pride Toolkit and Resource Guide*, NAT'L COUNCIL ON INDEP. LIVING (Oct. 2017), <https://ncil.org/resources/disability-pride-toolkit-and-resource-guide> (educating others on disabilities and (identifying the lack of intersectionality is important education and “lack of accessible and inclusive services and communities” as barriers to creating a healthier environment fostering disability pride).

332. *Id.*; Krys Méndez Ramírez, *Academic Ableism Fighting for Accommodations and Access in Higher Education*, DISABILITY VISIBILITY PROJECT (Sept. 23, 2019), <https://disability-visibilityproject.com/2019/09/23/academic-ableism-fighting-for-accommodations-and-access-in-higher-education>.

333. John Hosterman, et al., *Testing Accommodations the Perils of the Approve Everything Model*, 3(2) J. NAT'L COLL. TESTING ASS'N 9–10 (2019).

334. DOLMAGE, *supra* note 143, at 24, 82, 96; Hong, *supra* note 156, at 219–220, 22; Lyman et al., *supra* note 217, at 130; Marshak et al., *supra* note 154, at 158; Kathleen F. Stein, *DSS and Accommodations in Higher Education Perceptions of Students with Psychological Disabilities*, J. POSTSECONDARY EDUC. & DISABILITY, 26(2) 155–57 (2013); Allie Grasgreen, *Students with Disabilities Frustrated with Ignorance and Lack of Services*, INSIDE HIGHER ED (Apr. 2, 2014), <https://www.insidehighered.com/news/2014/04/02/students-disabilities-frustrated-ignorance-and-lack-services>.

335. Annie Tulkín, *Fees*, ACCESSIBLE COLL. (2022), <https://accessiblecollege.com/fees-2>.

336. See generally Cheryl A. Hurtubis et al., *Requesting Accommodations in Higher Education*, 38(3) TEACHING EXCEPTIONAL CHILDREN 28–34 (2006); Grasgreen, *supra* note 332 (stating that there are bureaucratic barriers regarding accommodations in higher education).

337. DOLMAGE, *supra* note 143, at 82.

institutions or high-stakes standardized testing.<sup>338</sup> For example, the bar exam for lawyers can require “submitting stacks of medical records,”<sup>339</sup> ten different sections of detailed information about past accommodations from childhood onward, all accommodation records from childhood, transcripts, and an essay about how their disability affects all aspects of the student’s life.<sup>340</sup> This multi-step process includes required information from many third parties from different time periods across what can be twenty+ years of a student’s life, making it extremely difficult to “cheat the system.”<sup>341</sup> A state bar organization can take six months to review the accommodations application, and some students have shared that they have been given a denial just five days before taking the exam.<sup>342</sup> Thus, many students would not have the time and energy to “cheat” by going through the arduous process of accommodations unless they were absolutely necessary.<sup>343</sup>

Further, although disabled students anonymously self-report at high rates in post-secondary schools, only one-third of students register to receive any accommodations.<sup>344</sup> Disabled students report that they do not seek accommodations because of the ostracization and stigmatization by disability offices and faculty members.<sup>345</sup>

---

338. *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, U.S. DEP’T OF EDUC. (Sept. 2011), <https://www2.ed.gov/about/offices/list/ocr/transition.html>.

339. Jane Easter Bahls, *Challenging the Bar Exam on Hidden Disabilities*, 27 STUDENT L. 21 (1998).

340. See CAL. BAR, TITLE 4. ADMISSIONS & EDUC. STANDARDS, [https://www.calbar.ca.gov/Portals/0/documents/rules/Rules\\_Title4\\_Div1-Adm-Prac-Law.pdf](https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf) 21–26; *Requesting Testing Accommodations*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations/Requesting-Testing-Accommodations>.

341. See generally Sarah E. Silverman, *Why Are Academic Accommodations Positioned as “Situationally Sanctioned Cheating?”*, <https://sarahemilysilverman.com/2022/01/05/why-are-academic-accommodations-positioned-as-situationally-sanctioned-cheating> (arguing that academic accommodations should not be looked at as cheating, as they often are).

342. Bahls, *supra* note 339, at 21.

343. *Id.*

344. DOLMAGE, *supra* note 143, at 22; Grasgreen, *supra* note 334.

345. Wendy S. Harbour & Daniel Greenberg, *Campus Climate and Students with Disabilities*, 1(2) NCCSD RSCH. BRIEF 1–25 (2017); Hong, *supra* note 156.



#### IV. DISABILITY DISPARITIES IN POST-SECONDARY EDUCATION THROUGH A DISABILITY CRITICAL RACE THEORY LENS

##### A. External Diagnosis

Institutions' role in perpetuating oppressive attitudes, policies, and practices is a central focus of critical race theorists. Disability Critical Race Theory (also known as DisCrit) will be utilized in this section, which is an subset of critical race theory and mirrors other subsets such as feminist critical race theory.<sup>346</sup> Crit theorists argue that because institutions are frequently governed by the most privileged individuals (white, able-bodied, heterosexual, male, etc.), they fail to adopt policies that promote equal access for minority groups.<sup>347</sup> Thus, DisCrit theorists, aim to address the "how racism and ableism, intersecting with additional oppressions, often have serious and sometimes deadly implications," highlighting the need for cross-sectional research.<sup>348</sup> This theory emphasizes that post-secondary institutions have existed for decades or centuries and are often built on ableism and racism, and closed off to the needs of disabled students, privileging the ableist, white, male hegemony.<sup>349</sup> This is evidenced by the fact that disability has only been recognized as a statutorily protected class for the last thirty-one years, thus, DisCrit theory seeks to build upon analysis and intersectional study of ableist structures that may impact other forms of oppression.<sup>350</sup> The same institutions that are now accepting disabled individuals as students are the same institutions that not long ago used disabled individuals as research subjects and enabled anti-disability concepts like eugenics to proliferate throughout society.<sup>351</sup>

Crit theorists argue that student disparities in higher education are due to systematic discrimination and subordination in large

---

346. See Subini Ancy Annamma et al., *Dis/Ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/Ability*, 16 RACE ETHNICITY & EDUC. 1, 5–6 (2013).

347. Sara H. Petit-McClure & Chelsea Stinson, *Disrupting Dis/Abilization: A Critical Exploration of Research Methods to Combat White Supremacy and Ableism in Education*, 3 INTERSECTIONS: CRITICAL ISSUES IN EDUC. 73 (2019).

348. Subini Ancy Annamma, Beth A. Ferri, & David J. Connor, *Disability Critical Race Theory: Exploring The Intersectional Lineage, Emergence, And Potential Futures of DisCrit in Education*, 42(1) REV. OF RSCH. IN EDUC. 46, 47 (2018).

349. Tenisha L. Tevis et al., *Disrupting White Hegemony: A Necessary Shift Toward Adopting Critical Approaches within the Teaching and Learning Environment*, 35 INT'L J. QUALITATIVE STUD. EDUC. 341, 342 (2022).

350. 42 U.S.C § 12101 et seq. (2022).

351. DOLMAGE, *supra* note 143, at 50.

post-secondary institutions and beyond.<sup>352</sup> Like reformists, crit theorists heavily cite the post-secondary statistics in degree completion, equal access and accommodation concerns, post-graduation employment, and income disparities.<sup>353</sup> They argue, however, that this data exhibits a need for institutional reform and not just integration.<sup>354</sup> Crit theorists can look to post-secondary education as a jumping-off point to eliminate subordination because higher education is shown to increase one's socioeconomic standing, reducing poverty and social mobility.<sup>355</sup> Crit theorists see post-secondary inclusion as a major impetus for societal and socioeconomic change for the disabled population, empowering disabled individuals, and reducing the lack of disabled representation in positions of power.<sup>356</sup> (See fig. V).

Crit theorists disagree with the idea that bodily difference is a defect.<sup>357</sup> The vast diversity of the human body "exists on a continuum of human variation,"<sup>358</sup> making disability a common facet of life.<sup>359</sup>

While a disability is an impairment, unequal access is what creates a *disabling* effect.<sup>360</sup> Theorists view this definition of "disability" as a social construction manifested when the surrounding community interprets the impairment as a burden and subsequently declines to give equal access in the community.<sup>361</sup> The physical impairment is not what "disables" an individual; rather, it is the "reactions of the family and social group[s] toward [a disabled individual] as a non-typical member" that hinder the individual's full participation in society.<sup>362</sup>

Crit theorists like Stanford professor Subini Ancy Annamma who created DisCrit's theoretical framework, declares an intersectional lens of other socially constructed identities is necessary to

352. Ashley Taylor & Lauren Shallish, *The Logic of Bio-Meritocracy in the Promotion of Higher Education Equity*, 34 DISABILITY & SOC'Y 1200, 1202 (2019).

353. See *id.* at 1201–02.

354. See Patricia Silver et al., *Universal Instructional Design in Higher Education: An Approach For Inclusion*, 31 EQUITY & EXCELLENCE IN EDUC. 47, 50 (1998).

355. See, e.g., Yusuf Sayed, EDUC. AND POVERTY REDUCTION STRATEGIES: ISSUES OF POL'Y COHERENCE 53, 58 (Simeon Maile ed., 2008); Broton, *supra* note 3, at 20.

356. See DOLMAGE, *supra* note 143, at 27–29.

357. See, eg., Braddock, *supra* note 94, at 11–12.

358. Tonette S. Rocco, *From Disability Studies to Critical Race Theory: Working Towards Critical Disability Theory*, ADULT EDUC. RSCH. CONF. (2005), <https://newprairiepress.org/aerc/2005/papers/17>.

359. See *id.*

360. See Braddock, *supra* note 94, at 11.

361. *Id.*

362. See ALAN G. GOWMAN, THE WAR BLIND IN AM. SOCIETAL STRUCTURE 5 (1957).

understand their interaction with disability and the oppression found at the crossroads of marginalized identities.<sup>363</sup>

Crit theory has a firm emphasis that identities do not exist in a vacuum, thus it is vital to consider the whole individual when discussing their civil rights. By examining a disabled person's race, ethnicity, color, gender, sex, sexual orientation, gender identity, citizenship, language, housing status, national origin, class, socioeconomic status, or ancestry—the identities of which either result in oppression or privilege—crit theorists break from the norm of disaggregation, instead looking at the holistic individual to more accurately reflect a person's experiences with civil rights.<sup>364</sup> Examples of crit theorist's intersectional analysis can be seen research conducted by leaders such as the Center for Black Deaf Studies,<sup>365</sup> Autistic Women & Nonbinary Network,<sup>366</sup> and the Center for Racial and Disability Justice.<sup>367</sup>

Unlike the traditionalist's medical model that posits that disability is solely the "problem of the person,"<sup>368</sup> crit theorists recognize the additional issues of unequal or no access to the world, and this may be exacerbated by other identities, including disability and race.<sup>369</sup> A crit theory lens contends that a disabled individual's "exclusion from society is not their disability but rather the physical, attitudinal, and legal barriers that prevent them from fully

---

363. See Subini Ancy Annamma et al., *supra* note 347, at 5–6 (2013); see also Kimberlé Crenshaw on Intersectionality, *More than Two Decades Later*, COLUM. L. SCH., <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later> (a brief overview of intersectionality as originally coined by Kimberlé Crenshaw, which also contains a link to the seminal 1989 paper, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, UNIV. OF CHI. LEGAL F.).

364. *Id.* (While the focus of this introductory article is theoretical civil rights frameworks and their application to disability, it would be remiss not to mention that there are many intersectional statistical analyses that can be performed to better understand the cross-sections of marginalized identities resulting in disaggregation and cross-tabulation. Because of the vast amount of data, further articles will be needed to delve into a cross-sectional basis regarding intersectional identities that result in multi-marginalized communities).

365. Center for Black Deaf Studies, GALLAUDET UNIV., <https://gallaudet.edu/center-black-deaf-studies> (last visited Apr. 7, 2023).

366. Autistic Women & Nonbinary Network, <https://awnnetwork.org> (last visited Apr. 7, 2023).

367. *Northwestern Pritzker Law Center for Racial and Disability Justice (CRDJ)*, NORTHWESTERN PRITZKER SCH. OF L., <https://www.law.northwestern.edu/research-faculty/racial-disability-justice> (last visited Apr. 7, 2023).

368. Lisa I. Iezzoni & Vicki A. Freedman, *Turning the Disability Tide: The Importance Of Definitions*, 299 JAMA NETWORK 332, 332 (2008).

369. See *id.* at 333.

participating as equal members in society,” as well as the other identities a disabled student may hold that contribute to systematic oppression.<sup>370</sup>

Crit theorists disagree with the long-held tendency to infantilize disabled individuals.<sup>371</sup> Instead, they push for self-determination primarily through holistic narratives told by disabled people and then seek to make those nuanced voices heard in positions of power.<sup>372</sup> The goal of crit theorists is to change institutions to reframe disabled individuals as “rights holders, rather than passive recipients of services.”<sup>373</sup> An example of a successful implementation of this process was the CRPD, which brought disabled individuals from around the world to craft a declaration of disability rights with a goal of creating global systemic change.<sup>374</sup>

Crit theory has taken this social model of disability and further illuminated the context that surrounds society and its conscious impact on disability.<sup>375</sup> The word “handicap” originates from how horse racers would purposefully put rocks and weights on horses to “handicap” them in a competition.<sup>376</sup> This concept directly demonstrates the social model of disability where outside forces “disable” a person in all aspects of society.<sup>377</sup> Whether being subjected to degrading and inhuman comments from family members,<sup>378</sup> going to an inaccessible restaurant or school, encountering benevolent paternalism or lowered expectations, or living in an inaccessible home, historical and systematic oppression is what causes discrepancies in disabled students’ access to higher education.<sup>379</sup>

370. Kanter, *supra* note 64, at 597.

371. See FRED PELKA, *WHAT WE HAVE DONE: AN ORAL HISTORY OF THE DISABILITY RIGHTS MOVEMENT* ix (2012).

372. See Rocco, *supra* note 358.

373. Kanter, *supra* note 64, at 596.

374. See UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, U.N. DEP’T OF ECON. & SOC. AFF’S 14 (2006), <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>.

375. See generally Emily Krebs, *Baccalaureates or Burdens? Complicating Reasonable Accommodations for American College Students with Disabilities*, 39 *DISABILITY STUD. Q.* (2019), <https://dsq-sds.org/article/view/6557/5413>.

376. See Jørn Hansen, *The Origin of the Term Handicap in Games and Sports—History of a Concept*, 65 *PHYSICAL CULTURE & SPORT* 7, 8 (2015).

377. See *id.* at 9–10.

378. See Mohammad Mehdi Tabatabainia, *Listening to Families’ Views Regarding Institutionalization & Deinstitutionalization*, 28 *J. INTELL. & DEV’L DISABILITY* 241 (2003).

379. See Krebs, *supra* note 375.

### B. External Prescription

#### i. Combat Systemic Discrimination: Bring Disabled Voices to Forefront

Because crit theorists believe that institutions sustain ableism, perhaps their most important prescription is to ensure that disabled individuals, especially people of color with disabilities, are represented in leadership of institutions.<sup>380</sup> Crit theorists go further than reformists to argue that not only is integration needed,<sup>381</sup> but institutional anti-subordination measures are vital to ensure disabled individuals have equal access.<sup>382</sup> Latinx Crit theorist Alexis Padilla describes the need to “engender dialogue among radically different categories of educators and emancipatory learning contexts.”<sup>383</sup> By placing disabled individuals in authority positions within institutions, they will be better able to use their influence to deconstruct the ableist aspects of the institution and build up a pro-disability infrastructure that truly understands and caters to disabled students.<sup>384</sup> Crit theorists like disability justice scholars Shain Neumeier and Lydia X. Z. Brown directly respond to the traditionalist perspective that discrimination is behind us by discussing the impact of thinly veiled anti-equity policies within academia.<sup>385</sup>

If openly disabled individuals make up a larger percentage of university professors and college disability office staff, faculty will be empowered to change the norms that currently discriminate and stigmatize disabled individuals for seeking accommodations and equal access.<sup>386</sup> Disabled faculty members make up around 4% of

380. See, e.g., Ruth Colker, *Anti-Subordination above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1436–37 (2006).

381. See *id.* at 1417.

382. See *id.*

383. Alexis C. Padilla, *Race, Disability and the Possibilities of Radical Agency: Toward a Political Philosophy of Decolonial Critical Hermeneutics in Latinx Discri* 1, 391 (Dec. 2018) (Ph.D. dissertation, University of New Mexico) (on file with University of New Mexico Digital Repository).

384. See Aleksandra Kosanic et al., *Researchers with Disabilities in the Academic System*, AM. ASS'N OF GEOGRAPHERS NEWSL. 1, 2 (Sept. 1, 2018), <http://researchonline.ljmu.ac.uk/id/eprint/13264/1/Kosanic%20et%20al%20%281%292018.pdf>.

385. See generally Shain A. M. Neumeier & Lydia X. Z. Brown, *Beyond Diversity and Inclusion: Understanding and Addressing Ableism, Heterosexism, and Transmisia in the Legal Profession: Comment on Blanck, Hyseni, and Altunkol Wise's National Study of the Legal Profession*, 47 AM. J. L. & MED. 76, 76–87 (2021) (revealing some of the ways the legal academy quietly promotes ableist culture).

386. See Rosa Ramirez, *Professors, Disabilities, and Other Soc. Identities; An Intersectional Look at Higher Education*, 1 MACKSEY J. 1, 8 (2020).

all faculty,<sup>387</sup> and in prestigious post-secondary institutions, disabled individuals hold just 1.5% of faculty positions.<sup>388</sup> Thus, faculty have just as much stigma, if not more, from the normative hegemonic ableist culture of universities that they must combat in a similar fashion to disabled students.<sup>389</sup> Professors will likely be treated as less capable by other faculty members if they disclose a disability;<sup>390</sup> therefore, faculty members must sacrifice these norms to create a better culture for students, a feat not easily done. Some faculty have indicated that they plan to disclose a disability or be a more vocal advocate only when they succeed in receiving tenure when employment is much more stable.<sup>391</sup> Further, those in a faculty minority as a person of color already are perceived as less qualified and their research less important than their white colleagues, creating additional barriers to tenure at the outset.<sup>392</sup> Crit theorists would maintain that faculty members that openly disclose and advocate for disability-related issues will change the systemic culture of post-secondary education.<sup>393</sup>

Disabled students will be greatly benefited from professors with the self-confidence to indicate a disability and still show they are an asset to the community.<sup>394</sup> Disabled students will have a role model of a professor that is disabled but still in a high position of academia and professional authority.<sup>395</sup> Of course, crit theorists would be sure to rebut the traditionalist mindset of “empowerment” should not be abused to state that *all* disabled people must make it to a prestigious tenured position, and those that do not are simply not working hard enough.<sup>396</sup> Instead, crit theorists indicate that student empowerment is siphoned through the student not having feelings of self-hatred and inadequacy in a disabled professor’s

---

387. Lilah Burke, *A Difficult Pathway*, INSIDE HIGHER ED (May 12, 2021), <https://www.insidehighered.com/news/2021/05/12/faculty-disabilities-say-academe-can-present-barriers>.

388. Kosanic et al., *supra* note 384, at 1.

389. See Ramirez, *supra* note 386, at 2, 9.

390. See DOLMAGE, *supra* note 143, at 177; see also Ramirez, *supra* note 386, at 5.

391. See Ramirez, *supra* note 386, at 7.

392. Donnetrice C. Allison, *Free to Be Me? Black Professors, White Institutions*, 38(4) J. OF BLACK STUDIES 641, 642-44 (2008).

393. See *id.* at 8.

394. *Id.*

395. *Id.*

396. See DOLMAGE, *supra* note 143, at 70.

class.<sup>397</sup> In addition, students now have a mentor<sup>398</sup> to speak with about disability-related issues in post-secondary education without fear that faculty will disparage their intelligence, ignore them in class, or see the disability as illegitimate.<sup>399</sup> Both of these factors contribute to reforming the culture of post-secondary education.

In addition, disabled voices must be clearly acknowledged and heard at all levels of an institution, both publicly and privately. Currently, non-disabled students are the norm at higher education institutions because historically few disabled students were able or allowed to attend.<sup>400</sup> Even now, disabled students are often invisible to their peers and the institutional community.<sup>401</sup> More efforts must be made to amplify stories regarding the complex disabled experience at colleges and universities. In addition, crit theorists portray disability not in a vacuum, but in accordance with an individual's many intersecting identities that leads to complex narratives only they can portray.<sup>402</sup> The benefits of this are multidimensional, helping both non-disabled students to gain a better understanding and appreciation for the experiences of their disabled peers and helping disabled students feel more empowered by seeing themselves as full members of and participants in the institution.<sup>403</sup>

Like reformists, crit theorists point to the fact that 94% of high school students with learning disabilities receive accommodations, but only 19% of disabled students receive accommodations once they enter higher education institutions.<sup>404</sup> Crit theorists contend that post-secondary educations have ableist cultures that actively seek to make students reluctant to seek accommodations, and if students seek assistance, they enter a convoluted and arduous

397. See Ramirez, *supra* note 386, at 5–6.

398. See Brigid M. Noonan et al., *Challenge and Success: A Qualitative Study of the Career Development of Highly Achieving Women with Physical and Sensory Disabilities*, 51 J. COUNSELING PSYCH. 68, 75 (2004).

399. Cf. Lyman et al., *supra* note 217, at 130 (highlighting some negative experiences students with disabilities have experienced with professors).

400. See DOLMAGE, *supra* note 143, at 59.

401. See *id.* at 9–10.

402. See generally Sumi Cho et al., *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 J. WOMEN IN CULTURE & SOC'Y, no. 4, 785–810 (2013); U.N. Convention on the Rights of Persons with Disabilities art. 24, *supra* note 371; ChrisTiana ObeySumner, #DisabilitySoWhite: Reflections on Race and Disability on ADA Day, EPIPHANIES OF EQUITY LLC (July 26, 2019) <https://www.christianaobeysumner.com/blog/2019/7/26/disabilitysowhite-reflections-on-race-and-disability-on-ada-day>; Ramirez, *supra* note 379, at 6 (articulating examples of intersecting identities to show how they create unique individual stories).

403. See Kosanic et al., *supra* note 384, at 2.

404. Newman et al., *supra* note 156, at 32.

process to receive the accommodation itself.<sup>405</sup> Crit theorists would want a complete overhaul of the institutional system to eliminate the difficulty and stigma of equal access.<sup>406</sup>

## ii. Equal Access Is Not a Controversy

Crit theorists respond directly to traditionalist cheating arguments by contending that comprehensive research has long held that the standardized tests *themselves*, not the accommodations, may be the external factor at issue for fairness.<sup>407</sup> Standardized testing has been empirically proven to be an insufficient indicator of intelligence or merit, negating the traditionalists' core argument that such tests are fair on their face.<sup>408</sup> The tests, especially high-stakes tests like the ACT, SAT, MCAT, and LSAT, are characterized by "conceptual incoherence"<sup>409</sup> and are "surprisingly poorly written."<sup>410</sup> Indeed, the fact that wealthy white celebrities have been able to pay their way to a high standardized test score may indicate that the tests themselves should be abolished in favor of more holistic evaluations of college readiness and academic aptitude.<sup>411</sup>

Although the Varsity Blues scandal did show that accommodations were abused, wealth was the greater factor. Crit theorists point to the fact that real societal change must occur to give equal access to those who do not have a privileged socioeconomic status.<sup>412</sup> Admissions scandal court documents revealed how wealthy families exploited the high stakes exams by paying \$15,000 to \$75,000 to ensure a high test score.<sup>413</sup> Although the Varsity Blues report gave the United States a case study in what wealth can provide, empirical studies have yet to do sufficient research in the area of socioeconomic inequality and accommodations.<sup>414</sup> However, anecdotal news

405. See DOLMAGE, *supra* note 143, at 22, 24, 93.

406. See *id.* at 82, 96; see Grasgreen, *supra* note 334.

407. See Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California*, CTR. FOR STUD. IN HIGHER EDUC., UNIV. OF CAL., BERKELEY 1, 6–7 (Dec. 2017).

408. See *id.* at 7–9.

409. Richard Delgado, *Official Elitism or Institutional Self Interest—10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 UC DAVIS L. REV. 598–99 (2009).

410. *Id.*

411. *Id.*

412. Benjamin J. Lovett, *Disability Identification and Educational Accommodations Lessons from the 2019 Admissions Scandal*, 49(2) EDUC. RSCH'ER 128 (2020).

413. Laura Smith, *Affidavit in Support of Criminal Complaint*, U.S. DEP'T OF JUST. 1, 11 (Mar. 11, 2019), <https://www.justice.gov/file/1142876/download>.

414. Lovett, *supra* note 404, at 127.



investigations have shown a high correlation of affluent school districts having much higher populations of students receiving accommodations compared with low-income districts.<sup>415</sup> Because of this inequality, crit theorists would look to overhaul the entire elitist system by eliminating timed tests altogether (the most oft-cited accommodation that causes controversy),<sup>416</sup> creating universal access systems for classrooms and tests,<sup>417</sup> providing free testing across the board,<sup>418</sup> eliminating legacy scholarships,<sup>419</sup> increasing access to healthcare to impoverished communities,<sup>420</sup> and even the need for a complete dismantling of learning disability evaluations made by and for ableist hegemonic culture.<sup>421</sup> The ACT, SAT, LSAT, GMAT, and other institutional players need to eliminate the socioeconomic subordination baked into their functionality as a gatekeeper to higher education.

As a note, attention must be given to the preeminence of fraud in society at large, especially when combating the traditionalist theory of fraud in accommodations. For example, most of the affluent students scammed universities by fabricating an athletics background, not through accommodation fraud.<sup>422</sup> But few traditionalists have suggested that athletic or legacy scholarships should be eliminated.<sup>423</sup> However, those abusing athletic scholarships obtained attendance at more prestigious schools like Yale, Stanford, UCLA, and

415. Dana Goldstein & Jugal K. Patel, *Need Extra Time on Tests? It Helps to Have Cash*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/extra-time-504-sat-act.html>.

416. Lovett, *supra* note 410; Greg Toppo, *Support Builds for Making the SAT Unlimited for Everyone*, 20(1) EDUC. NEXT at 2 (2020).

417. Sheryl Burgstahler, *Universal Design of Instruction (UDI) Definition, Principles, Guidelines, and Examples*, UNIV. OF WASH. (2020), [https://www.washington.edu/doit/sites/default/files/atoms/files/UD\\_Instruction\\_06\\_15\\_20.pdf](https://www.washington.edu/doit/sites/default/files/atoms/files/UD_Instruction_06_15_20.pdf).

418. Goldstein & Patel, *supra* note 415.

419. See generally Peter Arcidiacono et al., *Legacy and Athlete Preferences At Harvard*, 40(1) J. OF LAB. ECON. 153 (2022).

420. Goldstein & Patel, *supra* note 415; Bea Waterfield & Emma Whelan, *Learning Disabled Students and Access To Accommodations Socioeconomic Status, Capital, and Stigma*, DISABILITY & SOC'Y 327, 1000–02 (2017); see generally Ernest Moy et al., *Preparing the National Healthcare Disparities Report Gaps in Data for Assessing Racial, Ethnic, and Socioeconomic Disparities in Health Care*, MED. CARE 19–116 (2005).

421. Waterfield & Whelan, *supra* note 418; *Apology to People of Color for APA's Role in Promoting, Perpetuating, and Failing to Challenge Racism, Racial Discrimination, and Human Hierarchy in U.S.*, AM. PSYCH. ASS'N (Oct. 2021), <https://www.apa.org/about/policy/racism-apology>.

422. Smith, *supra* note 413.

423. See generally Peter Arcidiacono et al., *supra* note 419.

Georgetown in comparison to those abusing accommodations.<sup>424</sup> Although abuse and fraud should not occur at any institution, it is worth noting that fraudulent athleticism was a superior method of obtaining admission to prestigious universities.<sup>425</sup> Overall, certain individuals commit fraud in many aspects of life, from Medicaid<sup>426</sup> and corporate business,<sup>427</sup> to taxes<sup>428</sup> and athletics.<sup>429</sup> Yet these programs and activities continue to exist and are important parts of society. Crit theorists state that programs supporting disabled students should not be eliminated simply because dishonest and deceitful people commit fraud.<sup>430</sup> Instead, the focus should be on improving institutional access.

### iii. Universal Design

Crit theorists would also prescribe “universal design” instead of reformist “accommodations,” which may lead to more extensive integration and appeasing traditionalists. Universal design standards create social change by making facilities that are accessible for all, regardless of impairment.<sup>431</sup> While universal design was first approached as a design theory for physical buildings and classrooms, it also encompasses classroom management, teaching methodology, and other student resources.<sup>432</sup> With universal design, all students as well as their intersecting identities are considered proactively, eliminating the need for accommodations or other adaptations.<sup>433</sup> This prophylactic treatment of disability issues provides better education for all students, as the universal design of post-secondary courses will

424. Hannah Fry, *College Admissions Scandal Fallout: Stanford Students Sue UCLA, USC and Yale*, L.A. TIMES (Mar. 14, 2019), <https://www.latimes.com/local/lanow/la-me-ln-college-admissions-scandal-stanford-ucla-usc-lawsuit-20190314-story.html>.

425. *Id.*

426. See generally Alberto Coustasse et al., *Upcoding Medicare: Is Healthcare Fraud and Abuse Increasing?*, 18(4) PERSPECTIVES HEALTH INFO. MGMT. (2021).

427. See generally Alexander Dyck et al., *Who Blows The Whistle On Corporate Fraud?* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12882, 2007).

428. See generally Tisha King & Jonathan Farrar, *To Punish or Not to Punish? The Impact of Tax Fraud Punishment on Observers' Tax Compliance*, 183(1) J. BUS. ETHICS 289, 289–90 (2022); Binnaz Coban, *Taxation of the Rich the Issue Revisited with the Last Pandemic*, 32(120) SAYIŞTAY DERGİSİ 35, 54 (2021).

429. See generally Paul Massaro et al., *Learn How Anti-Doping Legislation Potentially Impacts College Athletics Administrators*, 18(5) COLL. ATHLETICS & L. 4, 4–5 (2021).

430. Burgstahler, *supra* note 417.

431. See generally Sally S. Scott et al., *Implementing Universal Design in Higher Education Moving beyond the Built Environment*, 16(2) J. POSTSECONDARY EDUC. & DISABILITY 78, 78–89 (2003).

432. *Id.*

433. Burgstahler, *supra* note 417.

not only acknowledge disabled students but will not disadvantage non-disabled students. With universal access, all students are provided access to physical facilities, resources, and classroom methods that are accessible to everyone. An example of universal design may range from a flexible lab experience with all physical tools for any impairment to providing class materials in multiple forms for all students.<sup>434</sup> This eliminates both the traditionalists' fear that disabled students will be unfairly advantaged while also taking the burden off disabled students to apply for and single themselves out in class when needing to use accommodations.

### C. Internal Diagnosis

As in reformism, crit theorists also think that external factors dominate the discussion regarding disability disparities in higher education, meaning internal factors play a lesser role.<sup>435</sup> Crit theorists reject traditionalists' "if you can't change your circumstances, you change yourself" theory as simplistic.<sup>436</sup> Crit theorists posit the primary internal factor is when individuals contribute to their own subordination.<sup>437</sup> This happens when disabled individuals allow discrimination to occur without opposing it. It can be extremely difficult for disabled students to develop the courage to advocate for themselves due to the stigmatization they face and their internalized fears of being viewed as a burden on society and the institutions that support them.<sup>438</sup> However, if a disabled student simply accepts an unwillingness to allow equal access, they are only permitting ableist attitudes and practices to continue.<sup>439</sup> A university that receives little to no pushback when denying accommodations will likely become more emboldened to continue this discriminatory practice, meaning future disabled students will also suffer.<sup>440</sup>

---

434. *Id.*

435. BROOKS, *supra* note 9, at 102.

436. Simon Sinek, *What Diversity & Inclusion is REALLY About* | Simon Sinek, YOUTUBE (Dec. 16, 2020), <https://www.youtube.com/watch?v=XisFCRrQivU> (showing traditionalist Simon Sinek talk about his version of diversity in business); BROOKS, *supra* note 9 at 102.

437. Simon Sinek, *supra* note 436; BROOKS, *supra* note 9 at 102.

438. Lyman et al., *supra* note 217, at 128.

439. *See id.*

440. *See id.* at 132.

### D. Internal Prescription

#### i. Avoid Contributing to Their Own Subordination

When disabled students and faculty members speak out and discuss hidden and unconsidered barriers to higher education, social change can occur.<sup>441</sup> Crit theorists point to the fact that disabled students perform on par with non-disabled students in opposition to the traditionalist view of internal diagnosis.<sup>442</sup> Crit theorists have often prescribed protests, marches, fundraising, and partnerships with organizations to raise awareness to the issue of barriers for disabled students in post-secondary education.<sup>443</sup> However, internalized ableism often prevents students from speaking out about potential discrimination.<sup>444</sup> Disabled students must not be afraid to speak up and out about changes needed for the institution in order to remove systemic barriers. By continuing to allow post-secondary institutions to promulgate the stigma that disabled students are not as capable as non-disabled students, disabled students contribute to their own subordination.<sup>445</sup> Disabled students may try to assimilate into the institution, but crit theorists contend that not speaking up keeps stereotypes alive regarding disability as an identity to “express profound and sincere sympathy for . . . while, at the same time, keeping them in a position of social and economic subordination.”<sup>446</sup> Instead, for example, if a disabled person can speak up in a professional manner about an ableist comment, however unintended, social awareness of disability as inferiority can change.<sup>447</sup>

When there are competing interests at the university (i.e., an institution’s historical policy differs from a student’s accommodation), the final decision should always consider the student’s right to equal access ahead of the potential need for institutional innovation or change. Providing equal access to education should

---

441. See Nikki Rojas, *Raising Awareness About Disability Amid Pandemic*, THE HARV. GAZETTE (Jan. 18, 2022), <https://news.harvard.edu/gazette/story/2022/01/raising-awareness-about-disability-amid-pandemic>.

442. Richard Sparks et al., *College Students Classified with ADHD and the Foreign Language Requirement*, 37 J. LEARNING DISABILITIES 169, 174 (2004).

443. BROOKS, *supra* note 9, at 102.

444. Fiona A. Kumari Campbell, *Exploring Internalized Ableism Using Critical Race Theory*, 23(2) DISABILITY & SOC’Y 151, 156 (2008).

445. BROOKS, *supra* note 9, at 102; Campbell, *supra* note 442, at 153.

446. Campbell, *supra* note 444, at 153.

447. See generally Emily Ladau, *I Am More Than An Empty Wheelchair: Speaking Up Against Ableism*, EMILY LADAU (Apr. 11, 2014), <https://emilyladau.com/2014/04/speak-up-against-ableism>.

be the institution's most important goal. This avoids putting the onus of worthlessness on disabled students.<sup>448</sup> Crit theorists would argue the missions of post-secondary institution should be reflective and truly invested in all students' education to create transformative academic societies.<sup>449</sup>

## ii. ADA Enforcement

Although crit theorists prefer complete institutional change in ADA legislation, they also prescribe "rigorous enforcement" of the current discrimination frameworks.<sup>450</sup> The current power to achieve change in disability discrimination cases is lacking.<sup>451</sup> Although the ADA was seen as the pinnacle of disability rights in the United States, it has far to go to achieve real equity.<sup>452</sup> Crit theorists would want to ensure that even if the ADA is not expanded, ADA discrimination cases are taken more seriously than they currently are. Research shows that only 1.7% of ADA civil rights cases litigated with the EEOC were successfully won by the disabled plaintiff, and 66.2% claims of discrimination were simply dismissed.<sup>453</sup> This is also mirrored outcomes in post-secondary education discrimination, where institutions won 81% of the time when the students requested academic adjustments.<sup>454</sup> Discriminatory treatment cases showed an even higher institutional win rate of 87.7% of the time.<sup>455</sup> Crit theorists would likely prescribe sociolegal change in the court system itself, educating lawyers and judges on the validity of disability. Unlike traditionalists, crit theorists argue that ADA disparate impact

---

448. Terry O'Banion, FOCUS ON LEARNING: A LEARNING COLL. READER 1, 2, 5 (2010).

449. John C. Scott, *The Mission of the University: Medieval to Postmodern Transformations*, 44(1) J. HIGHER EDUC. 1, 3 (2006).

450. BROOKS, *supra* note 9, at 50.

451. See Margaret M. McMenamin & Perry A. Zirkel, *OCR Rulings under Section 504 and the Americans with Disabilities Act Higher Education Student Cases*, 16(2) J. POSTSECONDARY EDUC. & DISABILITY 55, 55 (2003).

452. See Shruti Rajkumar, *The ADA Was A Victory For The Disabled Community, But We Need More. My Life Shows Why*, NAT'L PUB. RADIO (July 29, 2022), <https://www.npr.org/2022/07/29/1113535976/ada-disabilities-act-activists-more-protections>.

453. U.S. EQUAL EMP. OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES (CHARGES FILED WITH EEOC) (INCLUDES CONCURRENT CHARGES WITH TITLE VII, ADEA, EPA, AND GINA) FY 1997–FY 2021, <https://www.eeoc.gov/data/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent-charges>.

454. McMenamin & Zirkel, *supra* note 451, at 58.

455. *Id.*

cases also need to be strengthened.<sup>456</sup> Because most discrimination is now more hidden than before the ADA,<sup>457</sup> crit theorists argue dismantling the institutional norms will allow transformative equal access to post-secondary institutions.<sup>458</sup>

## V. DISABILITY DISPARITIES IN POST-SECONDARY EDUCATION THROUGH A LIMITED SEPARATIST LENS

### A. *External Diagnosis*

The theory of limited separatism envisions voluntary and non-exclusionary partial or complete uncoupling from the dominant hegemonic society, by a marginalized group. Importantly, this is very different from segregation, which is governmental or societal *forced* isolation. The theory comes from the fact that marginalized communities have been subordinated, oppressed, and dehumanized when trying to integrate or assimilate into the hegemonic society. Thus, *voluntary* separation creates a safe support system from oppression. Limited separatists also declare identity as an important part of a community, which ensures that those with similar life experiences and identities are creating opportunities, policies, and social norms that benefit those within the same identity community.

Limited separatists would diagnose the disparities in post-secondary education as one of forced integration to a majority non-disabled institution.<sup>459</sup> External factors of outward discrimination as well as unconscious bias have created institutional environments in which disabled students encounter barriers to equal access.<sup>460</sup> Non-disabled students and administrators do not understand disability and have skewed perceptions of disabled students.<sup>461</sup> This leads them to treat disabled students as “other,” falling outside the able-

---

456. *Payan v. L.A. Cmty. Coll. Dist.*, No.: 2:17-cv-01697-SVV-SK 2019 WL 2185138, at \*11 (C.D. Cal. May 21, 2019) *rev'd*, 11 F.4th 729 (9th Cir. 2021) (Disabled students have come to the forefront of several Supreme Court cases that may be decided later this year. The Supreme Court is set to receive an appeal in March to dismantle higher education disparate impact cases. The L.A. Community College District may appeal to the Supreme Court in early March).

457. Amanda Morris, *Deaf And Unemployed: 1,000+ Applications But Still No Full-Time Job*, NAT'L PUB. RADIO (Jan. 12, 2019), <https://www.npr.org/2019/01/12/662925592/deaf-and-unemployed-1-000-applications-but-still-no-full-time-job>.

458. See Campbell, *supra* note 444, at 160.

459. See DOLMAGE, *supra* note 143, at 53.

460. *Id.*

461. *Id.* at 153.

bodied norm.<sup>462</sup> Integration of disabled students into universities controlled by able-bodied individuals merely attempts to force disabled students to pretend they are the non-disabled population.<sup>463</sup> Limited separatists, like Jay Dolmage, illustrate this point further: “[t]he demand is that that one body be adapted to a curriculum (or structure or terrain) that is otherwise unwelcoming, inaccessible, inhospitable to that body and mind.”<sup>464</sup> Limited separatists believe it is unlikely that non-disabled individuals will allow disabled individuals to become genuine decision-makers at universities as crit theorists hope.<sup>465</sup> The non-disabled population is comfortable in their status as the dominant group and will not willingly switch places and allow disabled students to dictate institutional policies that may make non-disabled students the outsiders.<sup>466</sup> Thus, the current framework of integrated institutions has the potential to isolate disabled students in non-disabled spaces and put pressure on them to conform to non-disabled norms, which is an unrealistic endeavor.<sup>467</sup>

### B. *External Prescription*

Limited separatists would posit that disabled students are more likely to find success with those who understand disability intimately, namely disabled communities.<sup>468</sup> Limited separatists push back against the reformist and crit theorist argument that “separate is inherently unequal.”<sup>469</sup> Instead, limited separatists would argue that the solutions to disparities in post-secondary education would be to provide a loving and accepting environment though disability-focused institutions.<sup>470</sup> Reformists’ argument in favor of forced integration is due to a fear of disabled students’ mistreatment.<sup>471</sup> However, limited separatists would contend that these concerns are less worrying in higher education with adult students who have the autonomy

---

462. *Id.* at 108–09.

463. *Id.* at 72; See BROOKS, *supra* note 9, at 68.

464. DOLMAGE, *supra* note 143, at 72.

465. See *id.* at 43 (discussing the “[M]ethodical exclusion of disabled people from planning, architecture, and design decision making.”).

466. BROOKS, *supra* note 9, at 65 (discussion of the limited separatist view of human self-interest).

467. See DOLMAGE, *supra* note 143, at 72.

468. Noonan et al., *Challenge and Success: A Qualitative Study of The Career Development of Highly Achieving Women With Physical and Sensory Disabilities*, 51 (1) J. COUNSELING PSYCH., 68, 77 (2004).

469. See Colker, *supra* note 380, at 1422.

470. *Id.* at 1423.

471. See *id.*

to choose their institution and can better report mistreatment.<sup>472</sup> In addition, limited separatists stress that a disability-focused institution will be made with disabled students' and faculty's best interests in mind.<sup>473</sup> Although accommodations and support are often only given the bare minimum attention,<sup>474</sup> a disability-focused institution can give an extraordinary education that supports disabled students from all angles.<sup>475</sup>

Like crit theorists, these disability-focused universities would like to maintain universal design as well as provide any unique accommodations that students may have.<sup>476</sup> Universal design universities will push disability to the forefront, creating an environment that provides equal access to all.<sup>477</sup> Universal design may also combat the argument that having disabled institutions for each disability will be too burdensome.<sup>478</sup> Instead, limited separatists posit that providing the most equal access through universal design coupled with disability accommodations tailored to an individual will eliminate the need for separating out each "type" of disability by providing for all of an individual's intersecting identities.<sup>479</sup> Limited separatists would argue that universal design can also be executed more effectively in disability-focused institutions because the ableist culture of a regular institutions' norms will not constantly be pushing back against equal access.<sup>480</sup> Disability-led institutions managed by disabled faculty members and administration eliminate the guesswork of non-disabled administration trying to guess what disabled students need.<sup>481</sup> In addition, because limited separatist institutions

---

472. *See id.*

473. *Cf. id.* at 1465 (indicating a line of cases suggesting parents send their children to disability-only schools "[W]hen the public schools were not able to provide them with an adequate education for their children.").

474. *See generally* Justice Department Reaches Agreement with Brown University to Ensure Equal Access for Students with Mental Health Disabilities, U.S. DEP'T OF JUST. (Aug. 10, 2021), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-brown-university-ensure-equal-access-students-mental> (example of university following minimum regulatory ADA requirements but in the process, creating discriminatory issues); DOLMAGE, *supra* note 143, at 27.

475. Cecilia Simón et al., *Attitudes Toward Inclusion and Benefits Perceived by Families in Schools with Students with Autism Spectrum Disorders*, J. AUTISM DEV. DISORD. (2022).

476. Scott et al., *supra* note 431, at 83.

477. *See generally id.*

478. Burgstahler, *supra* note 417.

479. *Id.*

480. *See* DOLMAGE, *supra* note 143, at 72.

481. *See generally* David Harry Smith & Jean F. Andrews, *Deaf and Hard of Hearing Faculty in Higher Education Enhancing Access, Equity, Policy, and Practice*, 30(10) DISABILITY & SOC.



can “deny access to an individual belonging to another group . . . [if they] would destroy the institution’s identity,”<sup>482</sup> a majority of students would have disabilities.<sup>483</sup> This will prevent the usual institutional response of there being too few students with disabilities to seriously think about proactively providing equal access across the university.<sup>484</sup>

Post-secondary institutions like Gallaudet University, a historically deaf college in D.C., is a prime example of the merits of disability-centric institutions.<sup>485</sup> Unlike most colleges, all of Gallaudet’s “programs and services are specifically designed to accommodate deaf and hard of hearing students”<sup>486</sup> while producing students who have professional success in the changing local and global communities.<sup>487</sup> Gallaudet has turned disability “accommodation” on its head, instead providing all the tools for disabled success as the standard, influencing the very culture of the entire university.<sup>488</sup>

1521, 1521–36 (2015) (discussing solutions for institutions to integrate disabled faculty members using the same interventions that disabled students will also need).

482. BROOKS, *supra* note 9, at 76.

483. *See id.*

484. *See* DOLMAGE, *supra* note 143, at 42 (“There is a phrase that many disability studies teachers have heard from colleagues over and over again, . . . ‘but there are no disabled students in my class.’ . . . That wish or desire for higher education without disability is academic ableism in a nutshell . . . . But by more literally mapping disability as a reality and an important, contributing population in colleges and universities, there is a move to refuse this desire for academia and for an educational space without disability.”)

485. *See* Gallaudet University Mission & Vision Statement, GALLAUDET UNIV., <https://gallaudet.edu/about/#mission-vision> (“Gallaudet University . . . is a bilingual, diverse, multicultural institution of higher education that ensures the intellectual and professional advancement of deaf and hard of hearing individuals through American Sign Language (ASL) and English. Gallaudet maintains a proud tradition of research and scholarly activity and prepares its graduates for career opportunities in a highly competitive, technological, and rapidly changing world.”).

486. Kaitlin Luna, *Gallaudet University Named Location of the Month by the D.C. Office of Motion Picture and Television Development*, GALLAUDET UNIV. (Feb. 1, 2012), <https://gallaudet.edu/student-engagement-leadership/student-body-government/buff-blue/gallaudet-university-named-location-of-the-month-by-the-dc-office-of-motion-picture-and-television-development/#overview>.

487. *See* Gallaudet University Mission & Vision Statement, *supra* note 477 (“We will empower our graduates with the knowledge and practical skills vital to achieving personal and professional success in the changing local and global communities in which they live and work.”).

488. *See* Patricia C. Foley, *A Case “for” and “of” Critical Pedagogy: Meeting the Challenge of Liberatory Education at Gallaudet University*, 9(4) AM. COMM’N J. 1, 3 (2007) (“For D/deaf people at [Gallaudet University], everyday brings with it the joy of interacting with ease and equality within their own community . . .”).

The abnormal is now an individual who cannot communicate in ASL, different from most other universities.<sup>489</sup>

Gallaudet is a quintessential limited separatist institution, as it meets all three prongs of the theory.<sup>490</sup> First, d/Deaf<sup>491</sup> individuals have historically been treated poorly and dehumanized, so an environment of Deaf pride is of great importance.<sup>492</sup> Second, Gallaudet allows individuals from the outgroup and has about 8% non-deaf students in the student body each year.<sup>493</sup> Third, Gallaudet is cognizant of ensuring that only those who are respectful to disability and

489. See *id.* at 11 (“Throughout the history of the Deaf Community and [Gallaudet University], as well as in current times, the most important factors in achieving any goals that set are those of language use and language accessibility. To be an open, accessible campus where students and others can learn and achieve with equality, all activities must be conducted through ASL and visual communication.”).

490. See BROOKS, *supra* note 9, at 93–94 (“When writing about limited separatists many years ago, I developed a three-prong test . . . . The first prong requires the group employing limited separation to demonstrate a need to create a supportive environment free of debilitating . . . disadvantage . . . . The second prong requires institutions that operate under limited separation to grant access to individuals from outside the group, so long as these individuals are willing to support the institution’s mission . . . . The final prong permits a limited-separate institution to deny access to an individual belonging to another group only when . . . [it] would destroy the institution’s identity.”).

491. The signifier of “d/Deaf” indicates the distinction between being culturally Deaf (capitalized) and describing deaf as a medical condition. Those in the d/Deaf community often capitalize “Deaf” to indicate their cultural identity as a member of the Deaf community, including being immersed in Deaf culture, dialects of sign language, and customs. The word “deaf” with a lowercase “d” as primarily the medical hearing status of an individual. Here, I use both distinguishers because both deaf and Deaf individuals will be targeted and discriminated against by the predominantly non-deaf society. Of note, some of the Deaf community who embrace their deafness, often use identity-first language, instead of the word “disabled” to describe themselves as they have been brought up within the Deaf community. While holding space for these many identities, for purposes of legal definitions under state and federal anti-discrimination law, as well as the use of the social model for purposes of this article, deafness will be labeled a disability. d/Deaf people are discriminated against because of their hearing status. Kevin Morisod et al., *Interventions aimed at improving healthcare and health education equity for adult d/Deaf patients: a systematic review*, EUROPEAN J. PUBLIC HEALTH 32(4) 548–56 (2022); see also *Deaf History and Culture in the United States*, NPR, (March 30, 2021) <https://www.vpm.org/2021-03-30/deaf-history-and-culture-in-the-united-states>.

492. See Sara A. Kersting, *Balancing Between Deaf and Hearing Worlds: Reflections of Mainstreamed College Students on Relationships and Social Interaction*, 2 J. DEAF STUD. & DEAF EDUC., 252, 260–62, (1997) (discussing previous research on deaf culture and communities that describe D/deaf individuals as feeling alienated and suffering from discrimination).

493. See Lawrence Feinberg, *Gallaudet Admits Students With No Hearing Problems*, WASH. POST (May 24, 1986), <https://www.washingtonpost.com/archive/local/1986/05/24/gallaudet-admits-students-with-no-hearing-problems/723b3430-b510-4163-85f1-8a655c9a38dc> (“Yesterday, Gallaudet President Jerry C. Lee said the number of undergraduates with normal hearing will be limited at present to 8 percent of the undergraduate enrollment of about 1,200.”).

deaf culture can be allowed.<sup>494</sup> Gallaudet lauds deaf culture that sees deafness as not a physical condition but rather a set of sociocultural identity, language, and practices.<sup>495</sup> Legitimization of disability as a “normal” identity can create better outcomes for disabled students as those who go to schools like Gallaudet have much higher graduation rates on par with non-disabled students at other universities.<sup>496</sup> About 95% of Gallaudet bachelor’s degree graduates were employed after graduation.<sup>497</sup> This is a huge increase from the national average of disabled bachelor’s degree graduates, who have an employment rate of 42%.<sup>498</sup> Limited separatists would argue this high rate of employment after graduating is due to the supportive environment students are given.<sup>499</sup>

494. *See id.* (“For the first year, all of the hearing students must have completed at least two years at other colleges and major in fields related to deafness such as education and psychology. [Gallaudet President Jerry C.] Lee said they will have to learn sign language, which is used in all Gallaudet classes.”).

495. *See I. King Jordan, Deaf Culture and Gallaudet*, WASH. POST (Jan. 22, 2007), <https://www.washingtonpost.com/archive/opinions/2007/01/22/deaf-culture-and-gallaudet/183e3514-30e7-4e4e-bc7a-dc5ee9fd09b9> (describing Gallaudet as having “a vision for an inclusive deaf university in which everyone is valued and respected and that offers educational programs to an increasingly diverse population of deaf, hard-of-hearing, deaf-blind and hearing students. A major priority in . . . [Gallaudet’s] strategic plan was to preserve Gallaudet’s rich cultural heritage and promote the study and appreciation of Deaf culture, deaf history and American Sign Language (ASL)”).

496. *See Gallaudet Graduation Rate & Retention Rates*, COLL. FACTUAL, <https://www.collegefactual.com/colleges/gallaudet-university/academic-life/graduation-and-retention> (“With a six year graduation rate of 66.7%, **returning** students in the Gallaudet class of 2016 who attended classes **full-time** were more likely than average to graduate in a reasonable time. After eight years, the graduation rate was 68.5%. Nationwide, the average graduation rate for **returning** undergraduates attending classes **full-time** is: 53.8% after six years and 55.1% after eight years.” (emphasis original)).

497. *See Fall 2018/Spring 2019 Annual Survey of Recent Graduates: December 2016 through August 2017 Alumni*, Gallaudet Univ. (2020), [https://storage.googleapis.com/gal-media/documents/Institutional-Research/Alumni%20Survey/Alumni%20Survey\\_2018-2019\\_Final%20Report.pdf](https://storage.googleapis.com/gal-media/documents/Institutional-Research/Alumni%20Survey/Alumni%20Survey_2018-2019_Final%20Report.pdf) (“During the year since graduation and using all sources, the results show that in the year since graduation[,] [o]ne hundred and thirty-seven (96%) of undergraduate-level alumni were either working or pursuing additional education . . . . Post-graduation outcomes of working or pursuing additional education increased by 1% compared to last year in which 95% of the undergraduate-level alumni were either working or pursuing additional education.”).

498. *Labor Force Status of Persons 25 to 64 Years Old, by Disability Status, Highest Level of Education Attainment, Age, Sex, and Race/Ethnicity: 2015*, NAT’L CTR FOR EDUC. STAT. (Aug. 2016), [https://nces.ed.gov/programs/digest/d19/tables/dt19\\_501.35.asp?current=yes](https://nces.ed.gov/programs/digest/d19/tables/dt19_501.35.asp?current=yes).

499. *See BROOKS, supra* note 9, at 87 (“Limited separatists believe that the only prescription that has a proven record of success in redressing the external factors they identify as sustaining disparate resources . . . is the creation of beneficial forms of . . . isolation (i.e., limited separation).”).

### C. Internal Diagnosis

Limited separatists believe internal issues of self-loathing have prevented disabled students from staying and graduating from universities.<sup>500</sup> Discrimination and stigma have been shown to harm an individual's sense of identity.<sup>501</sup> Notable disabled writer Steven Kuusisto states that he was:

[r]aised to know I was blind but taught to disavow it, I grew bent over like the dry tinder grass. I couldn't stand up proudly, nor could I retreat . . . I reflected my mother's complex bravery and denial and marched everywhere at dizzying speeds without a cane. Still, I remained ashamed of my blind self."<sup>502</sup> Limited separatists use extensive research to indicate that when individual accepts and thrives with their identity and membership within a group, they will have greater resilience.<sup>503</sup>

---

500. See Roger D. Wessel et al., *Retention and Graduation of Students with Disabilities: Facilitating Student Success*, 21 J. POSTSECONDARY EDUC. & DISABILITY 116, 116–17 (2009) (“[T]he likelihood of earning a degree is decreased by the presence of a disability.’ . . . Belonging, involvement, purpose, and self-determination were identified as important factors affecting retention of college students with apparent and nonapparent disabilities.”); cf. BROOKS, *supra* note 9, at 90 (“Society’s pervasive rhetoric of color blindness, limited separatists argue, contributes to black nihilism because it measures civil rights success ‘by the extent to which society transcends race-consciousness.’ Given the death of Jim Crow, blacks have only themselves to blame for their problems. Unfortunately, limited separatists continue, many African Americans have imbibed this narrative and, as a result, think less of themselves and . . . limited separatists insist, leaves blacks with a kind of collective depression. This depression is so widespread among black students that one black educator described it as a ‘crisis of self-hatred.’”).

501. See Jennifer Katz et al., *Membership in a Devalued Social Group and Emotional Well-Being: Developing a Model of Personal Self-Esteem, Collective Self-Esteem, and Group Socialization*, 47 SEX ROLES 419, 428–29 (2002) (linking “membership in a devalued social group to emotional well-being[.]” and concluding that “members of devalued groups may internalize negative views about themselves as individuals.”); see also M. Catherine Cappadocia et al., *Bullying Experiences Among Children and Youth with Autism Spectrum Disorders*, 42 J. AUTISM & DEV. DISORDERS 266, 271–72 (2011) (describing children with Autism Spectrum Disorders having higher rates of victimization, and thus experiencing “higher levels of anxiety, hyperactivity, self-injurious and stereotypic behaviors, and over sensitivity[.]” and being “11 times more likely to have higher levels of internalizing mental health problems” compared to those children who were not bullied.).

502. Fiona A. Kumari Campbell, *Exploring Internalized Ableism Using Critical Race Theory*, 23 DISABILITY & SOC’Y 151, 156 (2008).

503. See Phillip Ferrigon, *Person-First Language v. Identity-First Language: An Examination of the Gains and Drawbacks of Disability Language in Society*, J. TEACHING DISABILITY STUD.

Identifying with the disability community has been shown to increase the levels of self-esteem of disabled individuals and protect them from psychological harm that comes from stigma.<sup>504</sup>

Although the concept of “disability pride” has been discussed for decades, it is still seen as a revolutionary idea. Many Americans still see disability as an inherently “bad” trait—not an identity to be proud of but rather an identity to be fixed back to a non-disabled identity.<sup>505</sup> Limited separatists see this majority view as evidence that disabled individuals will not receive respect from non-disabled individuals unless they are able to “cure” themselves.<sup>506</sup> Instead, disabled individuals would better flourish in a community that lifts and supports them as a whole human being. This community with other disabled individuals can enable disabled individuals to achieve their

---

(Jan. 3, 2019), <https://jtds.commons.gc.cuny.edu/person-first-language-vs-identity-first-language-an-examination-of-the-gains-and-drawbacks-of-disability-language-in-society> (asserting that, “[b]ecause society tends to view disability as a ‘problem,’ . . . this perpetuates myths and labels upon individuals medically diagnosed with a disability[,]” but by describing their disability positively, this provides a “method of empowerment” that helps “develop a person’s self-image . . .”); cf. Kate Cooper et al., *Social Identity, Self-Esteem, and Mental Health in Autism*, 47 EUR. J. SOC. POL’Y 844, 844–45 (2017) (“Having autism is likely to negatively impact . . . an individual’s ability to develop a positive social identity, thereby reducing physiological well-being. . . . This may be resolved through using identity management strategies . . . such as developing a sense of positive distinctiveness for the group . . . . This is likely to be associated with collective self-esteem, or a positive representation of the group, without which, group members are at risk of poor psychological well-being.”); BROOKS, *supra* note 9, at 94–95 (“Far from approaching racial nirvana, ‘integrated blacks’ faced loneliness, disaffection, and hypertension . . . . To resolve these external problems, limited separatists prescribe the legalization of a community-based black self-help program . . . . This community-based form of black self-help will create or reintroduce culturally defined institutions and traditions of black society from which young blacks, in particular, can acquire self-respect, a sense of purpose, and spirituality.”).

504. See Kathleen R. Bogart et al., *Disability Pride Protects Self-Esteem Through the Rejection-Identification Model*, 63 REHAB. PSYCH. 155, 155–56 (2018) (“Experiences of stigma have been associated with a number of negative physiological outcomes for minority group members . . . , including people with disabilities . . . . However, the rejection-identification model . . . argues that the negative impacts of stigma, that is, decreased self-esteem, may be mitigated when members of the stigmatized group reject a stigmatizing culture and choose to identify with each other rather than with the majority group.”); Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 ANN. REV. PSYCH. 393, 405 (2005) (“Group identification is positively correlated with self-esteem among stigmatized groups . . .”).

505. See Thomas P. Dirth & Nyla R. Branscombe, *Disability Models Affect Disability Policy Support Through Awareness of Structural Discrimination*, 73 J. SOC. ISSUES 413, 415 (2017) (“Likewise, because the medical model inherently treats disability as pathology, people with disabilities are subsequently perceived as defective and inferior to those without disabilities . . . .”); Lisa I. Iezzoni et al., *Physicians’ Perceptions of People With Disability and Their Health Care*, 40 HEALTH AFF. 297, 298 (2021) (“[P]hysicians’ bias toward disability could contribute to health care disparities.”).

506. Cf. BROOKS, *supra* note 9, at 91 (asserting that minorities will not receive respect from the majority until the minority conform).

full potential without non-disabled individuals constantly stereotyping them.<sup>507</sup>

Limited separatists respond to the traditionalist argument that disabled students are irresponsible or lazy individuals by further discussing identity.<sup>508</sup> Limited separatists discuss that disabled students must already build character and hard work—just like their peers—for areas in which they are similarly situated.<sup>509</sup> However, because institutions are set up specifically for the non-disabled identity, disabled students will run into unique barriers in areas where they are not similarly situated.<sup>510</sup> In addition, the identity of “multiple-marginalized dis[ ]abled students” creates further barriers to receiving accommodations.<sup>511</sup> For example, the process to receive accommodations “ignores the barriers that students—particularly Black and Brown students and/or students who come from low socioeconomic status backgrounds—encounter as they seek to obtain documentation.”<sup>512</sup> Thus, a disability-centric university will be much more cognizant of eliminating barriers.

#### D. Internal Prescription

Limited separatists would strongly prescribe that disabled students have a choice of post-secondary institutions.<sup>513</sup> A *choice* versus *compulsion* theory assists in creating strong identity wherever the student is.<sup>514</sup> Unlike choice, forced integration can be debilitating to students’ mental and physical health, as it requires students to often be the initial person in educating faculty members, combating stigma, and trying to change the culture of the institution.<sup>515</sup> This can lead to burnout from outwardly working to change the

507. See Major & O’Brien, *supra* note 505, at 405 (“Members of stigmatized groups may cope with identity threats by approaching, or identifying more closely with their group . . . . Groups can provide emotional, informational, and instrumental support, social validation for one’s perceptions, social consensus for one’s attributions, and a sense of belonging.”).

508. Cf. BROOKS, *supra* note 9, at 47, 101 (“[T]raditionalists believe disparate resources are sustained not by the external factor of race but by the internal factor of class—bad behaviors and bad values—within the African American community. . . . [L]imited separatists are asking blacks to embrace . . . ‘a positive shared identity.’”).

509. Cf. BROOKS, *supra* note 9, at 24 (“Another peculiarity about civil rights is that not all similarly situated groups receive the same level of opportunities created by civil rights.”).

510. Eddie Comeaux et al., *Dis/abled Student Campusmaking: Sites of New Possibility*, 11 (11) EDUC. SCIS. 1, 11 (2021); BROOKS, *supra* note 9, at 4.

511. *Id.*

512. *Id.*

513. *Id.* at 12.

514. *Id.* at 14.

515. Olsen et al., *supra* note 311, at 266.

culture and perpetuate personal worthlessness if students are not constantly vigilant to remember their identity is not a burden.<sup>516</sup>

Limited separatists refute the notion that disabled students can only learn hard work by removing all supports when they attend post-secondary institutions.<sup>517</sup> The notion that disabled students are less likely to achieve is unfounded. Students are working to achieve level ground while being disadvantaged by the institution's composition.<sup>518</sup> Although all students must complete a transition to responsibility and adulthood when moving to post-secondary education,<sup>519</sup> disabled students are better off receiving a tailored education. This leaves disabled students more time to give back to their community through scientific research, academic pursuits, starting disabled-led businesses, and technological advancements to better disabled people's lives.<sup>520</sup> Disabled students can better achieve academic excellence through institutions that have high expectations of students and are able to create a rigorous curriculum without stigma and barriers.<sup>521</sup> As Paul Gorski highlights, myths regarding the performance of historically marginalized students inhibit the ability to address the systemic inequities.<sup>522</sup> By attending institutions that uplift disability,<sup>523</sup> students can achieve their full academic potential. Having disabled students all around provides a "sanctuary for healing internalized oppression."<sup>524</sup> Instead of feeling the onus of burden, students

516. *Id.* at 268–69.

517. Krebs, *supra* note 375, at 2.

518. *Id.*

519. See generally Kennan Cepa & Frank F. Furstenberg, *Reaching Adulthood Persistent Beliefs About the Importance And Timing Of Adult Milestones*, 42(1) J. F. ISSUES 27 (2021).

520. *Deaf Research*, GALLAUDET UNIV., <https://www.gallaudet.edu/library/research/deaf-research> (explaining the cutting-edge deaf studies research from Gallaudet University); VICTOR PINEDA FOUND., <http://pinedafoundation.org> (Dr. Victor Santiago Pineda is one example of a disabled entrepreneur, businessperson, and scholar, who provides innovative solutions to accessible city design. While at UC Berkeley, he revived the Disabled Students' Union.); *Fredrick Ouko*, ASHOKA FELLOW, <https://www.ashoka.org/en-us/fellow/fredrick-ouko> (Fredrick Ouko is another disabled individual who went on to start Action Network for the Disabled ("ANDY"), assisting in targeting and eliminating barriers in employment for disabled individuals.).

521. Michael Fitzpatrick & Raschelle Theoharis, *The Law and the IEP: Establishing and Maintaining High Expectations for Deaf Students with Disabilities*, ODYSSEY: NEW DIRECTIONS IN DEAF EDUC. 15, 82 (2014) (discussing that best results come from institutions that have high expectations coupled with access to general curriculum).

522. See generally Paul Gorski, *The Myth of the 'Culture of Poverty'*, 65(7) EDUC. LEADERSHIP 32 (2008).

523. Westley James et al., *Disabling Barriers Experienced by Students With Disabilities in Post-Secondary Introductory Physics*, 16(2) PHYSICAL REV. PHYSICS EDUC. RSCH. 02011-1, 02011-17 (2020).

524. Campbell, *supra* note 444, at 155.

can create disability pride and acceptance within themselves, eliminating stigma and self-hatred in their identity.<sup>525</sup>

In addition, limited separatists would argue it is critically important to acknowledge the distribution of student resources.<sup>526</sup> They argue crit theorists do not provide an adequate or feasible prescription to solving disparate resources in current ableist hegemonic institutions.<sup>527</sup> Integration has not cured discrimination of disabled students.<sup>528</sup> Thus, pushing for further integration may never lead to true equality for a disabled identity. Furthermore, integration can be harmful to disabled students' physical and mental health, whether they try to emulate the hegemonic norm (stifling their identity)<sup>529</sup> or fight against it (creating burnout).<sup>530</sup> Instead, limited separatists contend that instead of pushing back against the self-interest of massive institutions, which can be a constant uphill battle, disabled individuals should focus on creating a separate institution.<sup>531</sup> These institutions would be available by choice, and disabled resources would be placed first on the priority list.<sup>532</sup> This would free students from the hegemonic culture that pushes their bodies to the edge and causes further medical conditions<sup>533</sup> instead allowing disabled identity to coexist with academic achievement. An accepting environment would eliminate the disability identity stigma so often discussed in regard to post-secondary education.<sup>534</sup>

Finally, reformists' argument for integration—that separation has been dehumanizing and inhumane—is why limited separatists vouch for the *choice* to attend disabled institutions.<sup>535</sup> Limited separatists look at the historical treatment of disabled individuals at higher education institutions and prescribe that disabled students should be given the choice to not attend an unwelcoming

525. Laura M. Wasielewski, *Academic Performance of Students with Disabilities in Higher Education Insights from a Study of One Catholic College*, 20(1) J. CATH. EDUC. 138 (2016).

526. DOLMAGE, *supra* note 143, at 65.

527. *Id.* at 65; see BROOKS, *supra* note 9, at 101; Petit-McClure, *supra* note 345, at 73.

528. Petit-McClure, *supra* note 347, at 78.

529. Riddel, *supra* note 53, at 42.

530. Campbell, *supra* at note 444, at 155.

531. *Id.* at 154.

532. Alan L. Strauss & Amos Sales, *Bridging the Gap Between Disability Studies and Disability Services in Higher Education: A Model Center on Disability*, 23(1) J. POSTSECONDARY EDUC. & DISABILITY 82 (2010) (exemplifying some potential academic supports found in disability-led institutions not normally emphasized in current post-secondary universities).

533. Kattari, *supra* note 314, at 482–83; see also Megan Winkelman Creasman, *How Pregnancy Unmasked My Internalized Ableism*, 326(24) J. AM. MED. ASS'N 2473, 2473–74 (2021).

534. Comeaux, *supra* note 510, at 8, 11.

535. *Id.* at 2.



environment.<sup>536</sup> Limited separatists would argue that disabled students cannot trust mainstream institutions to provide adequate resources as institutions are still showing abuse and neglect and instances of forced institutionalization are still happening in the present day.<sup>537</sup> Limited separatists cite the post-secondary institutions' ableist, hegemonic culture that still perpetuates these norms to disabled students.<sup>538</sup> Higher education institutions have historically subjugated disabled individuals through forced sterilization and unconsented research experiments, robbing autonomy, and not considering them for "student" status.<sup>539</sup> The continued, though more subtle, discrimination faced by disabled students today has a severely negative influence on students' lives.<sup>540</sup> In addition, although microaggressions are seen as much less frightening than historical abuse,<sup>541</sup> the current hegemonic, ableist culture is still pervasive enough within education that disabled students have internalized such ableism to justify physical and sexual abuse perpetrated against them.<sup>542</sup> Limited separatists contend that solutions have simply put too much weight on integration as a "cure-all."<sup>543</sup> The subordination of disabled students through the mainstream culture will continue for the foreseeable future.<sup>544</sup> Instead, limited separatist theorists prescribe innovative institutions that put disabled students as the top priority.

---

536. BROOKS, *supra* note 9, at 83.

537. Gi Lee & David Cohen, *Incidences of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 PSYCHIATRIC SERVS. 61, 61–68 (2021); Susan K. Livio & Ted Sherman, *Judge Grants Disability Advocates Access To N.J. Nursing Home Residents To Investigate Abuse, Neglect*, N.J. ADVANCE MEDIA (Mar. 12, 2022), <https://www.nj.com/coronavirus/2022/03/judge-grants-disability-advocates-access-to-nj-nursing-home-residents-to-investigate-abuse-neglect.html>.

538. DOLMAGE, *supra* note 143, at 50.

539. See generally Doe West, *Radiation Experiments on Children at the Fernald and Wrentham Schools Lessons for Protocols in Human Subject Research*, 6 ACCOUNTABILITY IN RSCH. 103 (1998).

540. Ja Young Kim, *The Effect of Experiencing Discrimination On The Life Satisfaction Of People With Disabilities In South Korea The Mediating Role Of Disability Acceptance*, 36 SOC. WORK PUB. HEALTH 276, 283 (2021).

541. *Understanding Racial Microaggression and Its Effect on Mental Health*, PFIZER (2023), [https://www.pfizer.com/news/articles/understanding\\_racial\\_microaggression\\_and\\_its\\_effect\\_on\\_mental\\_health](https://www.pfizer.com/news/articles/understanding_racial_microaggression_and_its_effect_on_mental_health).

542. Emily J. Hutcheon & Gregor Wolbring, *Voices of Disabled Post-Secondary Students Examining Higher Education Disability Policy Using an Ableism Lens*, 5 J. DIVERSITY HIGHER EDUC. 39, 43 (2012).

543. *Id.* at 48.

544. Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397, 420 (2000).

## VI. CONCLUSION

Social policy must be thoroughly analyzed to produce an adequate, feasible, and long-lasting solution to the disability disparity in education, and this paper has attempted to provide such a synthesis. Because no civil rights theory is complete, a synthesis will provide the most holistic changes for disabled students. Limited separatist prescriptions are realistic for the near future of academia, as disabled students must be given superior resources and uplifting social treatment to eliminate the disparities in post-secondary institutions. Moreover, limited separatist arguments are often highly aware of the workings of societal issues all while creating an innovative solution less frequently discussed in current academia.<sup>545</sup> In addition to seeking uplifting community support, limited separatists advise choice above compulsion.<sup>546</sup> Thus, a successful and comprehensive plan must also take into consideration the disabled students choosing to go to a majority non-disabled school. Using a reformist lens, we can ensure students are not left without advocacy in integrated institutions by making certain students have a support system and equal access to the same material, lectures, tests, and extracurriculars that non-disabled students have. Traditionalists' theory of eliminating fraud can be better implemented when combined with a critical race theory analysis of the structural biases and discrimination in current, mainstream academic culture. This combination can pursue less corruption in school systems, creating a more equitable system that apprehends those using elite wealth-based fraud to obtain access to education. Focusing on crit theorists' form of discourse to lift disabled student voices to the forefront of the conversation within institutions will also tear down systemic policies and procedures created to disenfranchise. To ensure disabled students can achieve the best outcomes, incorporating many different theorist voices, as well as empirical evidence, can assist in feasible solutions to disparate impacts.

---

545. See Petit-McClure, *supra* note 347, at 73-75.

546. BROOKS, *supra* note 9, at 82-83.

## VII. TABLES AND FIGURES

**Table I:** Protected Classes and Comparison and Application of Civil Rights Act and Modeled Laws (*Displaying the protected class of disability, and the roots and intricate crossovers between other insular groups*)

		Title II Public Accommodations	Title III Private Accommodations	Title VI Federal Government Funding	Title VII Employment	Title VIII Housing	
Race	1964 Civil Rights Act	X	X	X	X	X	X
Color	1964 Civil Rights Act	X	X	X	X	X	X
Religion	1964 Civil Rights Act	X	X	X	X	X	X
National Origin	1964 Civil Rights Act	X	X	X	X	X	X
Sex	Executive Order 11375	X <sup>549</sup>		X <sup>550</sup>	X <sup>551</sup>	X <sup>552</sup>	X
Gender Identity <sup>553</sup>	Executive Order 11375 (see <i>Bostock v. Clayton Cty.</i> )			X	X	X	X
Sexual Orientation <sup>554</sup>	Executive Order 11375 (see <i>Bostock v. Clayton Cty.</i> )			X	X	X	X
Age	Age Discrimination in Employment Act					X	X <sup>555</sup>

547. 52 U.S.C. § 10301.

548. *U.S. Department of Housing and Urban Development, Housing Discrimination Under the Fair Housing Act*, U.S. DEP'T OF HOUSING AND URBAN DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/fair\\_housing\\_act\\_overview#\\_Who\\_Is\\_Protected](https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_Who_Is_Protected).

549. Melissa Block, *Yes, Women Could Vote After The 19th Amendment—But Not All Women. Or Men*, NAT'L PUB. RADIO (Aug. 26, 2020), <https://www.npr.org/2020/08/26/04730251/yes-women-could-vote-after-the-19th-amendment-but-not-all-women-or-men> (explaining the 15th Amendment extended to white women in 1920, but Black women were not included as “[r]acism is a language that is shared by suffragists and anti-suffragists alike”).

550. *Types of Educational Opportunities Discrimination*, U.S. DEP'T OF JUST. (Mar. 24, 2022), <https://www.justice.gov/crt/types-educational-opportunities-discrimination#:~:text=Sex%2DBased%20Discrimination,and%20institutions%20of%20higher%20education>.

551. *Id.* (explaining the Equal Employment Act of 1972 extended Title VII to include education and federal government funding).

552. Exec. Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967).

553. Movement Advancement Project, *LGBT POL'Y SPOTLIGHT: PUB. ACCOMMODATIONS NONDISCRIMINATION LAWS (2018)* (clarifying that many individual states provide protections against public accommodation discrimination for sexual orientation and gender identity).

554. *Id.*

555. Marcia Stewart, *What Kind of Housing Discrimination Is Illegal?*, NOLO, <https://www.nolo.com/legal-encyclopedia/free-books/renters-rights-book/chapter5-2.html> (clarifying that, although not explicit, age protections are housed under the broader prohibition of discrimination based on familial status).

Disability	ADA; Voting Accessibility for Elderly and Handicapped Act of 1984 <sup>556</sup>	X	X	X	X	X	X
Veteran	ADA; Uniformed Services Employment and Reemployment Rights Act (USERRA)	X	X	X	X	X	X
Genetic Information	Executive Order 13145; The Genetic Information Nondiscrimination Act of 2008				X		
English Language Learners	Equal Educational Opportunities Act of 1974	X <sup>557</sup>		X <sup>558</sup>			
Citizenship	8 U.S.C. § 1324B. Unfair Immigration-Related Employment Practices					X <sup>559</sup>	

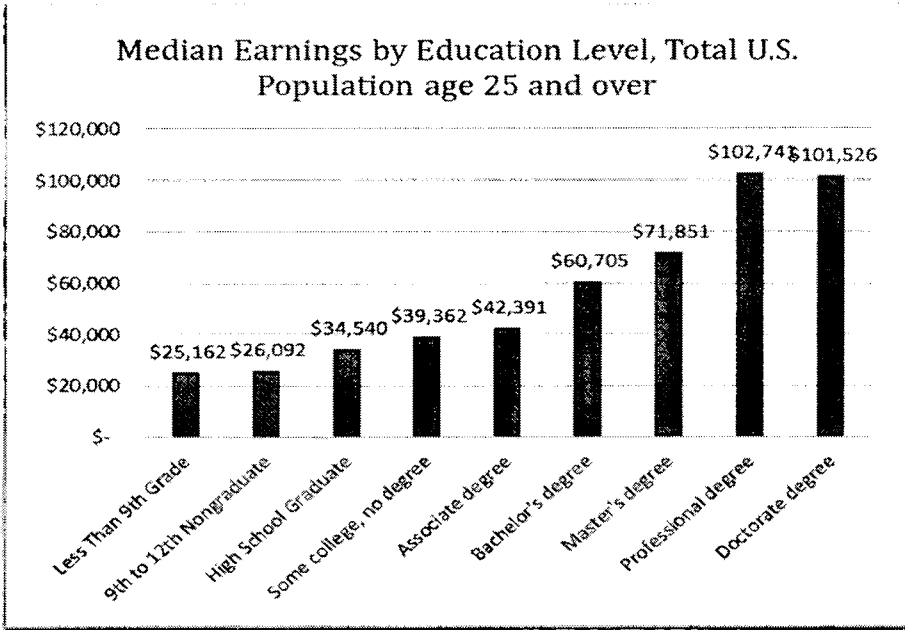
556. *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, U.S. DEP'T OF JUST. (Oct. 10, 2014), [https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm).

557. Voting Rights Act of 1965, S. 1564, 89th Cong. (1965).

558. *Types of Educational Opportunities Discrimination*, *supra* note 541.

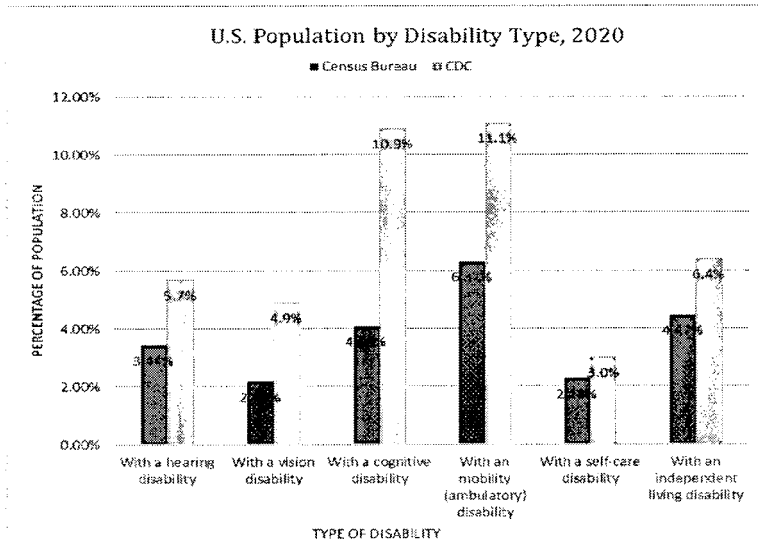
559. Unfair Immigration-Related Employment Practices, 8 U.S.C. § 1324b.

**Figure I.** Median Earnings by Education Level According to the 2021 Census<sup>560</sup>



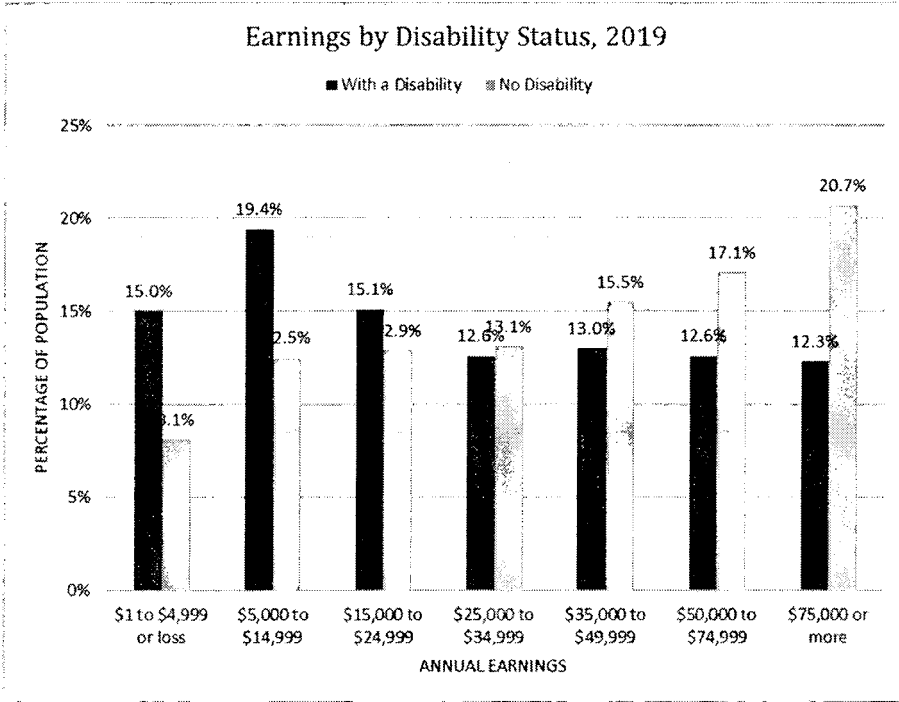
560. PINC-03. Educational Attainment—People 25 Years Old and Over, by Total Money Earnings, Work Experience, Age, Race, Hispanic Origin, and Sex, U.S. CENSUS BUREAU (Oct. 8, 2021), <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-03.html>.

**Figure II.** Visual Comparison of Census Bureau and CDC Measurement of Disabled Americans in 2017<sup>561</sup> (*note methodologies are quite different, however; one of the most noticeable differences is the Census Bureau tries to include a sample of Americans from ages 0+, while the CDC only measures adults 18+. Both studies use the same division and markers of “disability types.”*).



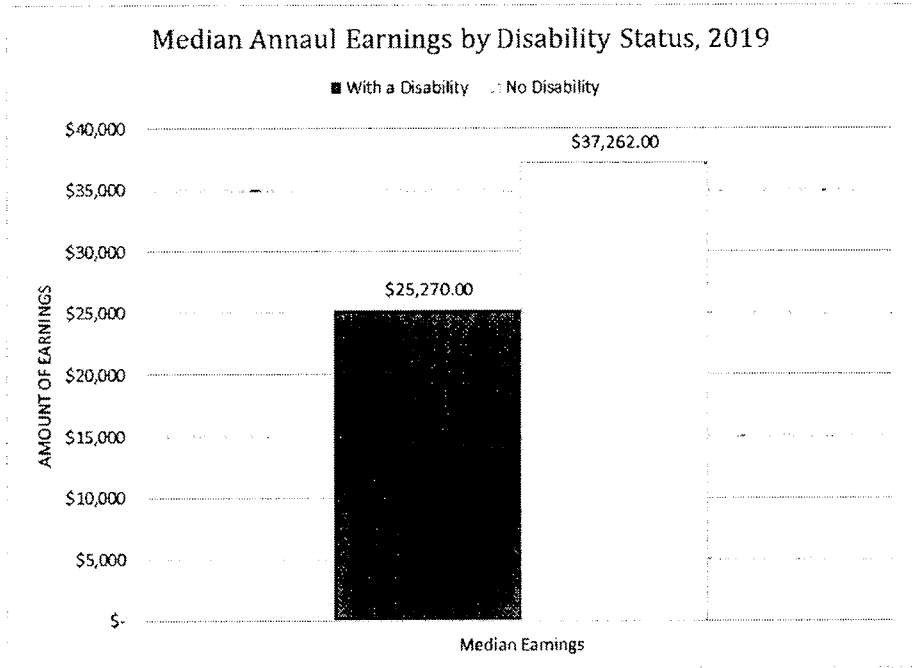
561. American Community Survey of Civilian Noninstitutionalized Population, U.S. CENSUS BUREAU (2020), <https://data.census.gov/table?q=Disability&tid=ACSST5Y2020.S1810> (see detailed methodology here: American Community Survey and Puerto Rico Community Survey 2020 Subject Definition, U.S. CENSUS BUREAU, [https://www2.census.gov/programs-surveys/acs/tech\\_docs/subject\\_definitions/2020\\_ACSSubjectDefinitions.pdf](https://www2.census.gov/programs-surveys/acs/tech_docs/subject_definitions/2020_ACSSubjectDefinitions.pdf); American Community Survey Accuracy of Data, U.S. CENSUS BUREAU, [https://www2.census.gov/programs-surveys/acs/tech\\_docs/accuracy/ACS\\_Accuracy\\_of\\_Data\\_2020.pdf](https://www2.census.gov/programs-surveys/acs/tech_docs/accuracy/ACS_Accuracy_of_Data_2020.pdf); Disability and Health Data System (DHDS) CENTERS FOR DISEASE CONTROL AND PREVENTION, (2020) <https://dhds.cdc.gov/LP?CategoryId=DISEST&IndicatorId=STATTYPE&ShowFootnotes=true&View=Table&yearId=YR5&stratCatId1=CAT1&stratId1=BO1&stratCatId2=&stratId2=&responseId=Q6DIS1&dataValueTypeId=AGEADJPREV&MapClassifierId=quantile&MapClassifierCount=5>, (see detailed methodology here: Disability and Health Data System (DHDS) Methods, CNTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/dhds/methods.html>, Behavioral Risk Factor Surveillance System, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/brfss/annual\\_data/2020/pdf/overview-2020-508.pdf](https://www.cdc.gov/brfss/annual_data/2020/pdf/overview-2020-508.pdf), LLCP 2020 Codebook Report, CENTERS FOR DISEASE CONTROL AND PREVENTION, and [https://www.cdc.gov/brfss/annual\\_data/2020/pdf/codebook20\\_llcp-v2-508.pdf](https://www.cdc.gov/brfss/annual_data/2020/pdf/codebook20_llcp-v2-508.pdf)). (Author’s note: 2020 data was used although there are more recent Census data released for 2021, because of lack of corresponding data for 2021 in the CDC for direct comparison. Also, note that there was a large fluctuation in number of disabled individuals before and after data taken during COVID-19 and data taken before the onset of COVID-19, which may affect recent data).

**Figure III.** Disability Earnings Brackets of Disabled Population in Comparison to Non-Disabled Population<sup>562</sup>



562. 2019 American Community Survey 1-Year Estimates, U.S. CENSUS BUREAU (2019) <https://api.census.gov/data/2019/acs/acs1/subject>.

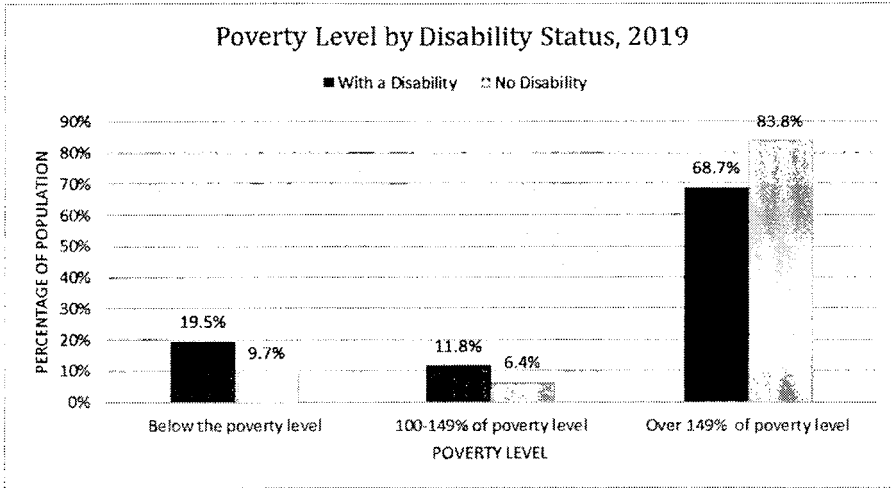
**Figure IV. Median Earnings of Disabled Population in Comparison to Non-Disabled Population<sup>563</sup>**



563. 2019 American Community Survey 1-Year Estimates, U.S. CENSUS BUREAU (2019) <https://api.census.gov/data/2019/acs/acs1/subject>.

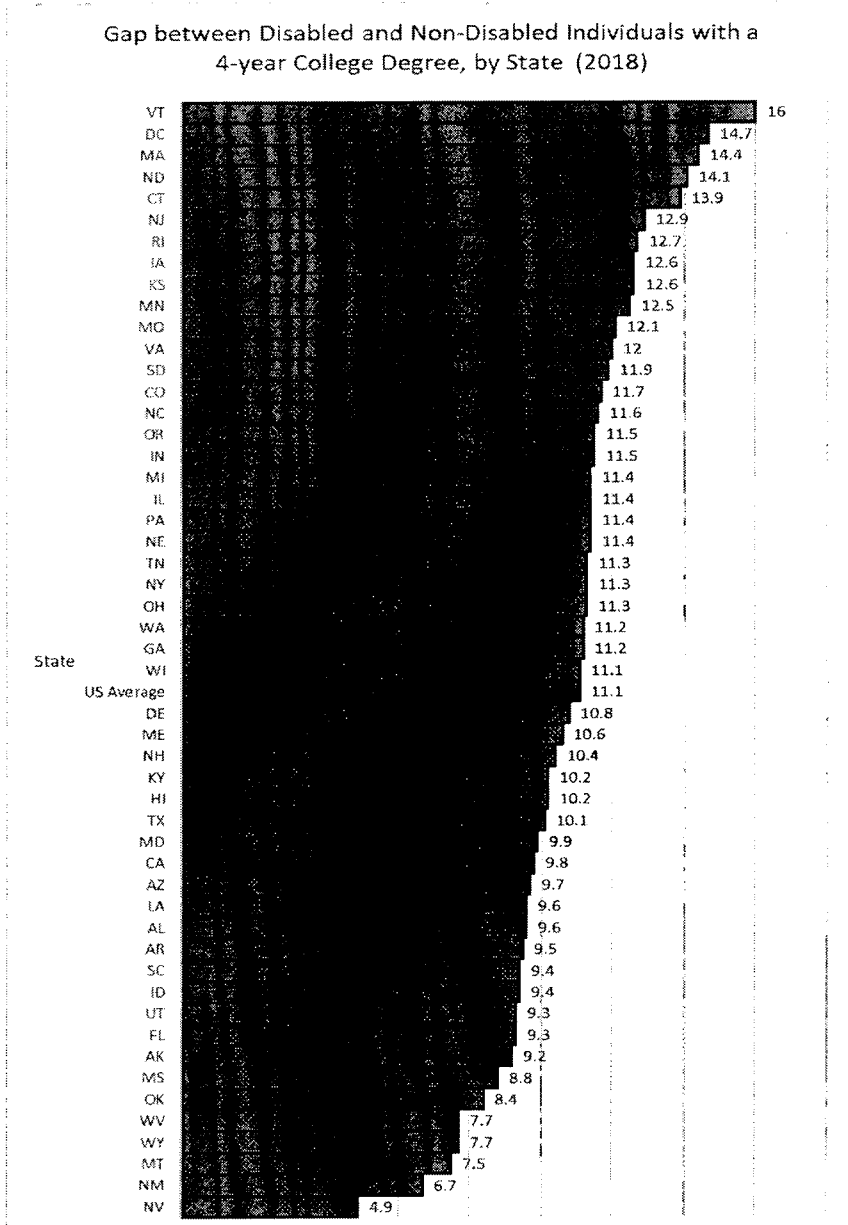


**Figure V.** Census Bureau's National Poverty Levels of Disabled and Non-disabled Populations<sup>564</sup>



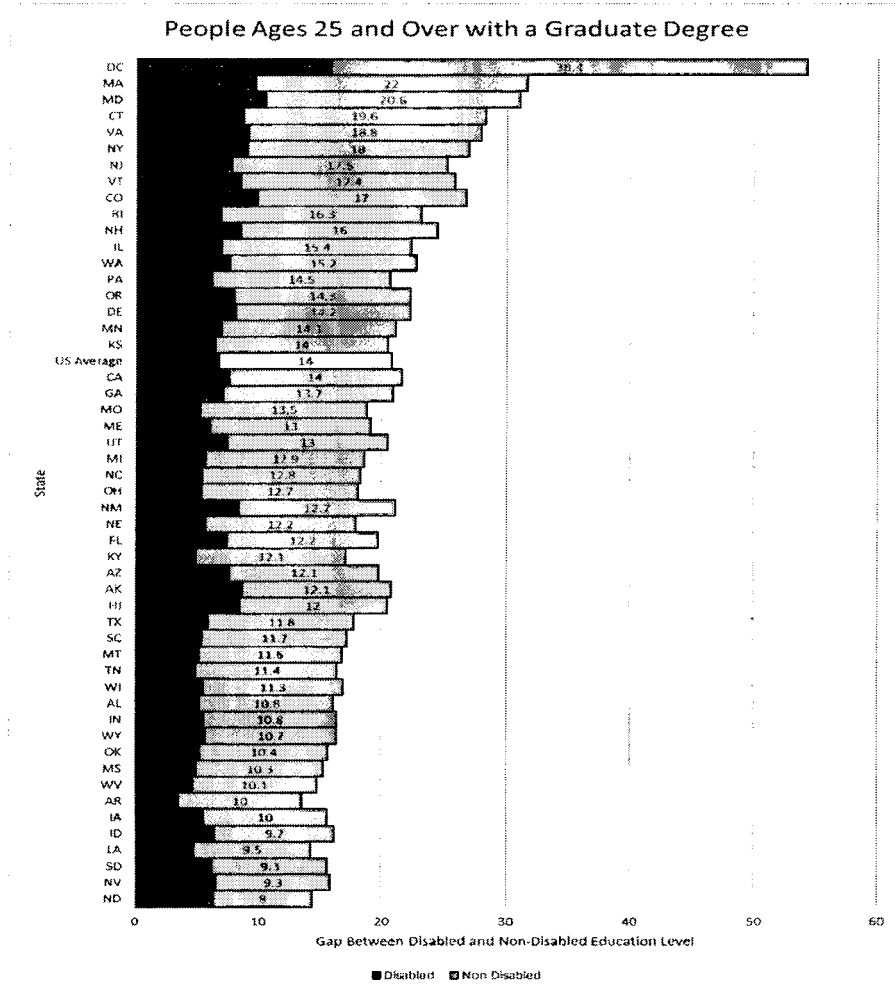
564. 2019 American Community Survey 1-Year Estimates, U.S. CENSUS BUREAU (2019) <https://api.census.gov/data/2019/acs/acs1/subject>.

**Figure VI.** Education Deficit between Non-disabled and Disabled Individuals with a 4-Year Degree<sup>565</sup>



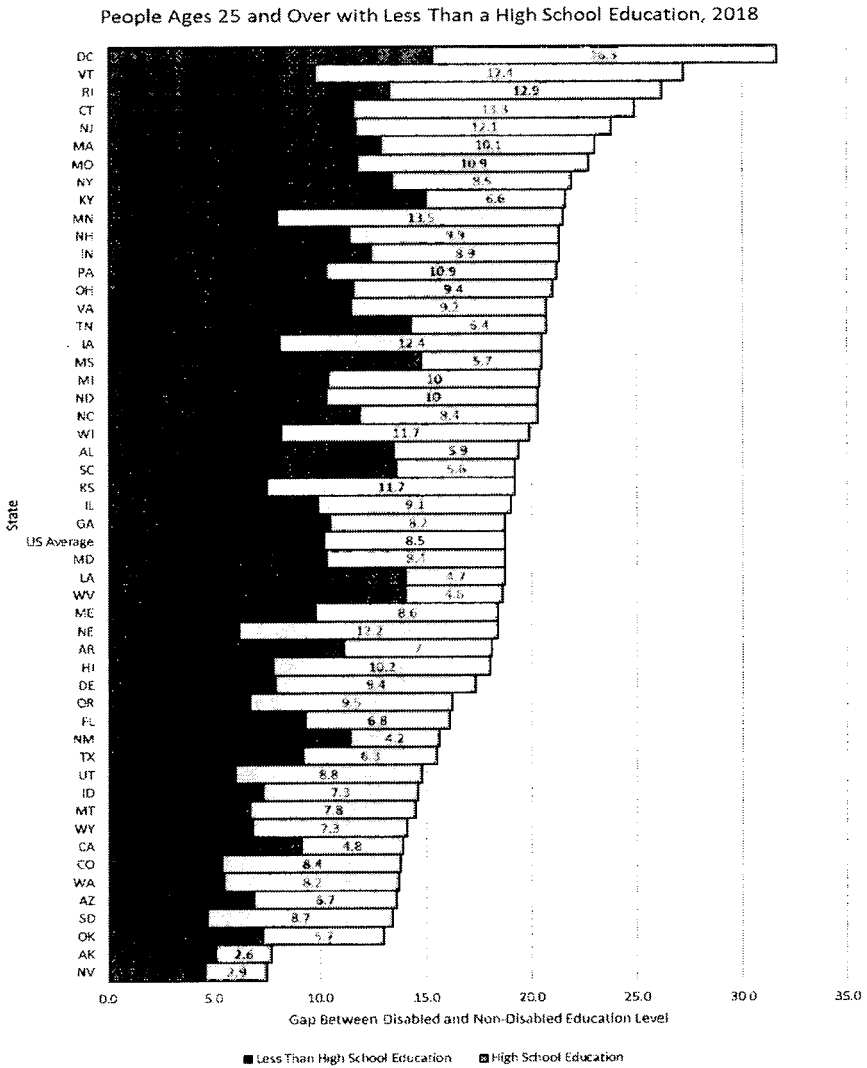
565. Eric A. Lauer, Sarah L. Boege, & Andrew J. Houtenville eds., *Annual Disability Statistics Compendium: 2019*, (Table 13.5), UNIV. N.H., INST. ON DISABILITY (2019); (Data represents the civilian, noninstitutional population. Based on a sample and subject to sampling variability); *American Community Survey, Public Use Microdata Sample*, U.S. CENSUS BUREAU (2017).

**Figure VII.** Graduate Degree Attainment of Disabled Population as Compared to Non-disabled Population by State<sup>566</sup>



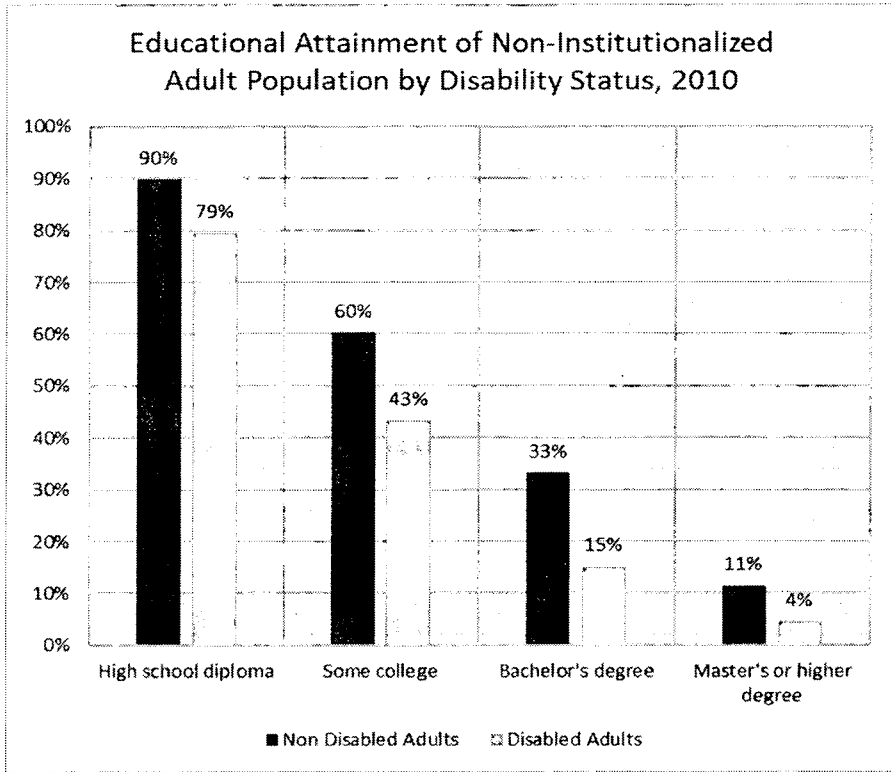
566. Eric A. Lauer, Sarah L. Boege, & Andrew J. Houtenville eds., *Annual Disability Statistics Compendium: 2019*, UNIV. N.H., INST. ON DISABILITY (2019); (Data represents the civilian, noninstitutional population. Based on a sample and subject to sampling variability); *American Community Survey, Public Use Microdata Sample*, U.S. CENSUS BUREAU (2017).

**Figure VIII.** Percentage of Disabled Population with Less Than a High School Education as Compared to Non-Disabled Population<sup>567</sup>



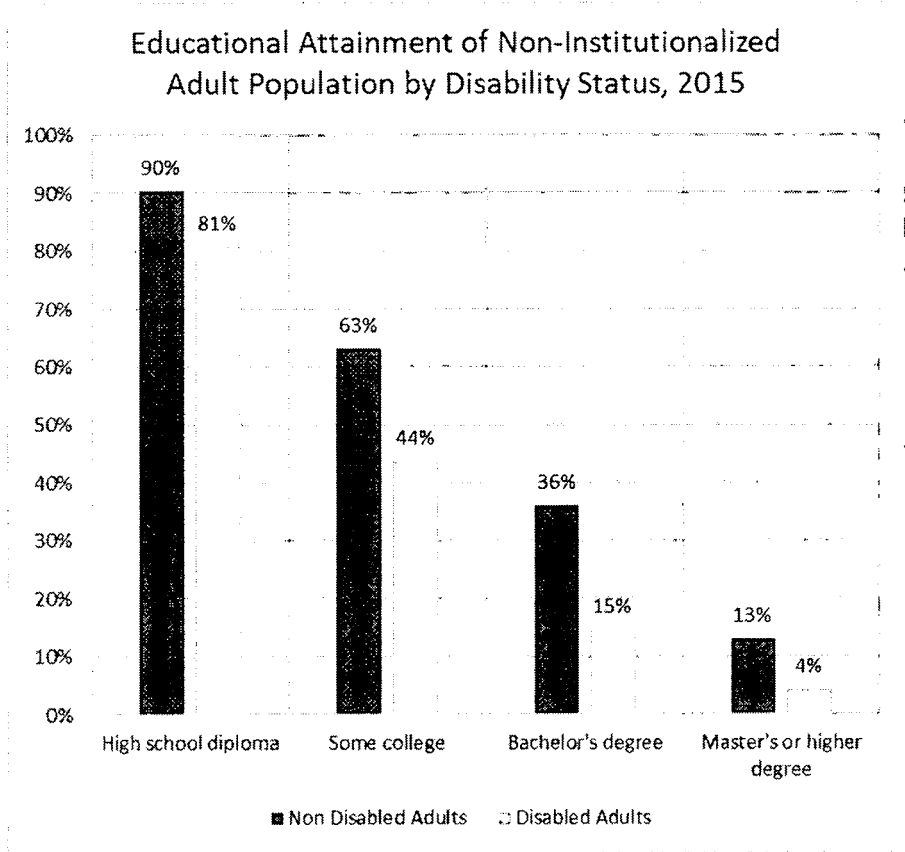
567. Eric A. Lauer, Sarah L. Boege, & Andrew J. Houtenville eds., *Annual Disability Statistics Compendium: 2019*, UNIV. N.H., INST. ON DISABILITY (2019); (Data represents the civilian noninstitutional population. Based on a sample and subject to sampling variability); *American Community Survey, Public Use Microdata Sample*, U.S. CENSUS BUREAU (2017).

**Figure IX.** 2010 Educational Attainment of Disabled Population as Compared to Non-Disabled Population<sup>568</sup>



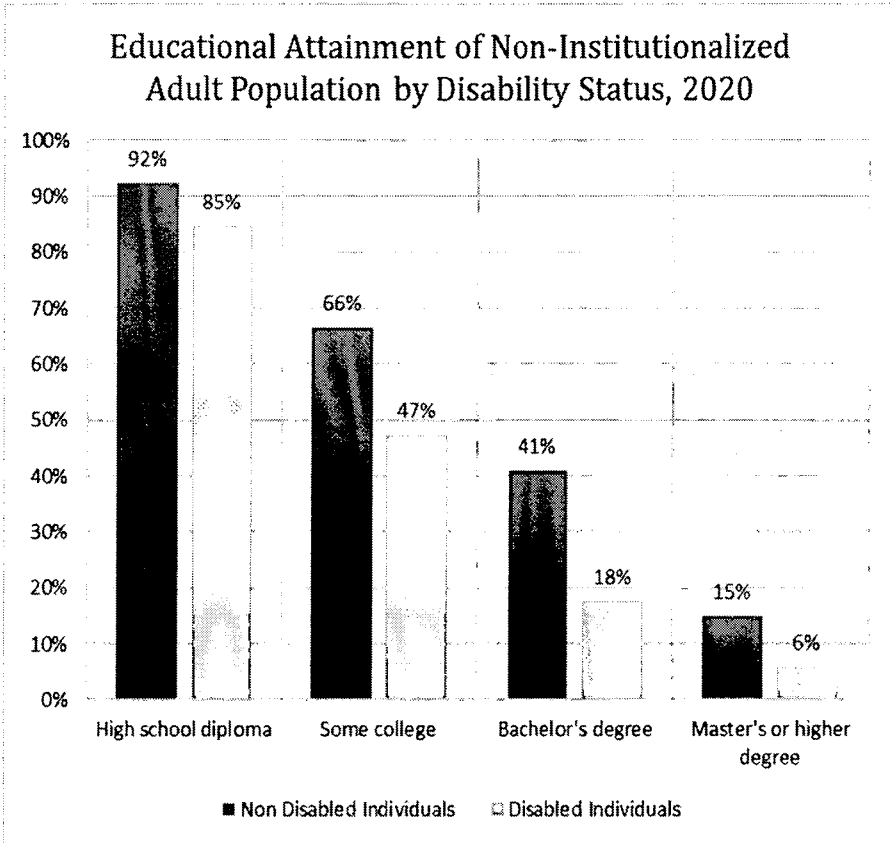
568. Digest of Education Statistics, Total Number Of Persons 25 to 64 Years Old, Number With Disabilities, And Percentage With Disabilities, by Highest Level of Educational Attainment And Other Selected Characteristics: 2010 and 2015, NAT'L CNTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_104.75.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_104.75.asp).

**Figure X.** 2015 Educational Attainment of Disabled Population as Compared to Non-Disabled Population<sup>569</sup>



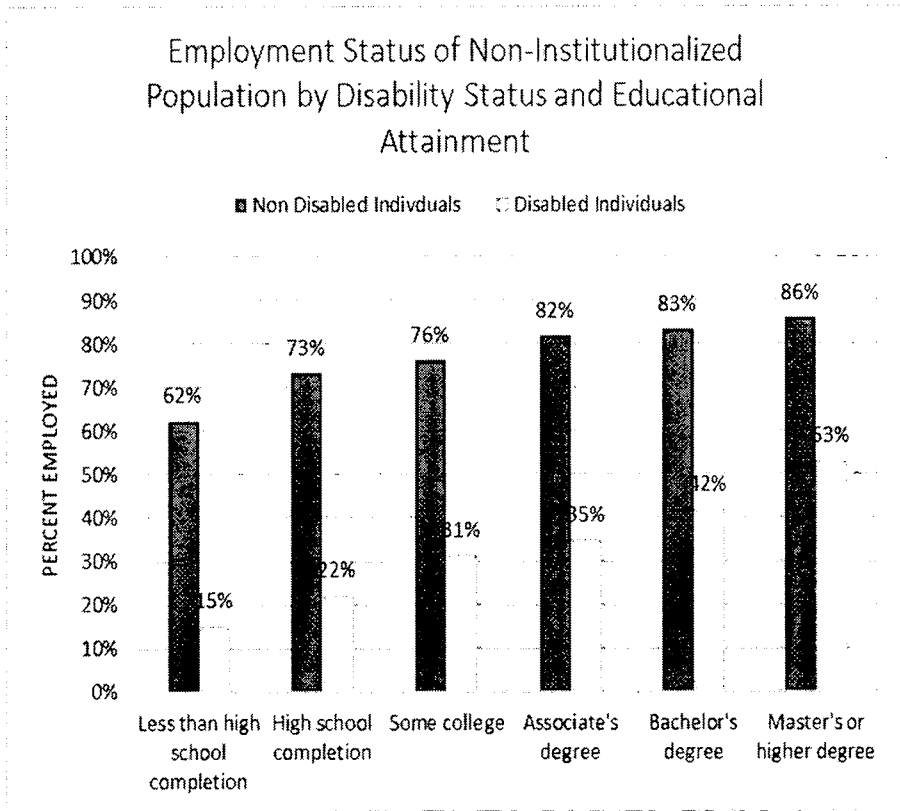
569. Digest of Education Statistics, Total Number Of Persons 25 to 64 Years Old, Number With Disabilities, And Percentage With Disabilities, by Highest Level of Educational Attainment And Other Selected Characteristics: 2010 and 2015, NAT'L CNTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_104.75.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_104.75.asp).

**Figure XI.** 2020 Educational Attainment of Disabled Population as Compared to Non-Disabled Population<sup>570</sup>



570. Digest of Education Statistics, Total Number Of Persons 25 to 64 Years Old, Number With Disabilities, And Percentage With Disabilities, by Highest Level of Educational Attainment And Other Selected Characteristics: 2010 and 2015, NAT'L CNTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_104.75.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_104.75.asp).

**Figure XII.** Employment Status Disabled Population as Compared to Non-Disabled Population by Degree<sup>571</sup>



571. Digest of Education Statistics, Labor Force Status Of Persons 25 To 64 Years Old, By Disability Status, Highest Level Of Educational Attainment, Age, Sex, And Race/Ethnicity: 2015, NAT'L CNTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d19/tables/dt19\\_501.35.asp?current=yes](https://nces.ed.gov/programs/digest/d19/tables/dt19_501.35.asp?current=yes).