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## The Intersection Between Disability and LGBT Discrimination and Marginalization

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# THE INTERSECTION BETWEEN DISABILITY AND LGBTQ DISCRIMINATION AND MARGINALIZATION

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## INTRODUCTION

In February of 2016, Kayden Clarke, a 24-year old autistic, transgender man in Mesa, Arizona, allegedly experienced a suicidal crisis. As a result, a friend or an acquaintance had reached out to the Mesa Police Department,

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leading to officers conducting a welfare check.<sup>1</sup> By the end of the incident, Kayden had died, having been shot by the police officers, alleging that Clarke had threatened them with a knife.<sup>2</sup> In a tragic irony, Kayden died by the very individuals whose official stated goal was to check on his well-being. What led Kayden to his crisis was his health provider's decision to deny access to gender-affirming care for his transition because of his diagnosis of Asperger's Syndrome.<sup>3</sup>

Kayden is not alone in any of the various identities that made his life unique and irreplaceable as a human being. Almost half of the people that die at the hands of police have been reported as having some kind of disability.<sup>4</sup> Further, fifty-eight percent of transgender individuals surveyed with a prior interaction with law enforcement had experienced mistreatment as a result of their transgender identity.<sup>5</sup> Like Kayden, many transgender individuals have faced discrimination in health care that is inextricably linked to both their transgender identity and their disability.<sup>6</sup> This is especially true of LGBTQ+ people with mental health, intellectual, and developmental disabilities (I/DD).<sup>7</sup>

The mistreatment of both individuals with disabilities and LGBTQ+ individuals is not a new phenomenon.<sup>8</sup> Indeed, among the many things that

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1. Ralph Ellis, *Transgender Man with Asperger's Killed by Mesa, Arizona, Police*, CNN (Feb. 7, 2016), <https://www.cnn.com/2016/02/06/us/transgender-man-with-aspergers-killed/index.html>.

2. *Id.*

3. *Id.*

4. David M. Perry & Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability: a Media Study (2013-2015) and Overview*, RUDERMAN FOUNDATION (March 2016), [https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability\\_final-final.pdf](https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf).

5. S. E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Dec. 2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

6. *Health Disparities at the Intersection of Disability and Gender Identity*, DISABILITY RIGHTS EDUC. & DEF. FUND (July 2018), [https://dredf.org/health-disparities-at-the-intersection-of-disability-and-gender-identity/#\\_edn1](https://dredf.org/health-disparities-at-the-intersection-of-disability-and-gender-identity/#_edn1).

7. Edward Cain et al., *The Experiences and Support Needs of People with Intellectual Disabilities Who Identify as LGBT: A Review of the Literature*, 57 RES. IN DEVELOPMENTAL DISABILITIES 39, 40 (2016).

8. David Pettinicchio, *Why Disabled Americans Remain Second-Class Citizens*, WASHINGTON POST (July 23, 2019), <https://www.washingtonpost.com/outlook/2019/07/23/why-disabled-americans-remain-second-class-citizens/>; Susan Miller, *'Not just about a cake shop': LGBT People Battle Bias in Everyday Routines*, USA TODAY (Jan. 16, 2018), <https://www.usatoday.com/story/news/nation/2018/01/16/not-just-cake->

intersect and join these communities is the vulnerability to discrimination, violence, and mistreatment in most facets of life, such as policing, employment, housing, and intimate partner violence.<sup>9</sup> This article examines the intersections of how disability, discrimination, and oppression disproportionately impact the LGBTQ+ community, and the legal and policy solutions that can reduce discrimination and oppression.<sup>10</sup>

## I. COMPARISON AND RELATIONSHIP BETWEEN DISABILITY AND LGBTQ LEGAL PROTECTIONS

### A. Disability Non-Discrimination Protections

In 1990, President George H.W. Bush signed into law the Americans with Disabilities Act (ADA).<sup>11</sup> This marked a historic moment because, for the first time in American history, Congress expanded civil rights law to cover individuals with disabilities as a class protected from discrimination.<sup>12</sup> Since its inception, the definition of a disability in the ADA has been expansive, defining a disability as “[a] physical or mental impairment that substantially limits one or more major life activities of such individual.”<sup>13</sup> However, the Senate’s passage of the ADA’s final text narrows the definition of disability in a very important manner. To the credit of the late Sen. Jesse Helms (R-NC), the final text of the ADA, with an explicit clause, excludes from the definition of disability: homosexuality, bisexuality, and “[t]ransvestitism, transsexualism pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”<sup>14</sup> The ADA statute with current amendments still contains this critical exclusion.

Leading disability advocates of that era welcomed the explicit transphobia and homophobia in this section of the ADA.<sup>15</sup> Policy makers at the time viewed this exclusionary language as an acceptable compromise in order to achieve the landmark civil rights legislation they sought.<sup>16</sup> In many ways,

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shop-lgbt-people-battle-bias-everyday-routines/1031339001/.

9. Miller, *supra* note 8.

10. Health Disparities, *supra* note 6.

11. 42 U.S.C. § 12101 (2009).

12. *Id.*

13. 42 U.S.C. § 12102 (2009).

14. 42 U.S.C. § 12211 (2009).

15. Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J., 2013, at 1.

16. Alok K. Nadig, *Ably Queer: The ADA as a Tool in LGBT Antidiscrimination Law*, 91 N.Y.U. L. REV. 1316, 1340 (2016).

this compromise foreshadowed later debates over diversity and inclusion within the disability movement. This clause survived the subsequent reforms of the ADA Amendments Act of 2008 that broadened the definition of disability.<sup>17</sup>

The ADA was, in its own way, a major achievement to many in the LGBTQ+ community, then-living at the height of the HIV epidemic. In *Bragdon v. Abbott*, the Supreme Court held that HIV qualified as a protected disability under the ADA because reproduction was a major life activity, and per the plain language of the ADA, HIV was a disability impacting this major life activity.<sup>18</sup> In the decades since, advocates have routinely used the statute to protect individuals living with HIV.

The impact of the ADA is best seen in *Olmstead v. L.C.*, where the Court held that the ADA prohibits undue institutionalization of individuals with mental disabilities.<sup>19</sup> Finding for the plaintiffs, two psychiatrically disabled women who had been institutionalized in Georgia, Justice Ginsburg wrote for the majority:

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. 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. Cf. *Allen v. Wright*, 468 U.S. 737, 755 (1984) (“There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action.”); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978) (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971))). 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. See Brief for American Psychiatric Association et al. as *Amici Curiae* 20–22. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar

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17. *Id.*

18. 524 U.S. 624 (1998).

19. See 527 U.S. 581 (1999).

sacrifice. See Brief for United States as *Amicus Curiae* 6—7, 17.<sup>20</sup>

Despite the achievements of the ADA, extremely pervasive ableism is prevalent throughout American society, causing continual violations of the rights established in law and affecting societal attitudes.<sup>21</sup> Decades after the passage of the ADA and other landmark legislation, police killings of individuals with disabilities, such as Kayden Clarke, persist.<sup>22</sup> In a 2019 poll, twenty years after *Olmstead*, a third of respondents stated that individuals with mental illness scared them.<sup>23</sup> Likewise, bills have been introduced that would weaken the protections of the ADA by establishing requirements for notification before a lawsuit can be filed over architectural barriers, such as H.R. 620, which passed in the House, but later stalled in the Senate.<sup>24</sup>

In the same vein as the various legislative threats to the ADA, we have seen multiple legislative attacks on *Olmstead*, demonstrating that its achievements cannot be taken for granted.<sup>25</sup> For example, during the ongoing 2020 Presidential campaign, Senator Kamala Harris unveiled her mental health policy plan.<sup>26</sup> Included in this plan, was the idea to enlarge the amount of inpatient institutional beds for psychiatric institutions, making it easier for Medicaid to cover these institutions.<sup>27</sup> Disability advocates criticized this idea,<sup>28</sup> and while Harris suspended her campaign shortly afterwards,<sup>29</sup> major

20. See *id.* at 600-01.

21. Edward Friedman, *Reframing Disability in an Ableist Society*, ROOSEVELT HOUSE (Oct. 24, 2017), <http://www.roosevelthouse.hunter.cuny.edu/?forum-post=reframing-disability-ableist-society>.

22. Marie M. Lee, *Op-Ed: It's Not Just the Costco Shooting. Disabled People are Often Killed by Police*, L.A. TIMES (June, 19, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-lee-disability-costco-shooting-20190619-story.html>.

23. *Survey: Americans Becoming More Open About Mental Health*, AMERICAN PSYCHOLOGICAL ASSOCIATION (May 1, 2019), <https://www.apa.org/news/press/releases/2019/05/mental-health-survey>.

24. ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2018).

25. Megan Flynn, *Olmstead Plans Revisited: Lessons Learned from the Rights of Persons with Disabilities*, 28 L. & INEQ, 407, 418 (2010).

26. Sara Luterman, *How Kamala Harris's Mental Health Plan Could Hurt the Most Vulnerable*, VOX (Nov. 27, 2019, 12:50 PM), <https://www.vox.com/firstperson/2019/11/27/20985430/kamala-harris-mental-health-plan>.

27. *Id.*

28. Zack Budryk, *Disability Advocates Raise Concerns About Democratic Candidates' Mental Health Plans*, THE HILL (Nov. 27, 2019), <https://thehill.com/policy/healthcare/472294-disability-advocates-raise-concerns-with-provisions-in-harris-buttigieg>.

29. Dan Merica & Kate Sullivan, *Kamala Harris Ends 2020 Presidential Campaign*, CNN (Dec. 3, 2019), <https://www.cnn.com/2019/12/03/politics/kamala-harris-ends-presidential-bid/index.html>.

Presidential candidates willing to incentivize unnecessary institutionalization demonstrates the need for concern to protect the achievements in *Olmstead*.

### B. LGBTQ+ Non-Discrimination Protections

Although LGBTQ+ advocacy has made great strides in winning the battle for the “hearts and minds” of the American public and has garnered LGBTQ+ acceptance,<sup>30</sup> legal achievements with respect to equal rights at the federal level continue to be challenged in the courts. In the span of a generation, the Court struck down anti-LGBTQ+ laws,<sup>31</sup> found sodomy laws unconstitutional,<sup>32</sup> and established marriage equality.<sup>33</sup>

However, unlike the ADA’s protection of disabled individuals against nationwide discrimination, a majority of states do not explicitly provide the same protections for the LGBTQ+ community.<sup>34</sup> Despite there being no inclusion of sexual orientation or gender identity in federal civil rights laws, in the past decade, multiple circuit courts and the EEOC have interpreted Title VII’s sex discrimination protections to include the LGBTQ+ community.<sup>35</sup> This interpretation is currently being challenged, with the question of whether Title VII protects LGBTQ+ people now currently pending before the Supreme Court, with oral arguments held on October 8, 2019.<sup>36</sup> Even if the Court correctly rules in the affirmative, Title VII does not cover the right of access to public accommodations, leaving the LGBTQ+ community unprotected from exclusion or refusal of service in many public spaces, such as restaurants, movie theaters, and stores.

Even in jurisdictions that prohibit discrimination against the LGBTQ+ community, a myriad of discriminatory practices persists. In 2015, the District of Columbia Office of Human Rights, an office providing protection

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30. Spencer Harvey, *GLADD’s 2019 Accelerating Acceptance Index, Results Show Further Decline*, GLAAD (June 24, 2019), <https://www.glaad.org/blog/glaad%E2%80%99s-2019-accelerating-acceptance-index-results-show-further-decline-lgbtq-acceptance-among>.

31. *Romer v. Evans*, 517 U.S. 1620, 1629 (1996).

32. *Lawrence v. Texas*, 539 U.S. 558 (2003).

33. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

34. *Non-Discrimination Laws*, MAP, [https://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](https://www.lgbtmap.org/equality-maps/non_discrimination_laws).

35. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*1 (E.E.O.C. Apr. 20, 2012).

36. *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, OYEZ, <https://www.oyez.org/cases/2019/18-107>; *Bostock v. Clayton County*, OYEZ, <https://www.oyez.org/cases/2019/17-1618>.

for the LGBTQ+ community, performed a résumé testing study that concluded forty-eight percent of employers appeared to prefer a less qualified applicant perceived as cisgender, over a more qualified applicant perceived as transgender.<sup>37</sup> The District of Columbia's Human Rights Act protects LGBTQ+ people from discrimination.<sup>38</sup>

### C. The ADA's Protection of Transgender People

Given the ADA's explicit exclusion of "transsexualism," legal scholars and litigators have called into question the ADA's protection of transgender individuals. This exclusion is highlighted in the current version of the *Diagnostic and Statistical Manual of Mental Disorder's* formal diagnosis of gender dysphoria, known mostly as the DSM-V. The first and most significant case considering whether the ADA provides transgender individuals with protection was *Blatt v. Cabela's Retail*.<sup>39</sup> In *Blatt*, the Eastern District of Pennsylvania held that transgender individuals are not categorically barred from seeking relief under the ADA. In contrast, the Northern District of Alabama in *Doe v. Northrop Grumman Sys. Corp.* held that the term "gender dysphoria" was synonymous with "gender identity disorder," a term Congress had already excluded from protection under the ADA. The court stated that:

Plaintiff's initial response to defendant's motion observes that the condition alleged in his complaint is 'gender dysphoria' and that 'gender dysphoria' is not specifically excluded by the language of 42 U.S.C. § 12211(B). That response overlooks the fact, however, that 42 U.S.C. § 12211(B) has not been amended since it was enacted on July 26, 1990. The statute utilizes the descriptive term referenced in defendant's motion, "gender identity disorders," but that term was replaced in 2013 by the Fifth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders with the one employed by plaintiff: "gender dysphoria."<sup>40</sup>

One fundamental advantage of using the ADA to protect transgender individuals from discrimination is that, unlike sex discrimination law, Title III of the ADA prohibits public accommodations from discrimination on the

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37. Teresa Rainey and Elliot E. Imse, *Qualified and Transgender* 6, D.C. OFFICE OF HUMAN RIGHTS (Nov. 2015), [https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender\\_FullReport\\_1.pdf](https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf).

38. 14 D.C. Code § 2-1401.01.

39. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at \*3 (E.D. Pa. May 18, 2017).

40. *Doe v. Northrop Grumman Sys. Corp.*, No. 5:19-CV-00991-CLS, 2019 WL 5390953, at \*5 (N.D. Al. Oct. 22, 2019).

basis of disability.<sup>41</sup> However, the differences in court decisions and the lack of circuit court decisions on the matter demonstrates the unsettled case on this topic.

## II. DISABILITY AND THE LGBTQ+ COMMUNITY - A SOCIAL AND EXPERIENTIAL INTERSECTION

Given the traumatic effect of systemic oppression on a person that identifies with the LGBTQ+, an LGBTQ+ individual's experience with hate and discrimination, in a majority cisgender society, is inherently a disability, particularly involving the damage to one's mental health.<sup>42</sup> It logically follows that LGBTQ+ individuals will be more likely to have a mental disability than the general population.<sup>43</sup>

Based on the U.S. Trans Survey of 2015, the proportion of transgender individuals who identify as disabled exceeds that of the general population.<sup>44</sup> Overall, thirty-nine percent of trans respondents admitted having one or more disability, compared to fifteen to twenty percent of the general population.<sup>45</sup> Similar to the trans community, the Movement Advancement Project reported forty percent of bisexual men, thirty-six percent of lesbian women, and thirty-six percent of bisexual women reported having a disability.<sup>46</sup>

While the reported numbers are already staggering, the data only reflects respondents that self-report, which, given the stigma associated with identifying as disabled and part of the LGBTQ+ community, likely means that the actual figures are much higher.<sup>47</sup> One way to curb possible underreporting, at least for mental health disabilities, is to review the prevalence of behavior indicating emotional distress and depression within the community.

For example, in the U.S. Trans Survey, in what may well be the most somber statistic of the entire study, forty percent of transgender respondents

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41. 42 U.S.C. § 12182.

42. Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBTQ People's Lives in Both Subtle and Significant Ways*, CENTER FOR AMERICAN PROGRESS (May 2, 2017), <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

43. S. E. James, *supra* note 5, at 103, 105.

44. *Id.*

45. *Id.* at 57.

46. *Non-Discrimination Laws*, MAP, [https://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](https://www.lgbtmap.org/equality-maps/non_discrimination_laws).

47. James, *supra* note 5, at 62.

reported to have attempted suicide at some point in their lives.<sup>48</sup> In that same study, thirty-nine percent of respondents experienced serious psychological distress during the thirty days preceding the survey.<sup>49</sup> This figure was fifty-three percent among respondents aged eighteen to twenty-five years old.<sup>50</sup> Given the modern understanding of what it means to be disabled and the disabling impact of trauma-based mental illness, both society and federal law should consider these numbers as part of the figure that represents LGBTQ+ people with disabilities.

LGBTQ+ people with disabilities are particularly vulnerable to various forms of oppression. For example, in the GLSEN 2017 National School Climate Survey, twenty-five percent of responding LGBTQ+ students reported experiencing bullying or mistreatment at school because of an actual or perceived disability.<sup>51</sup>

Another example of an issue disproportionately impacting LGBTQ+ individuals with disabilities is the vulnerability to abuse in healthcare settings. Thirty-three percent of transgender people reported experiencing verbal mistreatment by a healthcare provider.<sup>52</sup> Twenty-three percent reported avoiding seeing a doctor when needed due to the fear of mistreatment because of their transgender status.<sup>53</sup> Considering that people with disabilities likely need healthcare more than others, this is a particularly concerning statistic.

The prevalence of mental health disabilities in the LGBTQ+ community makes the community particularly vulnerable to harmful mental health policy proposals. An example includes, in part, H.R. 2646, known as the “Helping Families in Mental Health Crisis Act.”<sup>54</sup> If passed, a major consequence of this bill would have been the expansion of situations in which mental health providers could disclose otherwise legally protected information to family and other loved ones.<sup>55</sup> Senator Kamala Harris’s campaign plan for the 2020 election also supported this erosion of patient

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48. *Id.* at 5.

49. *Id.*

50. *Id.* at 106.

51. Joseph G. Kosciw, et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools*, GLSEN (2018), <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>.

52. James, *supra* note 5, at 5.

53. *Id.*

54. HELPING FAMILIES IN MENTAL HEALTH CRISIS ACT OF 2016, H.R. 2646, 114th Cong. (2016).

55. *Id.*

confidentiality.<sup>56</sup> For LGBTQ+ people who are more likely to be victims of abuse, experience mental health disabilities, and lack support from “loved” ones, well intended policy measures like H.R. 2646 could have detrimental effects. Despite the potential harm to LGBTQ+ individuals with disabilities, legislators routinely propose policies that would weaken confidentiality protections against mental health providers.

We would be remiss not to talk about how the state criminalizes LGBTQ+ individuals with disabilities, more specifically trans people of color. As exemplified with the case of Kayden Clarke, LGBTQ+ individuals with disabilities are more likely to experience victimization. Nearly a fifth of respondents to Lambda Legal’s *Protected and Served?* reported experiencing law enforcement harassment, with transgender individuals making up a quarter of all respondents.<sup>57</sup> In the U.S. Trans Survey, fifty-seven percent of transgender respondents expressed feeling somewhat, or very uncomfortable seeking help from the police.<sup>58</sup> Indeed, twenty-two percent of those who had been arrested expressed their being trans as part of the reason behind the arrest.<sup>59</sup>

As discussed at the beginning of this article, individuals with disabilities are much more likely to be victims of police perpetrated violence.<sup>60</sup> This victimization is further exemplified in the LGBTQ+ community’s large percentage of individuals having one or more disabilities.<sup>61</sup> Moreover, the previously demonstrated high rates of discrimination against LGBTQ+ individuals with disabilities often result in higher rates of poverty<sup>62</sup> and criminalization<sup>63</sup> in the community.

#### CONCLUSION

It is evident that disability issues disproportionately impact LGBTQ+ individuals. This, along with the broader intersections between disability, race, gender, and other marginalized backgrounds, must be a centerpiece in any form of advocacy involving the disability and LGBTQ+ communities

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56. *Kamala’s Plan to Address the Mental Health Care Crisis and Provide Mental Health Care on Demand- Full Policy* (2019), <https://kamalaharris.org/policies/mental-health/full-policy/>.

57. *Protected and Served?*, LAMDA LEGAL, <https://www.lambdalegal.org/protected-and-served/police>.

58. S. E. James, *supra* note 5, at 14.

59. *Id.*

60. Perry, *supra* note 4.

61. James, *supra* note 5, at 57.

62. *Id.* at 141.

63. *Id.* at 186.

and movements. With the HIV epidemic as the exception, LGBTQ+ advocacy has historically failed to incorporate disability as a core issue. Likewise, disability advocacy has failed to center intersectionality with other groups at its core. The negative treatment of the LGBTQ+ community causes trauma throughout the community and creates mental health disabilities. This harmful treatment and subsequent trauma must be addressed by advocates as they develop priorities and strategies. This also means that LGBTQ+ people with disabilities must be among said advocates and leaders.

Audre Lorde said there is no such thing as a single-issue struggle, for we do not lead single-issue lives.<sup>64</sup> This principle must be applied to the intersection of disability and queerness.

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64. AUDRE LORDE, *Sister Outsider: Essays and Speeches*, CROSSING PRESS (1984).