DISABILITY REPARATIONS AND THE MODERNIZATION OF THE COMMUNITY REINVESTMENT ACT OF 1977

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The Community Reinvestment Act of 1977 ("CRA") was enacted to reverse the historical exclusion of low and moderate income ("LMI") communities from bank lending, investment, and services. This practice of so-called "redlining" was endemic to a system of finance in which banks typically took wealth out of LMI communities while denying the credit needs of the individuals who lived and worked in them. As a result of redlining, certain demographic groups became concentrated in LMI neighborhoods, further clustering poverty. The CRA was designed in the restorative justice model to make banks accountable for returning resources to such communities.

Although people with disabilities comprise a significant portion of the LMI population, as approximately 1 in 4 Americans has a disability and

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more than 60% of adults with disabilities are LMI,[1] *banks have generally overlooked them when providing mandated CRA activities. In a significant advance in 2020, however, the Office of the Comptroller of the Currency ("OCC") proposed to modernize the regulations that implement the CRA to include support for people with disabilities in the examples of CRA-qualifying activities and to provide guidance about meeting the unmet needs of individuals in the disability community.*[2]

This article sets the CRA and financial institutions' treatment of people with disabilities in historical context and explores ways in which banks may now direct resources to the LMI disability community as restorative justice—akin to a "disability stimulus package"—to offset their systemic failure to serve people with disabilities. The authors of this piece offer recommendations for how the banking regulators can employ a multi-faceted, restorative justice approach to disability in its revised regulations to address the needs of LMI people with disabilities and to prevent further unjust exclusion from the financial system and the economic mainstream.

This piece: (1) proposes how a modernized CRA framework can help define community-development activities, (2) focuses evaluation of bank performance on activities likely to repair the harm that has resulted from the exclusion of the LMI disability population from the financial system, and (3) recommends compensating the population for lost economic opportunity. We further consider how offering community-development activities in support of the needs of the disability community can bring bank activities back into alignment with federal law. Updating the CRA to redress the financial exclusion of people with disabilities is critical at this time of pandemic and increased racial justice awareness.

1. Michael Morris, Nanette Goodman, Angel Baker, Kyle Palmore & Peter Blanck, *Closing the Disability Gap: Reforming the Community Reinvestment Act Regulatory Framework*, 26 GEO. J. ON POVERTY L. & POL'Y 355, 366 (2019).

2. OFF. COMPTROLLER CURRENCY, BULL. 2021-24, COMMUNITY REINVESTMENT ACT: IMPLEMENTATION OF THE JUNE 2020 FINAL RULE (2021), https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-24.html [https://perma.cc/88S4-Z5P9].

Introduction

The Community Reinvestment Act of 1977 ("CRA")[3] was enacted to reverse the long history of exclusion of low and moderate income ("LMI") communities from bank lending, investment, and services.[4] This "redlining,"[5] as it is commonly called, was endemic to an extractive system of finance in which banks took wealth out of communities while not meeting the credit needs of the LMI individuals who lived and worked in them. As a result of redlining, individuals who lacked access to credit became concentrated in LMI neighborhoods, further clustering poverty.[6] The CRA was designed to counteract this entrenched practice, arguably rooted in discriminatory assumptions about the credit risk and worthiness of certain demographic groups, by redirecting capital and services to those LMI communities using a restorative model.[7]

Civil rights statutes, also designed to address discriminatory practices, have traditionally been developed using a largely retributive model. Such statutes address discrimination on the basis of personal characteristics, such as race, sex (including gender identity and sexual orientation), age, and religion. The Americans with Disabilities Act of 1990 ("ADA"), as amended,[8] specifically addresses concrete instances of discrimination against a person or class of people on the basis of

3. Community Reinvestment Act of 1977, Pub. L. No. 95-128, § 801, 91 Stat. 1147 (codified at 12 U.S.C. §§ 2901-2905).

4. *See, e.g.*, Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. Rev. 513, 515–17 (2005).

5. Michael Berry & Jessie Romero, *Community Reinvestment Act of 1977*, Fed. Rsrv. Hist., https://www.federalreservehistory.org/essays/community-reinvestment-act (last visited Mar. 9, 2022) [https://perma.cc/ZWQ2-3Y64].

6. *See, e.g.,* Hyojung Lee & Raphael W. Bostic, *Bank Adaptation to Neighborhood Change: Mortgage Lending and the Community Reinvestment Act*, 116 J. Urb. Econ. 103211, at 1, 16 (2020), https://doi.org/10.1016/j.jue.2019.103211.

7. *Id.* at 1.

8. Americans with Disabilities Act Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008) (codified as 42 U.S.C. §§ 12101-12213) [hereinafter ADA].

disability.[9] Consistent with their retributive model, the civil rights statutes afford a range of compensatory and injunctive relief to rectify discrimination and deter future discrimination. Towards this end, the statutes focus on whether an act of discrimination occurred against an individual or group covered by the law, and whether an alleged bad actor (individual or organization) has been proven to be legally responsible.[10]

The CRA restorative model, in contrast to the retributive model, presupposes that the harm experienced by LMI communities is rooted in historical and structural injustices in policies and practices. It begins with the presumption that banks hold a degree of responsibility to those communities for the solution to this harm. Therefore, the CRA's remedies are designed to make banks accountable for restoring resources to LMI communities as a form of "reparations," given that absent banks' structural discrimination LMI communities would likely have received bank lending, investment, and services in a myriad of ways that would have reduced concentrated individual poverty.

Even though people with disabilities comprise a significant portion of the LMI population, in the forty-plus years since CRA's passage, banks have overlooked this diverse and intersectional community when allocating resources to meet CRA requirements.[11] In a significant advance toward rectifying the problem and providing clear guidance about meeting the unmet needs of the disability community, in 2020, the Office of the Comptroller of the Currency ("OCC") adopted a final rule to modernize the regulations that implement CRA and explicitly referred to people with disabilities in its list of examples of CRA-qualifying activities.[12] In December 2021, the OCC rescinded the rule in response to a directive from the Biden Administration for the three regulatory agencies responsible for enforcing CRA to jointly develop modernized rules (OCC, FDIC, and Federal Reserve).[13]

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9. PETER BLANCK, DISABILITY LAW AND POLICY (2020) [hereinafter "BLANCK (2020)"]; Peter Blanck, *On the Importance of the Americans with Disabilities Act at Thirty*, J. DISABILITY POL'Y STUD (Aug. 11, 2021), at 3–4, https://journals.sagepub.com/doi/abs/10.1177/10442073211036900 [https://perma.cc/L5ZY-95A9].

10. CIV. RTS. DIV., U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL, Ch. 9 (2021), https://www.justice.gov/crt/fcs/T6Manual9 [https://perma.cc/8MHB-TWDA].

11. Morris et al., *supra* note 1, at 364.

12. OFF. COMPTROLLER CURRENCY, *CRA Illustrative List of Qualifying Activities*, https://www.occ.gov/topics/consumers-and-communities/cra/cra-illustrative-list-of-qualifying-activities.pdf (last visited Mar. 9, 2022) [https://perma.cc/37R7-LBYU].

13. OFF. COMPTROLLER CURRENCY, NEWS RELEASE 2021-133, OCC ISSUES FINAL RULE TO RESCIND ITS 2020 COMMUNITY REINVESTMENT ACT RULE (2021), https://

Regardless of whether modernization results in explicit reference to disability or people with disabilities, however, people with disabilities still comprise a substantial portion of the LMI population and should be served. Even under the original rules and regulations, banks have always been required to serve people with disabilities under the CRA.[14]

While people with disabilities have enjoyed numerous civil rights protections over the last half century, they have lacked concomitant access to the economic resources necessary to restore their communities from the systematic financial exclusion experienced during the same period.[15] In passing the ADA in 1990, Congress declared that the "Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and *economic self-sufficiency.*"[16] This last aspiration, unfortunately still unfulfilled today, begs the pressing question: how will economic self-sufficiency be achieved if the disability community as a whole continues to experience an unaddressed and persistent economic resource deficit?

This Article examines the ways in which banks can direct resources to the disability community as restorative justice—akin to a "disability stimulus package"—to offset their substantial and persistent failure to serve people with disabilities over numerous decades. After the Introduction in Part I, Part II introduces the CRA and provides examples of the restorative justice model that is the basis for the CRA. Part III overviews the evolution of the CRA and certain other federal laws—the Americans with Disabilities Act of 1990 ("ADA"), as amended, the Supreme Court's ADA "integration mandate" as stated in the seminal 1999 decision *Olmstead v. L.C.*, and the Rehabilitation Act of 1973—addressing discrimination.

Part IV focuses on the current and long-term economic insecurity of people with disabilities, including those with intersectional identities, within the LMI community. Part V explores whether the long-

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www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-133.html [https://perma.cc/3V89-J39Z].

14. Morris et al., *supra* note 1, at 356.

15. *See, e.g.,* Phoebe Ball, Michael Morris, Johnette Hartnette & Peter Blanck, *Breaking the Cycle of Poverty: Asset Accumulation by People with Disabilities*, 26 DISABILITY STUD. Q., Winter 2006, https://dsq-sds.org/article/view/652/829 [https://perma.cc/BL54-HZ9R]; BLANCK (2020), *supra* note 9, at 13; James Schmeling, Helen A. Schartz, Michael Morris & Peter Blanck, *Tax Credits and Asset Accumulation: Findings from the 2004 N.O.D./Harris Survey of Americans with Disabilities*, 26 DISABILITY STUD. Q., Winter 2006, https://dsq-sds.org/article/view/654/831 [https://perma.cc/V5UG-6ZMB].; Morris et al., *supra* note 1, at 360–62.

16. ADA, *supra* note 8, § 12101(a)(7) (emphasis added).

term failure to include people with disabilities in CRA activities despite its mandate places banks out of alignment with the other anti-discrimination laws discussed and addresses how harmonizing the CRA with those laws can help effect improvement. Part VI offers recommendations for how the Federal Reserve can employ a multi-faceted, restorative justice approach to disability in its revised regulations to address the needs of LMI people with disabilities and to prevent further unjust exclusion from the financial system and the economic mainstream. More specifically, the section proposes how a modernized CRA framework can help define community-development activities, focus evaluation of bank performance on activities likely to repair the harm that has resulted from the exclusion of the LMI disability population from the financial system, and compensate the population for lost economic opportunity. In addition, offering community-development activities in support of the needs of the disability community can bring bank activities back into alignment with federal law. Section VII concludes, with the message that updating the CRA to make sure the financial needs of people with disabilities is critical at this time of pandemic and increased racial justice awareness.

I.
The CRA and the Restorative Justice Model

A. CRA Background and Purpose

The overarching legislative purpose of the CRA can be, in the words of former Chairman of the Federal Reserve Ben Bernanke, "interpreted as an attempt to rectify market failures" caused by banks' past discriminatory practices.[17] More directly, the CRA was enacted to reverse a history of discriminatory credit practices by banks. Designed to counteract the entrenched practice of redlining, the CRA requires banks to redirect capital and services to those economically vulnerable communities historically overlooked.[18] Its drafters sought "to reduce credit-related discrimination, expand access to credit, and shed light on lending patterns."[19]

17. Ben S. Bernanke, Chairman, Fed. Rsrv., Speech at the Cmty. Affs. Rsch. Conf. (March 30, 2007), https://www.federalreserve.gov/newsevents/speech/bernanke 20070330a.htm [https://perma.cc/FRG9-AL44].

18. Off. Comptroller Currency, Community Developments Fact Sheet, Community Reinvestment Act (2014), https://www.occ.gov/publications-and-re sources/publications/community-affairs/community-developments-fact-sheets/pub-fact-sheet-cra-reinvestment-act-mar-2014.pdf [https://perma.cc/Q4PN-ECDM].

19. Bernanke*, supra* note 17.

By mandating that banks target lending, investment, and services to LMI communities, this Article argues that the CRA is obligating banks to take responsibility for, and rectify the damage caused by, their discriminatory lending and other practices that perpetuated financial exclusion, deepened economic inequality, and contributed to attitudinal and structural discrimination facing various demographic groups in American society.

The CRA is distinct from most civil rights statutes in that it is inherently structural and restorative rather than discrete and retributive. It does not seek to vindicate the civil rights of individuals within a framework of protected personal characteristics, such as race, sex, religion, or disability, by holding bad actors accountable. Nor does it provide compensatory or injunctive relief to afford a person, or class of like persons, equal treatment, equal opportunities, and money damages.

Instead, the CRA is designed to repair and restore LMI communities, taken as a whole, from historic inequity and unequal access to wealth. Unlike civil rights statutes, under the CRA, the harm is a given—based on systemic and discriminatory practices of banks over much of the last century that fell disproportionately hard on certain communities. The CRA remedy is economic, restoring banking investments, loans, and services to LMI neighborhoods. It exists principally to repair, restore, and transform the banks' relationship with LMI communities and to reinvest resources in those communities.

Notably, none of the civil rights statutes that predated the CRA, such as the Civil Rights Act of 1964[20] and the Voting Rights Act of 1965,[21] and, in particular, laws designed to address discrimination in lending, such as the Equal Credit Opportunity Act of 1974[22] and Title VIII of the Civil Rights Act of 1968 ("The Fair Housing Act"),[23] were specifically designed to restore resources to impacted communities as a whole. Thus, the CRA was a necessary addition to the legal and policy landscapes, rather than a cumulative one.

A practical example helps demonstrate the distinction between the restorative justice objectives of the CRA and the retributive justice objectives of the civil rights statutes. If an African-American prospective borrower in an LMI neighborhood is denied a mortgage from his community bank on the basis of race, it is a violation of the Fair Hous-

20. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).
21. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965).
22. Equal Credit Opportunity Act, Pub. L. 93-495, 90 Stat. 1521 (codified at 15 U.S.C. § 1691).
23. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968).

ing Act, and that individual should have a legal right to sue the bank for discrimination. Should this individual marshal adequate evidence and prevail at trial, the relief afforded by the court could be characterized as retributive: an injunction to provide access to the mortgage and/or a monetary penalty to the bank in the form of compensatory and punitive damages.

In an alternative hypothetical scenario under the CRA, this same individual, without bringing a lawsuit for discrimination, could still benefit under a restorative model from a community-wide investment by the bank in affordable housing, consumer loans, financial literacy courses, computer equipment at the local library, broadband internet access, workforce development programs, and the like. This access would result from the bank's statutorily mandated responsibility to direct resources to LMI neighborhoods, given its history of failing to meet the credit needs of this community. This latter hypothetical, as this piece contends, illustrates that CRA remedies should be fashioned as holistically and broadly as is warranted based on exemplars of restorative justice.

One commonality of civil rights statutes and the CRA is that LMI neighborhoods potentially affected by both largely are comprised of many of the same demographic groups who have endured long histories of discrimination.[24] In concept, the aims of civil rights laws and the CRA are compatible and, when taken together, even additive. But while certain protected groups covered by the CRA presumably have had the benefit of both civil rights protections and CRA lending, investment, and services for the better part of forty years, people with disabilities generally have not. Intentional steps can and should be taken to rectify this problem.

B. The Restorative Justice Model

Restorative justice is often associated with criminal justice reform movements in the United States and worldwide.[25] At its core, restorative justice is a "theory of reparation and prevention," whose preferred response to conflict is repairing harm through inclusive and cooperative processes.[26] It typically involves identifying the harm and

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24. Bruce Mitchell & Juan Franco, NAT'L CMTY. REINVESTMENT COAL., *HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality* 4–6, 18, https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf.

25. *See, e.g.*, Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1027–28 (2020).

26. HANDBOOK OF RESTORATIVE JUSTICE 636 (Gerry Johnstone & Daniel W. Van Ness eds., 2007) 636, https://doi-org.libezproxy2.syr.edu/10.4324/9781843926191.

taking measurable steps to address it. In this process, relevant stakeholders are included in planning the response, including those that perpetuated the harm, those directly impacted by the harm, *and* their communities as a whole. Restorative outcomes may be achieved that not only repair the discrete harm, but also are transformative for impacted communities and aim to prevent the harm's recurrence.[27]

The remedies afforded within an economic restorative justice framework include repairing the adverse economic consequences of historic injustices and underlying system failures by restoring resources. Restorative justice practices may be defined as "reparations": "[t]he act of trying to repair the harm caused or revealed by an injustice *as fully as possible*."[28] Reparations can take many forms, such as education programs, skills training, workforce development, and investment in community-based organizations, in addition to actual monetary compensation to those harmed.[29]

The origin of the restorative justice movement dates to at least the 1970s, when reformers sought holistic remedies "to address harm, conflict, and crime, while simultaneously increasing individual accountability without reliance on conventional punitive approaches in the criminal justice system."[30] The goal of restorative justice is to restore and repair the community as a whole. Traditional retributive approaches to criminal justice, for instance, had outsourced (and still outsource) the resolution of conflicts to the state and professionals, often robbing the parties in conflict of their own ability to identify the harm and seek norms and standards for the mutual resolution of the dispute.[31] Restorative justice advocates have sought to change that dynamic by proffering a "relational" form of justice that empowers stakeholders to deliberate and agree upon root causes and reforms that can restore community integrity socially and economically. Importantly, the aim of restorative justice is for *both* the actor that caused the harm and the people who were harmed to rejoin their community after the harm imposed is repaired and community relationships are transformed.

Under a retributive justice model, when systemic factors including historic injustices have contributed to the harm—such as failing

27. Daniel W. Van Ness, Ctr. For Just. & Reconciliation, *RJ City: Phase 1 Final Report*, PRISON FELLOWSHIP INT'L 77, 78 (2010), http://restorativejustice.org/am-site/media/rj-city-final-report.pdf.

28. *Id.*

29. HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 26, at 635.

30. González, *supra* note 25, at 1028.

31. Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 329–31 (2017).

education systems, high unemployment or unpaid labor, depleted property values, predatory loans, and criminal justice fines and fees, they are often left unaddressed in favor of determining a legal punishment for a given offense. Restorative justice, in contrast, seeks to address both the harm at issue and the underlying structural and historical forces that contributed to the harm. It relies not simply on the individuals involved, but also on entire communities (whether defined geographically and/or demographically) to address the conflict and seek agreed-upon solutions designed to strengthen and restore the overall relationship with those that produced the harm.[32]

Although its origins lie in the criminal justice system, restorative justice has been applied across multiple public systems, in all U.S. states, at state, local, and regional levels, and in at least one hundred countries.[33] It has been used to address issues such as racial harm, sexual violence, environmental injustice, and the school-to-prison pipeline.[34]

Below are three examples of different ways restorative justice provides a framework for how it can address complex historic inequities, build accountability, and restore community resources. These examples demonstrate that restorative justice enables participants to identify how past events and systemic practices have contributed to ongoing "structural, social, and economic inequalities," take responsibility for them, and address them with community-wide solutions.[35]

First, truth and reconciliation commissions have been an important byproduct of the restorative justice movement. The South African

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32. *See id.* at 347–48.; *see also* John Braithwaite, *Restorative Justice and Responsive Regulation: The Question of Evidence* 10–12 (RegNet, Working Paper, Paper No. 51, 2016), https://johnbraithwaite.com/wp-content/uploads/2016/10/SSRN_2016_BraithwaiteJ-revised-51.pdf [https://perma.cc/PF2L-R7HF] (advancing the argument that restorative justice should not focus on restoring a previous condition or on individuals but on structural solutions to offending and victimizing).

33. Fania E. Davis, Mikhail Lyubansky & Mara Schiff, *Restoring Racial Justice*, RESEARCHGATE 3 (May 2015), https://www.researchgate.net/publication/277313215_Restoring_Racial_Justice. According to the Davis, Lyubansky & Schiff article, 100 countries utilize restorative justice, and it is estimated that there are over 300 U.S. victim-offender mediation programs, over 700 European ones, and over 700 U.S. juvenile conferencing programs. Australia and New Zealand codified restorative justice as a first response to juvenile offending over 20 years ago, and the Council of Europe, the European Union, and the United Nations Economic and Social Council encourage and support restorative justice practices. *Id.*

34. González, *supra* note 25, at 1030, 1033.

35. Joshua Inwood, Derek Alderman & Emily Barron, *Addressing Structural Violence Through US Reconciliation Commissions: The Case Study of Greensboro, NC and Detroit, MI*, POL. GEOGRAPHY, May 2016, at 59 https://doi.org/10.1016/j.polgeo.2015.11.005.

Truth and Reconciliation Commission ("TRC") is among the most famous of the approximately forty truth commissions that have existed since the early 1980s, which were crafted in the restorative justice model to address histories of racial injustice and violence.[36] The South African post-apartheid government initiated a public dialogue that culminated in the establishment of the TRC to receive victims' stories, decide the fate of responsible parties' amnesty petitions, make recommendations to prevent recurrences, and order reparations.[37] Notably, the South African TRC sought not only to hold transgressors accountable but also to encourage the growth of social and economic practices that could prevent the recurrence of such harm.[38]

Using the TRC model in the United States, in 2004, the Greensboro Truth and Reconciliation Commission ("GTRC") in North Carolina sought redress for a long history of racial violence and tensions precipitated in November 1979 when the Ku Klux Klan attacked protesters, killing five and wounding ten, who were labor organizers in a black neighborhood.[39] During the twenty years that followed, the community bore witness to two failed criminal trials that both resulted in acquittals by all-white juries.[40] A civil trial resulted in holding the police complicit with the Klan and Nazis in one death.[41]

During this period, the Greensboro community struggled economically.[42] As one study of the GTRC noted, as a consequence of the long-term impact of racial inequity, "there remained unresolved issues of police accountability, poverty and low wages, [and] lack of employment."[43] The GTRC issued a report of its core findings in 2006, "recommending institutional reform and community healing through official apologies, public monuments, museum exhibits, a community justice center, police review board, and anti-racism training for police and other officials," as well as measures to address the local economy in the region.[44] The report stated, "[r]ecognizing the role they play in creating the environment for events like Nov. 3, 1979, individual community members must commit to understanding issues of capital, labor, race, poverty, oppression, privilege and justice, and exploring

36. Davis, Lyubansky & Schiff *supra* note 33, at 8.
37. *Id.*
38. *Id*.
39. *Id.* at 9.
40. *Id.*
41. *Id.*
42. Inwood, Alderman & Barron, *supra* note 35, at 61.
43. *Id.* at 60.
44. Davis, Lyubansky & Schiff, *supra* note 33, at 9.

ways to have a positive impact on the way they play out in the community."[45]

The economic measures detailed in the GTRC report were, in fact, expansive. The GTRC concluded that the context of the 1979 incident included a well-documented socio-economic and racial divide, creating a situation ripe for the unrest and violence that occurred. In response, the GTRC recommended that the City of Greensboro and its county, Guilford County, adopt and fully enforce an ordinance to require all employees of the city and county, and all companies that contract with the city and county, to be paid a "living wage" as determined by the North Carolina Justice Center.[46]

The GTRC also called for an increase in social service and public health funding to serve low-income residents.[47] If the community was going to move forward, GTRC organizers argued, the events at issue, plus the corresponding social and economic harms, must be dealt with holistically.[48] Using restorative justice thus provided a platform to redress current resource deficits through the lens of "structural harms that underlie the immediate dispute."[49] Resources were needed in Greensboro not simply as a result of the 1979 violent dispute, but also due to "human rights abuses perpetrated by the state against African-Americans for centuries" and the corresponding social and economic consequences in Greensboro.[50]

A second example of how restorative justice can be used is the Restorative Justice City concept, first developed in Oakland, California in response to a history of mass incarceration and the corresponding economic marginalization of various demographic groups.[51] The Restorative Justice City concept was born as part of a new dialogue about how to stage successful systemic interventions, such as new policies, trainings, education, resources, and infrastructure, to stop mass incarceration and transform impacted communities.

The first iterative community dialogue about building a Restorative Justice City began in Oakland on May 6, 2014, when restorative

45. Greensboro Truth and Reconciliation Comm'n, *Greensboro Truth and Reconciliation Commission Report Executive Summary* 37 (2006), https://greensborotrc.org/exec_summary.pdf.
46. *Id.* at 31.
47. *Id.* at 33.
48. *Id.* at 28.
49. *See, e.g.,* Agnihotri & Veach, *supra* note 31, at 343 (describing in the criminal justice context how the use of restorative justice techniques can help address structural harms that underlie an individual dispute).
50. Davis, Lyubansky & Schiff, *supra* note 33, at 9.
51. Tessa Finlev & Deanna VanBuren, INST. FOR THE FUTURE, *The Restorative Justice City: From Punitive to Restorative Justice* 2 (2015), https://www.iftf.org/rjcity/.

justice leaders convened in response to what they deemed a "*current crisis* arising out of . . . cities suffering from high rates of policing and incarceration."[52] Subsequent events would make clear that the time was more than ripe for such discussions. As described in the literature that later memorialized the event:

> 2014 has been a landmark year for exposing the cracks in America's criminal justice system and starting the conversation about reform. The deaths of unarmed men Eric Garner, Michael Brown, and Ezell Ford at the hands of police sparked the Black Lives Matter movement and put a global spotlight on the inequality pervasive in America's policing and prison system.[53]

Rather than merely attempting to discuss police reforms, however, the forum focused comprehensively on mounting inequality and declining wages throughout communities that experienced high rates of policing and incarceration. Cross-cutting solutions were discussed, such as business ownership, access to healthy foods, new urban infrastructure, access to social services, jobs, and "municipal level infrastructure for investing in small businesses started by the formerly incarcerated."[54] Resource maps of Oakland were drawn to demonstrate where and how assets might be restored within Oakland as a Restorative Justice City to intercept negative cycles of incarceration and poverty.[55]

The Oakland Restorative Justice City convening took place the same year the U.S. Department of Justice ("DOJ") issued its findings in the aftermath of the police shooting and death of Michael Brown in Ferguson, Missouri, bringing additional national attention to unconstitutional and discriminatory policing. The DOJ found that local law enforcement agencies and the courts engaged in patterns that systematically targeted communities of color,[56] including imposing discriminatory and unconstitutional "fines and fees" related to non-violent offenses that fueled cycles of incarceration and poverty and reduced wealth in these communities.[57] The DOJ found that "many officers appear to see some residents, especially those who live in Ferguson's

52. *Id.* at 3 (emphasis added).
53. *Id.* at 1.
54. *Id.* at 3.
55. *Id.* at 5.
56. U.S. Dep't Just., Civ. Rts. Div., *Investigation of the Ferguson Police Department* 1 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.
57. *Id*. at 3–4.

predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and *sources of revenue*."[58]

Likewise, a few years later, in the aftermath of the death of Freddie Gray in police custody, the DOJ issued its findings on the Baltimore City Police Department's unconstitutional pattern and practice of stops, searches, and arrests.[59] The DOJ reported that the BPD's "zero tolerance" policing strategy had disproportionately focused on "predominantly African-American neighborhoods that have been segregated for generations due to government policies that systematically prevented African Americans from acquiring wealth and obstructed their ability to move into neighborhoods with better jobs or schools."[60] Commentators have pointed out that police violence and discriminatory unconstitutional actions against African-American LMI communities during the same period disproportionately targeted individuals with disabilities.[61]

As with the TRC model, the first convening of Oakland's Restorative Justice City necessitated discussions about how to reverse historic patterns of discrimination, including discriminatory policing and mass incarceration, by investing resources within the boundaries of impacted communities where wealth had been discriminatorily extracted. An increasing number of cities are participating in discussions of this kind about the vital link between the full realization of civil rights, full inclusion, and the restoration of wealth and resources.[62]

A third example of restorative justice includes, in recent years, the ascendance of guaranteed income policies or the Universal Basic Income ("UBI") into mainstream political discussions. A confluence of factors, including increased consciousness about structural inequalities, the ever-widening gap between the rich and poor, the changing nature of work, automation, and the rising costs of housing and childcare has vaulted the concept of UBI into mainstream policy discussions.[63] Assessing the historical origins of such inequality, Jhumpa

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58. *Id.* at 2 (emphasis added).

59. U.S. Dep't Just., Civ. Rts. Div., *Investigation of the Baltimore City Police Department* 25 (2016), https://www.justice.gov/crt/file/883296/download.

60. *Id.* at 70.

61. Dominic Bradley & Sarah Katz, *Sandra Bland, Eric Garner, and Freddie Gray: The Toll of Police Violence on Disabled Americans*, THE GUARDIAN (June 9, 2020), https://www.theguardian.com/commentisfree/2020/jun/09/sandra-bland-eric-garner-freddie-gray-the-toll-of-police-violence-on-disabled-americans.

62. *See, e.g.*, Dep't Econ. & Soc. Affs., Sustainable Dev., *Sustainable Development Goal 11: "Sustainable Cities and Communities*," UNITED NATIONS, https://sdgs.un.org/goals (last visited Mar. 15, 2022).

63. Terra Allas, Jukka Maksimainen, James Manyika & Navjot Singh, *An Experiment to Inform Universal Basic Income,* MCKINSEY & CO. (Sept. 15, 2020), https://

Bhattacharya argues, in a 2019 Policy Brief published by the Roosevelt Institute, that "[r]ace- and gender-based wealth inequities are two of the greatest failures of the American economy . . . the GI Bill and redlining created wealth-building opportunities for white men but established barriers for everyone else."[64]

Proponents of the UBI, like Bhattacharya, justify it as needed to offset the structural wealth extraction policies advanced by the government over the past century that disproportionately impacted communities of color and women.[65] While these policy proposals may seem experimental, UBI originated well over fifty years ago in the civil rights movement. It was included as a proposal in Martin Luther King, Jr.'s last published book, *Where Do We Go from Here: Chaos or Community?* and in A. Phillip Randolph's 1966 Freedom Budget, calling for a universal basic income.[66] African Americans were disproportionately underemployed, unemployed, and members of the working poor following the passage of the Voting Rights Act and the March on Washington.[67]

King and Randolph were concerned that, along with civil rights protections, communities battered by the effects of racial segregation and discrimination receive resources to restore and repair wealth and eliminate poverty, something not assured simply through passage of civil rights protections alone. In effect, King recognized that full citizenship required economic freedoms alongside the other vital protec-

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www.mckinsey.com/industries/public-and-social-sector/our-insights/an-experiment-to-inform-universal-basic-income [https://perma.cc/7FGS-FFQU]

64. Jhumpa Bhattacharya, ROOSEVELT INST., *Exploring Guaranteed Income Through a Racial and Gender Justice Lens* (2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_UBI-Racial-Gender-Justice-brief-201906.pdf.

65. *Id.* at 1 ("Without bold, visionary action and policies to address these issues, the chasm between those who are economically secure and those who are not—mainly Black, brown, and Native American communities and women—will continue to grow, ultimately threatening our nation's ability to finally achieve our promise of freedom, dignity, and security for all.").

66. DR. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 171 (Beacon Press 1967). *See also* Drew Desilver, *Who's Poor in America? 50 Years into the "War on Poverty," a Data Portrait*, PEW RSCH. CTR. (Jan. 13, 2014), https://www.pewresearch.org/fact-tank/2014/01/13/whos-poor-in-america-50-years-into-the-war-on-poverty-a-data-portrait; EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 374 (2013), https://www.govinfo.gov/content/pkg/ERP-2013/pdf/ERP-2013.pdf [https://perma.cc/UU8E-VGCB].

67. King, *supra* note 66, at 170–72. According to data from the Census Bureau, the unemployment rate of African Americans in 1966 was 7.3% compared with only 3.4% of Whites. 41.8% of African Americans lived in poverty compared with 13.3% of Whites.

tions bestowed through civil rights. These beliefs propelled King's last march, the Poor People's Campaign of 1968.[68]

Today, the wealth gap that concerned King and Randolph is ever-widening: as of 2017, "approximately 160,000 households in America now own more wealth than the poorest 90 percent combined—the highest concentration of wealth since 1962,"[69] four years prior to the publication of the Freedom Budget. "[T]he differences in wealth between white Americans and people of color is at its highest level in 25 years";[70] for example, "[i]n 2016, the typical white household held $171,000 in wealth—*10 times* that of the typical Black household, and about *8 times* that of Latinx households."[71] This inequality has particularly strong effects when taking into account intersectional social identities including race, gender, sexual orientation and gender identity, and, as discussed more fully below, disability.

In a proposal distinct from other arguments in support of the UBI, and targeted to rectify these inequities, Battacharya and the US Basic Income Guarantee Network have argued for a tiered guaranteed income model that gives stipends, based on historic disadvantage and current wealth status, to repair and restore historically disadvantaged communities.[72] Unlike other anti-poverty measures, Battacharya proposes that the UBI be implemented in a manner that gives a standard benefit plus an additional payment dispersed to "people of color and women-headed households . . . to make up for barriers placed on them by policies of our past and present."[73]

C. The CRA: A Restorative Justice Model that has Fallen Short

The examples of restorative justice in action demonstrate efforts to recognize historic and entrenched inequities, include a range of stakeholders in identifying potential solutions, and use the intentional restoration of resources to repair the harm and transform communities. But while the above examples reflect ideas with underpinnings in restorative justice, they currently lack the structure and mandate of a federal statutory scheme notable in the CRA. In other words, they are generally either based on local bodies convening to make recommendations, as with the Greensboro TRC, or they are cutting-edge thought

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68. *Id.*
69. Bhattacharya, *supra* note 64, at 1.
70. *Id.* at 3.
71. *Id*.
72. *Id*. at 13–16.
73. *Id*. at 15.

experiments not yet codified into law, such as Restorative Justice Cities and the UBI.

The CRA thus holds an unmatched place in American law as a concrete restorative justice mechanism. Its purpose, embodied in statute, was, and still is, to address historic injustices imposed on LMI communities through discriminatory redlining by repairing banking relationships with, and restoring resources to, those communities.

As the mandate of restorative justice efforts is intentionally broad and capable of addressing entire communities—meaning the intersecting social identities of all those who live in those communities—ostensibly so, too, has been the CRA from its inception. And over the past forty years, the CRA has made strides in addressing the damage caused by prior discriminatory practices. But these successes must be contrasted with regulators' and banks' failures to serve a sizable demographic subpopulation of those same communities.

It is the absence of historically serving that population which now requires banks to restore and repair their relationship with the sixty one million Americans with disabilities and one in four families with a family member with a disability.[74] Given the intersectionality of race, gender, and disability, efforts to modernize CRA regulations to directly address disability in addition to other LMI populations will strengthen and bolster the ability of banks through lending, investment, and service to restore resources to those most financially vulnerable Americans.

II.
The CRA and Other Federal Laws Affecting People with Disabilities

People with disabilities have endured centuries of economic, social, and political exclusion in America and globally, including unnecessary institutionalization, economic marginalization, employment discrimination, and discrimination in places of public accommodation.[75] They represent the country's largest minority population.[76] By some estimates, there are presently sixty-one million Americans (al-

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74. Ctrs. for Disease Control & Prevention, *CDC: 1 in 4 US Adults Lives with a Disability,* CDC Newsroom (Aug. 16, 2018), https://www.cdc.gov/media/releases/2018/p0816-disability.html. *See also* U.S. Census Bureau, *Disability and American Families: 2000*, at 3 tbl.2 (2005), https://www.census.gov/prod/2005pubs/censr-23.pdf.

75. Blanck (2020), *supra* note 9, at 13.

76. ADA Nat'l Network, *People with Disabilities: America's Largest Minority* (Facilitator's Guide, ADA Trainer Network, Module 5a, 2012), https://www.adapacific.org/assets/documents/5a_america-largminorityfinal.pdf.

most one in five) with disabilities, and more than one billion individuals (one in seven) with disabilities around the world.[77] In the United States today, more than one quarter of working-age people with disabilities are living below the poverty level, over twice the rate of those without disabilities.[78] It is all too clear that, despite various federal laws designed to address some of the problems, more work needs to be done. This Article will overview the development of some of these laws before focusing on the financial challenges that, despite the CRA, continue to confront many people with disabilities today.

A. *The Evolution of the CRA*

The CRA as enacted advanced the proposition that "financial institutions are required by law to serve 'the convenience and needs,' including credit needs, of the communities in which they are chartered to do business."[79] The obligation of financial institutions to serve their communities was consideration for privileges afforded them, such as the protection of federal deposit insurance and access to the Federal Reserve's discount window.[80]

A handful of significant legislative and regulatory changes have shaped the CRA since it was enacted in 1977. The Financial Institutions Reform and Recovery Act of 1989 required the appropriate Federal Agency to prepare written evaluations of bank performance and publicly disclose their findings in a four-tiered CRA examination rating system, with performance levels of "Outstanding," "Satisfactory," "Needs to Improve," or "Substantial Noncompliance."[81] In 1995, regulatory changes established a three-pronged CRA test based on performance in the areas of lending, investments, and services.[82] While these regulations placed the emphasis on lending, they encouraged innovative approaches to addressing community development needs.[83]

In 2005, regulators made two other significant changes. First, they "streamlined" the evaluation criteria for a large number of banks

77. BLANCK (2020), *supra* note 9, at 11, 13.

78. *Id.* at 13.

79. Bernanke, *supra* note 17, n.8 (quoting 12 U.S.C. § 2901).

80. *Id*.

81. Sandra F. Braunstein, Dir., Div. Consumer & Cmty. Affs., The Community Reinvestment Act, Address Before the Committee on Financial Services, U.S. House of Representatives (Feb. 13, 2008), *in* BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/newsevents/testimony/braunstein20080213a.htm. In 1995, regulatory changes established a three-pronged CRA test based on performance in the areas of lending, investments, and services.

82. *Id.*

83. *Id.*

by revising the threshold of what would be considered "small" banks and adding a category of "intermediate small" banks.[84] As a result, only banks with over one billion dollars in assets were subject to the three-pronged test.[85] Small banks became subject only to a lending test, and "intermediate small banks" to a lending test as well as a new community development test more flexible than the test applied to large banks.[86] Second, the 2005 revisions broadened the term "community development" to allow CRA credit for activities addressing "distressed and underserved nonmetropolitan middle-income geographies and designated disaster areas."[87]

Throughout the revisions to the CRA, the law has maintained a focus on requiring banks to provide lending and other services within their local communities, including LMI areas, where banking institutions have a physical branch office and take deposits (also known as their CRA assessment areas).[88] However, as banks increasingly have offered online services and thus serve customers from outside the geographic area in which they have physical branches, the concept of a physical footprint has become outdated.[89] This trend has accelerated with the health and economic emergency resulting from the COVID-19 pandemic and, correspondingly, has increased the need for CRA-qualifying activities to address access to broadband, technology, financial technology ("fintech"), and digital online banking services.[90]

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84. *Id.* In 2005, regulators made two significant changes. First, they "streamlined" the evaluation criteria for a large number of banks by revising the threshold of what would be considered "small" banks and adding a category of "intermediate small" banks. As a result, only banks with over one billion dollars in assets are subject to the three-pronged test. Small banks are subject only to a lending test and "intermediate small banks," are subject to a lending test as well as a new community development test that is more flexible than the test applied to large banks.

85. *Id.*

86. *Id.*

87. OFF. COMPTROLLER CURRENCY, FED. RSRV. BANK & FED. DEPOSIT INS. CORP., FIL-33-2006, COMMUNITY REINVESTMENT ACT INTERAGENCY EXAMINATION PROCEDURES attach. (2006) (Small Institution CRA Examination Procedures), https://www.fdic.gov/news/news/financial/2006/fil-33-2006a.pdf.

88. Barbara S. Mishkin, *Treasury Issues Recommendations for Modernizing the CRA*, CONSUMER FIN. MONITOR (Apr. 5, 2018), https://www.consumerfinancemonitor.com/2018/04/05/treasury-issues-recommendations-for-modernizing-the-cra.

89. *Id.*

90. *See, e.g.*, Press Release, World Bank, Fintech Market Reports Rapid Growth During COVID-19 Pandemic (Dec. 3, 2020), https://www.worldbank.org/en/news/press-release/2020/12/03/fintech-market-reports-rapid-growth-during-covid-19-pandemic.

Despite these changes, the CRA has faced challenges in its approach to adequately evaluating banks' compliance with the law.[91] As a result, community advocates have pushed for tougher requirements and enforcement, and many groups have issued reports highly critical of the regulators.[92] At the same time, as the experience of the 2008 recession has waned, the banking industry has pressed for a decrease in its regulatory burden.[93] Bankers argue for greater predictability in the CRA exam process, more precision as to how the ratings are determined, and a more consistent application of the regulations across agencies and examiners within each agency to minimize discrepancies across exams over time.[94]

In 2018, the Office of the Comptroller of the Currency ("OCC"), an independent bureau in the U.S. Department of the Treasury that regulates banks,[95] took steps to modernize the CRA to aid banks to more effectively serve their communities through increased lending, investment, and activity; to evaluate CRA activities more consistently; and to provide greater clarity as to CRA-qualifying activities.[96] For the first time since its enactment over forty years earlier, the OCC regulations provided guidance and examples of CRA-qualifying activities that address ways that investment, lending, and services can specifically support the unmet needs of LMI people with disabilities.[97] Examples of CRA-qualifying activities related to LMI people with disabilities included: (a) An unsecured consumer loan to a moderate-income individual for household assistive technology products and vehicle modifications to improve accessibility; (b) Donations to workforce development programs designed to improve employment opportunities for LMI individuals with disabilities; (c) Financial capability training by bank employees to individuals with disabilities; and (d) Loans to upgrade equipment in a public library to accommodate

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91. Mark A. Willis, *It's the Rating, Stupid: A Banker's Perspective on the CRA*, 4 COMMUNITY DEVELOPMENT INVESTMENT REVIEW, no. 1, Feb. 2009, at 59–60, https://www.frbsf.org/community-development/files/its_rating_stupid1.pdf.

92. *Id.*

93. *Id.*

94. *Id.*

95. OFF. COMPTROLLER CURRENCY, BULL. 2018-17, COMMUNITY REINVESTMENT ACT: SUPERVISORY POLICY AND PROCESSES FOR COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATIONS (2018), https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-17.html.

96. Reforming the Community Reinvestment Act Regulatory Framework, 83 Fed. Reg. 45,053 (proposed Sept. 5, 2018) (codified at 12 C.F.R. pts. 25, 195).

97. Ctr. for Disability-Inclusive Cmty. Dev., *New Final CRA Rule Published by OCC: Historic Gains for LMI People with Disabilities* (June 5, 2020), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/06/ndi-summary-of-cra-final-rule-060420.pdf.

LMI disabled individual patrons. The list of qualifying activities that meet CRA requirements are an illustrative list and not meant to be an exhaustive list.[98]

While under the prior CRA rules, banks received CRA credit for serving the LMI disability population, the revised rules explicitly recognize the disability target population to ensure that people with disabilities are not overlooked in CRA activities, as they generally have been in the past.[99]

In December 2021, the OCC rescinded the rule issued in May 2020 in response to a directive from the Biden Administration for the three regulatory agencies responsible for enforcing CRA (OCC, FDIC and Federal Reserve) to jointly develop modernized rules. The three agencies are expected to propose new regulations in 2022 for public comment. This is an opportunity for the regulators to provide guidance and examples of how LMI people with disabilities should be included in CRA-qualifying activities—both to comport their mandates with the anti-discrimination mandates of other applicable federal laws and to address the critical unmet needs of the LMI disability population.

B. Other Federal Laws Addressing People with Disabilities

At the time the CRA was enacted in 1977, the majority of people with disabilities lived without expectations of full participation in the workforce or the economic mainstream.[100] Historically, such persons were educated in separate school settings, isolated in state and regional mental institutions, and supervised in adult care facilities without expectation that they would be employed, live independently, own a home, or acquire wealth.[101] The decade of the 1970s did see, how-

98. *Compare* Community Reinvestment Act Regulations, 85 Fed. Reg. 34,734 (June 5, 2020) (codified at 12 C.F.R. pts. 25, 195) *with* OFF. COMPTROLLER CURRENCY, CRA ILLUSTRATIVE LIST OF QUALIFYING ACTIVITIES (2020), https://www.occ.gov/topics/consumers-and-communities/cra/cra-illustrative-list-of-qualifying-activities.pdf [https://perma.cc/9UXY-TREJ].

99. *Id.*

100. Morris et al., *supra* note 1, at 361.

101. *Id.*; *see also* Peter Blanck, *Disability in Prison*, 26 S. CAL. INTERDISC. L. J. 309, 310 (2017); *Deinstitutionalization: A Psychiatric "Titanic,"* FRONTLINE (May 10, 2005), https://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html (excerpt from Chapter 1 of E. FULLER TORREY, M.D., OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS (1997)); Peter Blanck, *Why America is Better Off Because of the Americans with Disabilities Act and the Individuals with Disabilities Education Act*, 35 TOURO L. REV. 605, 610 (2019); Peter Blanck, *Thirty Years of the Americans with Disabilities Act: Law Students and Lawyers as Plaintiffs and Advocates*, 45 HARBINGER 8, 11 (2021), https://socialchangenyu.com/harbinger/thirty-years-of-the-americans-with-disabilities-act/.

ever, the emergence of federal legislative action to address various inequities.

With the passage of the Rehabilitation Act in 1973, students with disabilities saw federal protections that allowed them to attend their neighborhood schools for the first time.[102] That Act, discussed more fully below, set the stage for the ADA in its language and implementing regulations. Many terms in the ADA are derived from the Rehabilitation Act and its accompanying regulations.[103] The ADA explicitly acknowledges that the Rehabilitation Act regulations and case law are instructive for interpreting the ADA.[104]

In 1975, Congress enacted the Education of All Handicapped Children Act, subsequently codified and amended as the Individuals with Disabilities Education Act ("IDEA").[105] The IDEA was reauthorized in 1997 and reauthorized again by the Individuals with Disabilities Education Improvement Act of 2004.[106] One purpose of these laws is to ensure that children with disabilities have available a "free appropriate public education" that emphasizes special education and related services to meet their needs and prepare them for further education, employment, and independent living.

It was not until 1990 that Congress passed, and George H.W. Bush signed into law, the bi-partisan Americans with Disabilities Act. The predominant purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[107] The statute enumerated as "the Nation's proper goals regarding individuals with disabilities [assuring] equality of opportunity, full participation, independent living, and *economic self-sufficiency* for such individuals."[108]

The ADA, comparable in its reach and aims to the civil rights statutes of the 1960s, sought to end discrimination against individuals with disabilities and guarantee equal opportunity in employment, public services, and places of public accommodation. The National Council on Disability described the ADA as "an incomparable legislative achievement, . . . [that] served as an example to the world that institu-

102. BLANCK (2020), *supra* note 9, at 33.

103. Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title."

104. *Id.* at 40; 42 U.S.C. § 12201(a).

105. BLANCK (2020), *supra* note 9, at 196; 20 U.S.C. § 1400–1487.

106. *Id*.; Pub. L. No. 108–446, 118 Stat. 2647 (2004).

107. 42 U.S.C. § 12101(b)(1).

108. 42 U.S.C. § 12101(a)(8) (emphasis added).

tional isolation, exclusion, and discrimination that had been perpetuated against people with disabilities for centuries had no place in America or its future."[109]

The ADA is reflective of the modern disability civil rights ("rights") model that began to influence government policy after passage of the Rehabilitation Act in 1973. Both the "rights" and "social" models of disability view people with disabilities as a minority group, entitled to the same hard-won legal protections for equality that have emerged from the struggles of African Americans, women, individuals with differing sexual orientations and gender identities, and others.[110] Under the rights and social models, disability is a social, economic, political, and cultural construct—a construct related to one's physical and mental capabilities. Thus, often, laws, policies, and social, economic, and cultural practices, themselves, subordinate persons with disabilities.[111] Under the ADA, however, the government is to secure within reason the equality of persons with disabilities by eliminating those artificial barriers that unfairly preclude full and equal involvement in society.[112]

As demonstrated by the following analysis of the current financial status of people with disabilities, the CRA has failed to live up to either its promise or, in its interpretation and execution, the mandates of the ADA and other federal anti-discrimination laws.

III.
People with Disabilities and their Exclusion from the Financial System

More than thirty years after the enactment of the ADA and earlier laws that have increased opportunities for people with disabilities to enjoy civil rights where they live, work, and go to school,[113] and de-

109. Nat'l Council on Disability, 2020 Progress Report on Nat'l Disability Pol., 10, https://www.ncd.gov/sites/default/files/NCD_Progress_Report_508_0.pdf.

110. Blanck (2020), *supra* note 9, at 13.

111. *Id*. *See also* Peter Blanck, *Supported Decision-Making: Emerging Paradigm in Research, Law, and Policy,* J. Disability Pol'y Stud.: OnlineFirst, June 22, 2021, at 1, https://doi.org/10.1177/10442073211023168; Peter Blanck & Jonathan G. Martinis, *"The Right to Make Choices": The National Resource Center for Supported Decision-Making*, 3 Inclusion 24 (2015); Dilip V. Jeste, Graham M. L. Eglit, Barton W. Palmer, Jonathan G. Martinis, Peter Blanck & Elyn R. Saks, *Supported Decision Making in Serious Mental Illness*, 81 Psychiatry: Interpersonal & Biological Processes 28 (2018). Guardianship laws are an example of laws and policies that subordinate people with disabilities

112. Michael Ashley Stein, *Under The Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 Va. L. Rev. 1151 (2004).

113. Blanck (2020), *supra* note 9, at 13.

spite applicable language in the CRA provisions about restoring the financial status of the LMI community, people with disabilities remain disproportionately poor and displaced from the mainstream economy. The consequences are inescapable—lower income levels among people with disabilities (even in states with generous social welfare systems) lead them to have fewer assets, such as home ownership, and to experience other effects of poverty. Lack of access to resources diminishes the ability of people with disabilities to protect themselves. There is substantial literature demonstrating that when disability is coupled with being a woman, and/or a member of a racial and ethnic minority, the discriminatory effects are multiplied.[114]

It is well documented that financial institutions have long failed to serve "the convenience and needs," including credit needs, of people with disabilities, even though they long have been required to do so under the CRA.[115] These facts demonstrate that the introduction of civil rights protections at the end of the 20th century—under the Rehabilitation Act, ADA, and other seminal statutes—while groundbreaking in many ways, was insufficient to offset the history of economic exclusion from the financial system and discriminatory extraction of wealth that such persons endured in our nation preceding the passage of those statutes.

This situation is exacerbated for people with disabilities due to "disability" being a non-monochromatic social identity with an inherent propensity for intersecting with other demographic social identities.[116] Enforcement of civil rights laws, in the traditional sense, often has fallen short of the cross-cutting remedies needed to address the adverse economic effects of experiencing disability as well as other multiple and complex intersecting social identities. Even when inter-

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114. *See, e.g.,* Peter Blanck, Meera Adya & Maria Veronica Reina, *Defying Double Discrimination*, 8 GEO. J. INT'L AFFS. 95 (Winter/Spring 2007); NANETTE GOODMAN, MICHAEL MORRIS & SABRINA EAGER, NAT'L DISABILITY INST., RACE, ETHNICITY AND DISABILITY: THE FINANCIAL IMPACT OF SYSTEMIC INEQUALITY AND INTERSECTIONALITY 3 (Aug. 20, 2020), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/08/race-ethnicity-and-disability-financial-impact.pdf [https://perma.cc/KK5W-92QQ].

115. Ben S. Bernanke, Chairman Fed. Rsrv., The Community Reinvestment Act: Its Evolution and New Challenges, Address at the Community Affairs Research Conference (Mar. 30, 2007), https://www.federalreserve.gov/newsevents/speech/Bernanke20070330a.htm; Kevin A. Park & Roberto G. Quercia, *Who Lends Beyond the Red Line? The Community Reinvestment Act and the Legacy of Redlining*, 30 HOUSING POLICY DEBATE 4–26 (2019), https://doi.org/10.1080/10511482.2019.1665839.

116. BLANCK (2020), *supra* note 9, at 387 (citing references in support).

sectional remedies are permitted, they are not typically designed to restore discriminatorily extracted resources from the community.[117]

In recent years, research has documented that people with disabilities are a sizable subpopulation of LMI neighborhoods. More than 60% of adults with disabilities are considered LMI, meaning they have household incomes less than 80% of the median household income.[118] Other data indicate that people with disabilities "make up approximately 12% of the U.S. working-age population, yet they account for more than 40% of those living in long-term poverty."[119] The poverty rate for adults with disabilities is nearly twice the rate for adults with no disabilities (26% versus 11%).[120]

Significantly, for decades, people with disabilities have faced barriers to work whether economic times are good or bad. Nearly two-thirds of working-age adults with disabilities do not participate in the labor market.[121] When people with disabilities do work, historically they have been "vastly underrepresented in the fastest-growing occupations in the economy and overrepresented in the occupations with the fastest rate of decline."[122] Moreover, people with disabilities are often excluded from mainstream financial services. They are more likely to be "unbanked," less likely to have access to mainstream credit, less likely to have savings, and more likely than most any other group in the nation to experience trouble making ends meet.[123]

The National Disability Institute has documented several core data points about the financial needs of people with disabilities and the extent to which banks fail to meet their needs. For example, in 2019,

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117. Peter Blanck, *Thirty Years of the Americans with Disabilities Act: Law Students and Lawyers as Plaintiffs and Advocates*, 45 HARBINGER 8, 11 (2021), https://socialchangenyu.com/harbinger/thirty-years-of-the-americans-with-disabilities-act/.

118. Morris et al., *supra* note 1, at 366.

119. *Id*.

120. NAT'L INST. FOR DISABILITY, INDEPENDENT LIVING, AND REHABILITATION RESEARCH, 2020 ANNUAL DISABILITY STATISTICS COMPENDIUM 64–65 tbls.6.1 & 6.2 (2020), [https://perma.cc/UZB4-RGLM].

121. Press Release, Bureau of Lab. Stat., Persons with a Disability: Labor Force Characteristics — 2021 (Feb. 24, 2022), https://www.bls.gov/news.release/pdf/disabl.pdf [https://perma.cc/LE3Q-P2DD].

122. NAT'L COUNCIL ON DISABILITY, 2020 PROGRESS REPORT IN NATIONAL DISABILITY POLICY: INCREASING DISABILITY EMPLOYMENT 23–25 (July 24, 2020), https://www.ncd.gov/sites/default/files/NCD_Progress_Report_508_0.pdf [https://perma.cc/9DR7-LGLE].

123. NANETTE GOODMAN, BONNIE O'DAY & MICHAEL MORRIS, NAT'L DISABILITY INST., FINANCIAL CAPABILITY OF ADULTS WITH DISABILITIES: FINDINGS FROM THE NATIONAL FINANCIAL CAPABILITY STUDY 3–4 (2017), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/01/ndi-finra-report-2017.pdf [https://perma.cc/8DFY-2MB3].

16% of households with a disability were unbanked, meaning that no one in the household had a checking or savings account at a bank or credit union, compared to 4.5% of people without disabilities.[124] People with disabilities also have less access to affordable credit. Only 49% of households with a disability had bank credit (credit card or personal loan), compared with 77% of their nondisabled peers.[125] When they do not have mainstream credit, households with a disability are twice as likely as those without a disability to use non-bank, often predatory, credit arrangements such as payday loans, pawn shops, or tax refund anticipation loans (11% versus 5%).[126]

Working-age adults with disabilities are more likely than those without disabilities to show signs of financial stress. Compared to working-age adults without disabilities, they are almost three times (23% versus 9%) more likely to have extreme difficulty paying bills; significantly more likely (55% versus 32%) to report that they could not come up with $2,000 if an unexpected need arose; significantly more likely to overdraw checking accounts (31% versus 18%); and more than twice as likely to be late on mortgage payments (31% versus 14%) and to take loans from retirement accounts (23% versus 10%).[127]

This financial stress is evident in access to housing and healthcare. Almost one-quarter (24%) of households with a disability spend more than half of their income on housing, compared with 16% of those without a disability.[128] Despite having a thinner margin of good health, 31% of people with disabilities skipped a medical test, treatment, or follow-up recommended by their doctor because of cost, as compared with 16% of their nondisabled peers.[129]

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124. FDIC, HOW AMERICA BANKS: HOUSEHOLD USE OF BANKING AND FINANCIAL SERVICES, 2019 FDIC SURVEY 13 (2020), https://www.fdic.gov/analysis/household-survey/2019report.pdf [https://perma.cc/W6SV-WGQK].

125. *Id.* at 47.

126. *Id.*

127. GOODMAN, ET AL., *supra* note 123, at 10, 15–17.

128. Online Table Search Results, *American Housing Survey (AHS) Table Creator*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html (build a table with the following options from the table criteria and variables: National, 2019, Housing Costs, Disability Status, NONE).

129. GOODMAN, ET AL., *supra* note 123; NANETTE GOODMAN & MICHAEL MORRIS, NAT'L DISABILITY INST., BANKING STATUS AND FINANCIAL BEHAVIORS OF ADULTS WITH DISABILITIES: FINDINGS FROM THE 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS (2019), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/11/ndi-banking-report-2019.pdf [https://perma.cc/7R9A-KT32]; NANETTE GOODMAN, MICHAEL MORRIS & KELVIN BOSTON, NAT'L DISABILITY INST., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA

Current research on the financial and economic conditions of individuals grouped by disability status *and* racial/ethnic identity reflects that "individuals who live at [the] intersection of race and disability experience disproportionate levels of financial distress."[130] Across nearly every relevant metric, whether the poverty rate, educational level, savings and net worth, housing costs, or job loss, Black, Indigenous, and People of Color ("BIPOC") with disabilities experience worse economic outcomes than either BIPOC without disabilities or non-BIPOC with disabilities.

For example, more than one-third of Black and Latinx working-age adults with disabilities are living in poverty (36% and 34% respectively), compared to 17% and 15%, respectively, of Black and Latinx adults without disabilities and 23% of white adults with disabilities.[131] Likewise, only 15% of adults with disabilities are college graduates, compared to approximately one-third of adults without a disability, but when race is added as a factor, individuals have even lower levels of educational attainment, with only 11% of African-American adults with a disability having graduated college.[132]

Across all racial and ethnic groups, households with a disabled working-age householder had an average net worth of $14,180, compared to other households with net worths averaging $83,985.[133] However, the group with the lowest overall net worth is Black households where the householder has a disability, with an average net worth of only $1,282.[134] This disparity is evident in the banking sector. While overall, 16% of households with a disability are unbanked, the rate is much higher for BIPOC households with a disability: 28.5% of African American and 22% of Hispanic households with a disability are unbanked.[135] Those who live at the intersection of race and disability

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(2017), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf [https://perma.cc/59MQ-UAX4].

130. NANETTE GOODMAN, MICHAEL MORRIS & SABRINA EAGER, NAT'L DISABILITY INST., RACE, ETHNICITY AND DISABILITY: THE FINANCIAL IMPACT OF SYSTEMIC INEQUALITY AND INTERSECTIONALITY 3 (Aug. 20, 2020), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/08/race-ethnicity-and-disability-financial-impact.pdf [https://perma.cc/KK5W-92QQ] [hereinafter NDI, *Inequality and Intersectionality*]. For a historical perspective, see LARRY LOGUE & PETER BLANCK, RACE, ETHNICITY, AND DISABILITY: VETERANS AND BENEFITS IN POST-CIVIL WAR AMERICA (2010).

131. NDI, *Inequality and Intersectionality*, *supra* note 130, at 4.

132. *Id*. at 5.

133. *Id*. at 7.

134. *Id*.

135. Online Custom Chart Tool – Vertical, *How America Banks: Household Use of Banking and Financial Services*, FDIC, https://www.fdic.gov/analysis/household-survey (build a chart with the following options from the table criteria and variables:

are a core sub-population of LMI neighborhoods, and arguably the most economically vulnerable portion of those communities.

Disability disproportionately impacts people in LMI neighborhoods—as disability can give rise to poverty, so, too, can poverty give rise to disability—because they live in more densely populated, LMI neighborhoods with inadequate access to healthcare and related resources, poorer housing conditions, food insecurity, and job loss.[136] Correspondingly, LMI people with disabilities are documented to have higher susceptibility to chronic health conditions that impose additional costs on them, even while they endure an ever-widening gap in income and overall wealth.[137]

While disability and race have strong interactive and compounding effects, public systems and remedies afforded under law, including those addressed in this article, historically have tended to treat them differently and individually rather than together in a restorative justice framework of the type the CRA affords. Nevertheless, existing civil rights laws forbid overlooking disability in the provision of community development activities,[138] provisions that apply to activities under the CRA. This has important ramifications for LMI people with disabilities.

In light of U.S. laws and the historical and current status of people with disabilities in the LMI population, the CRA, a statute premised upon holistic restorative justice, is uniquely positioned to return unfairly extracted resources from the community as a whole. Given overarching community intersectionality,[139] if banks begin to meet the credit and other needs of people with disabilities, such efforts will be

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Year: 2019, Y Topic: Bank Account Ownership, Y Variable: Unbanked, X Topic: Demographic, X Variable: Disability status).

136. *Id*. *See also*, MAJORITY STAFF OF S. COMM. ON HEALTH, EDUC., LAB. & PENSIONS, 113TH CONG., REPORT ON FULFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES 6 (Comm. Print 2014), https://www.help.senate.gov/imo/media/doc/HELP%20Committee%20Disability%20and%20Poverty%20Report.pdf.

137. *Id*.

138. *See, e.g.*, Americans with Disabilities Act, 42 U.S.C. § 12132; Rehabilitation Act, 29 U.S.C. § 794(a); Olmstead v. L.C., 527 U.S. 581 (1999).

139. "Intersectionality" is a term coined by legal scholar Kimberlé Crenshaw, and is a "lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other." Katy Steinmetz, *She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today*, TIME MAGAZINE (February 20, 2020), https://time.com/5786710/kimberle-crenshaw-intersectionality/ [https://perma.cc/R8V6-S2R6]; *see also* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

signposts for whether their lending, investment, and services are in fact also restoring resources to BIPOC individuals and to the most economically vulnerable in LMI communities. It is therefore critical that, for the future promise of racial, gender, and multiple minority identity equity in housing, employment, and access to financial services, the update to the CRA include addressing the structural inequalities currently and historically experienced by people with disabilities.

IV.
Harmonizing the CRA with the Rehabilitation Act and the ADA

Banks are prohibited under federal civil rights laws from excluding people with disabilities from CRA lending, investment, and services, but as the foregoing has shown, banks have done just that. As promoting economic self-sufficiency and prohibiting discrimination against people with disabilities are core purposes of the Rehabilitation Act and the ADA, reforming CRA activities with intentionality to include people with disabilities will bring banks in step with the current landscape of civil rights law and policy. Further, as banks become more effective at reaching the disability sub-population, they will also increase the efficacy of their efforts to reach other sub-populations with multiple minority identities.

Section 504 of the Rehabilitation Act prohibits discrimination against people with disabilities in programs that receive federal financial assistance ("FFA").[140] A threshold legal issue is whether the support banks receive from the federal government qualifies as FFA. As addressed more fully below, we believe that because banks distribute federal guaranteed loans, enjoy the protections offered by the Federal Deposit Insurance Corporation (FDIC), access credit from the federal discount window, and receive CRA credit by supporting Community Development Financial Institutions (CDFIs), banks typically receive FFA. Thus, banks that overlook the disability population in CRA planning and implementation are not only less effective; they may also violate Section 504.

Moreover, unless they include people with disabilities in their CRA plans, banks may unwittingly thwart the progress of state and local governments in complying with Title II of the ADA and the Supreme Court's seminal 1999 decision *Olmstead v. L.C.* (endorsing the ADA's "integration mandate") addressing Title II. They may thus undermine significant public investment. For these reasons, it is critically

140. Rehabilitation Act, 29 U.S.C. § 794.

important that the banking system begin to repair and restore its relationship with LMI people with disabilities and plan holistically to include them in future CRA activities.

A. Non-discrimination for Recipients of FFA under the Rehabilitation Act

Section 504 requires that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination."[141] Section 504 applies to programs and activities receiving federal financial assistance ("FFA"), or programs and activities conducted by federal agencies or the U.S. Postal Service.[142] In 1978, the Department of Health Education and Welfare (now two departments: Health and Human Services, and Education) issued regulations implementing Section 504 that required recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons."[143] The preamble to these regulations noted that "separate" treatment of individuals with disabilities is permitted only when necessary to ensure equal opportunity and effective benefits and services.[144] Later, other agencies, including the DOJ, promulgated Section 504 regulations and included this integration mandate.[145]

While grants and loans from a federal agency are generally considered FFA under Section 504, the case law is less clear about whether banks' actions to comply with federal regulations under the CRA, or funds or services disbursed by banks pursuant to the CRA, are covered by Section 504's nondiscrimination requirements. Even though banks do not receive direct appropriations from the Department of Treasury ("Treasury") for CRA loans and investments, they do distribute federally guaranteed loans and enjoy the protections afforded by federal deposit insurance and access to the Federal Reserve's discount window.[146] Thus, to decipher banks' nondiscrimination obligations, given their direct involvement with these federal guarantees, it is necessary to consider the Rehabilitation Act and its implementing regulations.

141. *Id.* § 794(a).
142. *Id.*
143. Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973, 43 Fed. Reg. 2132, 2134 (Jan. 13, 1978).
144. *Id*.
145. *See, e.g.,* 28 C.F.R. § 39.130(d) (DOJ: General prohibitions against discrimination).
146. Bernanke, *supra* note 17.

The principles of statutory interpretation and the plain language of the Rehabilitation Act lead to the conclusion that Section 504 does cover CRA programs and activities. While other federal civil rights statutes that guarantee nondiscrimination in the receipt of federal funds—including Title IX of the Education Amendments Act of 1972, Title VI of the Civil Rights Act of 1964, and the Age Discrimination Act of 1975—explicitly exempt "contract[s] of insurance or guaranty" from the nondiscrimination requirements, Section 504 does not.[147]

Given this specificity in other civil rights statutes that bear the same legislative purpose and Congress' silence on the same specific point in Section 504, the silence can be reasonably interpreted as entirely purposeful—a "pregnant silence."[148] Thus, it is sensible to interpret Section 504 as intending to include programs derived from federal loan guarantees, and, in turn, to prohibit banks' exclusion of the disability population from programs like CRA that are backed by such federal guarantees.

This conclusion is further supported by the regulations implementing Section 504. In 2017, Treasury issued its first set of agency-specific rules implementing Section 504, even though the Notice of Proposed Rulemaking recognized that "Treasury recipients have been subject to section 504 since its effective date in 1973."[149] Those rules establish that "federal financial assistance" may include "any other arrangement by which the Department [of Treasury] provides or otherwise makes available assistance in the form of . . . (b) Services of federal personnel."[150]

The regulations provide that the prohibition on discrimination "solely by reason of disability" under "any program or activity receiving Federal financial assistance from the Department of Treasury" may include a program or activity "providing government assistance"

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147. Jared P. Cole, Cong. Rsch. Serv., LSB10459, Applicability of Federal Civil Rights Laws to Recipients of CARES Act Loans 2 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10459.

148. For other examples of pregnant silences, see United States v. Bestfoods, 524 U.S. 51, 62 (1998) ("Against this venerable common-law backdrop, the congressional silence is audible."); Elkins v. Moreno, 435 U.S. 647, 666 (1978) (absence of reference to an immigrant's intent to remain citizen of foreign country is "pregnant" when contrasted with other provisions of "comprehensive and complete" immigration code); Meyer v. Holley, 537 U.S. 280, 286 (2003) (ordinary rules of vicarious liability apply to tort actions under the Fair Housing Act; statutory silence as to vicarious liability contrasts with explicit departures in other laws).

149. Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance from the Department of the Treasury, 82 Fed. Reg. 67 (proposed Jan. 3, 2017) (to be codified at 31 C.F.R. pt. 40).

150. *Id*. at § 40.3.

to "a corporation, partnership, or other private organization."[151] As regulators (including the Treasury, its OCC, and the Federal Reserve) provide government assistance and oversight to regulated banks under the CRA, regulated banks that subscribe to the requirements of CRA are thereby covered by Section 504. Pursuant to Section 504, CRA-regulated banks may not, directly or indirectly, use criteria or methods of administration that subject qualified individuals with disabilities to discrimination on the basis of disability.[152]

In addition, commercial banks that enjoy the benefits of the "federal discount window" may borrow from the Federal Reserve system to meet minimum reserve thresholds that ensure the stability of the U.S. banking system.[153] In this regard, the FFA that they receive extends beyond mere regulatory oversight or technical assistance. Instead, the discount window authorizes commercial banks to be borrowers from the United States' central bank. Depository institutions may access three types of discount window credit from their regional Federal Reserve Bank: primary credit, secondary credit, and seasonal credit, each with its own interest or "discount" rate.[154] Rates are established by each Reserve Bank's board of directors, subject to the review of the Board of Governors of the Federal Reserve System.[155]

The discount window seeks to prevent "runs on the bank" of the kind experienced during the Great Depression, when banks experienced fluctuations in deposits and loans during market shocks that caused some banks to fail.[156] By borrowing from the Federal Reserve through the discount window, sometimes daily, overnight, or seasonally, banks accept FFA, which, in turn, imposes nondiscrimination obligations upon them under Section 504, including in how they administer their CRA programs.

Accordingly, it is arguably a violation of federal law for banks not to include LMI people with disabilities, solely on the basis of their disabilities, in their CRA planning, administration, and funding of qualifying activities. In addition to deploying resources to the disability population to rectify this problem, it is imperative, as described later in this article, that banks begin to collect meaningful data disag-

151. *Id*.
152. *Id*. at § 40.4(b)(3).
153. *Regulatory Reform: Discount Window Lending*, Bd. Governors Fed. Rsrv. Sys., https://www.federalreserve.gov/regreform/discount-window.htm (Mar. 10, 2021) [https://perma.cc/QWN6-L7GM].
154. *Id*.
155. *Id*.
156. *Id*.

gregating the LMI sub-populations by disability, and other intersectional identities, to ensure that those resources reach the sub-population and better ensure compliance with Section 504.

Section 504 also applies to Community Development Financial Institutions ("CDFIs"), which are direct recipients of FFA and receive an appropriation from Treasury for the Community Development Financial Institution Fund ("CDFI Fund").[157] The CDFI Fund is an agency within Treasury established through the Riegle Community Development and Regulatory Improvement Act of 1994 to promote economic revitalization in distressed communities throughout the United States.[158] Thus, under Section 504, CDFIs are prohibited from excluding people with disabilities when they disburse funds to these distressed communities.

To date, however, few CDFIs nationally have manifest plans or measured outputs for appropriating investment, loans, or services to people with disabilities in the communities served. This problem is magnified by CDFIs' dependence on obtaining liquidity and equity from the investments of larger banks that have CRA obligations.[159] In this regard, if the larger banks fail to comply with Section 504 in their CRA implementation, that problem will redound to the CDFIs that typically receive investments or loans from those banks and that play a crucial role in deploying capital directly to historically underserved populations. While banks are incentivized by the CRA to invest in CDFIs, receiving the extra credit for doing so does not currently require the banks to provide an accounting of the particular LMI sub-populations served.

These system failures impact millions of Americans with disabilities. They perpetuate their financial exclusion from the banking system, rather than restoring and repairing that exclusion.

B. ADA Title II and Olmstead*'s Integration Mandate*

Bank's current CRA activities may be unknowingly and unintentionally perpetuating the segregation of individuals with disabilities. Thus, in addition to their non-compliance with Section 504, banks

157. *What Does the CDFI Do?* DEPT. TREASURY CMTY. DEV. FIN. INSTS. FUND, https://www.cdfifund.gov/ (last visited Mar. 8, 2022).

158. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103-325 (codified at 12 U.S.C. § 4701 *et seq.*).

159. FDIC, AFFORDABLE MORTGAGE LENDING GUIDE PART I: FEDERAL AGENCIES AND GOVERNMENT SPONSORED ENTERPRISES 81 (2018), https://www.fdic.gov/resources/bankers/affordable-mortgage-lending-center/guide/part-1-docs/affordable-mortgage-lending-guide-part-1.pdf.

may be unwittingly undermining state and local governments' efforts to comply with Title II of the ADA and the Supreme Court's 1999 decision in *Olmstead v. L.C*. Under Title II of the ADA, Congress prohibited public entities, meaning state and local governments, from discriminating against individuals with disabilities when it stated:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[160]

The Title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[161] The preamble for the discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."[162]

In *Olmstead v. L.C.*,[163] the U.S. Supreme Court held that Title II prohibits the unjustified segregation of individuals with disabilities. The Court held that public entities are required to provide community-based services to persons with disabilities when such services are appropriate, the affected persons do not oppose community-based treatment, and community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity.[164]

The *Olmstead* Court explained that this holding "reflects two evident judgments."[165] First, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." Second, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, *economic independence*, educational advancement, and cultural enrichment."[166]

To comply with the ADA's integration mandate, public entities must reasonably modify their policies, procedures, and practices when

160. 42 U.S.C. § 12132.
161. 28 C.F.R. § 35.130(d) (the "Integration mandate").
162. 28 C.F.R. pt. 35, App. B. (addressing § 35.130).
163. 527 U.S. 581 (1999).
164. *Id.* at 607.
165. *Id.* at 600.
166. *Id*. at 600–01 (emphasis added).

necessary to avoid discrimination.[167] The obligation to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would "fundamentally alter" its service system.[168]

The *Olmstead* ruling is the *Brown v. Board of Education* of the disability rights movement. It impacts millions of Americans with disabilities and their right to live, work, and go to school in the community.[169] As a result of the *Olmstead* decision and the DOJ's enforcement of the decision, states have taken concrete steps to move their residential care, employment, and educational service systems for people with disabilities away from serial over-investment in institutional care and towards providing services to support people with disabilities at home and in their communities.[170]

The efforts of state and local governments to comply with this mandate are complex and highly deliberative. They are reliant on shifting incentives, including Medicaid funding rate methodologies and reimbursement systems, and increases in the availability of resources for permanent supportive housing, supported employment, and individualized personal care giving in the community.[171] Importantly, these efforts hinge on state and local governments rebalancing previous public investments in institutionalization to ensure individuals have a meaningful choice of services within these public systems in the most integrated setting appropriate.

While the public system has engaged in a massive effort to rebalance and modernize public investments in disability services to

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167. 28 C.F.R. § 35.130(b)(7)(i).

168. *Id.*; *see also*, Olmstead v. L.C., 527 U.S. 581, 604–07 (1999).

169. *See Olmstead*, 527 U.S. 581.; *Olmstead: Community Integration for Everyone*, DEP'T OF JUST. CIV. RTS. DIV., https://www.ada.gov/olmstead/ (last visited Mar. 8, 2022) [hereinafter DOJ *Olmstead*]. *See also* Lane v. Brown, 166 F. Supp. 3d 1180 (D. Or. 2016); United States v. Rhode Island, No. 1:14-cv-00175 (D.R.I. April 9, 2014); Ga. Advo. Off. v. Georgia, 447 F. Supp. 3d 1311 (N.D. Ga. 2020).

170. *See, e.g*., U.S. COMM'N ON CIV. RTS., IMPACTS ON THE CIVIL RIGHTS OF PEOPLE WITH DISABILITIES 19 (2020), https://www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf (citing supplemental testimony from Regina Kline, Esq. stating, "public employment systems in the majority of states have *serially overinvested* in sheltered workshops to the exclusion of integrated alternatives like supported employment, many people with disabilities, who can and want to work but need additional services and supports to do so, will continue to be pipelined, referred, or otherwise enrolled in segregated sheltered workshops with little opportunity to make meaningful and informed choices to work elsewhere.") (emphasis added).

171. DOJ CIV. RTS. DIV., DISABILITY RIGHTS SECTION, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, ADA.GOV (Feb. 25, 2020), https://www.ada.gov/olmstead/q&a_olmstead.htm.

comply with the Rehabilitation Act, the ADA, and *Olmstead*, banks often continue to deploy capital to private investments without regard for, or awareness of, the efforts state and local governments are making.[172] This means even those banks that ostensibly are committed to serving those who have been historically excluded from the mainstream financial system have made investments in the very institutions that the government and civil rights laws would deem "segregated" and that run contrary to the economic self-sufficiency and autonomy of individuals with disabilities.

Data collected by the Federal Financial Institutions Examinations Council does not include information on disability or the outcome of investments or loans and their effect on LMI sub-populations.[173] Thus, banks currently lack a dashboard to track the effect of their loans and investments in this regard. This omission may seriously undermine current efforts underway to reform and rebalance public disability spending.

Consider, for example, that states have spent years and millions of dollars, and engaged in complex and coordinated efforts, to transition service systems from institutional settings like "sheltered workshops" to inclusive employment in the community with supported employment services, job development, and job coaching.[174] Consider, too, that, as reported by the Federal Reserve Bank of Philadelphia in *Banks' Reinvestment Act (CRA) Opportunities for Promoting Job Creation, Workforce Development, and Place-Based Investments*, banks count as "CRA eligible community development activities."[175] But recently, a $1.3 million loan to construct a Goodwill store for job training was made in the state where Goodwill has come under fire for

172. *See, e.g.*, DOJ *Olmstead, supra* note 169.

173. FED. FIN. INST. EXAMINATIONS COUNCIL, A GUIDE TO CRA DATA COLLECTION AND REPORTING (2016), https://www.ffiec.gov/cra/pdf/2015_cra_guide.pdf.

174. Sheltered workshops are where individuals earn sub-minimum wages in exchange for employment services provided in segregated institutional settings. *See, e.g.,* Peter Blanck, *Employment integration, economic opportunity and the Americans with Disabilities Act: Empirical Study from 1990 to 1993*, 79 IOWA L. REV. 910 (1994).

175. SYDNEY GOLDSTEIN & LEI DING, FED. RES. BANK OF PHILA. BANKS' REINVESTMENT ACT (CRA) OPPORTUNITIES FOR PROMOTING JOB CREATION, WORKFORCE DEVELOPMENT, AND PLACE-BASED INVESTMENTS, APP. B (2017), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/06/banks-community-reinvestment-act-opportunities.pdf [hereinafter, Banks' Report]. *See also* Sarah Kim, *What the Decisions of Illinois Goodwill Say About Overall View on Disabled Workers,* FORBES, (July 17, 2019), https://www.forbes.com/sites/sarahkim/2019/07/17/goodwill-disabled-workers/ [https://perma.cc/K7TN-2QTA] .

paying workers with disabilities subminimum or no wages in segregated sheltered workshops.[176]

The *Banks' Report* showed that while CRA credit in the hundreds of thousands of dollars has been approved for loans to non-profits that, for example, "provide[ ] job training and placement and vocational rehabilitation for low-income developmentally disabled individuals," there is no way of knowing whether the non-profits provide services in the most integrated setting appropriate.[177] More to the point, it is unclear that banks have been sufficiently guided by regulators or other authority to better understand the requirements of the ADA and *Olmstead* to direct investments, loans, and services toward integrated settings in an effort to harmonize private investment with civil rights law.

The regulations implementing Title II were based on those issued under Section 504.[178] The ADA is based on the "remedies, procedures and rights" of Section 504,[179] and courts have interpreted the statutes consistently. Significantly, Treasury's Section 504 implementing regulations state, "[r]ecipients shall administer programs or activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[180] Thus, the *Olmstead* decision applies equally to programs and activities receiving FFA. Because, as addressed earlier, CRA-regulated banks are covered by Section 504, they likewise carry obligations to provide CRA-qualifying activities, including lending, investment, and services, in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

This analysis does not mean, however, that banks are categorically excluded from providing loans, investments, or services in institutional settings. But it does suggest that private banks must ensure that CRA activities support a range of disability investments, loans, and services, including those provided in integrated settings, to maximize individuals with disabilities' access to economic self-sufficiency and participation in the economic mainstream. The Federal Reserve should delineate these services for consultation by the banks.

Arguably, qualified LMI individuals with disabilities have a legal right to bring Section 504-based complaints against commercial banks that are CRA-regulated and participate in the federal discount window, or against CDFIs that exclude them from CRA programs, includ-

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176. *Banks' Report*, *supra* note 175.
177. *See id*.
178. *See supra* note 143.
179. 42 U.S.C. § 12133.
180. 29 C.F.R. § 32(4)(d).

ing investment, lending, and services. Such individuals may file complaints for discrimination when existing CRA programs significantly over-rely on investments in segregated institutional settings to the exclusion of integrated alternatives in the economic mainstream of community life.

V.
Community Development and Bank Evaluation in a Restorative Justice Model

Thus far, this article has argued that the needs of people with disabilities have been largely overlooked in CRA enforcement over the past four decades and that failing to include people with disabilities in CRA activities runs contrary to civil rights laws. As we have also addressed, the disability population comprises a sizable portion of those who are in LMI communities, including those individuals who are the most economically vulnerable of all. For these reasons, bank regulators should not wait any longer to modernize CRA enforcement as part of a restorative justice framework.

This modernization would include adding clear incentives and additional opportunities for banks to invest, lend, or provide services to people with disabilities, with the goal of restoring and repairing banks' relationship with them and to offset a long history of discrimination. A new regulatory framework should make it clear to banks that a "disability inclusive lens" will be used to assess the full CRA-related worth of a given project.

In the tradition of other restorative justice commissions and consistent with the restorative-justice approach of the CRA, a federally appointed commission should be designated by the Federal Reserve Board. The members may include individuals with knowledge of, and expertise about, disability; relevant civil rights laws; and CRA investment, lending, and bank services. The members should include, to the extent not already covered, representatives from the disability community. Such membership qualifications will be needed to determine how to better align incentives and apportionment of bank lending, investment, and services to the disability population.

At a minimum, the committee should take the following actions:

(1) Recommend ways to "fast track" individual determinations submitted by banks or the public of whether community development activities designed by or for people with disabilities qualify for CRA credit;

(2) Determine what activities, in terms of lending, investment, and service, should be minimally reported by banks in a "disability equity score" to track progress toward the goal of economic inclusion, and determine the frequency of this reporting;

(3) To further compensate for failing to serve the disability subpopulation, make recommendations for added economic incentives and additional ways that investment, lending, and services can be provided to support the economic inclusion of people with disabilities; and

(4) Provide guidance to CDFIs about ways to more immediately engage and cultivate borrowers with disabilities and investments in disability-led solutions and businesses.

In addition, the Federal Reserve should issue regulations providing that banking activities that have not meaningfully considered the needs of people with disabilities because of their disabilities, or that are not provided in the most integrated setting appropriate, should not receive CRA credit. The regulations can delineate ways that those banks that do serve the disability population may receive extra CRA credit.

Moreover, as reparations for the historic and ongoing exclusion of LMI people with disabilities from CRA activities, CRA-regulated banks should be required to commit some minimum portion of funds to the disability subpopulation. These funds will enable the banking system to effectively reach more individuals with disabilities who remain underbanked or unbanked as a result of historic exclusion, including BIPOC people with disabilities. As an illustration, the total CRA expenditure of banks in 2018 was $480 billion.[181] If banks tied 1% of that total expenditure to disability in a given year, it would equal $4 billion set aside for disability investment, loans, and services. For comparison, in Fiscal Year 2021, the Federal Government allotted $3.7 billion to provide employment support services (vocational rehabilitation) to people with disabilities across all states.[182]

Likewise, banks should be required to commit some reasonable minimum portion of funds deployed to CDFIs for disability. For example, a bank may provide an investment in a CDFI to support lend-

181. *The Community Reinvestment Act: Is the OCC Undermining the Law's Purpose and Intent? Hearing Before the H. Comm. On Fin. Serv*., 116th Cong. 2 (2020) (testimony of Comptroller Joseph M. Otting), https://www.govinfo.gov/content/pkg/CHRG-116hhrg42793/pdf/CHRG-116hhrg42793.pdf.

182. DEP'T OF EDUC., REHABILITATION SERVICES: FISCAL YEAR 2021 BUDGET REQUEST (2021), https://www2.ed.gov/about/overview/budget/budget21/justifications/j-rehab.pdf.

ing for affordable integrated and accessible housing development. Given the housing shortages presently facing persons with disabilities, the bank and the CDFI should focus on the accessibility of a minimum number of units, beyond minimum federal standards. The eventual goal should be universal design housing to serve people across the spectrum of disabilities.[183]

A significant investment in financial education and counseling should likewise require a minimum number of outreach efforts and partnerships with the disability community.[184] A bank may provide investment in CDFIs for small business loans, with low-cost debt. Likewise, the bank and CDFI should commit to some minimum portion of those monies lent to LMI people with disabilities. Banks should receive extra credit for these efforts, and they should be required to be reported with specificity in the banks' disability equity score statement.

Moreover, banks should be incentivized to make investments earmarked for "seeding" savings accounts for people with disabilities, to bring people with disabilities into the financial system. The proposed Federal Reserve Commission should determine an appropriate minimum acceptable level of seed, or fund-matching, for the Achieving a Better Life Experience ("ABLE") Act tax-advantaged savings accounts for individuals with disabilities in LMI communities.[185]

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183. *See, e.g.,* Peter Blanck, *Universal Architectural Design and People with Disabilities*, 14 NUMBERS MAGAZINE (KREAB), 64 (Apr. 29, 2016) (Spanish and English), https://globaluniversaldesign.org/wp-content/uploads/2021/06/2016-blanck-universal-architectural-design.pdf [https://perma.cc/3TMW-JVCE].

184. For more information on likely future developments for people with disabilities, *see* Peter Blanck, Principal Investigator, Rehabilitation Research Training Center on Employment Policy, funded by the U.S. National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) (2020), *cited in* Peter Blanck, Editorial, *Disability Inclusive Employment and the Accommodation Principle: Emerging Issues in Research, Policy, and Law*, 30 J. OCCUP. REHAB. 505, 506 (2020), https://doi.org/10.1007/s10926-020-09940-9 (discussing that, over the next five years, the new national Rehabilitation Research and Training Center on Disability Inclusive Employment Policy—"DIEP RRTC"—will design and implement a series of studies that produce new data and evidence to increase employment and economic opportunity for people with disabilities).

185. *See, e.g.,* Michael Morris, Christopher Rodriguez & Peter Blanck, *ABLE Accounts: A Down Payment on Freedom*, 4 INCLUSION 21 (2016) (ABLE accounts are tax-advantaged savings programs for eligible people with disabilities to enable designated beneficiaries to pay for qualified disability expenses; distributions are tax-free if used for qualified disability expenses); *see also*, *ABLE Accounts—Tax Benefit for People with Disabilities*, INTERNAL REV. SERV. (Feb. 22, 2021), https://www.irs.gov/government-entities/federal-state-local-governments/able-accounts-tax-benefit-for-people-with-disabilities [https://perma.cc/N672-V4DB].

The joint effort of the Federal Reserve, OCC, and the FDIC in modernizing the regulations should follow the OCC construct of providing meaningful examples of qualifying CRA activities that will benefit LMI individuals with disabilities. These may include donations to support workforce development activities to increase employment for people with disabilities, provision of loans for the purchase of assistive technology devices and work-related technologies,[186] and staff engagement in financial education and counseling services. Additional examples of qualifying CRA activities may include contributions the ABLE seed or fund-matching noted above, and expansion of broadband access and technology equipment to increase access to mobile banking, financial inclusion, and traditional and "gig" employment.[187]

Finally, and critically, what gets measured meaningfully is more likely to get done. Access to affordable and accessible housing, small business loans, responsive financial services that are accessible, upskilling, reskilling, entrepreneurship training, support of mobile banking, access to fintech, availability of financial education and counseling, or affordable small dollar and consumer loans for purchase of assistive technology and/or home or vehicle modifications, are all examples of qualified CRA activities that can be quantified and measured and can become a standard part of the evaluation of bank performance. Moreover, innovative CRA investments can include making impact investments in disability-led technology solutions, medium and small businesses, and early-stage companies.

Conclusion

As the nation experiences rising inequality, a health, social, and economic crisis of unprecedented proportions due to the pandemic, and an inflection point in the movement for racial justice, the time is ripe for a modernized approach to CRA.

If the CRA is viewed as a restorative justice mechanism to include people with disabilities, it can become a reconciliation tool and a refined instrument designed to reach those most vulnerable members of LMI communities. CRA regulatory authorities and banks must convene a deliberative body that will seek to reconcile past failures to

186. Peter Blanck, eQuality: The Struggle for Web Accessibility by Persons with Cognitive Disabilities (2014).

187. Paul Harpur & Peter Blanck, *Gig Workers with Disabilities: Opportunities, Challenges, and Regulatory Response*, 30 J. Occup. Rehab. 511–520 (2020); Peter Blanck & Paul Harpur, California's Response to the Status of Gig Workers with Disabilities: An Update, 30 J. Occup. Rehab. 511, 512 (2020).

include LMI people with disabilities in CRA activities, and, with intentionality, to forge a clear path forward towards inclusive community development. The three bank regulators should include a wide range of stakeholders in its discussions—most importantly, diverse people with disabilities—about ways to reconcile and restore resources to people with disabilities to repair the harm and transform communities.

As the mandate of restorative justice efforts is intentionally broad and capable of addressing entire communities—meaning the intersecting multiple social identities of those who live in such communities—so too must the CRA be implemented. Given the intersectionality of race and disability, and of other marginalized identities, banks must take concrete steps to collect data and information about the diverse sub-populations that comprise LMI communities. They can and must make concerted efforts to ensure that those sub-populations are included fully and equally in community development activities.

More than three decades after the passage of the ADA, and almost fifty years since the enactment of the Rehabilitation Act, banks maintain responsibility for meeting the "integration mandate" of those statutes. All three bank regulating agencies (OCC, FDIC, and Federal Reserve) should include within new rules guidance to regulated banks about how to provide meaningful community development activities to people with disabilities in the most integrated setting appropriate to their needs. Regulators and banks must proactively address, and seek to remove, systemic and attitudinal barriers that continue to deny people with disabilities full access to the economic mainstream, including the financial system.

CRA modernization will enable the regulators to expand coverage to LMI people with disabilities. It will assist financial institutions to work cooperatively, in economically positive ways, towards the goal of eliminating disability poverty, and poverty more generally. In doing so, consumer economic, social, and civic participation will be strengthened as access improves for affordable products and services and more universally inclusive community development activities become available. These efforts will build a more inclusive and robust economy, and greatly advance the cause of civil rights.