

## ***SHELBY, RACE, AND DISABILITY RIGHTS***

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Much has been written about the gradual, yet ongoing, evisceration of civil rights and the commitment to racial equality in contemporary American society so courageously fought for by generations of activists of all races. The Voting Rights Act of 1965<sup>1</sup> was famously paid for in blood by countless activists, notably three young men who were brutally lynched in Mississippi in 1964.<sup>2</sup> Yet this was only one chapter in a painful struggle that stretches back decades; a struggle that featured a stinging criticism of the shameful Jim Crow system that infected all aspects of American society by towering figures such as the iconic W.E.B. Du Bois,<sup>3</sup> St. Croix born Hubert Harrison<sup>4</sup> and the legendary Trinidadian socialist polymath C.L.R. James.<sup>5</sup>

In *Shelby v. Holder*,<sup>6</sup> a majority of the Supreme Court ruled that the coverage formula section requiring specified jurisdictions with a history of racial discrimination to pre-clear changes in voting tests, section 4(b) of the Voting Rights Act, was unconstitutional.<sup>7</sup> It is one more decision among many that have come to be known as the New Federalism jurisprudence which collectively manifest a resistance toward rectifying the various inequalities that continue to plague American society and an increasing willingness on the part of the Supreme Court to restrict Congress' ability to pass, *inter alia*, civil rights litigation pursuant to Section 5 of the 14<sup>th</sup> Amendment.<sup>8</sup> This marked retreat by the Rehnquist and

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<sup>1</sup> 42 U.S.C. §1973 (2012).

<sup>2</sup> See WILLIAM BRADFORD HUIE, *THREE LIVES FOR MISSISSIPPI* (1965). For a broader historical account of the period, see PENIEL E. JOSEPH, *WAITING 'TIL THE MIDNIGHT HOUR: A NARRATIVE HISTORY OF BLACK POWER IN AMERICA* (2006).

<sup>3</sup> See DAVID L. LEWIS, *W.E.B. DU BOIS: A BIOGRAPHY* (2009) for a magisterial biography of Du Bois' life.

<sup>4</sup> The leading source on the largely forgotten Harrison's life is JEFFREY B. PERRY, *HUBERT HARRISON: THE VOICE OF HARLEM RADICALISM, 1883-1918* (2009). Perry is currently writing volume two of Harrison's biography, which documents the final decade of Harrison's remarkable life.

<sup>5</sup> For three superb overviews of James' life, see PAUL BUHLE, *C.L.R. JAMES: THE ARTIST AS REVOLUTIONARY* (1988); KENT WORCESTER, *C.L.R. JAMES: A POLITICAL BIOGRAPHY* (1995); ALDON L. NIELSEN, *C.L.R. JAMES: A CRITICAL INTRODUCTION* (1997).

<sup>6</sup> 133 S.Ct. 2612 (2013).

<sup>7</sup> *Id.*

<sup>8</sup> See e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding Religious Freedom Restoration Act was not legitimate use of Fourteenth Amendment powers), *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Patent and Plant Variety Protection Remedy Clarification Act not legitimate use of Fourteenth Amendment powers given no evidence of a pattern of patent infringement by States), *Kimel v. Florida Bd. of Regents*, 528 U.S.62 (2000) (Age Discrimination in Employment Act authorizing private individuals to sue states for damages for age discrimination not a legitimate use of Fourteenth Amendment powers given lack of pattern of age discrimination by States),

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Roberts Courts has generated much reflection by those firmly committed to critical race praxis.<sup>9</sup> Critical race praxis entails a deep skepticism of law reform projects to alleviate the structural racism that continues to plague American society.

In this short essay, I suggest that scholars committed to a critical race paradigm need to think carefully about how legal retreats in voting rights directed at fighting racism may also adversely affect the voting rights of people with disabilities. The struggle against racism and the struggle against ableism at their core share a common language of solidarity against hierarchy, privilege and oppression.<sup>10</sup> Millions of Americans have disabilities and face an array of barriers in many aspects of life including employment, health care, education, transportation and housing.<sup>11</sup> People with disabilities also face significant barriers in voting including problems with access to polling stations, the actual process of voting and in some cases actual disenfranchisement.<sup>12</sup> In the aftermath of *Shelby*, it is an open question whether various provisions designed to protect the voting rights of people with disabilities, such as the 1982 amendments to the Voting Rights Act,<sup>13</sup> the Americans with Disabilities Act of 1990 (ADA),<sup>14</sup> and Help America Vote Act of 2002 (HAVA),<sup>15</sup> may face constitutional challenge. I propose that the narrative method, as represented by the landmark scholarship of socio-legal scholars David Engel and Frank Munger,<sup>16</sup> is one useful way to challenge ignorance about the lives

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United States v. Morrison, 529 U.S. 598 (2000) (holding that provision in the Violence Against Women Act providing victims of gender-motivated violence with a federal civil action against perpetrator could not be justified as legitimate exercise of Congress's power under Commerce Clause or 14<sup>th</sup> Amendment), and Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) (provision of Americans with Disabilities Act allowing private individuals to sue states employers for damages not valid use of Fourteenth Amendment given lack of evidence of pattern of disability discrimination by States)

<sup>9</sup> For an overview of critical race theory, see KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER, & KENDALL THOMAS, EDs., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995). For a recent commentary identifying *Shelby* as part of the New Federalism jurisprudence, see Joey Fishkin, *The Way Forward After Shelby*, BALKANIZATION (June 25 2013), <http://balkin.blogspot.ca/2013/06/the-way-forward-after-shelby-county.html>.

<sup>10</sup> For a suggestive reading of the similarities between racism and ableism, see BETH A. FERRI & DAVID J. CONNOR, *READING RESISTANCE: DISCOURSES OF EXCLUSION IN DESEGREGATION AND INCLUSION DEBATES* (2006)

<sup>11</sup> See DORIS Z. FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* (2011); Michael E. Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1832-35 (2005) (noting widespread barriers for people with disabilities).

<sup>12</sup> See *infra* notes 21-32, and accompanying text.

<sup>13</sup> 42 U.S.C. § 1973aa-6 (2002). As a conditional spending statute, HAVA is likely significantly less vulnerable than the other statutes. See generally Allison Quick, *Legal Limits on Conditional Spending including Recent Challenges to No Child Left Behind*, Harvard Law School Federal Budget Policy Seminar, Briefing Paper No. 19 (May 2, 2006).

<sup>14</sup> 42 U.S.C. § 12101 (2002).

<sup>15</sup> Pub. L. No. 107-252, 116 Stat. 1666 (2002).

<sup>16</sup> See DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2002).

of people with disabilities and the barriers they face, including barriers at the voting booth. The narrative method exemplifies the social model of disablement, which is centered on the need to remove structural barriers, which make society inaccessible for people with disabilities.<sup>17</sup> It is also consistent with the counter-storytelling approach advocated by critical race theorists such as Richard Delgado,<sup>18</sup> further suggesting possible opportunities for collaboration between critical race and disability theorists.

## I. Voting Rights and Disability Rights

While one typically thinks of voting barriers in the context of racial discrimination, people with both mental and physical disabilities have faced significant obstacles to exercising their right to vote. It is important to embrace a broader conception of equality to fully appreciate the barriers facing people with *physical* disabilities in particular, given that people with physical disabilities are not formally prohibited from voting and have a long history of running for elected office.<sup>19</sup> Yet the fact remains people with physical disabilities encounter many barriers with respect to a right that lies at the core of democratic values. Barriers include inaccessible polling places which may be located in schools, churches, libraries and recreational centers borrowed for the purposes of elections.<sup>20</sup> As Michael Waterstone notes, elections may present additional barriers because election officials may not have the authority to modify buildings borrowed for the purposes of polling or it may be too costly to modify for the purpose of elections.<sup>21</sup> Social science research demonstrates that accessibility barriers continue to be widespread. The General Accounting Office, for instance, found that 84% of polling places had one or more barriers in the 2000 presidential election.<sup>22</sup> These included barriers such as inordinately steep ramps, high door thresholds and a failure to

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<sup>17</sup> See MICHAEL OLIVER & COLIN BARNES, *THE NEW POLITICS OF DISABLEMENT* (2012). For American treatments, see NIRMALA EREVELLES, *DISABILITY AND DIFFERENCE IN GLOBAL CONTEXTS: ENABLING A TRANSFORMATIVE BODY POLITIC* (2011); Sunny Taylor, *The Right Not to Work: Power and Disability*, 55 MONTHLY REV. 30 (2004).

<sup>18</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989).

<sup>19</sup> Michael E. Waterstone, *Lane, Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 825 (2005) (hereinafter “*Lane*”). See also Michael E. Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV 353 (2003). Franklin Roosevelt, who had a mobility impairment due to polio, famously served as President of the United States during the Great Depression and World War II. See HUGH G. GALLAGHER, *FDR’S SPLENDID DECEPTION: THE MOVING STORY OF ROOSEVELT’S MASSIVE DISABILITY—AND THE INTENSE EFFORTS TO CONCEAL IT FROM THE PUBLIC* (1999). Even earlier, Eugene T. Kingsley, a double amputee, ran for the House of Representatives in California in 1896 and 1898 as a socialist before moving to Canada where he led a political party. See Ravi Malhotra, *Electioneering and Activism at the Turn of the Century and the Politics of Disablement: The Legacy of E. T. Kingsley (1856-1929)* 7 REV. DISABILITY STUD. 34 (2011). The author is writing, with Benjamin Isitt, a biography of Kingsley under contract for University of British Columbia Press.

<sup>20</sup> *Lane*, *supra* note 19, at 826.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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provide accessible parking.<sup>23</sup> A significant proportion of counties throughout the country failed to consider accessibility in planning polling sites.<sup>24</sup> The decentralized manner in which elections are conducted, with responsibility for accessibility conferred by states on thousands of local authorities, makes enforcing physical accessibility in voting that much more challenging.<sup>25</sup>

A second area where barriers are commonplace is during the actual voting process. People with dexterity issues face barriers in using these machines independently, which is essential to preserve the secrecy of the ballot.<sup>26</sup> People with visual impairments face issues in reading the ballot independently.<sup>27</sup> While electronic voting is slowly altering this, it is critical to ensure that the technology itself is fully accessible to people with disabilities.<sup>28</sup> As Waterstone has noted, states and counties also require appropriate funding, fraud prevention protocols and training for election workers in order for technology to work effectively.<sup>29</sup> Finally, the vast majority of states have enacted provisions, which restrict at least some people with mental disabilities from voting without an individualized test of capacity.<sup>30</sup>

While several laws address voting rights for people with disabilities to some degree, I focus, for the sake of simplicity and space constraints here, on two key provisions that are particularly likely to be subject to future challenge. Title II of the ADA prohibits discrimination against people with disabilities in services, programs, or activities of a public entity.<sup>31</sup> This would clearly encompass voting, although court decisions have been split on whether Title II mandates independent and secret voting.<sup>32</sup> HAVA provides very specific provisions to protect the rights of people with disabilities to vote. These include funding to ensure the accessibility of polling sites so that all citizens may independently vote and requiring voting

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (noting that more than one quarter of counties failed to consider accessibility in selecting polling places in 2000).

<sup>25</sup> Lane, *supra* note 19, at 825.

<sup>26</sup> *Id.* at 827 (noting more than 1.2 million Americans have insufficient dexterity to use a pen or pencil).

<sup>27</sup> *Id.*

<sup>28</sup> For an insightful discussion of the importance of implementing accessibility when designing new technology, See ALAN ROULSTONE, ENABLING TECHNOLOGY: DISABLED PEOPLE, WORK AND NEW TECHNOLOGY (1998) For some reflections on the delays in implementing electronic voting, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711 (2005).

<sup>29</sup> Lane, *supra* note 19, at 827.

<sup>30</sup> Taokaji, *supra* note 28 at 827-28. See also *Developments in the Law - The Law of Mental Illness VII: Voting Rights and the Mentally Incapacitated*, 121 HARV. L. REV. 1179, 1181-85 (2008) (noting how many states use arbitrary criteria to disenfranchise people with mental disabilities).

<sup>31</sup> 42 U.S.C. 12132 (2012).

<sup>32</sup> Tokaji, *supra* note 28, at 1745-46 (comparing *Am. Ass'n of People with Disabilities v. Hood*, 278 F. Supp. 2d 1345 (M.D. Fla. 2003). with *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120 (C.D. Cal. 2004)).

systems to be accessible.<sup>33</sup> Although a private right of action is not provided in the statute, the Attorney General's Office may enforce HAVA or a citizen may file a complaint in a state-based administrative grievance procedure.<sup>34</sup> It also mandates the Election Assistance Commission (EAC) to conduct research on the feasibility of various types of election technology, including an analysis of the implications of the technology for accessibility for voters with disabilities.<sup>35</sup> In the aftermath of *Shelby*, could the provisions relating to Title II of the ADA or HAVA be subject to further constitutional challenge by those committed to protecting state sovereignty? Could new laws requiring stricter forms of identification be enacted which make it more challenging for people with disabilities to vote?<sup>36</sup> Although it should be noted that HAVA does not target particular states as does section 4(b) of the Voting Rights Act, an issue the *Shelby* majority judgement found to be of concern in violating principles of equal sovereignty,<sup>37</sup> these are not idle queries given the Supreme Court's inconsistent attitude toward the ADA as applied to the states and because in *City of Cleburne v. Cleburne Living Centre, Inc.*,<sup>38</sup> the Court held that disability discrimination was a classification subject only to rational basis review when interpreting the Equal Protection Clause.<sup>39</sup>

In *Tennessee v. Lane*, a majority of the Supreme Court reversed its trend toward a more restrictive approach to interpreting the 14<sup>th</sup> Amendment, holding that a failure of the State of Tennessee to make state courts accessible to people with physical disabilities was conduct that Congress could appropriately sanction pursuant to its Section 5 enforcement powers, abrogating state sovereign immunity established in the Eleventh Amendment in enacting Title II of the ADA.<sup>40</sup> This contrasts sharply with its holding in *Board of Trustees of the University of Alabama v. Garrett*, finding that Title I of the ADA, relating to employment, was not properly

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<sup>33</sup> Lane, *supra* note 19, at 829.

<sup>34</sup> *Id.*

<sup>35</sup> Tokaji, *supra* note 28, at 1746-47. However, Republican legislators have sought to abolish the EAC. See Deborah Barfield Berry, *House panel OKs ending Election Assistance Commission*, USA Today, (June 5 2013), <http://www.usatoday.com/story/news/politics/2013/06/04/house-panel-approves-eliminating-election-commission/2389737/>.

<sup>36</sup> This already seems to be happening in Texas. See Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, (June 26 2013), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/with-voting-rights-act-out-states-push-voter-id-laws/>.

<sup>37</sup> *Shelby*, 133 S.Ct. 2612, 2627-28 (2013).

<sup>38</sup> 473 U.S. 432 (1985).

<sup>39</sup> Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. F. 1658, 1691 (2010)(book review). This contrasts dramatically with other jurisdictions, such as Canada, which treat all grounds of discrimination equally. See McKinney v. University of Guelph, [1990] 3 S.C.R. 229 (rejecting the *Cleburne* approach of levels of scrutiny). A detailed examination of this aspect of the issue is beyond the scope of this Article.

<sup>40</sup> 541 U.S. 509, 533-534 (2004). A similar counterpoint to the New Federalism trend may be found in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (ruling that the dependent care provisions of the Family Medical Care Leave Act were a valid exercise of Congress' Fourteenth Amendment powers to combat sex discrimination).

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enacted by Congress pursuant to its section 5 enforcement powers.<sup>41</sup> George Lane was a paraplegic who was unable to climb the stairs to reach the county courthouse when he was compelled to attend court to face criminal charges. After he refused to be carried up to his trial, he was later arrested and imprisoned for failing to appear at his trial.<sup>42</sup>

A broader reading of *Lane* suggests that it ought to apply beyond simply access to courts, to encompass lack of access to other services or programs covered by Title II that impinge on fundamental rights such as voting.<sup>43</sup> While I agree with a broad interpretation of *Lane* and share the view of many scholars that courts have failed to properly appreciate the ADA as a genuine civil rights statute and misinterpreted its reasonable accommodation requirements as a charitable gesture,<sup>44</sup> I would further argue that having a robust record of voter discrimination and other state-imposed barriers faced by people with disabilities is the key to convincing courts to find in favour of plaintiffs should voting rights legislation relating to people with disabilities come under attack.<sup>45</sup> Anecdotes of barriers experienced by people with disabilities at the polls and elsewhere can play a powerful role in demonstrating to reluctant judges the need for Congressional action to remove barriers with respect to voting.<sup>46</sup> Why are narratives describing acts of disability discrimination beyond voting barriers so salient for an interpretation of the jurisprudence that would uphold Title II of the ADA? *Lane* indicates that courts will consider discrimination and unequal treatment by government officials with respect to rights other than the one currently in dispute where Congress has enacted a statute protecting several fundamental rights. In *Lane*, discrimination on the part of states in areas such as abuse and neglect in state mental health institutions, unjustified confinement and zoning was evaluated

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<sup>41</sup> Garrett, 531 U.S. at 356.

<sup>42</sup> Lane, *supra* note 19, at 808.

<sup>43</sup> See Anita Silvers & Leslie Pickering Francis, *A New Start on the Road Not Taken: Driving with Lane to Head Off Disability-Based Denial of Rights*, 23 WASH. U. J.L. & POL'Y 33, 48-55 (2007) (suggesting a broader reading of *Lane* implies protection of due process rights).

<sup>44</sup> *Id.* at 38-39 (noting how courts have been wrong in distinguishing the ADA from other civil rights statutes).

<sup>45</sup> *Accord* Lane, *supra* note 19, at 843 (“*Lane* teaches that where fundamental rights are concerned, the Court will expand the scope of what evidence it will consider. In addition to unequal treatment in voting, courts will consider differential treatment in related fundamental rights to gauge the gravity of the harm Congress attempted to remedy”). For a comparative treatment of the origins of the duty to accommodate in American and Canadian jurisprudence, see Ravi Malhotra, *The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective*, 23 WASH. U. J.L. & POL'Y 1 (2007) (suggesting the robust duty to accommodate religious minorities in Canadian law facilitated a better reception on the part of the judiciary to accommodating employees with disabilities than in the United States).

<sup>46</sup> Of course, a Court determined to ignore discrimination may not be persuaded even by voluminous evidence. This was evident in *Shelby* itself. See *Shelby*, 133 S.Ct. 2612, 2636 (2013) (Ginsburg J., dissenting) (noting that Congress compiled legislative record of 15,000 pages before reauthorizing Voting Rights Act).

in adjudicating the claim with respect to access to courthouses.<sup>47</sup> Hence, a challenge under Title II of the ADA concerning voting may be fruitfully met by producing evidence of discrimination against people with disabilities in a variety of areas. Waterstone makes the further perceptive claim that, in light of the Court's holding in *Lane*, a hypothetical provision for a private right of damages in HAVA would withstand scrutiny against challenge on federalism grounds.<sup>48</sup> I concur and suggest that the best way to promote disability rights—and limit the damage sustained to advocates of social justice in *Shelby*—is to find ways to effectively marshal convincing evidence of disability discrimination. I now turn to a discussion of how narratives can help provide the needed evidence to best protect laws that enforce voting rights for people with disabilities.

## II. Narratives and the Law

Narratives are particularly effective at transforming public discourse because they provide a vivid account of experiences of marginalized people that may not be commonly known or discussed. The act of narrative itself allows new legal concepts to develop over time; perhaps the most famous example is how, as more and more women reported and discussed the inequalities and indignities that they experienced in the workplace in the form of humiliating and unwanted sexual remarks, these narratives of women's experiences of gradually coalesced into the legal concept of sexual harassment.<sup>49</sup> Narratives played a part in a dramatic transformation in public attitudes and perception from analyzing the possibly immoral and promiscuous misconduct of a woman alleging sexual harassment to viewing the situation in terms of a the abuse by men of a power relationship.<sup>50</sup> Feminist legal scholars have also used narratives to powerfully convey the horrors of sexual violence, a topic rarely discussed in the public sphere in the past. Susan Estrich famously describes her own rape in a piece that proceeds to set out a framework for sexual assault law reform, adding a vividly personal dimension so searing that it made it impossible for the reader to ignore the pain and violation she experienced.<sup>51</sup>

Richard Delgado has played a major role in advocating counter-storytelling to disrupt traditional tropes of racist narratives that marginalize the concerns of people of color.<sup>52</sup> He notes how African American slaves had a long history of telling narratives about their oppression through songs, letters and poetry. Latinos and

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<sup>47</sup> *Lane*, *supra* note 19, at 820-21.

<sup>48</sup> *Id.* at 848-49.

<sup>49</sup> IRIS YOUNG, INCLUSION AND DEMOCRACY 72-73 (2000).

<sup>50</sup> For a history of this remarkable shift, see Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 3-5, Catharine A. Mackinnon & Reva B. Siegal eds. (2004).

<sup>51</sup> Susan Estrich, *Rape*, 95 YALE L.J., 1087, 1089-1091 (1986). For a broader defense of the narrative method in feminist legal scholarship, see Kathryn Abrams, *Hearing the Call of Stories* 79 CAL. L. REV. 971 (1991).

<sup>52</sup> Delgado, *supra* note 18.

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Native Americans also have a long tradition of passing down stories of oppression and the deprivation of their land from generation to generation.<sup>53</sup> Critical race scholar Anthony Farley has brilliantly used narratives from his own childhood when he was subjected to humiliating racism to explore the notion of race as a form of sadomasochistic pleasure in one's own body whereby whites achieve pleasure through the humiliation of people of color. A highly luminous meditation on the nature of racism that incorporates the political thought of, *inter alia*, Frantz Fanon, Michel Foucault and James Baldwin, Farley simultaneously maintains that the humiliation is a part of a process that structures a racial hierarchy.<sup>54</sup> And Black feminists have elegantly used the narrative form to highlight the politics of intersectionality and the alienation that women of color often encounter when trying to interact with the legal system as they are simultaneously marginalized by both white feminists and anti-racist movements led by men.<sup>55</sup> Narratives enable us to see that the production of knowledge is inherently political. They can have a counter-hegemonic ability to subvert the mainstream understanding of society.<sup>56</sup>

Disability narratives are especially important because many barriers experienced by people with disabilities generally lie outside the lived experience of the average person. Many people without disabilities believe stereotypes about the capabilities of people with disabilities and are likely unaware of the extent of barriers that remain endemic in American society. Literature as diverse and canonical as Shakespeare and Melville has portrayed people with disabilities in ways that are thoroughly dehumanizing and marginalizing.<sup>57</sup> David Engel and Frank Munger effectively employed the life stories of people with disabilities who had never engaged in ADA litigation to discuss their experiences relating to the market, gender and religion. They show that there was a recursive and mutually constitutive relationship between rights and identity. In other words, the mere passage of disability rights legislation transformed the way people with disabilities saw themselves even though they never once engaged in litigation. A strong disability identity facilitated their procurement of rights and how those rights became active.<sup>58</sup> Morgan Rowe and I have recently built on Engel and Munger's legacy and, using an adapted version of their methodology, explore the relationship

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<sup>53</sup> *Id.* at 2435-36.

<sup>54</sup> Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 473-474 (1997).

<sup>55</sup> See e.g., PATRICIA WILLIAMS, *THE ROOSTER'S EGG: THE PERSISTENCE OF PREJUDICE* (1995). For a key articulation of the theory of intersectionality, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1273-74 (1991).

<sup>56</sup> Patricia Ewick & Susan Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 199 (1995).

<sup>57</sup> DAVID T. MITCHELL & SHARON L. SNYDER, *NARRATIVE PROSTHESIS: DISABILITY AND THE DEPENDENCIES OF DISCOURSE* (2001), at 17-18 (analyzing portrayal of disability in Shakespeare's *RICHARD III* and Melville's *MOBY DICK*).

<sup>58</sup> Engel & Munger, *supra* note 16, at 241-42.

between disability narratives and the formation of an advocacy identity in the Canadian context.<sup>59</sup> One of our participants, Lisa, recounts the humiliating barriers that she experienced at school when the school administrators insisted that she demonstrate that she was able to safely climb stairs:

My parents were there, and my dad kept saying to me, “Let me support your hips. Let me do this.” And I said, “No, because if you touch me and if you let me use you as support, they are going to see that as sufficient reason to not allow me to do this if I need to. Yeah, it breaks your heart because you’re my father, and you don’t want to see me stumble on a flight of stairs, but this could be the difference between me getting the credits I need to graduate or not. So just, unless I start falling, just please, I have to do this. It’s going to hurt, and I’m going to feel it for days, but I need to prove to them that I’m not unable.”<sup>60</sup>

Lisa’s narrative shows how educational authorities focused on regulating her physical activities rather than working on improving the accessibility of her school. David Connor’s study of racialized working class youth in New York City labelled as having learning disabilities is a particularly striking example of using prose narratives from a small number of research participants to garner a deep understanding of the barriers they face. Their daily dilemmas cut across class, race, gender and disability in complex ways that only a narrative methodology can fully communicate.<sup>61</sup>

I suggest that narratives of barriers in voting and beyond would significantly help protect voting rights laws precisely because narratives operate so powerfully in influencing decision makers. Whether it is a blind woman robbed of her ability to cast a ballot for her preferred candidate alone in the voting booth or a man in a wheelchair who is unable to access a polling station, narratives of voting barriers provide a rich emotional content that a simple legal argument can never do. Decision makers need to fully acknowledge and appreciate the impact of barriers on the dignity of people with disabilities. And given that disability transcends all racial boundaries, any successful efforts in this regard can only bolster legal strategies to prevent the disenfranchisement of racialized voters and facilitate vigorous efforts to ensure that all American citizens can cast a ballot.

In *Shelby*, the Supreme Court announced a significant retreat from the civil rights jurisprudence that it had articulated for decades. The majority chose to

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<sup>59</sup> RAVI MALHOTRA & MORGAN ROWE, EXPLORING DISABILITY IDENTITY AND DISABILITY RIGHTS THROUGH NARRATIVES: FINDING A VOICE OF THEIR OWN (2013).

<sup>60</sup> *Id.* at 66.

<sup>61</sup> DAVID CONNOR, URBAN NARRATIVES—PORTRAITS IN PROGRESS: LIFE AT THE INTERSECTIONS OF LEARNING DISABILITY, RACE & SOCIAL CLASS (2008).

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undergird its reasoning to strike down § 4(b) of the Voting Rights Act through the acceptance of a vision of an American racial utopia that tragically is yet to exist. It will require great vigilance on the part of advocates for social justice and equality to ensure that the same fate does not befall the legal protections enacted to ensure that people with disabilities can exercise their right to vote.