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## *ESSAY*

### FROM CARRIE BUCK TO BRITNEY SPEARS: STRATEGIES FOR DISRUPTING THE ONGOING REPRODUCTIVE OPPRESSION OF DISABLED PEOPLE

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*In June 2021, Britney Spears made headlines when she testified to a judge that she was being prevented from having children because her conservator would not allow her to stop using contraception. Britney Spears’s dreadful experiences are a glaring reminder that nearly 100 years after the infamous Buck v. Bell decision, reproduction is still weaponized to subjugate people with disabilities. Indeed, the reproductive oppression experienced by Britney Spears and other people with actual or perceived disabilities is deeply entrenched in our laws, in our policies, and in our collective conscience. Confronting these persistent inequities will require us to radically transform our laws and policies. This Essay responds to the ongoing reproductive injustice experienced by disabled people by proposing a vision to assist activists, legal professionals, scholars, and policymakers conceive of and articulate the basic contours of a paradigm shift that supports the coalescence of the reproductive justice and disability justice*

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*movements. The guiding principles set forth herein are intended to advance a long-overdue conversation about reproductive justice for people with disabilities by providing a starting point for activists, scholars, legal professionals, and policymakers to use, critique, and improve upon. The need for action could not be more timely or clear.*

#### INTRODUCTION

*“I want to be able to get married and have a baby . . . I wanted to take the (IUD) out so I could start trying to have another baby. But this so-called team won’t let me go to the doctor to take it out because they don’t want me to have children—any more children.” – Britney Spears<sup>1</sup>*

On June 23, 2021, Britney Spears delivered a twenty-four-minute statement to the Los Angeles Superior Court passionately pleading for an end to the thirteen-year conservatorship to which she has been subjected.<sup>2</sup> In her heartbreaking testimony, Britney Spears presented a lengthy list of abuses she has allegedly endured, including surveillance, confinement, forced medication, and arduous labor demands.<sup>3</sup> One detail stood out as especially egregious: Britney Spears wants to get married and have more children but is being prevented from doing so because her conservators will not authorize the removal of her intrauterine device (“IUD”).<sup>4</sup> The juxtaposed responses of people with and without disabilities are a telling commentary on the state of reproductive freedom for disabled people.<sup>5</sup>

<sup>1</sup> Jem Aswad, Read Britney Spears’ Full Statement Against Conservatorship: ‘I Am Traumatized’, *Variety* (June 23, 2021, 3:59 PM), <https://variety.com/2021/music/news/britney-spears-full-statement-conservatorship-1235003940/> [https://perma.cc/QJ6Y-9UBH] (transcript of Spears’s June 23, 2021, statement to Los Angeles Superior Court Judge, Brenda Penny).

<sup>2</sup> *Id.* At the time of this writing, Britney Spears’s case is ongoing. On September 29, 2021, the court suspended Britney Spears’s father, James Spears, as his daughter’s conservator and temporarily replaced him with a new conservator. Joe Coscarelli, Julia Jacobs & Liz Day, Judge Frees Spears From Father’s Control (Oct. 2, 2021), <https://www.nytimes.com/2021/09/29/arts/music/britney-spears-court-decision-conservatorship.html> [https://perma.cc/9N3S-S8NA]. The court has scheduled a hearing for November 12, 2021, to determine whether the conservatorship should end. *Id.*

<sup>3</sup> Aswad, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Consistent with disability rights and disability justice movements, this Essay acknowledges the importance of language in shaping how we think about disability and how ableism can pervade language choices as well as reflect and perpetuate disability-based subordination. Lydia X. Z. Brown, *Ableism/Language*, *Autistic Hoya* (Feb. 27, 2021), <https://www.autistichoya.com/p/ableist-words-and-terms-to-avoid.html> [https://perma.cc/HS2F-LJ2C]. To that end, I use person-first and identity-first language

Fans, celebrities, and public officials, on the one hand, expressed horror and astonishment that such reproductive oppression was lawfully occurring in the United States.<sup>6</sup> People with disabilities, on the other hand, while enraged, were not surprised that Britney Spears's conservator was exerting reproductive control over her, explaining that such efforts are emblematic of the United States' ongoing practice of weaponizing their reproduction to subjugate them.<sup>7</sup>

Britney Spears's experiences are neither unique nor uncommon. Rather, the belief that people with actual or perceived disabilities—including physical, intellectual, sensory, and psychiatric disabilities—

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interchangeably (e.g., “parents with disabilities” and “disabled parents”) in recognition of the disability community's diverse language preferences. See generally Dana S. Dunn & Erin E. Andrews, *Person-First and Identity-First Language: Developing Psychologists' Cultural Competence Using Disability Language*, 70 *Am. Psych.* 255 (2015) (exploring the evolving language preferences among people with disabilities).

<sup>6</sup> See, e.g., @yooitsmo, Twitter (June 24, 2021, 11:58 AM), <https://twitter.com/yooitsmo/status/1408092248265445387> [<https://perma.cc/UX86-TLL3>] (“I’m sorry but...Britney HAS to keep an [IUD] in under her conservatorship??? How is any of this legal/okay????”); Meghan McCain (@MeghanMcCain), Twitter (June 23, 2021, 9:14 PM), <https://twitter.com/MeghanMcCain/status/1407869786156146689> [<https://perma.cc/T7S7-3X6G>] (“This goes beyond any normal courts, there should be human rights violations investigations. Britney Spears was held captive, out in the open and we gawked at her and didn't listen. This is how we treat famous women. Thank God she didn't kill herself. There is a rot in our culture”); Congresswoman Katie Porter (@katieporteroc), Twitter (June 24, 2021, 7:25 PM), <https://twitter.com/katieporteroc/status/1408204566592561157> [<https://perma.cc/AA53-C7WG>] (“Every American—regardless of their gender identity or disability status—ought to be able to make decisions about their own bodies. #FreeBritney”).

<sup>7</sup> See, e.g., Imani Barbarin (@Imani\_Barbarin), Twitter (June 24, 2021, 10:54 AM), [https://twitter.com/Imani\\_Barbarin/status/1408076140028305422](https://twitter.com/Imani_Barbarin/status/1408076140028305422) [<https://perma.cc/3W8S-DPTB>] (“I don't like the gaslighting that goes on when disabled people tell y'all that what's happening with #FreeBritney is not at all unique. You just have a hierarchy of disability and a point at which you think someone is “too disabled” to care about.”); Sarah Lerner (@SarahLerner), Twitter (June 23, 2021, 6:42 PM), <https://twitter.com/SarahLerner/status/1407831499164962817> [<https://perma.cc/A8BU-TS75>] (“Britney Spears being held under a 13-year conservatorship and being forced to keep her IUD in despite the fact that she wants another child is where disability rights and reproductive rights intertwine.”); Dr. Sherri G. (@onlymeindc), Twitter (June 24, 2021, 9:27 PM), <https://twitter.com/onlymeindc/status/1408235268545519617> [<https://perma.cc/UV6J-LU5J>] (“The Britney Spears situation is most definitely a disability rights issue. The medical and social models of disability are clashing right in front of your eyes. One model boils us down to impairment through oppressive paternalism forcing us in the sick role and the other doesn't.”); Eric Michael Garcia (@EricMGarcia), Twitter (June 23, 2021, 5:55 PM), <https://twitter.com/EricMGarcia/status/1407819545394434051> [<https://perma.cc/8BKP-PMAL>] (“As always, it's important to remember that #FreeBritney is a disability rights issue. If the state can do this to one of the most influential pop stars in my lifetime, think about what it can do to others.”).

should not have reproductive autonomy is woven into our nation's fabric.<sup>8</sup> Each day, disabled people experience reproductive oppression, including forced sterilization, coerced abortion, inadequate access to sexual and reproductive health services and information, and loss of custody of their children.<sup>9</sup> The injustices are even more pronounced for multiply marginalized people with disabilities, including disabled people of color and LGBTQ+ people.<sup>10</sup> The reproductive oppression experienced by disabled people is deeply entrenched in our laws, in our policies, and perhaps most importantly, in our collective conscience. To transform our society into one that respects and supports reproductive freedom for people with disabilities, therefore, the systems that propagate these injustices must be entirely dismantled.

This Essay responds to the persistent reproductive oppression experienced by people with disabilities by proposing a vision to help activists, legal professionals, scholars, and policymakers conceive of and articulate the basic contours of a paradigm shift that supports the coalescence of the reproductive justice and disability justice movements. Part I examines the social context, institutions, and history that perpetuate reproductive oppression among people with disabilities in the United States. It describes the origins of weaponizing reproduction to subjugate disabled people and contemporary examples of such injustice. Part II explores two complementary frameworks for analyzing and confronting the reproductive oppression of disabled people: reproductive justice and disability justice. Finally, guided by reproductive justice and disability justice, Part III proposes four guiding principles necessary for a jurisprudential and legislative agenda to achieve and deliver reproductive justice for people with disabilities.

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<sup>8</sup> See *infra* Part I (contextualizing the United States' history of the reproductive oppression of people with disabilities and the ways in which it persists today).

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

<sup>10</sup> Zoe Brennan-Krohn & Rebecca McCray, Britney Spears' Reproductive Freedom Is a Disability Rights Issue, ACLU (June 25, 2021), <https://www.aclu.org/news/civil-liberties/britney-spears-reproductive-freedom-is-a-disability-rights-issue/> [<https://perma.cc/KZ9E-75WS>] ("Spears' experience is part of a long history of people with disabilities—most often people of color—being robbed of the right to control their reproductive destinies."); Nat'l LGBTQ Task Force, *Queering Reproductive Justice: A Toolkit 5–7* (Zsea Beaumonis, Candace Bond-Therault, Stacey Long Simmons & Sabrina Rewald eds., 2017), <https://www.thetaskforce.org/wp-content/uploads/2017/03/Queering-Reproductive-Justice-A-Toolkit-FINAL.pdf> [<https://perma.cc/5L88-TMXB>].

## I. PERSISTENT REPRODUCTIVE INJUSTICE

The recent revelations of the reproductive control being exerted by Britney Spears’s conservator must be situated within the nation’s long and reprehensible history of weaponizing reproduction to oppress disabled people, as well as other marginalized communities. This Part limns the ways in which laws and policies have led to the reproductive oppression of people with disabilities—particularly girls and women with disabilities<sup>11</sup>—beginning with the eugenics movement. Without attempting to provide a complete description of the myriad ways in which reproduction has been weaponized to subjugate disabled people, this Part highlights examples of how these practices have lawfully endured over time, focusing primarily on contemporary practices.

*A. Historical Reproductive Injustice*

The United States has a horrible history of preventing disabled people from controlling their destinies, including enacting laws and policies restricting their reproductive decision-making. During the eugenics movement of the early 1900s, more than thirty states passed involuntary sterilization laws, postulating that people with disabilities and other marginalized communities were socially inadequate and should be prevented from procreating.<sup>12</sup> This line of reasoning underscored the infamous 1927 *Buck v. Bell* decision.<sup>13</sup> Carrie Buck was purportedly a

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<sup>11</sup> Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 *Berkeley Women’s L.J.* 122, 123–24 (1993) (“Only a few of the dozens of cases regarding involuntary sterilizations involve the sterilization of males. Therefore, sterilization practice is interwoven with the issue of control of female reproductive rights and, to some extent, of female sexual expression.”). But see *In re Guardianship of Kennedy*, 845 N.W.2d 707, 708–09 (Iowa 2014) (evaluating an appeal brought by a 21-year-old man with intellectual disabilities challenging the legality of a vasectomy his guardian had arranged for him without obtaining a court order); Renu Barton-Hanson, *Sterilization of Men with Intellectual Disabilities: Whose Best Interest Is It Anyway?*, 15 *Med. L. Int’l* 49, 57–58 (2015) (examining recent cases concerning sterilization of men with intellectual disabilities and noting the frequent justification as purportedly promoting sexual freedom).

<sup>12</sup> See Eric M. Jaegers, Note, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 *U. Louisville J. Fam. L.* 947, 948, 953–54 (1993) (“The purpose of these laws was to protect and streamline society by preventing reproduction by those deemed socially or mentally inferior.”).

<sup>13</sup> 274 U.S. 200 (1927).

“feeble minded” woman institutionalized in Virginia.<sup>14</sup> She was likewise the daughter of a “feeble minded” woman committed to the same institution.<sup>15</sup> At seventeen years old, Carrie Buck became pregnant after being raped; her daughter Vivian was also deemed “feebleminded.”<sup>16</sup> After Vivian’s birth, the institution sought to sterilize Carrie Buck in accordance with Virginia’s compulsory sterilization statute.<sup>17</sup> It should be noted that Vivian was removed from her mother after birth and placed in a foster home.<sup>18</sup> Following a series of appeals, the law was upheld as constitutional in part on the grounds that it served “the best interests of the patients and of society.”<sup>19</sup> Concluding this historical decision, Justice Oliver Wendell Holmes, Jr. declared, “It is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind.”<sup>20</sup> During the twentieth century, as many as 70,000 Americans, many of whom were people of color or whom had disabilities, were sterilized.<sup>21</sup> Notably, *Buck v. Bell* has never been overturned.<sup>22</sup>

Laws forbidding people with disabilities from marrying were another hallmark of the eugenics movement.<sup>23</sup> Specifically, three eugenics-based justifications were put forth to advance marriage restrictions: “the potential children must be protected; people with [disabilities] themselves must be protected; and society at large must be protected.”<sup>24</sup> For example,

<sup>14</sup> *Id.* at 205; see also Stephen Jay Gould, *Carrie Buck’s Daughter*, 2 *Const. Comment.* 331, 336 (1985) (asserting that Buck was not “feebleminded” but rather institutionalized to hide her rape).

<sup>15</sup> *Buck*, 274 U.S. at 205; Gould, *supra* note 14, at 334.

<sup>16</sup> Gould, *supra* note 14, at 333, 336; *Buck*, 274 U.S. at 205.

<sup>17</sup> *Buck*, 274 U.S. at 205–06; Gould, *supra* note 14, at 331.

<sup>18</sup> Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* 104–05 (2008).

<sup>19</sup> *Buck*, 274 U.S. at 206–08.

<sup>20</sup> *Id.* at 207.

<sup>21</sup> Fresh Air, *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR (Mar. 17, 2016), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> [<https://perma.cc/5KYD-Z79X>].

<sup>22</sup> Fifteen years after *Buck v. Bell* was decided, the Supreme Court struck down an Oklahoma law requiring that people with two or more convictions for felonious offenses be sterilized. *Skinner v. Oklahoma*, 316 U.S. 535, 536–37, 543 (1942). Although both *Skinner* and *Buck* concern involuntary sterilization statutes, *Skinner*’s analysis took a narrower focus, relating only to the punitive sterilization of criminals, thereby avoiding addressing the forced sterilization of people with disabilities. *Id.* at 542–43.

<sup>23</sup> Brooke Pietrzak, *Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment*, 17 *Dev. Mental Health L.* 1, 34–35 (1997).

<sup>24</sup> *Id.* at 35.

a Connecticut law banned “epileptics, imbeciles, and feebleminded persons” from marrying or having extramarital sexual relations before the age of forty-five.<sup>25</sup> In 1974, a study found that over forty states had laws preventing people with intellectual disabilities from marrying.<sup>26</sup> The most recent systematic investigation of these statutes was undertaken in 1997 and found that thirty-three states still had laws restricting people with intellectual or psychiatric disabilities from marrying.<sup>27</sup>

### *B. Contemporary Reproductive Injustice*

As Britney Spears’s recent testimony demonstrates, people with disabilities’ reproductive freedom continues to be controlled in a multitude of ways. For example, while nearly all states have repealed their involuntary sterilization laws, most states still permit sterilization with prior judicial authorization.<sup>28</sup> Recently, the parents of Mary Moe,<sup>29</sup> a 32-year-old pregnant woman with a psychiatric disability, petitioned a Massachusetts court for guardianship over Mary Moe to consent to an abortion.<sup>30</sup> Although Mary Moe vehemently opposed abortion, the trial court appointed her parents as co-guardians and authorized that Mary Moe be “coaxed, bribed, or even enticed . . . by ruse” into a hospital for an abortion.<sup>31</sup> Further, the trial judge ordered *sua sponte*, and without notice, that Mary Moe be sterilized “to avoid this painful situation from recurring in the future.”<sup>32</sup> Eventually, the decision was reversed on appeal, with the appellate court noting in regard to the sterilization order, “No party requested this measure, none of the attendant procedural requirements has been met, and the judge appears to have simply

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<sup>25</sup> Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 Colum. L. Rev. 1418, 1432 (1981).

<sup>26</sup> President’s Comm. on Mental Retardation, OHD 74-21002, Silent Minority 33 (1974).

<sup>27</sup> Pietrzak, *supra* note 23, at 1–2. Although no known studies have systematically examined marriage laws as they apply to people with disabilities, scholars contend that these statutes continue to exist in some states. Michael E. Waterstone, *Disability Constitutional Law*, 63 Emory L.J. 527, 548–49 (2014).

<sup>28</sup> See Vanessa Volz, Note, *A Matter of Choice: Women with Disabilities, Sterilization, and Reproductive Autonomy in the Twenty-First Century*, 27 Women’s Rts. L. Rep. 203, 207–08 (2006).

<sup>29</sup> Mary Moe is a pseudonym; Massachusetts General Law requires that informed consent proceedings for an abortion be kept confidential. Mass. Gen. Laws ch. 112, § 12R (2020).

<sup>30</sup> *In re Guardianship of Mary Moe*, 960 N.E.2d 350, 352 (Mass. App. Ct. 2012).

<sup>31</sup> *Id.* at 353 (quoting the family court’s decision).

<sup>32</sup> *Id.* (quoting the family court’s decision).

produced the requirement out of thin air.”<sup>33</sup> Although Moe’s case had a positive outcome consistent with her articulated desires, her case demonstrates how disabled people experience threats to their reproductive freedom even with supposed judicial protections.

The “Ashley X” case provides another disturbing example of how the reproductive freedom of people with disabilities is subordinated. Ashley was a young girl with intellectual and physical disabilities.<sup>34</sup> In 2004, at age six, a Washington hospital, with Ashley’s parents’ permission, performed a series of procedures, including growth attenuation via hormone therapy, a hysterectomy, and bilateral breast bud removal.<sup>35</sup> Her physicians and family justified the permanent alteration of her body by arguing that the procedures ensured “the best possible quality of life,” by enabling her to be more easily cared for by her family, while also allowing her to “retain more dignity in a body that is healthier, more of a comfort to her, and more suited to her state of development.”<sup>36</sup> Further, Ashley’s parents asserted, “Ashley has no need for her uterus since she will not be bearing children,”<sup>37</sup> and her physicians contended that the hysterectomy benefited both Ashley and her family because it “eliminate[d] the complications of menses.”<sup>38</sup> Thus, Ashley’s “best interest was equated with her parents’ ability to maintain her at home and being easily able to carry and move her.”<sup>39</sup> Notably, Ashley’s parents successfully sought these procedures with just the authorization of an internal ethics board and not through adjudication.<sup>40</sup> Years later, an investigation revealed that the hospital had violated state law in this matter.<sup>41</sup> Nonetheless, the

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<sup>33</sup> *Id.* at 355.

<sup>34</sup> Daniel F. Gunther & Douglas S. Diekema, *Attenuating Growth in Children with Profound Developmental Disability: A New Approach to an Old Dilemma*, 160 *Archives Pediatrics & Adolescent Med.* 1013, 1014 (2006); Marcia H. Rioux & Lora Patton, *Beyond Legal Smokescreens: Applying a Human Rights Analysis to Sterilization Jurisprudence*, in *Critical Perspectives on Human Rights and Disability Law* 243, 243–44 (Marcia H. Rioux, Lee Ann Bassler & Melinda Jones eds., 2011).

<sup>35</sup> Gunther & Diekema, *supra* note 34; Rioux & Patton, *supra* note 34, at 244.

<sup>36</sup> The “Ashley Treatment”, *Towards a Better Quality of Life for “Pillow Angels”*, at 3, 12 (Mar. 17, 2012), <http://pillowangel.org/Ashley%20Treatment.pdf> [<https://perma.cc/8E3Z-VCEQ>] (the document is authored by: “Ashley’s Mom and Dad”).

<sup>37</sup> *Id.* at 10.

<sup>38</sup> Gunther & Diekema, *supra* note 34, at 1015.

<sup>39</sup> Rioux & Patton, *supra* note 34, at 244–45.

<sup>40</sup> *Id.* at 244.

<sup>41</sup> Amy Burkholder, *Report: ‘Pillow Angel’ Surgery Broke Law*, CNN (May 8, 2007), <http://www.cnn.com/2007/HEALTH/05/08/ashley.ruling/index.html> [<https://perma.cc/Z8RD-LF78>] (“Children’s Hospital, in acknowledging its error, said that



“Ashley Treatment” remains accepted globally, with more than 100 families estimated to have subjected their children to similar procedures while thousands more are said to have considered it.<sup>42</sup> Thus, “[i]f the parents and doctors are all on board, these sorts of sterilization decisions can easily fly under the radar and evade mechanisms of legal accountability.”<sup>43</sup>

Sterilization remains a standard procedure for many people with disabilities. Indeed, several recent studies have found that disabled women, especially those with intellectual disabilities, are significantly more likely than nondisabled women to be sterilized and at younger ages.<sup>44</sup> Further, today, sterilization of people with disabilities is primarily “driven by parents, guardians, and social service providers who are uneasy . . . [that] they will incur the additional burden of caring for the offspring.”<sup>45</sup> Tellingly, in petitions to courts for approval to sterilize people with disabilities or terminate their pregnancies, guardians often cite cost as a prevailing factor.<sup>46</sup> In fact, in authorizing the sterilization of disabled people, courts often advance analogous presumptions to those put forward in *Buck*, such as that people with disabilities are “incapable of adequate parenting” and their children will “inevitably be a financial burden on the state.”<sup>47</sup> Thus, while the “[e]ugenic rhetoric might have declined,” the “eugenic motivations and eugenic laws did not.”<sup>48</sup> While

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beyond implementing changes to ensure that sterilization of disabled children doesn’t happen again without a court order, it will seek court approval for other procedures involved in the controversial growth attenuation therapy.”)

<sup>42</sup> Ed Pilkington & Karen McVeigh, ‘Ashley Treatment’ on the Rise Amid Concerns from Disability Rights Groups, *The Guardian* (Mar. 15, 2012) <http://www.guardian.co.uk/society/2012/mar/15/ashley-treatment-rise-amid-concerns/> [<https://perma.cc/B5WF-ENKY>].

<sup>43</sup> Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 *Harv. L. & Pol’y Rev.* 273, 289 (2020).

<sup>44</sup> See Justine P. Wu et al., *Female Sterilization Is More Common Among Women with Physical and/or Sensory Disabilities than Women Without Disabilities in the United States*, 10 *Disability & Health J.* 400, 403 (2017); William Mosher et al., *Contraceptive Use by Disability Status: New National Estimates from the National Survey of Family Growth*, 97 *Contraception* 552, 555 (2018); Henan Li et al., *Female Sterilization and Cognitive Disability in the United States, 2011–2015*, 132 *Obstetrics & Gynecology* 559, 561 (2018).

<sup>45</sup> Beverly Horsburgh, *Schrödinger’s Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 *Cardozo L. Rev.* 531, 572 (1996).

<sup>46</sup> Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 *Berkeley Women’s L.J.* 122, 126 (1993).

<sup>47</sup> *Id.*

<sup>48</sup> Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 *Cardozo J.L. & Gender* 319, 350 (2008).

sterilization should unquestionably be an option for permanent contraception for people who choose it, given the country's history, it is not difficult to imagine that many of these sterilizations may be coerced.

Inadequate access to sexual and reproductive health services and information, including contraception, also thwarts disabled people's reproductive autonomy. As Britney Spears's experiences demonstrate, there is significant tension concerning people with disabilities and contraception. On the one hand, research indicates that disabled women have less contraception knowledge and lower contraception use compared to nondisabled women.<sup>49</sup> On the other hand, like Britney Spears, some women with disabilities are forced by family members or guardians to use contraception out of fear that their disabled relative will become pregnant.<sup>50</sup> In these instances, Britney Spears and others are in effect sterilized since they cannot reproduce due to forced contraception. Thus, some disabled people have inadequate access while other people are denied contraceptive decision-making. Extant research also suggests that pregnant women with disabilities experience higher risks of complications and poorer outcomes than nondisabled women because of inadequate access to health care.<sup>51</sup> Indeed, adverse perinatal outcomes are often the result of physical barriers, communication barriers, and programmatic barriers, including healthcare providers' negative attitudes about sexuality and reproduction among disabled women.<sup>52</sup>

Finally, prejudice and speculation about the competencies of parents with disabilities—emulating those raised during the eugenics movement—have led to contemporary discriminatory child welfare,

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<sup>49</sup> Robyn M. Powell, Susan L. Parish, Monika Mitra, & Eliana Rosenthal, Role of Family Caregivers Regarding Sexual and Reproductive Health for Women and Girls with Intellectual Disability: A Scoping Review, 64 *J. Intell. Disability Rsch.* 131, 132 (2020) (citing studies).

<sup>50</sup> *Id.* at 151 (citing studies).

<sup>51</sup> Monika Mitra, Linda M. Long-Bellil, Suzanne C. Smeltzer & Lisa I. Iezzoni, A Perinatal Health Framework for Women with Physical Disabilities, 8 *Disability Health J.* 499, 499 (2015) (citing studies); Lesley A. Tarasoff et al., Health of Newborns and Infants Born to Women with Disabilities: A Meta-Analysis, 146 *Pediatrics*, e20201635, at 2 (2020) (citing studies); Ilhom Akobirshoev, Susan L. Parish, Monika Mitra & Eliana Rosenthal, Birth Outcomes Among US Women with Intellectual and Developmental Disabilities, 10 *Disability & Health J.* 406, 409 tbl. 2 (2017) (comparing maternal and infant outcomes of women with and without intellectual disabilities).

<sup>52</sup> Robyn M. Powell, Erin E. Andrews & Kara B. Ayers, Becoming a Disabled Parent: Eliminating Access Barriers to Health Care Before, During, and After Pregnancy, 96 *Tul. L. Rev.* (forthcoming 2021) (manuscript at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3808017](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808017) [<https://perma.cc/3JD2-WD5G>] (interviewing disabled parents about their experiences accessing health care services).

family law, and adoption and foster care policies and practices that assume parental unfitness.<sup>53</sup> For example, disabled parents experience disproportionate rates of child welfare system involvement and loss of parental rights.<sup>54</sup> Parents with disabilities also contend with state statutes that include disability as grounds for the termination of parental rights.<sup>55</sup> Family courts often deny parents with disabilities custody of or visitation with their children.<sup>56</sup> For example, Britney Spears has had limited access to her children since she was placed under conservatorship.<sup>57</sup> Meanwhile, foster care and adoption agencies regularly discriminate against prospective disabled parents based on presumptions that they are unfit to care for children.<sup>58</sup>

## II. REPRODUCTIVE JUSTICE AND DISABILITY JUSTICE

Britney Spears's tragic experiences are a stark reminder that nearly 100 years after the infamous *Buck v. Bell* decision, reproductive freedom is still denied to far too many disabled people, often because of discriminatory laws and policies. Thus, attention by activists, legal

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<sup>53</sup> See generally Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 15 (2012) [hereinafter "Rocking the Cradle"], [https://www.ncd.gov/sites/default/files/Documents/NCD\\_Parenting\\_508\\_0.pdf](https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf) [<https://perma.cc/UB7C-XMMG>] ("The report provides a comprehensive review of the barriers and facilitators people with diverse disabilities—including intellectual and developmental, psychiatric, sensory, and physical disabilities—experience when exercising their fundamental right to create and maintain families, as well as persistent, systemic, and pervasive discrimination against parents with disabilities. The report analyzes how U.S. disability law and policy apply to parents with disabilities in the child welfare and family law systems, and the disparate treatment of parents with disabilities and their children. Examination of the impediments prospective parents with disabilities encounter when accessing assisted reproductive technologies or adopting provides further examples of the need for comprehensive protection of these rights.").

<sup>54</sup> *Id.* at 16.

<sup>55</sup> *Id.* at 265–300 (finding that over two-thirds of state dependency laws list parental disability as grounds for termination of parental rights).

<sup>56</sup> Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 *Fam. Ct. Rev.* 37, 38 (2019) ("Indeed, parents with disabilities contend with substantial and persistent bias within the family law system, often threatening their custody and visitation rights.").

<sup>57</sup> Laura Rizzo, *Inside Britney Spears' Custody Battle with Kevin Federline for Kids Sean Preston and Jayden*, *Life & Style Mag.* (June 24, 2021), <https://www.lifeandstylemag.com/posts/does-britney-spears-have-custody-of-kids-preston-and-jayden/> [<https://perma.cc/EQY3-9KZ3>] (explaining that Britney Spears had 30% custody at the time and was reportedly seeking 50%).

<sup>58</sup> *Rocking the Cradle*, *supra* note 53, at 153–66 (describing the ways prospective parents with disabilities experience discrimination within the foster care and adoption system).

professionals, scholars, and policymakers to these matters is urgently needed. The four guiding principles for achieving reproductive justice for disabled people proposed in Part III *infra* are guided by two complementary frameworks: reproductive justice and disability justice. Both reproductive justice and disability justice are intersectional social movements, theories, and praxes which provide important lenses for analyzing and responding to the ongoing weaponization of reproduction to subjugate people with disabilities. This Part briefly describes each framework.

### *A. Reproductive Justice*

Reproductive justice is based on the international human rights framework. It draws from reproductive rights and social justice. Reproductive justice was first “conceived in 1994 by feminists of color to conceptualize reproductive rights struggles embedded in social justice organizing that simultaneously challenged racism and classism, among other oppressions.”<sup>59</sup> According to Loretta Ross, co-founder of the SisterSong Women of Color Reproductive Health Collective, “[t]he Reproductive Justice framework analyzes how the ability of any woman to determine her own reproductive destiny is linked directly to the conditions in her community—and these conditions are not just a matter of individual choice and access.”<sup>60</sup>

Drawing from intersectionality, which “illustrate[s] how racial and gender oppression interact in the lives of Black women,”<sup>61</sup> reproductive justice is “based on the understanding that the impacts of race, class, gender, and sexual identity oppressions are not additive but integrative,”<sup>62</sup> and understands that only a holistic lens can address them. Accordingly, reproductive justice centers on “the ways in which aspects of social status and social identity (e.g., age, race/ethnicity, socioeconomic class, sexual orientation, gender identity, religion, ability) combine to impact women’s

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<sup>59</sup> Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 *Ann. Rev. L. & Soc. Sci.* 327, 328 (2013).

<sup>60</sup> Loretta Ross, *What is Reproductive Justice?*, in *Reproductive Justice Briefing Book: A Primer on Reproductive Justice and Social Change* 4, <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051> [<https://perma.cc/5SSG-QVSD>] (last visited Oct. 1, 2021) [hereinafter “*Reproductive Justice Briefing Book*”].

<sup>61</sup> Loretta J. Ross & Rickie Solinger, *Reproductive Justice: An Introduction* 73 (2017).

<sup>62</sup> *Id.* at 74.

experiences.”<sup>63</sup> In other words, reproductive justice recognizes the ways in which intersecting factors, such as race and disability, constrain the reproductive freedom of marginalized communities.

Reproductive justice emerged as a movement because women of color and other marginalized communities felt that the reproductive rights movement disregarded their needs and experiences.<sup>64</sup> Reproductive justice, therefore, goes beyond our traditional understanding of reproductive rights in two critical ways. First, reproductive justice recognizes the importance of choice while also considering the broader social, legal, and institutional structures that affect people’s reproductive decision-making.<sup>65</sup> Second, and relatedly, reproductive justice applies to all aspects of reproductive freedom instead of just abortion rights.<sup>66</sup> Accordingly, reproductive justice “includes not only a woman’s right not to have a child, but also the right to have children and to raise them with dignity in safe, healthy, and supportive environments.”<sup>67</sup> Thus, “[b]y moving beyond the traditional pro-choice narrative and into the reality of lived experiences within the women’s communities, the reproductive justice movement focuses on the inequality among groups of women that inhibits access to these rights for some more than others.”<sup>68</sup> In other words, reproductive justice challenges the pro-choice/pro-life dichotomy, viewing “choice” as something that divides people in policy and practice

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<sup>63</sup> Joan C. Chrisler, Introduction: A Global Approach to Reproductive Justice—Psychosocial and Legal Aspects and Implications, 20 *Wm. & Mary J. Women & L.* 1, 4 (2013).

<sup>64</sup> Sarah London, Reproductive Justice: Developing a Lawyering Model, 13 *Berkeley J. Afr.-Am. L. & Pol’y* 71, 75 (2011).

<sup>65</sup> Reproductive Justice Briefing Book, *supra* note 60, at 4. (“Moving beyond a demand for privacy and respect for individual decision making to include the social supports necessary for our individual decisions to be optimally realized, this framework also includes obligations from our government for protecting women’s human rights. Our options for making choices have to be safe, affordable and accessible, three minimal cornerstones of government support for all individual life decisions.”).

<sup>66</sup> *Id.* (“Instead of focusing on the means—a divisive debate on abortion and birth control that neglects the real-life experiences of women and girls—the Reproductive Justice analysis focuses on the ends: better lives for women, healthier families, and sustainable communities.”).

<sup>67</sup> Dorothy Roberts, Reproductive Justice, Not Just Rights, *Dissent* (Fall 2015), <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights> [<https://perma.cc/C37U-GS88>]; see also Luna & Luker, *supra* note 59, at 343 (“[R]eproductive justice is equally about the right to not have children, the right to have children, the right to parent with dignity, and the means to achieve these rights.”).

<sup>68</sup> Seema Mohapatra, Law in the Time of Zika: Disability Rights and Reproductive Justice Collide, 84 *Brook. L. Rev.* 325, 343 (2019).

because it accepts that all people have an equal ability to make the same choices.

Reproductive justice necessitates “an integrated approach that draws on constitutional protections and movement-based policy strategies.”<sup>69</sup> Further, reproductive justice recognizes that “many kinds of laws shape the conditions in which women conceive and bear children.”<sup>70</sup> Reproductive justice emphasizes an affirmative government role “in ensuring that all women have the social, political, and economic power and resources to make the best decisions for themselves and their families.”<sup>71</sup> Rather than relying only on litigation and attorneys, reproductive justice also engages in grassroots and community organizing.<sup>72</sup>

Extant legal scholarship has demonstrated the importance of applying reproductive justice to dissect and address the reproductive oppression of people with disabilities.<sup>73</sup> As Samuel Bagenstos notes, “[j]ust as ‘regulating Black women’s reproductive decisions has been a central aspect of racial oppression in America,’ regulating disabled people’s reproductive decisions has been a central aspect of disability oppression in America.”<sup>74</sup> Hence, reproductive justice can be engaged to confront the

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<sup>69</sup> Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. Davis L. Rev. 2191, 2240 (2018).

<sup>70</sup> Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 Ind. L.J. 207, 210 (2018).

<sup>71</sup> Sujatha Jesudason & Julia Epstein, Editorial, *The Paradox of Disability in Abortion Debates: Bringing the Pro-Choice and Disability Rights Communities Together*, 84 *Contraception* 541, 542 (2011).

<sup>72</sup> London, *supra* note 64, at 71–72.

<sup>73</sup> See, e.g., Robyn M. Powell, *Confronting Eugenics Means Finally Confronting Its Ableist Roots*, 27 *Wm. & Mary J. Race, Gender & Soc. Just.* 607, 628–31 (2021) (examining the history of eugenics in the United States and calling for a justice-based approach to address the role of ableism in eugenics); Bagenstos, *supra* note 43, at 279–86; Mary Ziegler, *The Disability Politics of Abortion*, 2017 *Utah L. Rev.* 587, 627–30 (2017) (describing ways in which reproductive justice should be used to advocate for programs to support people with disabilities as a mechanism for reducing disability-based abortions); Mohapatra, *supra* note 68, at 325–27 (2019) (using the Zika virus to highlight the tensions between reproductive rights and disability rights); Dorothy Roberts & Sujatha Jesudason, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 10 *Du Bois Rev.* 313, 316–18 (2013) (proposing how organizing based on an intersectional analysis can help facilitate alliances between reproductive justice, racial justice, women’s rights, and disability rights activists to develop strategies to address reproductive genetic technologies); Roberts, *supra* note 67 (describing the failures of the reproductive rights movement to respond to the needs of marginalized communities, including people with disabilities, and calling for a reproductive justice framework instead).

<sup>74</sup> Bagenstos, *supra* note 43, at 285 (quoting Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 6 (1997)).

myriad oppressions that prohibit people with disabilities from enjoying their reproductive freedoms by confronting and disrupting the longstanding systems that propagate reproductive injustice.

### *B. Disability Justice*

Disability justice is an equally important lens for dislocating the nation's ongoing reproductive oppression of people with disabilities. Indeed, "reproductive justice is disability justice."<sup>75</sup> Specifically, disability justice provides an important framework for examining ableism as it relates to other forms of oppression and identity. Disability justice was first conceived in 2005 by the Disability Justice Collaborative, a group of Black, brown, queer, and trans people.<sup>76</sup> Disability justice includes ten fundamental principles needed to achieve a truly inclusive and just society: "intersectionality . . . leadership of those most impacted . . . anti-capitalist politics . . . cross-movement solidarity . . . recognizing wholeness . . . sustainability . . . commitment to cross-disability solidarity . . . interdependence . . . collective access . . . [and] collective liberation."<sup>77</sup>

Similar to reproductive justice, disability justice distinguishes itself from a rights-based approach and calls for a holistic approach to disrupting the longstanding systems that cause oppression. According to *Sins Invalid*, a disability justice performance project, "Rights-based strategies often address the symptoms of inequity but not the root. The root of disability oppression is ableism and we must work to understand it, combat it, and create alternative practices rooted in justice."<sup>78</sup> Thus, "[w]here disability rights seeks to change social conditions for some disabled people via law and policy, disability justice moves beyond law and policy: It seeks to radically transform social conditions and norms in order to affirm and support all people's inherent right to live and thrive."<sup>79</sup> In other words, "[a]t its core, the disability rights framework centers people who can achieve status, power and access through a legal or rights-

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<sup>75</sup> *Sins Invalid*, *Skin, Tooth, and Bone—The Basis of Movement is Our People: A Disability Justice Primer* 59 (2d ed. 2019) (capital letters omitted).

<sup>76</sup> Leah Lakshmi Piepzna-Samarasinha, *Care Work: Dreaming Disability Justice* 11 (2018).

<sup>77</sup> *Sins Invalid*, *supra* note 75, at 22–26 (capital letters omitted).

<sup>78</sup> *Id.* at 15, 47.

<sup>79</sup> Talila "TL" Lewis, *Disability Justice Is an Essential Part of Abolishing Police and Prisons*, *Level* (Oct. 7, 2020), <https://level.medium.com/disability-justice-is-an-essential-part-of-abolishing-police-and-prisons-2b4a019b5730> [<https://perma.cc/J5QL-9UNR>].

based framework, which we know is not possible for many disabled people, or appropriate for all situations.”<sup>80</sup> Disability justice is based on community and grassroots organizing.

Further, like reproductive justice, intersectionality<sup>81</sup> is a fundamental aspect of disability justice. Indeed, disability justice was developed as a “movement-building framework that would center the lives, needs, and organizing strategies of disabled queer and trans and/or Black and brown people marginalized from mainstream disability rights organizing’s white-dominated, single-issue focus.”<sup>82</sup> Notably, “disability justice values an intersectional analysis which requires us to consider the complexities of reproductive justice in the context of ableism.”<sup>83</sup> For example, disabled people at the intersection of other marginalized identities, such as disabled people of color or LGBTQ+ disabled people, experience even greater reproductive oppression. Hence, “[p]eople who exist at the intersection of race and disability experience a multi-dimensional form of discrimination that is continually at risk of being flattened to a single dimension—*either* race or disability—due to the limitations of our collective understanding of intersectionality.”<sup>84</sup>

### III. ACHIEVING REPRODUCTIVE JUSTICE: FOUR GUIDING PRINCIPLES

*“Big problems require big solutions.” –Ruth Wilson Gilmore<sup>85</sup>*

The ongoing reproductive control of Britney Spears exposes the persistent subordination of people with disabilities. Moreover, it shines a light on the urgent need for a long-overdue conversation: How does the

<sup>80</sup> Sins Invalid, *supra* note 75, at 15.

<sup>81</sup> In 1989, Kimberlé Crenshaw coined the term “intersectionality” to help explain the oppression of African-American women. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 *U. Chi. Legal F.* 139, 140 (1989). Since then, intersectionality has been used to study how people who are members of multiple socially marginalized communities experience discrimination, including people with disabilities. See, e.g., Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 *Geo. J.L. & Mod. Critical Race Persps.* 209, 211–22 (2010).

<sup>82</sup> Piepzna-Samarasinha, *supra* note 76, at 11.

<sup>83</sup> Sins Invalid, *Reproductive Justice is Disability Justice 1*, [https://www.sinsinvalid.org/s/Reproductive\\_Justice\\_is\\_Disability\\_Justice.pdf](https://www.sinsinvalid.org/s/Reproductive_Justice_is_Disability_Justice.pdf) [<https://perma.cc/6XUF-Z8JL>] (last visited June 26, 2021).

<sup>84</sup> Alice Abrokwa, “When They Enter, We All Enter”: Opening the Door to Intersectional Discrimination Claims Based on Race and Disability, 24 *Mich. J. Race & L.* 15, 20–21 (2018).

<sup>85</sup> Ruth Wilson Gilmore, *Foreword to Dan Berger, The Struggle Within: Prisons, Political Prisoners, and Mass Movements in the United States* viii (2014).



United States finally confront its deplorable history of weaponizing reproduction to subjugate disabled people? As this Essay demonstrates, the reproductive oppression experienced by people with disabilities is deeply entrenched in our laws, in our policies, and in our collective conscience. Indeed, the problems of reproductive oppression are complex and require an interdisciplinary and interprofessional response that engages all fields of expertise, including law, medicine, public health, social work, and organizing, among others.

Below, I propose four guiding principles that I believe are necessary for a jurisprudential and legislative approach to achieving reproductive justice for people with disabilities. First, achieving reproductive justice for disabled people requires activists, scholars, legal professionals, and policymakers to actively engage people with disabilities. Second, legal and policy responses must be developed and implemented to ensure people with disabilities' rights to autonomy and self-determination are protected. Third, sexual and reproductive health services and information must be accessible and available for people with disabilities. Finally, people with disabilities and their families must be guaranteed rights, justice, and wellness for themselves and their families.

These guiding principles, which are grounded in the extant legal and social science scholarship, are foundational elements of more significant legal and policy changes that will need to be fleshed out in considerable detail. They are outlined in broad strokes to help facilitate a discussion among activists, legal professionals, scholars, and policymakers about the basic contours of a paradigm shift that supports the coalescence of reproductive justice and disability justice. Disrupting the longstanding systems that oppress disabled people's reproductive freedom will undeniably require a multifaceted approach. However, the need for such action could not be more timely or clear.

#### *A. Center People with Disabilities as Leaders*

Both reproductive justice and disability justice underscore the importance of centering people from marginalized communities as leaders in developing and implementing laws and policies that impact them. Indeed, a fundamental aspect of justice-based approaches is

“listening to, engaging, and developing affected communities.”<sup>86</sup> According to Sins Invalid, “By centering the leadership of those most impacted, we keep ourselves grounded in real-world problems and find creative strategies for resistance.”<sup>87</sup> Centering disabled people as leaders is also consistent with the disability community’s mantra, “nothing about us, without us,” which emphasizes that people with disabilities should be actively involved in legal and policy efforts that affect them.<sup>88</sup> Undeniably, when the voices of marginalized communities, including people with disabilities, are centered, solutions that benefit all members of society are conceived.

Cross-movement organizing is an important aspect of disrupting the reproductive oppression of disabled people. Historically, there have been significant tensions—particularly concerning issues of prenatal genetic testing for markers of disability and abortion on grounds of fetal disability—between the disability rights and reproductive rights movements.<sup>89</sup> However, as the Center for Reproductive Rights notes, “[t]he cost of ignoring tensions between the disability rights and reproductive rights movements is high.”<sup>90</sup> Accordingly, the Center for Reproductive Rights intentionally developed partnerships with disability rights groups in an effort to begin bridging the gap between the movements.<sup>91</sup> These discussions are an important reminder that the movements must work collectively to confront the subjugation of disabled people’s reproductive freedom, and that intentionally including people with disabilities is critical to developing legal and policy responses.

Accordingly, the first guiding principle to achieving reproductive justice for disabled people requires activists, scholars, legal professionals, and policymakers to actively engage people with disabilities, especially disabled people of color and LGBTQ+ disabled people, in leading legal

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<sup>86</sup> Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 *Am. U. L. Rev.* 275, 338 (2015) (describing the importance of actively engaging socially marginalized communities to address inequities).

<sup>87</sup> Sins Invalid, *supra* note 75, at 23.

<sup>88</sup> James I. Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* 3 (1998).

<sup>89</sup> Bagenstos, *supra* note 43, at 280–81.

<sup>90</sup> Center for Reproductive Rights, *Shifting the Frame on Disability Rights for the U.S. Reproductive Rights Movement 2* (2017), <https://reproductiverights.org/wp-content/uploads/2020/12/Disability-Briefing-Paper-FINAL.pdf> [<https://perma.cc/52GS-T2NV>].

<sup>91</sup> See *id.* at 1–2.

and policy responses to address reproductive oppression. Such engagement will require an understanding of and respect for disabled people sharing their lived experiences and should elevate people with disabilities to leadership positions within movements. Because disabled people are the experts of their lives, centering them will lead to legal and policy responses that are disability-competent and address the actual reproductive needs of people with disabilities.

As previously explained, centering disabled people as leaders should also lead to cross-movement organizing and a broader effort to foster alliances and grow partnerships among the impacted communities. Cross-movement solidarity will produce progress toward specific policy goals and increase and enhance the dignity of people who can value one another's shared humanity. Practically, this means that reproductive justice activists must make concerted efforts to include disabled people in their work. Similarly, disability rights and justice activists must recognize the diversity of the disability community and ensure that disabled people from marginalized communities hold leadership roles within the movements. To achieve reproductive justice, disabled people, especially disabled people of color and LGBTQ+ people, must be centered in all legal and policy efforts.

### *B. Protect Autonomy and Self-Determination*

As Britney Spears's heartbreaking ordeal exposes, people with disabilities are often denied bodily autonomy and self-determination, which in turn can result in reproductive oppression. Constitutional doctrine relating to abortion is rooted in a principle of autonomy.<sup>92</sup> Specifically, constitutional protections of abortion rights are rooted in the guarantee of "liberty" in the Due Process Clause of the Fourteenth Amendment.<sup>93</sup> Indeed, the Supreme Court of the United States has held that the liberty protected by the U.S. Constitution involves freedom in

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<sup>92</sup> See Pamela S. Karlan & Daniel R. Ortiz, In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda, 87 *Nw. U. L. Rev.* 858, 876 (1993) ("The language of autonomy has provided the central rationale for protecting individual women's control over the abortion decision.").

<sup>93</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) ("Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding [in *Roe v. Wade*] that the Constitution protects a woman's right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.").

making “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”<sup>94</sup> Likewise, a cornerstone of the disability rights movement is autonomy.<sup>95</sup> Indeed, disabled people have continuously fought against paternalism and the notion that other people—namely, family members and professionals—are best equipped to make decisions for disabled people.<sup>96</sup>

Guardianship, also known as conservatorship in some states, is a draconian and antiquated system that has existed for centuries and robs disabled people of autonomy and self-determination.<sup>97</sup> According to disability justice advocates:

While the law varies from state to state, guardianship orders routinely authorize third parties to make decisions about the most personal and important decisions in an individual’s life—choices that impact the person’s own body and reproductive health; how and where they receive medical, psychiatric, and psychological treatment; how the money and resources they work to earn are spent; and even with whom they associate.<sup>98</sup>

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<sup>94</sup> *Id.* at 851.

<sup>95</sup> Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 *Vand. L. Rev.* 745, 795 (2007) (“[P]aternalism has historically been one of the most significant contributors to the disadvantage people with disabilities experience. Non-disabled parents, teachers, doctors, rehabilitation counselors, employers, and others have arrogated to themselves the prerogative to decide what is best for people with disabilities. In so doing, they have deprived people with disabilities of opportunities to work and participate in the community. They have denied people with disabilities the autonomy that consists in making one’s own choices. And they have denied people with disabilities the dignity of risk—the opportunity to develop their skills, test them in the world, and succeed or fail according to their talents.” (internal quotation marks omitted)).

<sup>96</sup> Charlton, *supra* note 88, at 3 (“Control has universal appeal for [disability rights movement] activists because the needs of people with disabilities and the potential for meeting these needs are everywhere conditioned by a dependency born of powerlessness, poverty, degradation, and institutionalization. This dependency, saturated with paternalism, begins with the onset of disability and continues until death.”)

<sup>97</sup> Candida Moss, *The Romans, the Supreme Court, and Britney Spears—Conservatorship Abuse Has Been Happening for 2000 Years*, *The Daily Beast* (June 26, 2021), <https://www.thedailybeast.com/britney-spears-the-romans-and-the-supreme-court-conservatorship-abuse-has-been-happening-for-2000-years> [https://perma.cc/7UJL-389G] (tracing the history of guardianship to Roman law).

<sup>98</sup> *Ctr. for Pub. Representation*, *Statement from Disability Justice and Supported Decision-Making Advocates: Britney Spears Spotlights the Need for Change Now* (June 25, 2021), <https://supporteddecisions.org/2021/06/25/britney-spears/> [https://perma.cc/SKK5-2HKH].

Notably, like Britney Spears, many people under guardianship are forced to use contraception to prevent pregnancy.<sup>99</sup> According to the National Council on Disability, an estimated 1.3 million people with disabilities currently have guardians.<sup>100</sup>

Although “[t]he guardianship system is designed as a last resort, applied only when an individual lacks capacity to make decisions,” there is “reason to believe that guardianships are imposed on many individuals without sufficient evidence of their decision-making incapacity and that, in some cases, disability alone appears to be used as a sufficient justification for the imposition of guardianship.”<sup>101</sup> Consequently, the second guiding principle for achieving reproductive justice for disabled people requires the development and implementation of legal and policy responses that ensure people with disabilities’ autonomy and self-determination are protected. For example, disability rights advocates are pushing states to implement supported decision-making as a least restrictive alternative to guardianship.<sup>102</sup> Broadly, supported decision-making provides people with disabilities greater autonomy in their choices while receiving assistance from people whom they choose and trust.<sup>103</sup> It “does not require court involvement and can be coupled with other legal tools, such as powers of attorney and advance health care directives, that promote self-determination and autonomy.”<sup>104</sup> In addition to states enacting supported decision-making, efforts are needed to thwart the “school-to-guardianship pipeline,” whereby schools encourage parents to attain guardianship of their children once they reach the age of

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<sup>99</sup> Sara Luterman, For Women Under Conservatorship, Forced Birth Control Is Routine, *The Nation* (July 15, 2021), <https://www.thenation.com/article/society/conservatorship-iud-britney-spears/> [<https://perma.cc/Q9WD-SGCC>].

<sup>100</sup> Nat’l Council on Disability, *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination* 17 (2018), [https://ncd.gov/sites/default/files/NCD\\_Guardianship\\_Report\\_Accessible.pdf](https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf) [<https://perma.cc/D8WG-5HBX>].

<sup>101</sup> Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 Pa. St. L. Rev. 1111, 1117 (2013).

<sup>102</sup> Ctr. for Pub. Representation, *U.S. Supported Decision-Making Laws*, <https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions/> [<https://perma.cc/L58P-TTEY>] (last visited Sept. 2, 2021) (listing states that have implemented supported decision-making).

<sup>103</sup> Ctr. for Pub. Representation, *About Supported Decision-Making*, <https://supporteddecisions.org/about-supported-decision-making/> [<https://perma.cc/KG45-F327>] (last visited June 25, 2021).

<sup>104</sup> Ctr. for Pub. Representation, *supra* note 98.

majority.<sup>105</sup> In sum, to achieve reproductive justice, legal and policy efforts must protect the autonomy and self-determination of people with disabilities, including ensuring that they receive the least restrictive supports and abolishing guardianship.

*C. Ensure Sexual and Reproductive Health Services and Information Are Accessible and Available to People with Disabilities*

As described in Part II, disabled people experience a range of barriers to sexual and reproductive health services and information, often resulting in inadequate access and adverse outcomes.<sup>106</sup> Although federal disability laws, including the Americans with Disabilities Act (“ADA”),<sup>107</sup> Section 504 of the Rehabilitation Act of 1973 (“Section 504”),<sup>108</sup> and Section 1557 of the Patient Protection and Affordable Care Act (“Section 1557”)<sup>109</sup> mandate that healthcare providers be accessible and prohibit disability-based discrimination, these laws are often violated.<sup>110</sup> Moreover, disabled people often do not have access to adequate sexual and reproductive health information, such as sexuality education.<sup>111</sup> Without comprehensive information, people with disabilities are unable to make informed decisions about their reproductive wellbeing. Further, because disabled people are more likely to be poor and receive public benefits, policies such as the Hyde Amendment, which bars the use of

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<sup>105</sup> Nat’l Council on Disability, *Turning Rights into Reality: How Guardianship and Alternatives Impact the Autonomy of People with Intellectual and Developmental Disabilities* 29–36 (2019), [https://ncd.gov/sites/default/files/NCD\\_Turning-Rights-into-Reality\\_508\\_0.pdf](https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf) [<https://perma.cc/H2PR-X7Y7>].

<sup>106</sup> See *supra* Section II.B.

<sup>107</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

<sup>108</sup> Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796.

<sup>109</sup> Patient Protection and Affordable Care Act, 42 U.S.C. § 18116(a); 45 C.F.R §§ 92.102–105.

<sup>110</sup> Powell, *supra* note 73, at 625–27 (describing federal disability laws’ application to matters concerning reproductive justice).

<sup>111</sup> Robyn M. Powell & Michael Ashley Stein, *Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 *Frontiers L. China* 53, 57–58 (2016) (explaining the implications of disabled people not receiving sexuality education).

federal Medicaid funds for abortion care,<sup>112</sup> often inhibit their access to comprehensive sexual and reproductive health services.<sup>113</sup>

As such, the third guiding principle for achieving reproductive justice for disabled people necessitates ensuring that sexual and reproductive health services and information are accessible and available. Greater compliance with and enforcement of existing legal protections are urgently needed to ensure reproductive justice for people with disabilities. To that end, the United States Departments of Justice (DOJ) and Health and Human Services' Office for Civil Rights (OCR) should prioritize the reproductive rights of people with disabilities, such as by investigating alleged violations of disability-based discrimination by reproductive health providers and enforcing the law as necessary.

Disabled people also need access to comprehensive and accessible information about sexuality and reproduction. For example, existing research indicates that people with disabilities may be at increased risk of exposure to HIV/AIDS due in part to limited access to education and information about prevention.<sup>114</sup> For people with intellectual disabilities, not receiving sexual education has led to high rates of sexually transmitted infections and sexual assaults, along with limited ability to report abuses because of lack of knowledge.<sup>115</sup>

Further, a health justice approach is needed, recognizing that the social determinants of health impact access to sexual and reproductive health services and information.<sup>116</sup> Developing and implementing laws and policies that are consistent with health justice will allow for addressing factors such as poverty and transportation and how they affect disabled people's access to sexual and reproductive health services and

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<sup>112</sup> See Hyde Amendment Codification Act, S. 142, 113th Cong. (2013) (originally passed in 1977); Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, *The Hyde Amendment and Coverage for Abortion Services*, Kaiser Fam. Found. (Mar. 5, 2021), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/> [<https://perma.cc/NT7W-QL6W>].

<sup>113</sup> *Rocking the Cradle*, supra note 53, at 178 (noting that “Medicaid and Medicare [are] the primary health insurers for people with disabilities”).

<sup>114</sup> Nora Ellen Groce et al., *HIV Issues and People with Disabilities: A Review and Agenda for Research*, 77 *Soc. Sci. & Med.* 31–37 (2013) (analyzing research about the intersection of HIV/AIDS and people with disabilities and calling for greater attention to the topic).

<sup>115</sup> Amy Swango-Wilson, *Meaningful Sex Education Programs for Individuals with Intellectual/Developmental Disabilities*, 29 *Sexuality & Disability* 113–16 (2011).

<sup>116</sup> See generally Benfer, supra note 86 (explaining the social determinants of health and the health justice framework).

information. Hence, by addressing the social determinants of health, people will have greater access to those services and information.

*D. Guarantee Rights, Justice, and Wellness for People with Disabilities and Their Families*

Finally, people with disabilities and their families encounter numerous laws and policies that threaten their rights, justice, and wellness. For example, consider a parent with a physical disability who is unemployed and receives monthly Supplemental Security Income (“SSI”) benefits of \$794.<sup>117</sup> She also receives Medicaid, which pays for in-home personal care assistants. Although she would like to work, at least part-time, draconian rules proscribe that she will lose her SSI benefits if she earns more than \$1,310.<sup>118</sup> Since Medicaid eligibility in her state is tied to receipt of SSI benefits, she will also lose Medicaid and needed in-home supports. Thus, stringent federal and state rules force this mother to live in poverty.

Reproductive justice should not depend on where people live, how much they make, or who they are. And yet, as the above narrative illustrates, all too often these factors infringe on people with disabilities’ reproductive justice. For example, for people with disabilities, especially disabled parents, poverty is a persistent issue that directly affects access to housing, food, and other basic necessities needed for people’s wellbeing.<sup>119</sup> Although many people with disabilities receive government benefits, these benefit programs often keep people in poverty. Antiquated rules and restrictions force some people with disabilities to choose between creating families and receiving necessary income assistance.<sup>120</sup> Poverty is also a persistent issue because of high rates of unemployment among disabled people. U.S. Census Bureau data shows that compared to nondisabled people, people with disabilities have lower rates of

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<sup>117</sup> Soc. Sec. Admin., SSI Federal Payment Amounts for 2021, <https://www.ssa.gov/oact/cola/SSI.html> [<https://perma.cc/DW5R-6MY3>] (last visited July 20, 2021).

<sup>118</sup> Soc. Sec. Admin., Substantial Gainful Activity, <https://www.ssa.gov/oact/cola/sga.html> [<https://perma.cc/9YWP-XS5G>] (last visited September 2, 2021).

<sup>119</sup> *Rocking the Cradle*, supra note 53, at 202 (“[T]he most significant difference between parents with disabilities and parents without disabilities is economic . . .”).

<sup>120</sup> While marriage is certainly not required to form families, it should be available to people with disabilities the same as it is for nondisabled people. However, strict asset programs prevent disabled people from marrying. See *Waterstone*, supra note 27, at 549 n. 132.



employment, lower median annual earnings, and higher rates of poverty.<sup>121</sup>

People with disabilities, especially disabled people of color and LGBTQ+ people, often additionally contend with discriminatory legal and social service systems that separate them from their families.<sup>122</sup> For example, the child welfare system—more accurately known as the family policing system<sup>123</sup>—targets people of color and disabled parents using pathology, control, and punishment.<sup>124</sup> An estimated two-thirds of state child welfare system laws explicitly include parental disability, usually intellectual or psychiatric disabilities, as grounds for termination of parental rights.<sup>125</sup> Thus, in many states, disabled people are lawfully denied their right to raise children.

Accordingly, the fourth guiding principle recognizes that to achieve reproductive justice, people with disabilities and their families must be guaranteed rights, justice, and wellness for themselves and their families. Changing the income and asset rules that keep people with disabilities in poverty would enable them to have livable incomes and the families they desire. Employment opportunities similarly need to be expanded so that people with disabilities can work and earn livable wages. Further, parents with disabilities and their children must be able to live free from fear of unnecessary separation and have access to non-punitive supports and resources. Thus, the child welfare system, and other carceral systems, must be abolished to achieve true reproductive justice. Legal and policy solutions that reflect the fourth guiding principle will need to be comprehensive and transformative.

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<sup>121</sup> U.S. Census Bureau, Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status, <https://data.census.gov/cedsci/table?t=Disability&tid=ACSST1Y2019.S1811&hidePreview=true&vintage=2018> [<https://perma.cc/6JFJ-DATH>] (last visited July 11, 2021).

<sup>122</sup> See Section I.B *supra* (noting that disabled parents have disproportionate rates of child welfare system involvement and termination of parental rights).

<sup>123</sup> ‘Abolition Is the Only Answer’: A Conversation with Dorothy Roberts, *Rise Mag.* (Oct. 20, 2020), <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> [<https://perma.cc/9DMC-DQBL>] (“Policing captures what this system does. It polices families with the threat of taking children away. Even when its agents don’t remove children, they *can* take children and that threat is how they impose their power and terror. It is a form of punishment, harm and oppression.” (quoting Dorothy Roberts) (emphasis in original)).

<sup>124</sup> See generally Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 *Yale J.L. & Feminism* (forthcoming 2022) (on file with author) (arguing that child welfare system abolition is necessary to protect disabled parents and their children).

<sup>125</sup> *Rocking the Cradle*, *supra* note 53, at 16.

## CONCLUSION

Britney Spears's appalling experiences are a stark reminder that nearly 100 years after the infamous *Buck v. Bell* decision, reproductive freedom is still denied to far too many disabled people. Although forced sterilization of people with disabilities has waned over time, reproductive justice still has not been realized for all people with disabilities. Indeed, revelations about Britney Spears's harrowing struggles show that the right to decide whether to have children is still not fully afforded to people with disabilities.

The reproductive oppression experienced by people with disabilities is deeply entrenched in our laws, in our policies, and in our collective conscience. Accordingly, addressing the persistent reproductive oppression of people with disabilities will require us to transform our laws and policies radically. Informed by reproductive justice and disability justice frameworks, the four guiding principles set forth above provide a vision for transforming laws and policies to ensure reproductive justice for people with disabilities. This Essay seeks to advance a long-overdue conversation about reproductive justice for people with disabilities by providing a starting point for activists, scholars, legal professionals, and policymakers to use, critique, and improve upon. The need for such action could not be more timely or clear.