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When day comes we ask ourselves, / where can we find light in this never-ending shade? / The loss we carry, / a sea we must wade / We’ve braved the belly of the beast / We’ve learned that quiet isn’t always peace / And the norms and notions / of what just is / Isn’t always justice / And yet the dawn is ours / before we knew it / Somehow we do it / Somehow we’ve weathered and witnessed / a nation that isn’t broken / but simply unfinished – Amanda Gorman1

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ABSTRACT

Our nation—founded on life, liberty, and the pursuit of happiness—is a year into the COVID-19 pandemic. The pandemic has revealed the gap between what we are as a society and that which we long to be. A new critical intersectional legal framework, guided by Dr. Martin Luther King Jr.’s vision of The Beloved Community, will allow legal scholars and policymakers to reframe health equality and health justice toward a more perfect union. By combining the philosophical rigor of dialectical thinking, critical theory, and intersectional analysis, analysts can meet this moment and create new legal frameworks to correct social injustice. Analysts can build a just society based on equality to address the disproportionate sickness, disability, and death of America’s historically oppressed peoples. With the goal of addressing oppression across multiple axes of identity at once, and in the spirit of Dr. King’s appropriation of eclectic theologies and philosophies, this Article proposes a new Critical Intersectional Legal Analysis that develops critical social theory by bringing an intersectional analysis to the principles of dialectical thought and indeterminacy. This Article’s framework will analyze power structures as they exist and work together through the power of the state to class, race, and disable people moment to moment. Finally, this Article’s framework is reconstructive through self-reflexive application of theory through praxis. This Article will apply that new framework to a specific condition of oppression—the privilege of space as it relates to the risks of viral transmission, infection, and disease during the current coronavirus pandemic for children in psychiatric institutional settings in North Carolina and the Southeast.
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CONCLUSION

We are living through a historically significant moment, a critical juncture providing a rare opportunity for social change. Underlying political, economic, and social incentives that usually work against path divergence have been temporarily displaced as a result of the instabilities of this liminal period. This moment offers a chance to diverge from entrenched social paths. Newly arising conditions create new needs which must be satisfied. The COVID-19 pandemic has highlighted long-standing societal inequalities. Now is the time to assert positive social change through legislation and organization to correct conditions of oppression preventing many Americans from enjoying life, liberty, and the pursuit of happiness.

The year 2020 began with the historic impeachment trial of President Donald Trump. This seismic political event was quickly overshadowed by disaster—the deadly pandemic. On March 16th, 2020, Americans were sent home and told to stay there. Indefinitely. A year later, many of us are still at home.

By early April, public health data made visible fault lines; Black and Brown Americans were disproportionately infected with and dying from COVID-19. Just as Americans were attempting to process this disturbing confirmation of systemic racism at work in real time, we were isolated at

3. See id.
home and increasingly reliant on social media for essential social connection. The world had stopped, but police brutality continued against minorities at the exact time that Black and Brown Americans were disproportionately putting themselves at risk to work in jobs deemed “essential” for a functioning society.\(^8\) The videos documenting unrelenting physical brutality, humiliation, and dehumanization of Black Americans by law enforcement officers—including the horrific public execution of George Floyd by suffocation—caused widespread shock and outrage.\(^9\) World-wide marches and demonstrations demanding racial justice erupted.\(^10\) The global Movement for Black Lives declared, “We can’t breathe!”

Disparities in COVID-19 infection and mortality rates were entirely predictable.\(^11\) As one health expert stated, “There is an obligation to address these predictable consequences with evidence-based interventions.”\(^12\) Systemic discrimination gives rise to chronic stress and impacts overall health and immune functioning in individuals.\(^13\) While there may be some identifiable underlying genetic vulnerabilities, a picture of “racial/ethnic health disparities due to differential loss of health insurance, poorer quality of care, inequitable distribution of scarce testing and hospital resources, the digital divide, food insecurity, housing insecurity, and work-related exposures”—all direct consequences of race, disability, class, and age-based discrimination—will emerge as the most significant driver of


\(^10\) Id.

\(^11\) See generally Tracey O’Sullivan & Maxime Bourgojn, *Univ. of Ottawa, Vulnerability in an Influenza Pandemic: Looking Beyond Medical Risk* (2010), https://www.researchgate.net/publication/282817477_Vulnerability_in_an_Influenza_Pandemic_Looking_Beyond_Medical_Risk [https://perma.cc/6DD7-K2TC] (analyzing risk in order to identify areas for improved emergency management in anticipation of an influenza pandemic according multiple categories: income; social and physical environment; education; employment and working conditions; early life income and child development; ethnicity, culture, and language; age and disability; gender; and access to health services).


\(^13\) See id.
mortality and COVID-19-related disability. These consequences are conditions of oppression. The reality is that current social theories of class, race, and ability which inform our legal and political systems severely limit the means by which we can change the systemic discrimination that causes conditions which give rise to observed health disparities.

We must evaluate competing knowledge claims, assertions of the government’s proper role, and demands for accountability for injustice under law. All competing parties claim legitimacy from the founding rights of life, liberty, and the pursuit of happiness. Indeed, our success as a nation should be evaluated against the standards we have set for ourselves in our founding documents. As such, the lens of “double consciousness,” as formulated by W.E.B. DuBois, and the skill of adapting and transforming mainstream consciousness through language, which is at the heart of the resiliency of oppressed peoples, is essential and brings the rich intellectual traditions of oppressed communities into creative dialogue with traditional social theories. Our success as a nation should be measured by whether those aspirations are the lived reality for our most vulnerable citizens: the poor, minorities, children, and individuals with disabilities. We are failing the test.

14. See id.

15. Mari Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. CIV. RTS-CIV. LIBERTIES L. REV. 323 (1987), reprinted in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 63, 65 (Kimberlé Crenshaw et al. eds., 1995). W.E.B. DuBois described the development of double consciousness as a key component of the resiliency of Black Americans. It speaks to the development of a consciousness that “includes both mainstream American consciousness and the consciousness of the outsider.” Id. Frederick Douglass, through this lens, articulated a textualist interpretation of the Constitution as a “ringing indictment of slavery.” Id. Douglass’s arguments were persuasive because of the head-on confrontation of the inconsistency of chattel slavery with American values as expressed in the written words in the text of the Constitution and Bill of Rights. Id. “It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.” W. E. B. DU BOIS, Of Our Spiritual Striving, in THE SOULS OF BLACK FOLK 3, 3 (1903). Dr. King’s knowledge project within evangelical liberalism was chiefly concerned with examining and exposing the “mutual dependence of order and freedom” and bringing about the “Beloved Community.” Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theory of Dr. Martin Luther King, Jr., 103 HARV. L. REV. 985 (1990), reprinted in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 85, 85 (Kimberlé Crenshaw et al. eds., 1995). He envisioned “a rule of law rooted in experience and responsive to the conditions of oppression that denied the humanity of so many.” Id. at 100–01.
Following the one-year mark from the start of the pandemic in America, and looking back at the policy decisions, the human toll is devastating. From all possible options, the Trump Administration chose a laissez-faire policy. This selection was politically justified based on our nation’s founding principles as expressed through the ideologies of liberalism and capitalism. While the policy can be rationalized, it was arguably unethical and immoral. The tragic result of that facially neutral policy has been widespread disproportionate disease and death in communities of color, low-income communities, and in congregate living facilities.

Furthermore, we now know one of the best ways to prevent the spread of the coronavirus is “social distancing.” However, the ability to distance

16. The Administration advanced a policy of “ReOpen.” “ReOpen” is used here to represent the policy of the Trump Administration which has encouraged people to go to work and school as usual and to become infected with the SARS-CoV-2 virus to develop so-called herd-immunity rather than encouraging people to stay home to prevent infections and providing financial support to individuals and businesses until a viable vaccine was developed and distributed. This policy is advanced upon a framework of understanding death, disease, and disability solely as individualized pathology. See Marcia H. Rioux & Fraser Valentine, Does Theory Matter? Exploring the Nexus Between Disability Human Rights, and Public Policy, in CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND LAW 47, 50–51 (Dianne Pothier & Richard Devlin eds., 2006). This framework relieves the government of any obligation to manage the pandemic by situating responsibility for management solely as between an individual and their personal healthcare professional. Id.

is itself a privilege. Space is a resource that is closely tied to living and working conditions, both of which correlate with race, class, and disability. Exposure to the virus is nearly unavoidable in congregate living environments where profits dictate minimizing space on a per person basis. Yet disproportionate numbers of poor people of color and people with disabilities reside in these facilities and often have no way to petition for their own release. These numbers include far too many children with mental health disabilities who are locked away, twenty-four hours a day, in psychiatric residential treatment facilities.

Traditionally legal scholars and jurists have placed the identifiable results of social systems of hierarchy—race, class, and disability—at the center of antidiscrimination analysis. This historic moment calls for a critical theory—one which brings about change by centering the systems and ideologies themselves and addressing them summarily. The bedrock principles we declare for America’s governance in our founding documents are freedom and equality. Traditional legal theory presumes equality. Critical theory rebuts that presumption. It considers outcomes as actually observed and, in doing so, broadens what constitutes valid legal


19. Hooper et al., supra note 12, at 2466 (“[T]he ability to isolate in a safe home, work remotely with full digital access, and sustain monthly income are components of this privilege. COVID-19-related exposures are also exacerbated by a greater propensity to be homeless and reside in neighborhoods with substandard air quality.”).

20. By June 2020, “[t]he COVID-19 case rate for prisoners was 5.5 times higher than the US population case rate of 587 per 100,000.” Brendan Saloner et al., COVID-19 Cases and Deaths in Federal and State Prisons, 324 JAMA 602, 602–03 (2020), https://jamanetwork.com/journals/jama/fullarticle/2768249 [https://perma.cc/RP2R-LHZ2]. Additionally, “the adjusted death rate in the prison population was 3.0 times higher than would be expected if the age and sex distributions if the US and prison populations were equal.” Id. at 603. As of February 12, 2021, the CDC reported that 34% of all COVID-19-related deaths in the United States occurred in nursing homes and long-term care facilities, while the cases associated with these facilities are only 5% of all cases in the United States. Weekly Updates by Select Demographic and Geographic Characteristics, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 6, 2020), https://www.cdc.gov/nchs/nvss/vsrr/covid _weekly/index.htm#PlaceDeath [https://perma.cc/X2GY-VWFT]; More than One-Third of U.S. Coronavirus Deaths Are Linked to Nursing Homes, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/interactive/2020/us/coronavirus-nursing-homes.html?action=clic k&module=Spotlight&pui=Homepage [https://perma.cc/XYC6-P8CJ].

21. See PATRICIA HILL COLLINS, INTERSECTIONALITY AS CRITICAL SOCIAL THEORY 23 (2019). Intersectional theory considers the unique conflicts that arise at the intersection of different organizing principle of power with the goal of generating new questions while recognizing existing tensions between the different powers. Id.
knowledge. Additionally, by utilizing a dialectical framework, critical theory implements an iterative and recursive process to harmonize actual outcomes with aspirations by utilizing an express, immanent standard. Combining the philosophical rigor of dialectical thinking, critical theory, and intersectional analysis, legal scholars and policymakers can meet this moment and create new legal frameworks to correct social injustice. As a model, this Article proposes a new three-stage framework to analyze discriminatory legal practices: (1) conduct a dialectical determination of context; (2) identify oppressive conditions and relevant principles of power; and (3) apply a critical intersectional analysis to the controlling law. This Article’s new framework incorporates both a critical and an intersectional social theory of law and comports with the Enlightenment principles firmly embedded within America jurisprudence.

Part I of this Article identifies and analyzes several key organizing principles of power within American society, which seeks to explain dialectical context as it relates to stage one of the framework. Part II demonstrates the necessity for this new critical intersectional framework and describes normative aspirations and power differentials using Dr. King’s “Beloved Community” model as a guidepost. Finally, Part III applies this Article’s new framework to the issue of due process regarding poor minority children in psychiatric residential care. That application will illustrate how this new framework might be used to see relationships afresh and ask new questions as a basis for seeking justice.

22. Regarding the search for a normative source with which to advance critique of law, Matsuda counters the claim made by post-realist legal thinkers that there is no “external, universally accepted normative source exists to resolve conflicts of value.” Matsuda, supra note 15, at 63. This claim provides a segue into moral relativism from which false equivalencies place claims asserted by oppressors and the oppressed on seemingly equal footing. She instead asserts, “When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge.” Id. She then argues for “a new epistemological source for critical scholars: the actual experience, history, culture, and intellectual tradition of people of color in America.” Id.

23. COLLINS, supra note 21, at 63; Julie E. Maybee, Hegel’s Dialectics, STAN. UNIV. ENCYCLOPEDIA OF PHIL. (Oct. 2, 2020), https://plato.stanford.edu/entries/hegel-dialectics/ [https://perma.cc/WC97-L2G2]. That which is not useful going forward is not discarded, leaving a hole; rather, it is folded back into the whole, and a new form or expression arises out of newly conceptually generated or observed knowledge in service to the express standard. Id.

I. LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS: PRINCIPLES OF THE ENLIGHTENMENT OFFERED A POINT OF DEPARTURE FOR A UNIQUELY AMERICAN JURISPRUDENCE.

The Declaration of Independence established foundational principles for the new liberal democratic system of American government. The Declaration of Independence established foundational principles for the new liberal democratic system of American government.

25. Thomas Jefferson, Rough Draft of the Declaration of Indep., LIBR. OF CONG., https://www.loc.gov/resource/mtj1.001_0545_0548/ [https://perma.cc/8S73-B956]. Thomas Jefferson’s original draft communicates the Enlightenment philosophy upon which the new nation would establish law and order. Thomas Jefferson, The Papers of Thomas Jefferson, 1760-1776, at 423–28 (Julian P. Boyd et al. eds., 1950), https://jeffersonpapers.princeton.edu/selected-documents/jefferson’s-“original-rough-draught”-declaration-independence [https://perma.cc/6LJE-LEAX]. It declared, “We hold these truths to be sacred & undeniable; that all men are created equal & independant [sic], that from that equal creation they derive rights inherent & inalienable, among which are the preservation of life, & liberty, & the pursuit of happiness.” Id. at 423.


27. See John Locke, Two Treatises of Civil Government, in THE GREAT LEGAL PHILOSOPHERS 137, 137 (Clarence Morris ed., 1997). Within the Lockean system, the law of Nature “teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.” Id.

28. Charles, supra note 26, at 478–79. “Indeed, Locke was highly influential for the founding generation, but . . . historians have long understood that Locke’s writings do not provide the sole or primary answer in tracing the legal origins and meaning of the Declaration’s ‘life, liberty, and the pursuit of happiness’ language. Locke was just one of infinite sources read by the founding generation, and often too much weight is placed on Locke’s work as the wellspring of American constitutionalism. This does not mean that Locke’s understanding of happiness is without some constitutional merit in decoding the Declaration of Independence. As historian Darrin M. McMahon shows us, happiness in both the Lockean liberal and classical republican forms ‘most likely coexisted in [Jefferson’s] mind and even overlapped.’ In terms of eighteenth-century American constitutionalism, Lockean liberalism is reflected in constitutional rights, or what McMahon refers to as ‘barrier[s] . . . against the governments, institutions, and individuals that invariably [seek] to impede our natural due.’ Meanwhile, the classical republican view of happiness, this being
were the *actual* inspiration for Jefferson, Locke is this Article’s starting point.

*A. Locke, Kant, and Natural Law.*

Lockean natural law was well-established at the time of the Founders. Locke (1632–1704) was a well-known English political operative and colonial administrator. Locke’s system is premised on the law of Nature which governs the state of Nature and legally binds every person and reason. Equality is the organizing principle governing individual human relations. The law of Nature “teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.” The state of equality between humans is premised on all arising from an “omnipotent and infinitely wise Maker.” The law of Nature wills the “peace and preservation of all mankind.”

Equality under natural law is also the organizing principle governing the relationship between an individual and the government. The state of Nature between humans ceases upon mutual consent to enter into one body politic. In furtherance of the law, the Maker created government “to restrain the partiality and violence of men” in order to protect equality between individual humans. Locke concludes that, through individual consent, civil government is the “proper remedy for the inconveniences of the state of Nature.” Only those municipal laws founded on the law of Nature, formulated upon individual equality in furtherance of life, health, liberty, or possessions, are right. It is, therefore, equality that provides the basis for other organizing principles central to American jurisprudence.

a society based upon the consent of the governed, is reflected in the democratic structure of American constitutionalism. This model links civic virtue and the advancement of the public good to the happiness of society.” Id. (citations omitted).


30. Locke, supra note 27, at 137 (emphasis added).

31. Id.

32. Id. at 138.

33. Id. at 137.

34. Id. at 139.

35. Id.

36. Id.

37. Id. at 137–38. Justice arising from natural law is characterized both negatively—not absolute, not arbitrary—and the positively—determined through “calm reason and conscience.”
Immanuel Kant (1724–1804) was a contemporary of the Founders.\textsuperscript{38} Building upon Locke’s formulation of natural law, Kant contemplated individual rights and the distinction between natural and positive laws.\textsuperscript{39} Kant’s formulation of freedom and equality are consistent with those of Locke. He asserted that an individual’s only innate right, by virtue of their humanity, is the “Birthright of Freedom,” defined as the “[i]ndependence of the compulsory Will of another.”\textsuperscript{40} Kant stated there is “an innate [equality] belonging to every man which consists in his Right to be independent of being bound by others to anything more than that to which he may also reciprocally bind them.”\textsuperscript{41}

Kant’s Science of Right is “the philosophical and systemic knowledge of the Principles of Natural Right.”\textsuperscript{42} Natural Right, the principle upon which all positive law must be based, rests on natural law, which is based on \textit{a priori} principles. The will of the legislator gives rise to legislation which, being based on these \textit{a priori} principles, imparts positive or statutory rights.\textsuperscript{43} Jurisprudence is that which imposes the obligation to make the fulfillment of one’s duty.\textsuperscript{44} Right “has for its object the Principles of all the Laws which it is possible to promulgate by external legislation.”\textsuperscript{45} Right

\textsuperscript{38} See Immanuel Kant, \textit{The Philosophy of Law}, in \textit{THE GREAT LEGAL PHILOSOPHERS} 239, 244 (Clarence Morris ed., 1997).

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.} “Right . . . comprehends the whole of the conditions under which the voluntary actions of any one Person can be harmonized in reality with the voluntary actions of every other Person, according to a universal Law of Freedom.” \textit{Id.} at 242. An action is right when it can co-exist with “the Freedom of the Will of each and all in action, according to a universal Law.” \textit{Id.} The Universal Law of Right is expressed as, “Act externally in such a manner that the free exercise of thy Will may be able to co-exist with the Freedom of all others, according to a universal Law.” \textit{Id.} at 242. The Laws of Freedom are moral laws. These are distinct from natural law. The Laws of Freedom are comprised of juridical and ethical laws. Juridical laws are those that refer only to “external actions and their lawfulness.” \textit{Id.} Ethical laws refer those that “require that, as Laws, they shall themselves be the determining Principles of our actions.” \textit{Id.}

\textsuperscript{41} \textit{Id.} at 245.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.} at 240. Reason “commands how we ought to act” even absent an example in experience. \textit{Id.} The Will is the capacity of Pure Reason to affect volitional choice. \textit{Id.} External laws are those obligatory laws for which an External Legislation is possible. External legislation is made up of natural laws—the “obligatoriness of which can be recognized by Reason \textit{a priori} even without an external Legislation”—and positive laws—those which are “not obligatory without actual External Legislation.” \textit{Id.} at 240–41.

\textsuperscript{44} \textit{Id.} at 240 (“The agreement of an action with Juridical Laws, is its \textit{Legality}; the agreement of an action with Ethical Laws, is its \textit{Morality}

\textsuperscript{45} \textit{Id.} at 241.
also has “an implied Title or warrant to bring compulsion to bear on anyone who may violate it in fact.”

The principles of equality and freedom, as developed in natural law by Locke and Kant, were enshrined in America’s founding documents. Equality between individuals was established as self-evident and a requisite state from which all individual rights were to proceed. Freedom, the only innate right, is the standard by which the exercise of all individual rights was to be measured. However, in America, from the beginning, there was an obvious gap. As Samuel Johnson asked, “How is it that we hear the loudest yelps for liberty among the drivers of negroes?”

B. Principles of Natural Law Shape Traditional Social Theory

Social theories give rise to the form and expression of America’s founding principles. They provide the cognitive framework—structures—of societal institutions; these include academia, government, and law. While post-revolutionary America did not have social theories of race or disability, beginning with slavery, the development of such theories paralleled the development of capitalism.

A theory is an explanation of a phenomena. It shapes subsequent generation and organization of knowledge of the phenomena. In short, theories are powerful, cognitive knowledge-producing engines. A theory originates with general propositions, which are conceptual structures. Systematically, an individual encounters a fact and then categorizes it

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46. Id.
48. 3 James Boswell, Boswell’s Life of Johnson 201 (G. B. Hill ed., rev. & enlarged by L.F. Powell, Oxford Univ. Press 1934) (1791). It is important to note that the Enlightenment concept of equality being rooted in natural law provided the theoretical heavy lifting justifying the English colonies’ liberation from the absolute rule of the English Monarchy. Farr, supra note 29, at 283–84; Charles, supra note 26, at 461.
50. Horkheimer, supra note 24, at 188. A theory can be thought of as “the sum-total of propositions about a subject, the propositions being so linked with each other that a few are basic and the rest derive from these.” Additionally, “[t]he smaller the number of primary principles in comparison with the derivations, the more perfect the theory. The real validity of the theory depends on the derived propositions being consonant with the actual facts. If experience and theory contradict each other, one of the two must be reexamined.” Id. at 188.
   “Harmony, which includes lack of contradictions, and the absence of superfluous, purely dogmatic elements which have no influence on the observable phenomena, are necessary conditions[.]” Id. at 190 (citing Herman Weyl, Handbuch der Philosophie Part 2 118ff (1927)).
according to the conceptual structure.\textsuperscript{51} A law is established once there is sufficient verification of a theoretical proposition. The law becomes the operative cognitive framework and frames the process of knowledge development going forward—the systematic and iterative working between conceptually formulated knowledge and observable facts is considered the pursuit of truth.

Max Horkheimer, leader of the Frankfurt School of critical social theory, observed that within academia, historians develop theories of history by interpreting the past through conceptual frameworks.\textsuperscript{52} They select certain circumstances for analysis from among all historical circumstances. They establish connections between elements, “which are significant for historical continuity, and particular, determinative happenings.”\textsuperscript{53} Often, the historian seeks to identify the particular causal nexus that had the circumstances and happenings not existed, an effect would not have followed.\textsuperscript{54} According to Horkheimer, the rules of experience are “the formulations of our knowledge concerning economic, social, and psychological interconnections.”\textsuperscript{55} The reconstruction of the course of events extends beyond the events themselves “to what will serve as explanation” by working through conditional propositions applied to the circumstances.\textsuperscript{56} Horkheimer’s observation here is important and must be stressed. Historical reconstruction is more than simply an ordered list of facts. The reconstruction is the ordering of facts through a theoretical lens for the purpose of explaining the demands (i.e., standards and customs) imposed by the institution itself.

Additionally, Horkheimer observed that the essence of theory development corresponds to the immediate tasks at hand.\textsuperscript{57} Yet, in contrast with the traditional concept of a passive subject observing an active object, Horkheimer maintained that even sense perception itself is shaped by human activity and is thus “inseparable from the social life-process as it has

\textsuperscript{51} HORKHEIMER, \textit{supra} note 24, at 192–93 (“There is always, on the one hand, the conceptually formulated knowledge and, on the other, the facts to be subsumed under it. Such a subsumption or establishing of a relation between the simple perception or verification of a fact and the conceptual structure of our knowing is called its theoretical explanation.”).

\textsuperscript{52} Id.

\textsuperscript{53} Id.

\textsuperscript{54} Id. Otherwise stated, “[I]n accordance with the rules that govern our experience another effect would have followed.”

\textsuperscript{55} Id. at 193–94.

\textsuperscript{56} HORKHEIMER, \textit{supra} note 24, at 194.

\textsuperscript{57} Id. (“The manipulation of physical nature and of specific economic and social mechanisms demand alike the amassing of a body of knowledge such as is supplied in an ordered set of hypotheses.”).
evolved over the millennia." Sense perception of facts is “socially performed in two ways: through the historical character of the object perceived and through the historical character of the perceiving organ.” Thus, sense perception is not passive. It is dynamic. The observing individual is an active subject.

Yet due to traditional social theories, which are built upon a specific relationship between subject and object, individuals view themselves as passive and dependent subjects. Conversely, society, which is comprised of individuals, is viewed by individuals as an active subject, albeit a nonconscious one. Whether a society was founded directly on oppression or whether oppression has resulted from conflicting forces, this formulation frees individuals from accountability for the results of collective actions because the results are not proximately caused by the conscious choice of any single, free individual. This idea resonates in the normative assumption of the individual as the foundational unit of analysis under the Lockean formulation of natural law and the Kantian framework, which centers on an individual’s right of innate freedom. Horkheimer thus draws attention to the duality of activity and passivity according to whether they are applied to society or the individual.

58. Id. at 200.
59. Id.
60. Id.
61. Id. This duality of active and passive subjects is a significant challenge in establishing causation in a legal claim of discrimination. See Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, in Critical Race Theory: The Key Writings That Formed the Movement 29, 30 (Kimberlé Crenshaw et al. eds., 1995) (“Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm. The fault idea is reflected in the assertion that only ‘intentional’ discrimination violates the antidiscrimination principle. In its pure form, intentional discrimination is conduct accompanied by a purposeful desire to produce discriminatory results. One can thus evade responsibility for ostensibly discriminatory conduct by showing that the action was taken for good reason or for no reason at all. The fault concept gives rise to a complacency about one’s own moral status; it creates a class of ‘innocents’ who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations. This resentment accounts for much of the ferocity surrounding the debate about so-called reverse discrimination, for being called on to bear burdens ordinarily imposed only upon the guilty involves an apparently unjustified stigmatization of those led by the fault notion to believe in their own innocence.”).
62. See Horkheimer, supra note 24, at 200.
63. Id.
Horkheimer noted that theory becomes “absolutized, as though it were grounded in the inner nature of knowledge as such or justified in some other ahistorical way, and thus it [becomes] a reified, ideological category.” As new factual connections are observed, rather than renewing existent knowledge heuristically within the “context of real social processes,” they are analyzed deductively, in accordance with the ideological logic or methodology itself. Because of the reification of conceptual categories into ideologies, inconsistent observations are reflexively thrown out. Particularly in social science, over time, the result is a one-sided analysis detached from total activity of society—working wholly in the law.

Horkheimer describes how social theories become societal shadows, which fill the gap between reality and aspirations. Theories arise and become reified to ideologies, which stand outside ongoing social processes and are largely impenetrable. The changing needs of American society, as mediated by liberal and capital ideologies, are met through the ongoing development of race, class, and disability theories. These theories render the social location of individuals and communities suitable to societal needs. These theories also produce institutional knowledge, which feeds back into internal institutional operations and external social processes. Finally, these theories are further reified by becoming invisible and operating within the gap between who we are and who we want to be. Critical theory seeks to make these ideologies accessible—to shine light into the shadows for the purpose of enabling change.

Therefore, as lawyers who work to advance justice by closing the gap between the reality of oppression and the aspirational state of equality, we must examine the institution and practice of law as an epistemic system situated in a central role of social formation. As historians develop historical theories by interpreting the past through conceptual frameworks, lawyers develop legal theories by studying and applying conceptual frameworks set forth in jurisprudence. Lawyers select only certain circumstances for analysis, establish connections between legal elements and those circumstances, and seek to identify the particular past causal nexus (a chain of causation) such that had the nexus of circumstances not existed, the resulting effect would not have followed. Lawyers bring to this work rules of experience which are, as Horkheimer stated, “the formulations of our knowledge concerning economic, social, and psychological

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64. Id. at 194.
65. Id.
66. Id. at 199.
67. Id. at 209.
68. Id. at 199.
interconnections.”\(^{69}\) This legal reconstruction, like historical reconstruction, goes beyond the events themselves “to what will serve as explanation” by working in conditional propositions applied to the circumstances.\(^ {70}\) Thus, the legal case, like historical reconstruction, is more than simply an ordered list of facts applied objectively to law. Lawyers, as both individuals and a community, are not passive subjects. However, the product of legal institutions is presented simply as findings of fact and law as if the legal process operates as a passive subject solely calling balls and strikes. Legal reconstruction is ordering facts through a theoretical lens for the purpose of explaining the demands (i.e., standards and customs) imposed by the legal institution itself. Working wholly within the law is considered good lawyering.

While theories become reified ideologies, the contours of operant ideologies change because social theories are fluid and serve the changing needs of society and its institutions. Theoretical forms change over time while their principles remain the same. In essence, attempting to address the product of one social theory at a time is like trying to nail gelatin to a wall. Because theory and ideology are in constant flux, it is challenging to identify the applicable social theory and ideology and create the preconditions of change. Therefore, a dialectical approach anchors this analysis.

C. Hegel’s Dialectical Approach

Georg Wilhelm Friedrich Hegel developed an important dialectical method of inquiry.\(^ {71}\) In *Phenomenology of Mind*, Hegel’s

[C]ritique of knowledge seeks to reveal the essential boundedness, limitedness, isolatedness, etc. of concepts and complexes of concepts through their “progressive incorporation into the total picture of the whole.” The result is not the “simple negation” of each such view. The recognition of the conditional nature of knowledge, its partiality, does not lead to scepticism [sic] or relativism. Instead it leads . . . to the preservation of each notion, view or perspective as a “moment of truth.”\(^ {72}\)

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69. *Id.* at 193–94.
70. *Id.* at 194.
72. DAVID HELD, *INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS* 177 (1980) (quoting HORKHEIMER, Kritishe Theorie 1: Zum Problem der Wahrheit 236–37 (1935)).
This method’s express goal is to move past the one-sidedness of reified ideologies to reveal truth.\(^73\) The dialectical logic has three moments.\(^74\) The first moment, understanding, is of fixity. In that moment of understanding, concepts appear stable in definition and determination.\(^75\) The second, “negatively rational,” is a moment of instability; the previously stabilized determination from the moment of understanding sublates, both cancelling and preserving itself, as it pushes to its opposite.\(^76\) The third moment is “speculative” and can be thought of as the moment which “grasps the unity of the opposition between the first two determinations.”\(^77\) Hegel rejects the *reductio ad absurdum* argument.\(^78\) Rather, the third moment is one that results in “a unity of distinct determinations,”\(^79\) having “definition, determination or content because it grows out of and unifies the particular character of those earlier determinations.”\(^80\) Distinct from systems of logic based on binary constructions, the moment has content; it is not empty.\(^81\)

In the third moment, it is evident that Hegel’s dialectical process is one in which “the concept develops itself out of itself.”\(^82\) He states, “To consider a thing rationally means not to bring reason to bear on the object from the outside and so to tamper with it, but to find that the object is rational on its own account.”\(^83\) This innovation of analyzing an object in terms of its own standards, rather than applying external or a priori standards, grounds critical theory development.

\(^{73}\) See *id.* at 176 (“In this process of discovery, new conceptions of both subject and object emerge and hence new oppositions. The process whereby consciousness attempts to come to terms with the world around it involves continuous negation; that is, continuous criticism and reconstruction of the knowledge of subject and object and of their relation to one another. The development of consciousness through determinate negation consists precisely in the experience of surmounting old forms of consciousness and in incorporating these moments into a new reflective attitude.”).

\(^{74}\) Maybee, *supra* note 23.

\(^{75}\) *Id.* (citation omitted).

\(^{76}\) *Id.* (citation omitted).

\(^{77}\) *Id.* (citation omitted).

\(^{78}\) *Id.* The *reductio ad absurdum* argument is one “which says that when the premises of an argument lead to a contradiction, then the premises must be discarded altogether, leaving nothing.” *Id.*

\(^{79}\) Maybee, *supra* note 23 (citation omitted).

\(^{80}\) *Id.*

\(^{81}\) *Id.*


\(^{83}\) *Id.*
D. Critical Theory and Dialectics of Social Change

The Frankfurt School sought to establish a “critical social consciousness” in order to cause social change. It was concerned with “lay[ing] a foundation for an exploration in an interdisciplinary research context, of questions concerning the conditions which make possible the reproduction and transformation of society, the meaning of culture, and the relation between the individual, society[,] and nature.” Specifically, it aimed to assess the “breach between ideas and reality,” with the goal of creating non-authoritarian and non-bureaucratic politics. The School’s work, in pre-World War II Germany, rejected the rise of authoritarianism and its cause—what the School’s thinkers termed individual passivity.

Horkheimer and Theodor W. Adorno were two of the School’s most influential figures. Both men accepted Hegel’s critique of forms of thought as central to critical theory and stressed the “governing principle of dialectical thought” throughout their work; they employed the dialectical method and determinate negation to advance critical theory. They also preserved Hegel’s recognition that what empiricism holds out as finished systems of thought are, in fact, insufficient and imperfect. By doing this, they elevated necessity, “the irreducible tension between concept and object,” as the important driving force for revealing “incompleteness where completeness is claimed.” This tension between idea and reality powers critical theory, in which the gap between idea and reality is examined, criticized, and transcended by necessity. The result, a new understanding

84. HELD, supra note 72, at 201.
85. Id. at 16.
86. Id. at 183.
87. Id. at 25–26; COLLINS, supra note 21, at 61.
88. HELD, supra note 72, at 201. Horkheimer chiefly examined the “social functions of systems of thought” with particular focus on “exposing the way in which these systems, perhaps valid at a certain level, serve to conceal or legitimate particular interests.” Id. Adorno’s main task was development of an imminent critique of philosophy. His focus was on examining the way “philosophy expresses the structures of society.” Id.
89. Id. at 176.
90. Maybee, supra note 23. Hegel stated that “the dialectical constitutes the moving soul of scientific progression.” Id. Horkheimer accepted the critique of form of thought as set forth in Phenomenology of Mind. He rejected Hegel’s systematic intention, “mapping out of the nature and range of all forms of consciousness[,]” as well as his philosophy on history. HELD, supra note 72, at 176, 203. Horkheimer and Adorno rejected the notion of the absolute Idea, his concept of philosophy, and understanding of the cognitive process as one unfolding into unity—the complete identity of the subject and object.
91. HELD, supra note 72, at 177.
92. Id. at 177, 179 (quoting HORKHEIMER, supra note 24, at 25).
of the relationship between subject and object, establishes a precondition for social change.\textsuperscript{93}

This necessity-driven method is essential because Horkheimer observed that social change does not happen by creating new categories within existing ideologies under which to file (or dismiss) facts. Facts are determined by the active subject applying cognitive frameworks, which are based on social theories, to objects.\textsuperscript{94} This is self-reinforcing. “That new views in fact win out is due to concrete historical circumstances.”\textsuperscript{95} Horkheimer was speaking of “critical juncture[s],”\textsuperscript{96} whereby change occurs through historical processes which in turn redefine the relationship between subject and object.\textsuperscript{97} The power of the dialectical method is in situating societal dynamics to move and evolve under the irreducible tension of their existing inner dynamics.\textsuperscript{98} “Thinking is a form of praxis, always historically conditioned; as physical labour transforms and negates the material world under changing historical circumstances, so mental labour, under changing historical conditions, alters its object world through criticism.”\textsuperscript{99} Absent a critical juncture, the necessity-driven method can be used to generate the urgency for change by challenging closed systems of thought (i.e., jurisprudence),\textsuperscript{100} breaking their grip on social consciousness, and creating space for freedom—“creative, spontaneous thought and action.”\textsuperscript{101} During a critical juncture, the necessity-driven method can be harnessed to direct efforts toward intentional social change.

Much of the mental labor of praxis is apprehending the historical relations between subject and object, the relationship of part to whole, that forms the foundation of any social theory.\textsuperscript{102} Historical social processes give rise to traditions. Adorno recognized that tradition served “to mediate between known objects.”\textsuperscript{103} That understanding of tradition situates

\textsuperscript{93} Id. at 211–14. Adorno held the “grounds for transcendence in history are strictly (and tragically) circumscribed—by particular historical conditions.” Id. at 204. While philosophy cannot transform such conditions, Adorno was optimistic that it could help bring about preconditions for the alteration of the conditions.

\textsuperscript{94} Horkheimer, supra note 24, at 229.

\textsuperscript{95} Id.

\textsuperscript{96} Acharya et al., supra note 2, at 38.

\textsuperscript{97} Id. Importantly, “[t]he world as we understand and interpret it changes with the development of the subject.” Held, supra note 72, at 176.

\textsuperscript{98} Held, supra note 72, at 211.

\textsuperscript{99} Id. at 204.

\textsuperscript{100} Id. at 211.

\textsuperscript{101} Id. at 214.

\textsuperscript{102} Id. at 181. Hegel sought to demonstrate that “identity of phenomena cannot be separated from history, and in the last analysis, the genesis of the subject.” Id. at 176.

\textsuperscript{103} Id. at 214.
knowledge as “embedded in tradition.”104 This is where we find the disparity between “an object’s claim for itself and its actual performance” and the “discontinuity, disharmony and contradiction within the social whole.”105 That is the heart of Negative Dialectics, or non-identity thinking.106 It allows critical theory to transcend the tradition in which it is itself embedded.107 Identity thinking “aims at the subsumption of all particular objects under general concepts.”108 Non-identity thinking reveals the falseness of identity thinking by “assess[ing] the relation between concept and object, between the set of properties implied by the concept and the object’s actuality.”109 By employing non-identity thinking, we begin to peel back ideologies to gain understanding of how social theories, traditions, and identity thinking work together in the space between the concept and the object, the idea and the material world.110

Thus, within critical theory, the dialectical method becomes distilled to three principles. First, social reality is continually developing and evolving.111 Second, the continual change “stems from the drive within everything to achieve its highest potential, a drive which creates a continuing contradiction within things and the internal necessity to negate what they are in order to arrive at what they can be.”112 Third, it is through negation arising from “conflict and contradiction that progress to a new

104. Id.
105. Id. at 211.
106. Id.
107. Id. at 213–14.
108. Id. at 202. “‘The supposition of identity is . . . the ideological element of pure thinking . . . but hidden in it is also the true moment of ideology.’ . . . In a judgement of identification we claim that an object is adequate to its concepts[,] However, concepts comprehend more than a given particular object. They refer also to the central or guiding idea of the object. They point to a set of ideal properties—conditions and relations—held to be essential to the object and yet other than it. Under the present conditions of society, the object may fail to fulfill its concept. An object only does justice to its concept if it meets the specifications of its ideal characteristics. This Adorno called rational identity.” Id. at 215.
109. Id. at 215. “In assessing its object, negative dialectics employs the standards and criteria the object has of itself in its concept. The historically crystallized standards suggest what the object sought and perhaps seeks to be. They also suggest possibilities which are rarely, if ever, realized and present an image of (logically entailed) unfulfilled potentialities. Non-identity thinking employs language, through the construction of ‘constellations’ of concepts, as a connotative or indicative device. Thus specific sides of objects are revealed which are inaccessible to identity thinking and the dogmatic application of classificatory schema.” Id.
110. See id. at 217–18.
112. Id.
positive takes place.”

Ultimately, “the drive within anything to achieve its own potential creates a conflict with its present state of reality which has become a fetter upon its continuing evolution.” This drive itself has played out. In this sense, the Declaration of Independence was the manifestation of the first critical knowledge project of our nation—making observations from a social location outside the Empire and declaring revolution to achieve its full potential. This drive appears again in the Preamble to the Constitution, which followed the largely ineffective Articles of Confederation, setting as the goal a “more perfect” Union.

E. Traditional Theory and Critical Theory Distinguished

Under traditional theory, the individual “regards social reality and its products as extrinsic to him.” The view is premised on a passive subject and demands “acceptance of an essential unchangeableness between subject, theory, and object.” Critical theory rejects that understanding of the world. Thus, there is an important epistemic distinction. In traditional theory, the passive thinking subject is the social location where knowledge and object coincide; consequently, it is the starting point for attaining absolute knowledge. However, critical theory holds that an active thinking subject influences the action or object being observed; a factual event is mediated through the work of society as a whole, which is itself constantly changing and makes attaining absolute knowledge impossible.

In critical theory, what scholars hold as facts—objective realities given in perception—emerge from the work of society and are conceived as both

113. Id.
114. Id. at 128.
115. The Constitution of the United States: A Transcription, Nat’l Archives, https://www.archives.gov/founding-docs/constitution-transcript (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).
117. Id. at 211.
118. Id. at 210–11 (“Critical thinking is the function neither of the isolated individual nor of a sum-total of individuals. Its subject is rather a definite individual in his real relation to other individuals and groups, in his conflict with a particular class, and, finally, in the resultant web of relationships with the social totality and with nature. . . . His activity is the construction of the social present.”).
119. Id. at 211.
120. Id.
products of that work and under human control. Thus, facts “lose the character of pure factuality.” Critical theory affirms that a meaningful relationship “exists between intellectual positions and their social locations” and focuses on that relationship rather than, as in traditional theory, the proper categorization or total dismissal of observations under ideological categories. By utilizing dialectical context and critical theory, this Article’s proposed framework can provide legal scholars and policymakers with a tenable process to reflect on problems as they exist, consistent within the aspirational ideals of equality from natural law.

II. A PROPOSED CRITICAL INTERSECTIONAL LEGAL FRAMEWORK

Part I of this Article outlined the social theories of natural law deeply rooted within American jurisprudence and exemplified the same type of dialectical context that is required at the first stage of this Article’s proposed framework. The next Part of this Article will build on that dialectical context by deconstructing successful critical knowledge projects to demonstrate the need for a new critical framework that also deploys an intersectional approach. To ensure this new framework is grounded in a normative aspiration worth working toward, this Part will describe the historical and contemporary contexts of Dr. King’s “Beloved Community” model as a starting point, or guidepost, for this Article’s new proposed framework.

A. Deconstruction: Successful Critical Knowledge Projects

Recall that the goal of the Frankfurt School was to bring about critical social consciousness. Horkheimer asserted that “theories and methods are always (to be understood as) embedded in historical and societal processes.” Limitations of the empirical sciences are to be overcome “not by rejecting out of hand experiences won through methodical research, but by reconstructing and reinterpreting their works in the total context to which

121. Id. at 204 (“The integration of facts into existing conceptual systems and the revision of facts through simplification or elimination of contradictions are . . . part of general social activity.”).
122. Id. at 209. Horkheimer put forth the Kantian assertion that the common-sense notion of a “world of objects to be judged” is itself “in large measure produced by an activity that is itself determined by the very ideas which help the individual to recognize the world and to grasp it conceptually.” Id. at 202.
123. Id. at 209.
124. HELD, supra note 72, at 187.
their concepts and judgments refer.” In law, lawyers and jurists must reconstruct and reinterpret legal theories in the total context over which those theories are the controlling body of law. Lawyers can do this by utilizing Adorno’s Negative Dialectic to challenge closed systems of thought—like social theory and scientific epistemology—that underlie legal theory and method in order to create space for cognitive freedom. By doing this, we allow critical theory to transcend tradition, the vessel which both holds knowledge and transmits the knowledge formation of society.

Critical legal studies (CLS) scholars analyze legal ideology as a “social artifact[] that operate[s] to recreate and legitimate American society.” CLS scholars sought to “unpack legal doctrine to reveal both its internal inconsistencies (generally by exposing the incoherence of legal arguments) and its external inconsistencies (often by laying bare the inherently paradoxical and political worldviews embedded within legal doctrine).” CLS scholars primarily worked to reveal false necessity and expose the overall contingency of legal ideology as a function of economic class.

Antonio Gramsci, an Italian philosopher, influenced CLS scholars through his formulation of “hegemony”—“the means by which a system of attitudes and beliefs, permeating both popular consciousness and the ideology of elites, reinforces existing social arrangements and convinces the dominated classes that the existing order is inevitable.” Some CLS scholars relied on this formulation to explain “the continued legitimacy of American society by revealing how legal consciousness induces people to accept or consent to their own oppression.” People, by reason of adopting these attitudes and beliefs, are limited in what they can imagine for their lives. Critical race theorist, Kimberlé Crenshaw, described the CLS

125. Id. at 188. Horkheimer was adamant that every theoretical claim of knowledge must also subordinate itself to findings of relevant, individual empirical sciences, including the natural sciences, mathematics, and economics; standards for scientific research and theory are to be respected.


127. Id.

128. Id.

129. Id. (“Although society’s structures of thought have been constructed by elites out of a universe of possibilities, people reify these structures and clothe them with the illusion of necessity. Law is an essential feature in the illusion of necessity because it embodies and reinforces ideological assumptions about human relations which people accept as natural or even immutable.”).

130. Id.

131. See id.
position such that when people act upon their belief in these assumptions they in turn re-create their own oppression. Because it is the ideology itself that prevents people from imagining another world and that is the source of their own, self-generated oppression, it logically receives the first attention of CLS scholars.

Critical race theory (CRiT) scholars grew frustrated with the failure of CLS scholars to expand their work beyond the axis of class. CLS overlooked the role of race theory and racism in American life. Black Americans are not oppressing themselves:

[T]his version of domination by consent does not present a realistic picture of racial domination. Coercion explains much more about racial domination than does ideologically induced consent. Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others; moreover, the ideological source of this coercion is not liberal legal consciousness but racism.

The failure to deal with race consciousness was the impetus for legal scholars to split from CLS. CRiT builds upon CLS to address race theory as it operates within legal consciousness. CRiT scholars recognized that “race-consciousness is central not only to the domination of blacks but also to whites’ acceptance of the legitimacy of hierarchy and their identity with elite interest.”

Critical disability theory (CDT) analyzes the ideology of ability through the lens of citizenship. As applied by society, the ideology of ability causes individuals with disabilities to be denied formal and substantive citizenship and to be assigned the status of “dis-citizens.”

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132. Id. at 110.
133. See id. (“Once false necessity or contingency is revealed, these critics suggest, people will be able to remake their world in a different way.”).
134. Id. (citations omitted).
135. Id. at 112.
136. Dianne Pothier & Richard Devlin, Introduction: Toward a Critical Theory of Dis-Citizenship, in CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND LAW 1, 2 (Dianne Pothier and Richard Devlin eds. 2006). It is noteworthy that the United States is the only country that has not signed onto the UN Convention on the Rights of the Child. Frequently Asked Questions on the Convention on the Rights of the Child, UNICEF, https://www.unicef.org/child-rights-convention/frequently-asked-questions [https://perma.cc/9WBT-VYPK]. All other countries who have evolved out of the English Legal System have built legal frameworks for disability rights of children with this charter in mind. Thus, most scholarship in CDT related to children is framed within human rights, with much currently being developed in Canada and the United Kingdom.
“The ideology of ability is at its simplest the preference for able-bodiedness. At its most radical, it defines the baseline by which humanness is determined, setting the measure of body and mind that gives or denies human status to individual persons.”

CDT is a relatively recently initiated knowledge project in the United States, arising mainly in response to normalization of aspects of the ideology of ability in the law resulting from the enactment of and litigation regarding the Rehabilitation Act of 1973, the Education for All Handicapped Children Act of 1975 (IDEA), and the Americans with Disabilities Act of 1990 (ADA).

These knowledge projects have been largely characterized by their successful deconstruction of ideologies and the mapping of relationships between ideologies, law, and social formation. Critical social theorists created and employed a dialectical approach and an immanent method to deconstruct the inherent and unchanging principles by which society operates. CLS scholars deconstructed liberal legal ideology’s claim of “neutral reconciliation between individual freedom and the collective constraints needed to preserve that freedom.”

CRiT scholars deconstructed race consciousness in order to “transform[] the relationship among race, racism, and power.” CDT scholars deconstructed the ideology of ability in order to transform the relationship between ability, ableism, and power. Broadly, deconstruction reveals what is identifiable to us—our social identities—as products of epistemic systems of hierarchy cloaked in tradition and knowledge. The question now becomes how and what do we build?

B. The Need to Build a Critical Intersectional Legal Theory

“Nobody is only one thing.” – Edward Said

137. TOBIN SIEBERS, DISABILITY THEORY 8 (2008).


139. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3 (3d ed. 2017).

140. COLLINS, supra note 21, at 94-95. Our social identities, which arise from racial formation (social relations taking a historically determined form) as imposed on us by society, are not one and the same as our personal identities informed by our daily life experiences and the identity and knowledge claims we make for ourselves as a result. The Author addresses socially assigned identification in this Article, not individually claimed identity.

141. JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY, at xi (2012).
That statement may seem self-evident, but the law treats individuals as if they have only one identity when they seek to address oppression. The aforementioned knowledge projects tended to analyze single axes of identity in reflection of the law itself. Our legal institution must recognize and validate the multiple social identities through which we experience life and the interactions of the axes of ideologies and power that give rise to privilege and oppression through the heuristic of normative assumptions. The vision for this renewed institution must come from the bottom of our existing social hierarchy.

One example of a successful intersectional knowledge project is Black feminism. Black feminism recognized and validated a social location outside the civil rights and feminist movements from where it could critique the failure of both social movements to conceptualize and address the unique oppression experienced by Black women in America. The male-dominated civil rights movement failed to address misogyny and patriarchy, resulting in the oppression of women. The upper-class and white-dominated feminist movement failed to address classism and racism, resulting in the oppression of Black and Brown women. Black feminist studies developed an epistemic system to produce the knowledge by which to explain the social position of Black women. Black feminists directed that knowledge to develop Black feminist theory as critique, a theory by which to address as-lived experiences of oppression arising at the intersection of race, class, and gender. Through recognition and validation of this co-created oppressive shadow, the theory advanced a vision of community absent oppression. Black feminist theory has been incredibly successful because it is intersectional at its core. Reframing the analysis of race, class, and gender allowed new areas of critical studies to flourish, including the advancement of a gender knowledge project and Queer theory, which has offered new challenges to the treatment of sexuality within scholarship, politics, and law.

143. BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER, at x (2000).
145. HOOKS, supra note 143, at 37. For a groundbreaking intersectional study on the women’s liberation movement in the United States, see ANGELA Y. DAVIS, WOMEN, RACE & CLASS (1983).
146. Id. (“Since all forms of oppression are linked in our society because they are supported by similar institutional and social structures, one system cannot be eradicated while the others remain intact. Challenging sexist oppression is a crucial step in the struggle to eliminate all forms of oppression.”).
147. COLLINS, supra note 21, at 100–03.
No one experiences life through a single social identity, yet jurisprudence fails to provide a cause of action that allows a plaintiff to address oppression as it occurs in real life, across multiple identities at once. The plaintiff must choose one identity as basis for their antidiscrimination legal action. Then, the plaintiff must argue how the respondent fulfilled specific actions traditionally acknowledged to demonstrate discriminatory intent toward that single identity. American jurisprudence has normalized the “perpetrator perspective,” which views discrimination as “actions, or a series of actions, inflicted on the victim by the perpetrator.” The focus of litigation is on what the perpetrator has done to the victim, or victims, rather than on the resultant conditions of the victim class. The task of the court is to “neutralize the inappropriate conduct of the perpetrator.” As evidenced by cases alleging discrimination by race, facts are selected from various and sundry human behavioral practices that violate the principle of race-neutral decision-making. The court seeks to “outlaw the identified practices, and neutralize their specific effects.”

This concept of perpetrator perspective is applicable to discrimination claims based on disability and economic class, arguably even more so due to the lower level of scrutiny required in matters involving state action. The result is a jurisprudence that is indifferent to the conditions that are the enduring legacy of social theories of hierarchy. At heart, directing attention to the persistent and heretofore intractable conditions of oppression is what well-known sociopolitical movements like The Movement for Black

148. Freeman, supra note 61, at 29–30. While the victim perspective, discrimination describes the conditions of “actual social existence as a member of a perpetual social underclass.” Id. at 29. This underclass is characterized by economic conditions (lack of jobs, housing, money) as well as being oppressed by way of social identity (lack of choice and individuality.) Id. However, the perpetrator perspective does not allow these multiple axes of oppression to be addressed. Id. at 29–30. Only one social identity may be advanced per claim under current antidiscrimination theories of race and disability. Id.

149. Id. at 29.

150. Id.

151. Id.

152. Id.

153. Id.

154. Id. at 29. “From this perspective, the law views racial discrimination not as a social phenomenon but merely as the misguided conduct of particular actors.” Id. at 30.
Lives,155 ADAPT,156 and The Poor People’s Campaign157 are doing. Their intersectional platforms seek to improve the enduring conditions of oppression to ensure dignity for all oppressed people. Humane living conditions communicate respect of the state to communities. Humane living conditions are an expression of the value of inherent dignity. Organizing around the issues of respect and inherent dignity, in accordance with the recognition of the self-evidentiary nature of all people being created equal, is necessary to ensure life, liberty, and the pursuit of happiness for all. Where do we go from here?

C. Dr. King’s “The Beloved Community” as a Historically Relevant Guidepost for this New Framework

Dr. Martin Luther King, Jr. asked this question and provided insight and encouragement in the last book he wrote before he was assassinated.158 King “appreciated the dialectic of theory and the broad-based confrontational strategies of socially transformative action.”159 The methods and practices he set forth offer guidance to those of us who seek to address and change “exclusionary, repressive, and noncommunal dimensions of American life.”160 Dr. King grounded his critique as follows:

Negroes have proceeded from a premise that equality means what it says, and they have taken white Americans at their word when they talked of it as an objective. But most whites in America in 1967, including many persons of goodwill, proceed from a premise that equality is a loose


157. Our Demands: A Moral Agenda Based on Fundamental Rights, POOR PEOPLE’S CAMPAIGN, https://www.poorpeoplescampaign.org/about/our-demands/ [https://perma.cc/8AHD-E265] (“We have met with tens of thousands of people, witnessing the strength of their moral courage in trying times. . . . The Souls of Poor Folk: Auditing America report reveals how the evils of systemic racism, poverty, ecological devastation, and the war economy and militarism are persistent, pervasive, and perpetuated by a distorted moral narrative that must be challenged.”).


159. Cook, supra note 15, at 90.

160. Id.
expression for improvement. White America is not even psychologically organized to close the gap—essentially it seeks only to make it less painful and less obvious but in most respects to retain it. Most of the abrasions between Negroes and white liberals arise from this fact.

. . . .

The Negro on a mass scale is working vigorously to overcome his deficiencies and his maladjustments. . . .

. . . .

Whites, it must frankly be said, are not putting in a similar mass effort to reeducate themselves out of their racial ignorance. It is an aspect of their sense of superiority that the white people of America believe they have so little to learn. The reality of substantial investment to assist Negros into the twentieth century, adjusting to Negro neighbors and genuine school integration, is still a nightmare for all too many white Americans.

. . . .

The legal structures have in practice proved to be neither structures nor law. The sparse and insufficient collection of statutes is not a structure; it is barely a naked framework. Legislation that is evaded, substantially nullified and unenforced is a mockery of law. Significant progress has effectively been barred by the cunning obstruction of segregationists. It has been barred by equivocations and retreats of government—the same government that was exultant when it sought political credit for enacting the measures.

. . . .

. . . It would be grossly unfair to omit recognition of a minority of whites who genuinely want authentic equality. Their commitment is real, sincere, and is expressed in a thousand deeds. But they are balanced at the other end of the pole by the unregenerate segregationists who have declared that democracy is not worth having if it involves equality.161

These words resonate today. They confirm that the conditions of oppression are persistent and resistant to changes despite well-intentioned programs and policies. Conditions of oppression are the result of stable principles and ideologies reflected in fluid forms and expressions.

Quite literally, as this Author was editing this Article, the world watched insurrection upon the American Capitol on live television.162 Congress was present to certify the electoral college votes of the 2020

161. King, Jr., supra note 158, at 8–12 (emphasis added).

presidential election. Senator Ted Cruz addressed the Senate with a proposal to set up an election commission to investigate alleged irregularities, calling upon the precedent of the notorious Compromise of 1877 at the exact moment insurrectionists were breaching Capitol barricades to stop the certification. Senator Cruz called forth the white supremacist specter of the event which ended Reconstruction and ushered the South into the era of the Black Codes and Jim Crow that would last until the 1960s.

The simultaneous breaching of the Capitol itself visually underscored how dangerously close America is at all times to losing its democracy; how easy it would be to enter a post-Civil Rights Movement nadir. Significantly, earlier that morning, Reverend Raphael Warnock, successor to Dr. King’s pulpit at the historic Ebenezer Baptist Church, won election to the United States Senate as the first Black Senator from Georgia. The Capitol was then stormed by those who “declared that democracy is not worth having if it involves equality.”

Dr. King’s powerful and salient social critique was the result of as-lived experience as “other”: “King saw the world and evaluated the theories marshaled in support of it through the lens of these experiences of


164. IBRAHIM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 258–59 (2016). The morning of November 8, 1876, Democratic New York Governor Samuel J. Tilden and Republican Ohio Governor Rutherford B. Hayes were virtually tied for electoral college votes. Outgoing Republican President Grant believed it had been a mistake to grant Black men the right to vote. Hayes agreed. With Tilden poised to win and votes from South Carolina and Louisiana in dispute, Hayes representatives met with Democrats. Following the meeting, Democrats handed Hayes the Presidency and Hayes ended Reconstruction with the withdraw of federal troops from the South. As stated in The Nation, it was time for “the negro to disappear from the field of national politics . . . . Henceforth, the nation, as a nation, will have nothing more [sic] do with him.”


167. King, supra note 158, at 11–12 (emphasis added); see also Gorman, supra note 1 ("The hill we climb / If only we dare / It’s because being American is more than a pride we inherit, / it’s the past we step into / and how we repair it / We’ve seen a force that would shatter our nation / rather than share it / Would destroy our country if it meant delaying democracy / And this effort very nearly succeeded / But while democracy can be periodically delayed / it can never be permanently defeated / In this truth / in this faith we trust.").
oppression. These experiences necessitated his eclectic appropriation of various theologies and philosophies, which he constantly revised in light of his growing understanding of the problems of American life.”

From his social position as a Black man in the American South, drawing from the evangelical liberal theological tradition, Dr. King experientially deconstructed societal practices through nonviolent, direct action and intellectually deconstructed operative principles of society through critiques of coherency, universality, and determinacy. King’s intellectual analysis drew upon theology and philosophy, specifically based in natural law. He then developed a reconstructed vision for community: The Beloved Community.

Historically, the African-American church has served a foundational role in reconstructing a sense of community destroyed by the institution of slavery. It was from within the freedom to worship that slaves began to assert self-determination of identity and community. It was at church that slaves transformed an ideology of racial inferiority “intended to reconcile them to a subordinate status into a manifesto of their God-given equality.” Slaves developed an alternate interpretation of scripture that called for the end of the very social structure of racial hierarchy that white evangelicals sought to legitimize through scripture. “In short, slaves deconstructed ideology through their struggles against oppression.” Their appropriation of Christian ideology sustained them through the dehumanization and brutality of slavery.

First, as African-American “prophetic Christianity” developed, it rejected “white Christianity’s claim that the law and order of an oppressive secular authority were necessary to constrain the evil proclivities of human nature.” Dr. King exposed that the hierarchy could be inverted. “The

169. Id. at 97.
170. Id.
171. Id.
172. Id. at 92.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id. at 93.
178. Id. at 91–93 (“Slavemasters believed Christianity had a stabilizing and disciplining influence on the slave’s disposition, and they thought it would foster consent by Africans to the legal and extralegal devices of slavery. The conservative evangelicalism of slave society was premised on five basic assumptions. First, the fallen nature of human beings, the pervasiveness of human depravity and sin... The fourth was the separation of believers, the sometimes physical but most times psychological separation of the community of
privileging of order over freedom assumed that the latter was only possible within the constraints imposed by sovereign authority. Otherwise, civil society would degenerate into a Hobbesian war of all against all.”

Inasmuch as freedom presupposed order, order presupposes freedom. Recall that Kant established freedom as the only innate right of all humans, by virtue of their being human. Dr. King realized that “if humans are not also capable of substantial good, no social order is possible, because individuals by definition would be ungovernable.” Therefore, the “social order supposedly necessitated by human evil presupposes the freedom and human goodness it denies.”

The privilege of order over freedom lacked an objective foundation. It was merely preference.

Second, Dr. King realized that the privileging of order over freedom need not be held as universally valid. Along similar lines as the Frankfurt School, he argued that the choice “might be viewed as historically contingent and conditioned, and thus subject to change if individuals are willing to engage in transformative struggles to alter the conditions under which these conceptions appear coherent.” This realization arose from Evangelical liberalism, which questioned the universality of the theological

believers from sinful worldly concerns and pursuits. And the last was the separation of church and state, the extreme deference to the existing social order and dependence on the state for the laws and rules necessary to constrain the sinful side of earthly beings.”; see also KING, supra note 158, at 40 (“Here, then, was the way to produce a perfect slave. Accustom him to rigid discipline, demand from him unconditional submission, impress upon him a sense of his innate inferiority, develop in him a paralyzing fear of white men, train him to adopt the master’s code of good behavior, and instill in him a sense of complete dependence.”).

179. Cook, supra note 15, at 94; DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL Assault on TRUTH in AMERICAN LAW 29 (1997). At the end of Chapter One, Farber and Sherry frame the question as, “If reason and knowledge cannot be objective or universal, what is left?” and summarize the arguments of critical legal theorists and critical race theorists as follows: “If the modern era begins with the European Enlightenment, the postmodern era that captivates the radical multiculturalists begins with its rejection. According to the new radicals, the Enlightenment-inspired ideas that have previously structured our world, especially the legal and academic parts of it, are a fraud perpetrated and perpetuated by white males to consolidate their own power. Those who disagree are not only blind but bigoted. The Enlightenment’s goal of an objective and reasoned basis for knowledge, merit, truth, justice, and the like is an impossibility: ‘objectivity,’ in the sense of standards of judgment that transcend individual perspectives, does not exist. Reason is just another code word for the views of the privileged. The Enlightenment itself merely replaced one socially constructed view of reality with another, mistaking power for knowledge. There is naught but power.” Id. at 33.

180. See supra notes 38–46 and accompanying text.


182. Id.

183. Id. at 95.
assumption of the evilness of human nature. Rather, it posited that human
nature was rooted in goodness and it was evil of institutions that limited
human efforts to realize Godly ideals. Accordingly, an “infallible
scripture reflecting the static will of God could not justify” oppressive social
institutions. Furthermore, joined with the social gospel, which posited
that “there was a necessary relationship between the sacred and the
secular,” Dr. King argued that a person’s love for God was evidenced in
the fruits of love for suffering humanity and that such love necessitated the
transformation of all social institutions and practices that maintain and
reproduce oppression in all its forms.

Third, Dr. King argued that even if the concept of humanity as rooted
in evil was valid, it failed to necessitate any one vision of community. Dr. King asserted that even if the conservative Church’s deference to the
authority of the state, as ordained by God, was valid, that deference did not
necessitate a segregated society. He maintained that order must serve the
end of justice; must respect the law of God in accordance with natural
law. King concluded that natural law does not support oppression:

A just law is a man-made code that squares with the moral law or the law
of God. An unjust law is a code that is out of harmony with the moral law . . . not rooted in eternal and natural law. Any law that uplifts human
personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and
damages the personality. It gives the segregator a false sense of superiority,
and the segregated a false sense of inferiority . . . . So segregation is not
only politically, economically, and sociologically unsound, but it is morally
wrong and sinful.

184. Id.
185. Id.
186. Id.
187. Id.
188. Id. (“Evangelical liberalism and the social gospel repudiated the traditional conception of human nature; they replaced the traditional conception with the antithetical view and reached a different conclusion about the relationships between church and state as well as between Christians and the evil work in which they must live.”).
189. Id.
190. Id at 96; see also King, supra note 158, at 38 (“Justice at its best is love correcting everything that stands against love.”).
Dr. King understood and demonstrated through his reasoning that the acceptance of principles does not “mechanically determine specific visions of community; how we live in community remains a matter of choice that implicates a host of competing values.”  

Through deductive logic, King revealed the values a person holds with regard to human potential, social theories, power, and community will determine which form and expression of order and freedom that person will find most persuasive—which vision of community that person will deem necessary.

Dr. King enacted his theoretical findings through praxis—the experiential deconstruction of social practices through the nonviolent civil disobedience of unjust law, done out of love and with willingness to bear consequences. In this way, he exhibited respect for law and order while being true to higher duty. This is important because critiques alone “are abstract and ahistorical; they do not provide rich historical contextuality essential to an understanding of the actual operation of power.” Praxis reveals conditions of importance for explaining legitimacy where logic and reason alone cannot. Praxis also enables the discovery of “insights into the ways in which marginalized groups transform powerless conditions into powerful possibilities, thereby informing a broader reconstructive vision than previously existed.” Thus, the practice of nonviolent civil disobedience provided essential direct democratic corrective feedback to legal and social theories.

The Beloved Community, as an inspirational and aspirational vision of a just society based on equality and as a program for realizing that society, remains viable in the age of the COVID-19 pandemic to address the disproportionate sickness, disability, and death of America’s historically oppressed peoples. Dr. King provided a viable, alternate social theory based in equality, justice, and love, from which individual rights proceed.

He provided a prescription for healthy communities:

192. Id.
193. Id.
194. Id.
195. Id.
196. Id. at 97.
197. Id.
198. Id.
199. See King, supra note 158, at 41. King drew a distinction between slogans in the civil rights movement, like “Black Power” and “Back to Africa,” and a program with a strategy to bring about sustained social change.
200. Cook, supra note 15, at 99. King recognized that individual rights are important and extend beyond traditional liberties and rights as set forth in liberalism. “King . . . understood that the oppressed could make rights determinate in practice: although ‘the law tends to
Dr. King’s Beloved Community is a global vision in which all people can share in wealth of the earth. In the Beloved Community, poverty, hunger and homelessness will not be tolerated because international standards of human decency will not allow it. Racism and all forms of discrimination, bigotry and prejudice will be replaced by an all-inclusive spirit of sisterhood and brotherhood.

Dr. King, in accordance with both Christian existentialism and natural law, held these rights extended beyond liberalism to “inherent rights that are God-given and not simply privileges of the state.” King held that the rights of life, liberty, and the pursuit of happiness are incompatible with poverty and required the “state [to] affirmatively create the institutions necessary to realize the natural rights.” King recognized that advancing this alternative theory into the mainstream in the hope of its ultimate adoption would require both legislation and organization: “The oppressed must take hold of laws and transform them into effective mandates.”

With the goal of addressing oppression across multiple axes of identity at once, and in the spirit of Dr. King’s appropriation of eclectic theologies and philosophies, a proposed Critical Intersectional Legal Theory (CrILT) must draw upon the two main principles of critical social theory but be distinct from the other critical knowledge projects previously discussed in Part II(A) above. It must develop critical social theory by bringing intersectional analysis to the principles of dialectical thought and indeterminacy. It must analyze power structures as they exist and work together through the power of the state to class, race, and disable people declare rights—it does not deliver them. A catalyst is needed to breathe life experience into a judicial decision.’ For King, the catalyst was persistent social struggle to transform the oppressiveness of one’s existential condition into ever-closer approximations of the ideal. The hierarchies of race, gender, and class define those conditions, and the struggle for substantive rights closes the gap between the latter and the ideal of the Beloved Community.”

Id.; see also Farr, supra note 29, at 510 (noting that a social theory, in order to legitimate a resulting social order, must empirically explain hierarchy through the articulation of normative standards). Dr. King accomplished that legitimization in his formulation of the Beloved Community.


204. Id. at 166–67.
moment to moment. It must be reconstructive through self-reflexive application of theory through praxis.

D. Protection Against Bias Being Transmitted through Principles and Theories.

Undertaking this knowledge project, we must address underlying bias perpetuated by and alongside America’s founding principles. The need to thoughtfully examine the origins and operations of principles is addressed here in recognition of Dr. King’s assertion that we cannot simply mechanically apply them. Even if bias is not explicit, the concern cannot be easily set aside. Although core principles appear “race-neutral in their formulations,” bias may influence theories “by affecting the articulation of intermediate principles and the selection of central problems to be addressed.”

Locke’s theory of natural law stands on the idea of “State of Nature,” a concept that arose from observations of indigenous communities as viewed through a lens of colonial theories of civilization and savagery. The English colonial theory, which was the justification for colonial domination, shaped Locke’s observations, and was the foundation for the theory of social compact in natural law. Setting aside the question of whether this particular bias’s formulation of State of Nature guides oppression in America today, it is an example of how such biases live on through facially neutral principles. Analysis is a nuanced undertaking, as Locke’s writings do not reflect any indication that he held an explicitly hierarchal view of races.

Kant was an outspoken believer and proponent of social theory of racial hierarchy in his early years. In 1788, despite having developed a universalistic moral theory, Kant published an essay making clear that he believed people from Africa and India lacked mental capacities to be successful in Northern climates. Kant’s definition of race was formulated in terms of heritable physical traits. He then tied this definition to a

205. Pauline Kleingeld, Kant’s Second Thoughts on Race, 57 PhILO. Q. 573, 585 (2007).
206. Id. at 584. Of the conforming theories of class, race, and disability, given the scope of this Article, only race will be addressed here as an example.
207. Farr, supra note 29, at 498.
208. Id.
209. See id. (“Locke’s theoretical and colonial writings do not cohere as a unified body.”).
210. Kleingeld, supra note 205, at 574.
211. Id.
212. Id.
“hierarchical account according to which the races also vary greatly in their capacities for agency and their powers of intellect.”213

Kant and Locke shared the presumption of Africans and American Blacks as humans—fully people under natural law.214 Hegel took a significant departure, beginning with the premise of all humans having the potential for personhood which must be gained through recognition by others.215 Hegel held, with regard to Africans and American Blacks, the “natural behavioural determinants to the geography of the race’s origins and the colour of that race’s skin” to be “so forceful as to inhibit personhood.”216 Hegel was committed to the three following ideological positions: (1) natural or biological racial distinctions are necessary and part of the rational scheme of things; (2) associated with those biological differences are psychological and spiritual differences; and (3) the character of these psychological or spiritual differences is that whites are free and rational and other races are not.217

The question for this analysis is what to do—if anything—with those views? How do they inform our analysis, and work in the development of theory and its application? Can we isolate the racially problematic viewpoints of Locke, Kant, and Hegel from the important core philosophical concepts? It is a possibility that without extremely careful consideration, by taking these core principles and using them to build a new cognitive framework, legal scholars and policymakers may perpetuate the same epistemic oppression, injustice, and resistance that advocates are working to overcome.218 Only by investigating the systemic roles of racism,

213. Id. Kant later categorically opposed chattel slavery. Id. at 577–88 (“In his notes for Toward Perpetual Peace (1794–5), Kant repeatedly and explicitly criticizes slavery of non-Europeans in the strongest terms, as a grave violation of cosmopolitan right. . . . He criticizes the ‘very most gruesome and most calculated slavery’ on the Sugar Islands.”).

214. Kleingeld, supra note 205, at 574. The Kantian notion of personhood is contingent on the possibility of rational or autonomous action. Theoretically a human could lose the rights of personhood.

215. Darrel Moellendorf, Racism and Rationality in Hegel’s Philosophy of Subjective Spirit, 13 HIST. POL. THOUGHT 243, 250 (1992). Despite having extensive knowledge of the Haitian Revolution, Kant maintained that slavery was not unjust because slaves have lost the struggle for recognition from others such that they could be counted as persons. Hegel believed that “being rational or potentially free is not enough to be granted the moral status of personhood; one is not a person until one courageously becomes one factually, that is, until one has won freedom.” Id.

216. Id. at 249.

217. Id. at 248.

218. See Collins, supra note 21, at 129.
ableism, and classism in the wider moral and political theory, can we assess the influence of a philosopher’s bias (or lack of bias) on the work.\textsuperscript{219}

Dr. King observed that as we move toward creating a just society, we begin to move away from strictly constitutional rights and towards human rights more broadly.\textsuperscript{220} In order to address laws and institutions which have failed to bring about equality, “corrective legislation” is required.\textsuperscript{221} For example, later in life Kant moved away from his view of racial hierarchy and further developed his political theory and theory of right to reflect important shifts in his ideas of citizenship and the new concept of cosmopolitan right, similar to what is now considered human rights.\textsuperscript{222} Organization must accompany corrective legislation to alter entrenched behavioral path dependence.\textsuperscript{223}

\textit{E. A Proposed Framework to Begin Creating Critical Intersectional Legal Knowledge}

Legal theories for society are epistemic systems which form society. In order to create the conditions for social change, a new framework must develop and deploy a critical theory of law. This is not to say we abandon traditional theory. It has explanatory value. The dialectical principle instead indicates that we hold traditional legal theory as a moment within a particular historical context. The current context—the demand of large portions of American society to end oppression resulting from healthcare disparities during the pandemic—demands an intersectional approach.

Dr. King recognized that the values one holds regarding human potential, social theories, power, and community are determinative of the vision of community one will hold as necessary. The Frankfurt School also recognized this relationship and recognized that these values are usually invisible to the individual who holds them because they are in the shadows cast by ideologies. Intersectionality is an analytical tool applied to elucidate the “linking of social structures and ideas that reproduce them.”\textsuperscript{224} Intersectional frameworks help us to shift that which we consider fixed.\textsuperscript{225}

\begin{itemize}
\item 219. Kleingeld, supra note 205, at 585–86 (“In short, [bias] can . . . influence how the most basic moral and political principles are applied in the elaboration of the full theory.”). Rather than simply deleting the problematic statement, an additional positive change will be needed.
\item 220. \textit{KING}, supra note 158, at 138.
\item 221. \textit{Id.} at 167.
\item 222. Kleingeld, supra note 205, at 590–92.
\item 223. \textit{KING}, supra note 158, at 138.
\item 224. \textit{COLLINS}, supra note 21, at 27.
\item 225. \textit{Id.}
\end{itemize}
For the sake of this Article, the Author considers intersectionality a tool by which scholars and policymakers analyze interlocking systems of power which are significant for “co-produce[ing] one another in ways that reproduce both unequal material outcomes and the distinctive social experiences that characterize people’s experiences within social hierarchies.”

Intersectionality can be used to generate social theory with which to interpret and change the social world. It democratizes knowledge production. This reflects the dialectical method of self-reflexive knowledge production based both on theory and on praxis. It is an immanent method coming forth from a specific context and speaks to that context.

Intersectionality develops the core principles of critical theory to yield additional insight into social change in four particular ways which, taken together, inform this Article’s proposed framework for developing a critical intersectional analysis:

First, critical theory holds the view that all societies contain certain core principles that remain constant even if the form and expression of those principles change. These changes of form and expression are inherent to society. Intersectionality “explain[s] the changing same of power relations as shaped by human agency across multiple, co-forming systems of power.”

Second, critical theory and intersectionality have explicitly ethical and normative aspirations. Intersectionality reinforces critical social theory as a site of resistance by providing a framework for examining and theorizing on the nuances of current norms that militate against these aspirations.

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226. *Id.* at 46. See Patricia Hill Collins & Sirma Bilge, *Intersectionality* 2 (2016) (“Intersectionality is a way of understanding and analyzing the complexity in the world, in people, and in human experiences. The events and conditions of social and political life and the self can seldom be understood as shaped by one factor. . . . Intersectionality as an analytic tool gives people better access to the complexity of the world and of themselves.”).


228. *Id.* at 61 (“[S]ocial theory is a body of knowledge that explains the social world, and theorizing is a process or a way of working that produces social theory.”).

229. *Id.*

230. *Id.*

231. *Id.* at 62.

232. *Id.*

233. *Id.*
Third, critical theory, as a dialectical theory of society, rejects the traditional epistemological stance of traditional theory. Intersectionality’s similar technique of dialectical engagement, in view of Horkheimer’s commitment to dialectical processes, recognizes that, given the power relations that shape all dialogues, dialogue between groups often does not take place among equals. Recalling the identification of bias and social theory with which philosophers approach their works, “[w]hen it comes to understanding how epistemic oppression and epistemic resistance influence intersectional theorizing, this construct of dialectical analysis” is useful.

Fourth, critical theory holds itself accountable. It critically assesses its methodology. It is accountable to itself for effects that its knowledge—both observed and generated by theory—has or may have. This is in stark contrast to traditional theory which “brackets out” its own influence on practices that come about through its own power relations. Building upon these principles of critical theory, self-reflexive praxis of social engagement is at the core of Intersectionality.

In sum, this proposed critical intersectional approach has three stages:

i. **Stage 1: Dialectical determination of context.**

It is essential to clarify the specific context within which the analysis will occur. The Hegelian dialectical method guides that clarification, whereby legal scholars and policymakers consider as object the American legal system’s handling of discrimination generally.

ii. **Stage 2: Identify oppressive conditions and relevant principles of power.**

Analysis of oppression traditionally begins with that which is identifiable: social identity. To move beyond an individualized

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234. *Id.*
235. *Id.*
236. *Id.* at 63.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Siebers, supra* note 137, at 14 (“Identities, narratives, and experiences based on disability have the status of theory because they represent locations and forms of embodiment from which the dominant ideology of society becomes visible and open to
“intentionalist understanding” of stigmatization and discrimination grounded in power hierarchies, analysts must reframe their analysis to center on entrenched community conditions rather than fluid individual identities. First, identify the context in which the social identity is created, who is being oppressed, and who is being privileged by reason of identity. Then, identify conditions adjacent to oppression as indicators of intersection of state power and principles and ideologies of power. The conditions are the identifiable indicators and expressions of power.


At this point in the analysis, scholars and policymakers are prepared to ask essential questions, which can be organized into four groups:

1. What are the core principles? What are the forms and expressions of these principles? How do forms and expressions change?

2. What are the express normative aspirations sought through this legal action?

3. What power differentials (social theories/ideologies) perpetuate epistemic oppression and epistemic resistance that interfere with dialogue among equals?

4. What is the effect of this newly observed and conceptually generated knowledge on real people in real life? Does the effect align with the desired remedy, which is identified by the oppressed community itself?

243. COLLINS, supra note 21, at 61–64.
244. Matsuda, supra note 15, at 70. Matsuda argues persuasively that “looking to the bottom helps to refute the standard objections to” what some call reparations—generally—and what Dr. King referred to as “corrective legislation.” “In response to the problem of horizontal connection among victims and perpetrators, a victim would note that because the experience of discrimination against the group is real, the connections must exist. . . . The continuing group damage engendered by past wrongs ties victim group members together, satisfying the horizontal unity sought by the legal mind.” Id. Integrationism views race reform as legitimate only when oppressed peoples move into historically privileged (white) schools, participating in privileged (while) cultural activities, and working in privileged (white-owned and white-controlled) economic enterprises. Gary Peller, Race-Consciousness, 1990 DUKE L.J. 758 (1990), reprinted in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 127, 137–39 (Kimberlé Crenshaw et al. eds., 1995)
This framework allows analysts to start to bring about the preconditions (understanding) for the alteration of conditions, just as Adorno contemplated.\textsuperscript{245}

\textbf{III. APPLICATION OF THE PROPOSED CRITICAL INTERSECTIONAL FRAMEWORK TO PRTFs IN RESPONSE TO THE COVID-19 PANDEMIC}

[C]ritical theory has no specific influence on its side except concern for the abolition of social injustice. – Max Horkheimer\textsuperscript{246}

As with the development of Black feminist theory, this analysis must undertake two distinct knowledge projects to create a framework upon which to develop a critical intersectional theory: producing a body of intersectional knowledge and advancing that knowledge toward a critical theory capable of \textit{interpreting} and \textit{changing} society. The following application demonstrates how legal scholars and policymakers can reposition issues and create cognitive freedom. This dialectic approach brings about new questions in a recursive process whereby the analysis surmounts old ideas and incorporates new insights toward a critical consciousness.

\textit{A. Stage 1: Dialectical Determination of Context.}

Recalling from Part I, dialectic logic walks through three moments.\textsuperscript{247} In step one (the fixed, stable moment) we regard the American legal system through the lens of identity thinking; it is in fact what it claims for itself. It is a system that administers justice; through reasoned analysis of law and fact, it establishes right and final determinations of law.

In step two (negative dialectics) the object is negated and yet a partial element is preserved in a synthesis of something yet to emerge. Non-identity thinking recognizes that the object is distinct from the ideal because it fails to fulfill all aspects of the ideal. The legal institution administers state power. The legal system thereby empowers certain

(explaining that integrationism, arising from liberalism, fails to understand racial justice in terms of the transfer of resources and power to the oppressed communities as an entities; “providing the material means for improving the housing, schools, cultural life, and economy of oppressed neighborhoods”).

\textsuperscript{245} See supra notes 102–110 and accompanying text.
\textsuperscript{246} HORKHEIMER, supra note 21, at 209.
\textsuperscript{247} See supra notes 74–83 and accompanying text.
theories. To address oppression in court, the legal system, through the legal tradition (jurisprudence) requires that the plaintiff conform a claim of oppression as a cause of action: an individual acted intentionally and directly upon another individual with a particular identity which resulted in discrimination. Identity here refers to the product of theory which is reified into ideology (i.e., race, class, disability). Thus, identity-as-ideology becomes the center around and through which the legal analysis occurs. Yet identity is fluid. Therefore, the American legal system cannot administer justice as a right and final determination of law to any lasting effect.

In step three (the positively rational stage), upon closer inspection, it is evident that administration of justice situates the American legal system as an epistemic system through which information arising from competing knowledge claims is filtered and knowledge is validated as an expression of state power. The court issues a ruling and opinion: judicially produced knowledge. The opinion contains findings of facts and findings of law. The opinion becomes law which has a powerful role in ongoing social formation and future traditional legal theory.

B. Stage 2: Identify Oppressive Conditions and Relevant Principles of Power.

1. Characterization of the problem

Children across the country are forced to live in institutions to receive basic mental health care and treatment because many states lack adequate access to community-based mental health services. A child should only be placed in a psychiatric residential treatment facility—a specific type of
institution also known as a PRTF—when removal from the home is essential for treatment. Too often this is not the case. Residency in institutions is strongly associated with developmental delays as well as delays in physical growth, cognition, and attention. While children do show recovery once they leave the institutions and move to home-like environments, these delays can persist for more severely affected children.

On any given day, around 700 of North Carolina’s children are locked up, twenty-four-hours a day, in PRTFs. The children are almost

251. 10A N.C. ADMIN. CODE 27G .1901(c) (2005) (mandating that a PRTF “shall provide a structured living environment for children or adolescents who do not meet criteria for acute inpatient care, but do require supervision and specialized interventions on 24-hour basis”); 10A N.C. ADMIN. CODE 27G .1901(e) (mandating that a PRTF “shall serve children or adolescents for whom removal from home or a community-based residential setting is essential to facilitate treatment”).


253. Id. at 703. A recently published global study demonstrates that such institutions harm children. “Every effort should be made to minimize children’s exposure to institutional care. Reducing the number of children entering institutions and increasing the number leaving institutions is urgently needed. Where institutional care is considered absolutely necessary, the length of stays should be as short as possible, even if care is adequate.” Id. at 704. The study excluded therapeutic institutions like PRTFs. Id. at 707. However, the paper notes several times that children with disabilities need even more support from caregivers than the children without disabilities who were the subject of the study. See id. at 706–07. Not enough staffing causes “global deprivation” to children—meaning not enough stimulation is provided to the child to support proper physical, emotional, and cognitive development. Id. Globally depriving institutions have high staff turnover, staff with little training, poor caregiver-child interactions, and segregation of children with disabilities and other health problems. Globally depriving institutions staff at ratios of one staff to between ten and thirty children. Id. A “psychologically depriving” institution typically has the same type of staffing flaws as a globally depriving one but has a staff ratio of one staff to between three and six children. Id.; 10A N.C. ADMIN. CODE 27G .1902(b). North Carolina PRTF licensing regulations require staffing at the psychologically depriving level of two staff members per six children. Every child at a PRTF has a mental health disability. Id. “At all times, at least two direct care staff members shall be present with every six children or adolescents in each residential unit.” Id. Staffing is central to the harms caused in PRTFs. The North Carolina Department of Health and Human Services frequently cites facilities for failing to have required staffing ratios.

254. The Author is aware of this number of North Carolina children institutionalized in PRTFs through presentations at stakeholder meetings for the Every Day Matters Initiative; the numbers are otherwise unpublished, which the Author contends is part of the problem in addressing issues in PRTFs. See Supporting the NC Six Core Strategies© and Building Bridges/Every Day Matters Initiative, THE IMPACT CTR. AT FPG (Aug. 27, 2019), https://impact.fpg.unc.edu/news/supporting-nc-six-core-strategies©-and-building-bridges/very-day-matters-initiative [https://perma.cc/WA9K-DXMC]. This number reflects data
completely isolated from the outside world. They are educated at the facility through PRTF-established nonpublic schools. PRTFs are staffed facilities that do not provide a child with a family or home-like environment. Space is limited. Infection control varies widely. 

PRTFs are regulated by the state. Demographic information for children living PRTFs is very difficult to obtain because many states, including North Carolina, do not collect or maintain records of that data. Data can be compiled by requesting records from the facilities themselves, Medicaid, private insurance companies, and managed care organizations, but it is a time-intensive undertaking and it is not real-time data. Generally, the majority of children residing in PRTFs in North Carolina and throughout the Southeast are Black or Brown children, most are in the care and custody of county child welfare organizations, and Medicaid pays for most of the treatment costs—up to $800 per day.

2. Supreme Court Jurisprudence: Through the Lens of a Medical Model of Disability Formulated as Individual Pathology

When a child is placed in state-institutional care, the child’s private interest is implicated. In March 2020, at the onset of the pandemic, all children in the country were sent home from school for their own health and safety. When schooling resumed, many school districts kept children and teachers at home and moved to remote education. During that time, however, children remained in PRTFs, sharing living space. Inevitably, staff members brought the virus into the facilities. Even in the best of circumstances, maintaining standards of cleanliness and infection control is difficult. Additionally, it is difficult to maintain the enhanced hygiene from North Carolina Medicaid. It does not include children who receive care at PRTFs through private or other funding sources.

255. van IJzendoorn et al., supra note 252, at 703–04.
256. This observation stems from data that the Author has personally recorded and observed in the course of her job at the state-designated Protection and Advocacy system. Other data supports this observation. For example, recent documentation from one facility revealed that ten of twelve residents were Black, eight of twelve were in the care of county guardians, and twelve of twelve were receiving care under Medicaid funding. Hannah Rappleye et al., A Profitable ‘Death Trap’: Sequel Youth Facilities Raked in Millions While Accused of Abusing Children, NBC News (Dec. 16, 2020, 5:17 PM) https://www.nbcnews.com/news/us-news/profitable-death-trap-sequel-youth-facilities-raked-millions-while-accused-n1251319 [https://perma.cc/VX3E-K9JL].
257. See Keith & Gharib, supra note 6.
practices required to curtail viral transmission with children who struggle with behavioral control. Given these factors, the risk of infection and resultant disease is high for children living in these congregate facilities. This is evidenced by several PRTFs in North Carolina having multiple COVID-19 outbreaks. One PRTF knowingly admitted a child amidst an outbreak. Even more concerning, medical professionals do not yet understand the long-term health impacts of exposure or disability that these children may face as a result of the infection.

Liberty interest is implicated because PRTFs significantly restrict freedom of movement and space-per-resident. In the context of the pandemic and infection control, PRTFs limit the ability to maintain social distancing. Space is a privilege these children do not have. Children living in PRTFs have the right to due process under the Fourteenth Amendment to the United States Constitution. However, Supreme Court jurisprudence has established a floor with almost no due process protection. While some states like North Carolina have enacted statutes that go beyond the minimal constitutional requirement, most states in the Southeast have not. Therefore, depending on the jurisdiction in which the child is receiving treatment, due process can vary drastically. Furthermore, pursuant to the Interstate Compact on the Placement of Children, children are regularly placed out-of-state for treatment. For example, as of 2013, North Carolina had approximately 200 children living in out-of-state PRTFs on

259. Div. of Health Serv. Regul., N.C. Dep’t of Health & Hum. Servs., Statement of Deficiencies and Plan of Correction for Canyon Hills Treatment Facility 11 (2020), https://info.ncdhhs.gov/dhss/mh/lcs/sods/2020/20200602-110356.pdf [https://perma.cc/RM8E-PWPA] (“Client #1 was . . . placed on the B wing of the facility with two clients who had tested positive for Covid-19. In addition, a staff who tested positive for Covid-19 was working on the B wing. . . . The facility received positive test results for 14 of 19 clients on 4-27-20. However, they admitted Client #1 on 4-29-20 after the Health Department determined the facility had a Covid-19 outbreak. The facility did not disclose to the placement agency that the facility had a Covid-19 outbreak prior to admitting Client #1 into the facility.”). The state deemed a violation for serious neglect and the facility was fined $3000. Id.

260. See Parham v. J.R., 442 U.S. 584, 613 (1979) (concluding that “an independent medical decision-making process, which includes [a] thorough psychiatric investigation . . . followed by additional periodic review of the child’s condition, will protect children who should not be admitted”); Kent v. U.S., 383 U.S. 541, 562 (1966) (holding that the hearing in juvenile court must measure up to the essentials of due process and fair treatment but is not required to conform to all requirements of a criminal trial or administrative hearing).

261. Parham, 442 U.S. at 613.

262. See infra Table 1.

any given day. As a result, many children who are residents of North Carolina have been denied any opportunity to petition for their release during the pandemic because they are receiving treatment in another state.

In 1967, the Supreme Court of the United States held in *In re Gault* (*Gault*) that in juvenile court proceedings, which are civil in nature, a minor has the right to notice of the charges, counsel, confrontation and cross-examination, privilege against self-incrimination, receive a transcript of the proceedings, and appellate review. The *Gault* decision was a distinct break from past jurisprudence, which held that children did not have a liberty right, but rather, merely a custodial right under common law.

In 1979, in the cases of *Parham v. J.R.* (from Georgia) and *Secretary of Public Welfare v. Institutionalized Juveniles* (from Pennsylvania), the Burger Court addressed the issue of “what process is constitutionally due a minor child whose parents or guardian seek state administered institutional mental health care for the child and specifically whether an adversary proceeding is required prior to or after the commitment.” In both cases, the Court held that a review of a child’s case by a neutral decision maker was necessary and sufficient; an adversarial procedure was not required.

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264. See Matthew Herr, *Outsourcing Our Children: The Failure to Treat Mental Illness In-State*, 24 N.C. INSIGHT 56, 56 (2014). Updated numbers are currently unpublished, which the Author asserts is part of a systemic issue of failing to track North Carolina children as they are sent out-of-state. Through the Author’s work at Disability Rights North Carolina, the Author has personal knowledge of North Carolina children currently placed in PRTFs in Tennessee, South Carolina, Georgia, and Arkansas under the authority of this law.

265. In contrast, litigation has moved forward to depopulate North Carolina prisons due to the risk of contracting COVID-19. See *NAACP v. Cooper*, 20 CVS 500110 (Wake Cnty. Super. Ct. Apr. 8, 2020). DRNC has joined with the ACLU of North Carolina, NAACP-NC, and other advocacy organizations to attempt to address the exposure of incarcerated individuals with disabilities to COVID-19.

266. *In re Gault*, 387 U.S. 1, 17 (1967) (“[P]roceedings involving juveniles were described as ‘civil’ and not ‘criminal’ and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.”).

267. *Id.* at 10, 17 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)) (“We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.”).

268. *Id.* at 17; Curtis C. Shears, *Legal Problems Peculiar to Children’s Courts*, 48 A.B.A. J. 719, 720 (1962) (“The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so.”).


In a nod to Gault, Chief Justice Burger wrote, “It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state’s involvement in the commitment decision constitutes state action under the Fourteenth Amendment.”271 However, the Burger Court did not follow Gault’s construction of the private interest of the child. Instead, it constructed the due process right of a child through the jurisprudence lens of parental rights mitigated by an interest-balancing test272:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.273

Here, it is important to recognize that the opinion’s conceptual framework of disability proceeds from a medical model.274 This framework gives rise to specific limiting normative assumptions. For example, the opinion compares mental health treatment to a “tonsillectomy, appendectomy, or other medical procedure.”275

The heart of the debate about social justice arises from the inherent tension grounded in different models of race, class, and disability. Liberalism gives rise to individualist and essentializing concepts, with the primary responsibility for difference arising within the individual.276 These concepts justify a restricted (if any) state role in correcting inequality. At the intersection of liberalism, capitalism, and social theory (in this case, the medical model of disability) we find the normative assumption that

271. Id. at 600.
272. See id. at 602–03. Supreme Court jurisprudence upholds broad parental authority over minor children. JAMES KENT, COMMENTARIES ON AMERICAN LAW *190 (Charles M. Barnes ed., Little, Brown, & Co. 13th ed. 1884). The longstanding position of the Court with regard to presumptive parental relationship is best summarized as, “Natural bonds of affection lead parents to act in the best interests of their children.” Parham, 442 U.S. at 602.
274. See Rioux & Valentine, supra note 16, at 50–51 (describing the scientific view of disability through a medically oriented treatment regime).
275. Parham, 442 U.S. at 603–04 (“The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents’ authority to decide what is best for the child.”).
disability is an “individual pathology,” which gives rise to the two formulations of disability found in Parham.277 One is a biomedical approach, focused primarily on professionals providing treatment, cure, and comfort.278 The other is a functional approach, in which “disability is a consequence of individual functional abilities and capabilities.”279 Both approaches lead to a societal approach to disability as a field of professional expertise directed to the treatment and cure of the individual.280 It is a positivist paradigm, characterizing disability as incapacity in relation to non-disabled persons.281 The paradigm distinguishes disability and its costs as an anomaly and social burden.282 It further portrays the inclusion of people with disabilities as a private responsibility whereby disadvantage is privatized pursuant to justification of the limitation of state intervention for prevention and comfort.283

In Part I, this Article discussed the duality of the active and passive subject regarding the individual and society. In Part II, this Article made the connection between this recognition and the observation that a challenge to applying antidiscrimination law to address conditions of oppression is that the responsibility for the creation of such conditions is situated within the “passive” society. This creates resentment within individuals who, although they benefit from oppression, do not feel they are at fault for the conditions and thus it is unjust to hold them accountable. Here, in Part III, the challenge of addressing conditions of oppression because of the duality of subject informs our understanding of entitlement.284

The construct of entitlement as “charitable privilege” arises from the medical model of disability and gives rise to equality constructed as “equal opportunity.”285 Providing care and treatment for people with disabilities has historically been based on “benevolence and compassion and on forms

277. *Id.* at 50.
278. *Id.*
279. *Id.*
280. *Id.*
282. *Id.*; *Parham v. J.R.*, 442 U.S. 584, 597–99 (1979) (“[T]he State was merely assisting parents who could not afford private care by making available treatment similar to that offered in private hospitals and by private physicians. . . . As medical knowledge about the mentally ill and public concern for their condition expanded, the states, aided substantially by federal grants, have sought to ameliorate the human tragedies of seriously disturbed children.”).
284. *Id.* Equal opportunity presumes barriers to participation can be overcome.
285. *Id.*
of paternalism.”

That “social responsibility arises from the acknowledgement that while there is a functional incapacity inherent to the individual, the physical and social environments may exacerbate it.”

“If people with disabilities are seen as biomedically and functionally incapable of participating in the social life of their communities, the obligation of the state is likely to be circumscribed and limited only to humanitarian relief.”

Discrimination can be justified as “a mechanism to protect the individual from harm to self and to others.” This form of paternalism is a significant impediment to equality for individuals with disabilities. Thus, the challenge to creating conditions necessary for equality is threefold: overcoming (1) the normative assumptions of the passive society as subject, (2) the passive restricted model of state as subject, and (3) the simultaneous active individual subjects within society regarding individuals as disabled from a paternalistic “charitable privilege” perch.

The medical model and the construct of charitable privilege situate disability as an individualized private concern and the primary point of intervention. Thus, politicians give justifications based on biomedical views to rationalize their failures to enact corrective legislation while advancing their policy and spending priorities “at the expense of the exercise of rights” of oppressed peoples.

A distinction is then made between what falls within the public domain and what falls within the private domain. Limiting economic expenditure to ensuring the relief of private disadvantage is then arguably reasonable. In this way, a cost-benefit analysis is factored into how far one has to go to ensure the rights and citizenship of people with disabilities.

This formulation speaks directly to the choice of the Court in Parham to employ an interest-balancing test and the requirement that state fiscal burden be considered in opposition to the private interests at stake.

Similar to Dr. King’s argument that the privileging of order over freedom was based on values and lacked independent necessity, so too is the formulation of disability as individual pathology. A construction of

286. Id. at 57.
287. Id.
288. Id. at 58.
289. Id.
290. Id. at 50–51.
291. Id. at 48.
292. Id. at 51.
293. Cook, supra note 15, at 94.
disability as “social pathology” is also valid. Disability grounded in social pathology begins with the assumption that “disability is a consequence of social structure and that the social determinants of disability can be identified and addressed.”

Society needs to be changed to enable the individual. The two approaches that flow from this formulation are an environmental approach and a human rights approach. The environmental approach advances on the knowledge that “personal abilities and limitations are the result, not only of factors residing in the individual but also of the interaction between individuals and their environments.”

The human rights approach flows from knowledge that “disability is a consequence of how society is organized and the relationship of the individual to society at large.”

The environmental approach is concerned with the individual’s immediate surroundings, while the human rights approach is focused on systemic factors and change. Both approaches share several identifiable characteristics: assuming that disability is not inherent in the individual; situating society as the unit of analysis; prioritizing solutions in the political, social, and built environments; emphasizing secondary prevention rather than primary treatment; recognizing disability as difference rather than abnormality; and holding inclusion of individuals with disabilities as a public responsibility.

In addition to the model of disability, the representation of disability matters. Liberalism dictates that difference is ignored. Arising from the model of individual pathology, difference is recognized as stigma. Disability itself is not what is noticed. Instead, it operates as an identifiable representation of misfortune, which is to say it is conceptualized as the bad luck of the individual. Disability is not seen as fact but rather an indicator of a category of person. This, in turn, creates a hierarchy of difference based not on disability itself, but on an abstract notion of luck. To be “fortunate” is better and therefore higher in hierarchy than to have “misfortune.”

Approaches to disability, under this binary construct, are expressed along a continuum; the focus is on prevention at one end, moving through treatment or cure, to rehabilitation, to tolerance. In Parham, the Court, specifically addressed the plaintiff’s concern regarding the stigmatization that arises.

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295. Id. at 49.
296. Id. at 52.
297. Id.
298. Id. at 51–52.
299. COLLINS, supra note 21, at 94.
301. Id. at 10.
302. Id.
from a mental health diagnosis, essentially saying that the stigma of having symptoms of mental illness is more damaging than the stigma of having been cured.  

Disability has long been a representational accessory to other social theories. It mediates social position along the multiple axes. So long as the targeted group can be conceptualized as “disabled” in some way, marginalization can be justified through the ensuing stigmatization. “Stigmatized social positions founded upon gender, class, nationality, and race often relied upon disability to visually underscore the devaluation of marginal communities.” This was evident in this Article’s earlier discussion of Kant’s and Hegel’s views being rooted in assertions of limited cognitive ability and various physiological differences. Many oppressed
groups have made gains toward equality in society over the last few decades. However, when their identities are tied to disability, “discrimination against them is justified anew.”

No one is just one thing. “Identity is . . . an epistemological construction that contains a broad array of theories about navigating social environments.” Identity makes knowledge claims. To address inequality, the law must engage with the complexity of knowledge claims across multiple social identities.


1. Step One: Identifying Core Principles and How They are Given Form and Expression

The Gault Court engaged with several core principles: individual freedom, social compact, rights of individuals, and limited powers of the state. This analysis recognizes that these principles of natural law, when taken together, work along the ideological axis of liberalism. The private, for-profit nature of PRTFs engage the economic principles of supply, demand, labor, and profit. These principles work along the ideological axis of capitalism. Governmental powers (state police powers) operate in service of health, safety, welfare and morals. These powers work along both axes and are given form and expression through a system of positive laws, as described by Kant; axes simultaneously represent foundational philosophical principles and constructed social theories (ideologies). The powers, along these axes, express social theories/ideologies of race, class, and ability, which take the form of programs, such as state Medicaid

and race was situated on a continuum of normality, on which American Blacks occupied the lowest rung and whites of so-called “Aryan heredity” who were able-bodied and of “sound mind” occupied the highest. Id. at 20–21.

308. SIEBERS, supra note 137, at 6. ("It is as if disability operates symbolically as an othering other. It represents a diacritical marker of difference that secures inferior, marginal, or minority status, while not having its presence as a marker acknowledged in the process. Rather, the minority identities that disability accents are thought pathological in their essence. Or one might say that the symbolic association with disability disables these identities, fixing firmly their negative and inferior status.").

309. Id. at 15.

310. In re Gault, 387 U.S. 1, 20 (1967) (making clear the Lockean foundation of the concept of due process American jurisprudence by stating, “Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”). Liberalism holds the individual as the unit of analysis. See Pothier & Devlin, supra note 136, at 10.
programs, child welfare programs, K–12 public education, and district courts, and their attendant programmatic goals.\textsuperscript{311}

2. \textit{Step Two: Statement of Express Ethical or Normative Aspirations Sought Through Legal Action}

Our express normative aspiration is equality and justice under the law. Both Locke and Kant formulated individual rights as proceeding from equality. The Declaration of Independence holds equality between individuals as self-evident. As such, this declaration of equality is the bedrock for the legitimization of American governance (among nations) and society (within the nation). It is the named normative aspiration in this Article because it has yet to be achieved in practice. Equality is necessary to bring about justice as conceptualized within the Beloved Community. Liberalism fails to establish equality; it performs equality in practice by ignoring difference. Equality is a normative assumption that is a legal fiction because in reality our society proceeds from multiple, co-created social theories of hierarchy.

What are we talking about, specifically, when we seek to engage the principle of equality in this context? The form and expression of equality must align with the knowledge of the problem generated by the epistemic system itself. We can think of equality in three ways. First, as “equal treatment,” which depends on sameness and presumes impartial enforcement of legal and social rights.\textsuperscript{312} Second, as “equality of opportunity,” which presumes barriers to participation can be “overcome.”\textsuperscript{313} Third, as “equal well-being,” characterized as “inclusion and participation . . . as the primary factor of entitlement to other forms of participation” and is based on a basic humanness value assumption.\textsuperscript{314} In the context of the pandemic and holding before us the vision of the Beloved Community, the third model of equality—equal well-being—is what is necessary to bring about health equity and health justice.

\textsuperscript{311} See U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

\textsuperscript{312} Rioux & Valentine, supra note 16, at 53.

\textsuperscript{313} \textit{Id.} at 54.

\textsuperscript{314} \textit{Id.}

Power differentials are indicators of social theories and ideologies at work. Social theories produce hierarchy. Hierarchy itself becomes ideological, which in turn becomes the “factual” basis of socially created traditions. These facts operate heuristically within knowledge production systems to validate and invalidate subsequently generated and observed information. Ideologically based heuristics are the unacknowledged fulcrums of our legal epistemic system. As such, they create a hierarchy of voices and narratives—competing knowledge claims—that dictate who is to be believed and who is to be disbelieved—who is deemed credible and who is deemed to lack credibility. This is a root of epistemic oppression—prevention of dialogue between equals. Therefore, this must be a site of resistance.

Here, we identify the express normative aspiration of equality and place it in dialogue with the system’s current normative assumptions to illuminate obstacles to the system delivering on its own claim of equality. Specifically, the current normative assumption of equality with regard to due process—a process rooted in dialogue—supports inequality among children in PRTFs regarding their ability to assert their private interest (in health, safety, and well-being) by petition for release from confinement. We return to the interest-balancing test used in Parham.

i. “[T]he private interest that will be affected by the official action[,]”

The Parham Court determined the private interest as follows:

Our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply. We also conclude, however, that the child’s rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care

315. Horkheimer, supra note 24, at 194.
316. Collins, supra note 21, at 34.
317. Id.
for their children, subject to a physician’s independent examination and medical judgement.\(^{319}\)

A first normative assumption is that parents will be heard—be believed and deemed credible. However, by function of social hierarchy (intersecting and co-creating social theories), individuals and groups are situated unequally in dialogue at the intersections of multiple axes of power. That hierarchy assigns different degrees of credibility to knowledge claims which in turn legitimize and delegitimize entitlements. This is properly understood as inherently unequal degrees of power in oppositional dialogue.

Regarding both children residing in PRTFs and their parents and kinship guardians, theories of race, ability, class, and age militate, to varying degrees, against their knowledge claims, power, and ability to be heard as equal in dialogue when they are in opposition to medical professionals, child welfare professionals, and agents of the court. Heuristics delegitimize the knowledge claims of certain race or ethnic groups (identifiable by physical characteristics or claimed identities), of classes (identifiable by education attainment, economic status, profession, linguistic structures, verbal accent, and cultural references), of disabilities (identifiable by physical ability, cognitive abilities, developmental ability, and psychological health), and of age groups (as identified by physical appearance, fashion, chronological age, demonstrated developmental maturity). In opposition to children, parents, and kinship guardians, heuristics assign presumptive credibility and deference to professionals.

The majority of children who reside in PRTFs in North Carolina are poor Black and Brown children who, in most cases, have poor Black and Brown parents and kinship guardians. Generally as a function of social location, particularly given the history of the American South, parents and kinship guardians will have had relatively limited access to formal education and correspondingly low levels of attainment.\(^{320}\) Furthermore, having had historically limited access to healthcare and continuing to be subject to discrimination within the healthcare system, parents and kinship

\(^{319}\) Id. at 604.

guardians often are themselves disabled as a function of chronic and undertreated illnesses and injuries.\textsuperscript{321}

Acknowledgment of the power of heuristics is important because although \textit{Parham} refers to “plenary power” of the parent, the opinion recognizes two noteworthy checks on the exercise of that power: parental fitness as determined by \textit{child welfare agencies} and clinical discretion as mediated by \textit{professional judgment}.\textsuperscript{322} First, given the power differentials involved, this construction of private interest implicitly co-produces inequality. Second, our history is replete with examples of the rights of minority parents and kinship guardians being grossly disregarded by professionals and the state.\textsuperscript{323} Third, this construction serves to exclude the knowledge required to change the legal system from entering the courts. Our legal system positions poor minority parents and kinship guardians, whose credibility and subsequent knowledge claims are heuristically delegitimized, in opposition to doctors, social workers, and lawyers, all of whom are heuristically privileged with high degrees of professional deference and high degrees of credibility, and are most often of dominant race, ethnic, and class groups. The burden is placed squarely on the oppressed to fight for their children’s freedom when, erroneously, they have been made captives.

A second normative assumption is that \textit{all} guardians are equal. Within a single state, children are not similarly situated by way of guardianship status. This reality plays a large role in militating against the opportunity of the child to be heard by relevant professionals, to access the courts, and to be heard on their own concerns regarding their own interests. There is a


\textsuperscript{322} \textit{Parham}, 442 U.S. at 604.

strong line in legal tradition regarding the deference given to parents.\textsuperscript{324} However, today the majority of children in PRTFs are not only poor, Black or Brown, and disabled, but also isolated from their families of origin and in the care and custody of the state. This guardianship distinction was recognized but not addressed in \textit{Parham}.\textsuperscript{325} The legal obligation of the state guardian to the child is set forth in statute.\textsuperscript{326} There is considerable evidence that calls into question what deference is owed the state guardian.\textsuperscript{327} The \textit{Parham} opinion recognizes two checks on the plenary power of the parent. These do not check the power of a state guardian in any meaningful way. It is a child welfare agency itself that investigates parental fitness upon reports of abuse or neglect. \textit{Parham} ultimately allows the child welfare agency to act as a check on itself. Yet too often children with complex needs suffer neglect in institutional settings. Child welfare agencies often view PRTFs as de facto permanent placements. With overwhelming caseloads, social workers often cannot give adequate time to advocate for the many needs of children with mental health disabilities, including the clinical and legal need to be moved to a less restrictive treatment environment when they are ready. In practice, \textit{Parham} actually gives more power to the state than to the parent without any legal justification. The failure of \textit{Parham} to consider evidence of actual abuses and documented history of neglect by child welfare agencies is an artifact of the record on appeal.\textsuperscript{328} It must be corrected.

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{324} \textit{Parham}, 442 U.S. at 602.
    \item \textsuperscript{325} \textit{Id.} at 618 (assuming that the “state will protect a child’s general welfare stems from a specific state statute”).
    \item \textsuperscript{326} \textit{Id.}
    \item \textsuperscript{327} \textit{See, e.g.}, FINAL REPORT, supra note 323. The Eugenic Board of North Carolina was established to oversee the sterilization of inmates and patients of publicly funded institutions deemed “mentally ill” or “feeble minded” by authorities. \textit{Id.} at 5. The Board expanded its scope to empower county departments of public welfare to petition for the sterilization of their clients. \textit{Id.} The vast majority of sterilizations were coerced. Blacks were disproportionately targeted for sterilization. \textit{Id.} at 7. Of the 7,686 sterilizations the Board performed since 1933, 5,000 were performed on Black people. Donna Franklin, \textit{Beyond the Tuskegee Apology}, WASH. POST (May 29, 1997), https://www.washingtonpost.com/archive/opinions/1997/05/29/beyond-the-tuskegee-apology/7f53a195-38e1-4c74-bb9f-1a75f0386c9e/ [https://perma.cc/XA6S-T3V6]. The Board operated until 1977, less than two years before the Supreme Court decided \textit{Parham}. See FINAL REPORT, supra note 323.
    \item \textsuperscript{328} \textit{Parham}, 442 U.S. at 618. The Court declined to make the assumption that the state “acts so differently from a natural parent in seeking medical assistance for the child.” \textit{Id.} Because the plaintiffs did not present evidence of state guardians supporting such a presumption, the Court declined to decide that issue. \textit{Id.}
\end{itemize}
\end{footnotesize}
A third normative assumption is that children, parents, and kinship guardians are all “citizens” within the dialogue of due process. Here we turn to the concept of citizenship, which has both form and substance. Citizenship in form is an individual status. Citizenship in substance is the “capacity to participate fully in all the institutions of society.” It is participation “that locates individuals in the larger community.” Together, the axes of ideology (based on core principles and social theories) and state power co-create “a system of inclusion and exclusion, defining boundaries between who belongs and who does not, who enjoys the privileges (and duties) associated with membership and who is denied such privileges.” Oppressed groups are thus “denied formal and/or substantive citizenship” and are “assigned to the status of ‘dis-citizens’ a form of citizenship minus” because identity (what is identifiable) operates in society as an organizing principle of political power. Oppressed people are made non-citizens and denied their agency as political actors. This has important implications for legal participation in due process dialogue and political organization for equality.

329. Rioux & Valentine, supra note 16, at 55. Citizenship is implicated also as a function of the model of equality, in which equal well-being based on inclusion and participation is the primary factor of entitlement. Id.
330. Id. (“Citizenship principles allow us to follow the ways that patterns of access are being altered under the pressure of new economic and social realities and public choices.”).
331. Pothier & Devlin, supra note 136, at 1.
332. Id. at 2.
333. Id. at 1–2.
334. Rioux & Valentine, supra note 16, at 55 (“[T]he concept of citizenship evokes an understanding of individual entitlement, as well as attachment to a particular community.”).
335. Pothier & Devlin, supra note 136, at 2; see also Rioux & Valentine, supra note 16, at 55.
ii. “[T]he risk of an erroneous deprivation of [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]”

A fourth normative assumption is that, because all states are facially compliant with the constitutional requirement of due process, all children are similarly situated with respect to their liberty interest. The reality is that states have significantly different statutory requirements. In practice, most states fail to protect children equally from erroneous loss of liberty.

<table>
<thead>
<tr>
<th>State</th>
<th>Due Process Category (A=Adversarial all ages, H=Hybrid by age, P=Parham/common law only)</th>
<th>Does a court review/approve continued admission (beyond evaluation period)?</th>
<th>Ongoing review of admission required?</th>
<th>max # days before admission reviewed?</th>
<th>Max # days between reviews?</th>
<th>Is the minor appointed counsel?</th>
<th>Can minor petition for release?</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Carolina</td>
<td>A</td>
<td>Y</td>
<td>Y</td>
<td>90</td>
<td>180</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Kentucky</td>
<td>N[^40]</td>
<td>Y</td>
<td>Y</td>
<td>60</td>
<td>180</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Mississippi</td>
<td>N[^42]</td>
<td>Y</td>
<td>termination of initial order</td>
<td>NA</td>
<td>NA</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>Alabama</td>
<td>P</td>
<td>N</td>
<td>N</td>
<td>NA</td>
<td>NA</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>Florida</td>
<td>P</td>
<td>N</td>
<td>N</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>N</td>
</tr>
<tr>
<td>Georgia</td>
<td>P</td>
<td>N</td>
<td>N</td>
<td>NA</td>
<td>6 months</td>
<td>NA</td>
<td>N</td>
</tr>
<tr>
<td>South Carolina</td>
<td>P</td>
<td>N</td>
<td>N</td>
<td>NA</td>
<td>6 months</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>Tennessee</td>
<td>P</td>
<td>N</td>
<td>N</td>
<td>6 months</td>
<td>N</td>
<td>Y</td>
<td>N</td>
</tr>
</tbody>
</table>

Table 1 Due Process Rights of Children Voluntarily Admitted to PRTFs in the Southeastern States

Analysis of statutes of several states in the Southeastern region demonstrates the various legislative approaches to due process. The

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338. N.C. GEN. STAT. §§ 122C-223 to -224.7 (2020).
340. KY. REV. STAT. ANN. §§ 645.030, .060. Youth age sixteen and older follow adult proceedings. Counsel is appointed for youth under sixteen years of age if parent or guardian petitions for certification.
342. MISS. CODE ANN. § 41-21-103(4), (5). Youth under age fourteen are admitted by parent or guardian. Youth age fourteen and older but younger than eighteen may be admitted
requirements vary along a continuum. On one end is North Carolina, which has adopted a statutory process substantially similar to that of the adversarial standard required by *Gault*.\(^{349}\) This was deemed unnecessary by the Supreme Court in *Parham* but is permissible.\(^{350}\) At the other end is Georgia, which follows the minimal process allowed by *Parham*.\(^{351}\) In North Carolina, all children are appointed counsel for representation in court for an initial review of admission and for subsequent regularly recurring hearings before a judge who determines whether evidence supporting continued admission meets a required legal threshold.\(^{352}\) In Georgia, a child’s admission and continued institutionalization are reviewed solely at the discretion of a director or other purportedly neutral factfinder within the institution itself.\(^{353}\) Currently, North Carolina sends children to Georgia for treatment at a PRTF, with Medicaid funds paying for treatment and North Carolina maintaining jurisdiction over the child. The children, because they are physically located in Georgia, in effect loses the due process rights they would have enjoyed had they received treatment in North Carolina but for the random chance of being placed by a managed care organization outside the state.

A fifth normative assumption is that whatever due process is adequate to prevent an erroneous initial admission of a child to a PRTF is also adequate to present erroneous continued residency.\(^{354}\) At one end of the

via the adult involuntary commitment proceeding which requires the appointment of counsel pursuant to § 41-21-67(3).

343. Ala. Code §§ 12-15-02, -411, 22-8-10, 22-52-10.4 (2020); R.J.D. v. Vaughn Clinic, P.C., 572 So.2d 1225, 1228 (Ala. 1990) (concluding that because the legislature has not addressed the question of the legal rights of a child admitted to a clinic for psychiatric treatment against her will but voluntarily admitted to the unit by her custodial parent, common law is controlling and thus the “parents’ common law right and duty to provide for the well-being of their children” prevails).

348. See supra Table 1.
349. See In re Gault, 387 U.S. 1, 30 (1967).
350. Parham v. J.R., 422 U.S. 584, 607 (1979) (“A state is free to require such a hearing, but due process is not violated by use of informal, traditional medical investigative techniques.”).
354. Parham, 422 U.S. at 607 n.15 (“[T]he District Court did not decide and we therefore have no reason to consider at this time what procedures for review are independently necessary to justify continuing a child’s confinement. We merely hold that a subsequent,
continuum, North Carolina mandates regular hearings which allow the child to present to the court evidence of improvement indicating that remaining in the most restrictive treatment environment is no longer necessary. At the other, Georgia’s statute fails to provide this important opportunity and therefore fails to provide an important safeguard against erroneous continued admission in violation the ADA. Thus, in Georgia, under the existing statute, a parent or guardian could be faced with the proposition of having to hire private counsel to bring an ADA claim should the treatment team determine that continued residence is appropriate and move to retain the child at the facility.

iii. “[T]he Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

The sixth normative assumption is that the state is both provider of and payor for mental health services. However, in most states mental health treatment is managed by the state, provided by private facilities, and paid for by a combination of private and public funds under a for-profit, managed-care model. In *Parham*, the Court addressed state-owned, operated, and funded institutions, relying on the affirmative and continuing duty imposed by the state on hospital superintendents to keep costs down to dismiss concerns that a clinician would fail to discharge a child as soon as appropriate. Today, however, such a duty does not exist for the private provider. In fact, along the axes of capitalism there is significant motivation to keep beds full in facilities, many of which are operated by hedge funds.

Independent review of the patient’s condition provides a necessary check against possible arbitrariness in the initial admission decision.”).

355. At this point the child should be moved to a less restrictive environment for continued treatment. *See Olmstead v. L.C.*, 527 U.S. 581, 607 (1999) (concluding that “under Title II of the ADA, States are required to provide community-based treatment for persons with mental health disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities”).

356. *Id.*

357. This implicates various state laws regarding involuntary commitment, which is typically what mental health professionals will seek if parents do not agree with the clinical determination for continued admission. This is beyond the scope of this Article. It is, however, an important issue of due process that must also be addressed.


359. *Id.* at 604.
motivated by maximizing profits for shareholders. Like for-profit prisons and for-profit immigrant detention centers, for-profit youth treatment facilities are a booming business. The state must ensure that vulnerable children placed in PRTFs are protected against the powerful motivation of profit, which provides significant motivation for erroneous retention of children at facilities.

The principles aligned along the axis of capitalism are advanced through contractual agreements between the state and providers. The axis of capitalism intersects with the axis of liberalism. When evaluating the government’s interest in the Parham test, we must consider that interest within the context of the medical model disability as individual pathology. In determining how much process is due, the process must be responsive to the unique vulnerabilities co-created at this intersection for specific populations across time—within historical context—in order to be appropriately protective of private interests of children and their families. The administrative and fiscal burdens necessary for proper protection must be determined through careful consideration of that knowledge.

4. Step Four: What is the effect of the newly observed and conceptually generated knowledge on real people in real life?

Parham finds justification situated within specific normative assumptions that arise from specific models and values. These assumptions lack necessity when compared to proposed alternate assumptions and conclusions. The normative assumptions underlying Parham produce inequality. The majority of children and their parents and kinship guardians are positioned as dis-citizens in the dialogue of due process. The Parham standard fails to protect their private interest adequately. This produces a high risk of erroneous deprivation of the liberty interest in the states that


361. Rioux & Valentine, supra note 16, at 51 (“A distinction is then made between what falls within the public domain and what falls within the private domain. Limiting economic expenditure to ensuring the relief of private disadvantage is then arguably reasonable. In this way, a cost-benefit analysis is factored into how far one has to go to ensure the rights and citizenship of people with disabilities.”).
have not enacted corrective legislation and a corresponding high probable value for creating additional or alternate procedural safeguards.

Turning to a fresh look at *Gault* as a model that imperfectly, but more effectively, establishes equality, the Court determined due process with respect to a child’s own a private interest independently of the parent or guardian. *Gault* held that when the state seeks to limit that interest in a civil proceeding, a due process hearing is required and the following is essential: the right to notice, appointed counsel, confrontation and cross-examination, the privilege against self-incrimination, to right to receive a transcript of the proceedings, and the right to appellate review. The holding of *Parham* perpetuates asymmetrical dialogue in a clinical setting: the child and parent or kinship guardian representing their individual and shared private interests are on one side, and the professionals representing the facility’s interest are on the other. The holding of *Gault* is corrective by recasting dialogue as between counsel representing the child’s interest on one side and the facility professional on the other side, thus aligning power differentials more symmetrically. Furthermore, the issue is before a judge, an independent party who brings state power and accountability to an order. Underlying the order is judicially produced knowledge. Importantly, access to legal advocates and courts is also a powerful corrective in this time of pandemic. As the important in-person monitoring and investigatory activities of many of the state and nonprofit agencies that serve to curb institutional abuses and neglect have been put on hold, a child or concerned party still has access to their appointed counsel and the court to surface abuses and neglect—including and importantly health issues that arise with COVID-19—when child welfare agencies and the facilities themselves are failing to take appropriate actions.

Considering children, their families, and PRTFs, organizing toward the goal of corrective legislation to end conditions of oppression and bring about health justice can take place at the state level in the form of state constitutional amendments and statutes. This is an important first step. However, as noted earlier, because children are sent between states for treatment, a state-by-state approach would not correct the current inequality conferred by geography. Therefore, organizing must also engage at the federal level. Certainly, this issue appears ripe for review at the United States Supreme Court. It also may be addressed through federal statutes that impact funding sources for treatment in PRTFs. After legislation, organizing must continue. Correction and formation call for a dialectical process to ensure the full exercise of rights based on equality and freedom.

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CONCLUSION

More broadly, the social location of “dis-citizenship” positions certain individuals and groups as “other” and best positioned due to their outsider status to produce the knowledge necessary for effective critique of the current system. It is advocates work to bring that knowledge into the legal system to effectuate change from within and to organize to effectuate change from without.

A new critical intersectional legal framework can help reframe health equality and health justice toward a more perfect union and ability to be heard as equal in dialoug. Our nation—founded on life, liberty, and the pursuit of happiness—is a year into the coronavirus pandemic. This pandemic has revealed the gap between what we are as a society and what we long to be. We are a nation conceived by the ideals of the Enlightenment: liberty, freedom, equality. These ideals have been light in darkness for the world. Yet, they have cast shadows. These principles have informed and continue to form our society. Recognizing law as an epistemic system of societal formation, we must intentionally democratize our legal epistemology, locate legal analysis within ongoing social processes, and consider overall the historic development of society to become the nation we have long aspired to be. Now is the time.

But one thing is certain: If we merge mercy with might, / and might with right, / then love becomes our legacy / and change our children’s birthright / So let us leave behind a country / better than the one we were left with / Every breath from my bronze-pounded chest, / we will raise this wounded world into a wondrous one / We will rise from the gold-limbed hills of the west, / we will rise from the windswepst northeast / where our forefathers first realized revolution / We will rise from the lake-rimmed cities of the midwestern states, / we will rise from the sunbaked south / We will rebuild, reconcile, and recover / and every known nook of our nation and / every corner called our country, / our people diverse and beautiful will emerge, / battered and beautiful / When day comes we step out of the shade, / aflame and unafraid / the new dawn blooms as we free it / for there is always light, / if only we’re brave enough to see it / If only we’re brave enough to be it.
– Amanda Gorman

363. Pothier & Devlin, supra note 136, at 2; Rioux & Valentine, supra note 16, at 49.
364. Gorman, supra note 1.