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WYATT AND "PSYCHIATRIC JIM CROW"†

*Susan Stefan**

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† I first discovered the term "psychiatric Jim Crow" in the article: Ayah Nuriddin, *Psychiatric Jim Crow: Desegregation at the Crownsville State Hospital 1948–1970*, 74 J. HIST. OF MED. & ALLIED SCIS. 85 (2018); *see also* Grant Application, Dr. Kylie M. Smith, Jim Crow in the Asylum: Psychiatry and Civil Rights in the American South, from the National Institute of Health, https://grantome.com/grant/NIH/G13-LM013010-01A1 (applying the term "psychiatric Jim Crow").

* Visiting Professor of Law, University of Miami School of Law. This article is dedicated with gratitude to Kermit Brown, an extraordinary and dedicated human rights officer for psychiatric clients of all races, who has patiently and gently taught me to understand at least some of the burdens of racism. I would like to express my thanks to James Tucker and Christy Johnson of ADAP for their help and support in providing background information for this piece, as well as the incredible work they have done for people with psychiatric disabilities in Alabama. Thanks also to Charlotte Watters and Amanda West for their excellent editing.

I. INTRODUCTION

Wyatt v. Stickney was filed on October 23, 1970.[1] The first major decision in *Wyatt* was issued by Judge Frank Johnson on March 12, 1971.[2] In that decision, Judge Johnson held that the patients institutionalized at Bryce State Hospital, a state psychiatric facility, were being denied their constitutional right to treatment, a right that grew out of the State's deprivation of their liberty.[3] At the time of the *Wyatt* decision, Alabama was fiftieth of the fifty states in spending per patient at state mental hospitals, averaging fifty cents a day.[4]

Most people think that *Wyatt v. Stickney* was the first class action involving the question of whether conditions at a state mental hospital violated the federal Constitution. But *Wyatt* is not even the first class action considering whether conditions in a state mental institution violated the federal Constitution that was decided in Alabama by Judge Frank Johnson.[5]

On February 12, 1969, two full years before the decision in *Wyatt*, a three-judge court, including Judge Frank Johnson, decided a case called *Marable v. Alabama Mental Health Board*.[6] Two years before he scathingly denounced the conditions at Bryce Hospital in *Wyatt* as violating constitutional rights of the residents, Judge Johnson described them in far more positive terms in the *Marable* case.[7]

That is because *Marable* was an equal protection case challenging the disparities between the conditions at Bryce, which was the state hospital for whites,[8]

1. Wyatt v. Stickney, 344 F. Supp. 373, 374 (M.D. Ala. 1972).

2. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (holding that there was a constitutional right to treatment and that it had been violated by the lack of treatment at Bryce Hospital, but left State officials free to devise specific standards that would ensure adequate treatment); *see also Wyatt*, 344 F. Supp. at 375 (adding plaintiffs six months later to their class action to include Searcy Hospital and Partlow).

3. *Wyatt*, 325 F. Supp. at 784.

4. *Id.*; *see also* Bob Sims, *The History: Bryce Hospital*, AL.COM, https://www.al.com/bn/2008/01/the_history_bryce_hospital.html (last visited Oct. 12, 2021). These pennies were augmented by the unpaid work of the patients themselves, who raised livestock and planted crops to feed themselves. *See* Steve Davis, *Brief History of Bryce Hospital*, LISTEN, ALA. DEP'T MENTAL HEALTH, OFF. CONSUMER REL., Winter 2009, at 1, 2. Close to fifteen years before the *Wyatt* decision, Bryce's farm revenue alone was over fifty million dollars, and the hospital retained the profit for the patients' unpaid labor, after "much of the food was used to feed the hospital's staff and patients." *Id.* Exploitation of the uncompensated labor for profit of involuntary laborers makes state psychiatric facilities uncomfortably analogous to plantations. *Id.*

5. *See* Marable v. Ala. Mental Health Bd., 297 F. Supp. 291 (M.D. Ala. 1969).

6. *Id.*

7. *Id.* at 294.

8. *See Id.* Bryce did have four hundred Black patients out of 5,100 total patients; 160 were housed in a ward eight miles away from the main campus. *Id.* The other were housed in three wards: Ward X,

and Searcy, which was the state mental hospital for African Americans.[9] The *Marable* plaintiffs won because the court found "that the medical services and facilities for care and rehabilitation of Negro patients are not only separate from but are typically inferior to those available to white patients."[10] Thus, the conditions at Bryce that were later found to violate the constitutional rights of *any* individual were still substantially better than the conditions African-Americans endured at Searcy.[11]

In *Marable*, Judge Johnson provided considerable detail as to just how much better conditions at Bryce were for the white patients than those at Searcy were for the Black patients:

> In contrast to the main complex at Bryce the physical facilities at Searcy are very old and crowded, have no day rooms, and have bare cement floors and seating consisting of backless wooden benches. Bryce has many recreational and occupational programs and craft shops; Searcy has a television set, dominoes and cards, if requested, and a weekly visit from the recreation department.[12]

Although Bryce's staff and treatment opportunities were found to be unconstitutionally inadequate, it was far better staffed (twenty-three physicians, twenty-six medical consultants, and nurses in training for 5,100 patients) than Searcy (five doctors and no consultants or nurses for 2,500 patients).[13] The three-judge panel gave the State of Alabama one year to desegregate Bryce and Searcy Hospitals.[14]

And yet, even though conditions at Searcy were far worse than conditions at Bryce, both in terms of structure and staffing, Searcy was not the hospital chosen for the first challenge to institutional conditions based on the argument that patients deprived of their liberty had the right to receive treatment and humane conditions.[15] In fact, residents of Searcy were only added to the *Wyatt* class five months after the initial court victory applicable only to the residents of Bryce.[16]

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a room with 83 beds in it, adjacent to the laundry where the Ward X patients all worked; The Lodge, which was a converted stable; and The Colony. *Id.*

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 295.
14. *Id.* at 298.
15. *See* Wyatt v. Stickney, 344 F. Supp. 373, 374 n.1 (M.D. Ala. 1972).
16. *Id.*

II. HISTORY OF THE *MARABLE* CASE

In 1963, the U.S. Court of Appeals for the Fourth Circuit became the first court to hold that exclusion or segregation of Black patients from publicly funded hospitals violated the Equal Protection Clause of the United States Constitution.[17] Although the hospital was a private facility, it had been built with public funds provided under the Hill-Burton Act, which had a provision specifically permitting segregated wards in hospitals built with government funding.[18] In *Simkins*, the Fourth Circuit found that the hospital was sufficiently entwined with the government to be subject to the Constitution, struck down the "separate but equal" portion of the Hill-Burton Act permitting segregated hospitals, and found that segregation in hospitals built substantially with federal funds violated the Equal Protection clause.[19] The Supreme Court denied the hospital's petition for writ of certiorari.[20]

President Lyndon Johnson signed the Civil Rights Act three months later.[21] Title VI of the Civil Rights Act codified the *Simkins* case by prohibiting discrimination on the basis of race by entities receiving federal funding.[22] Hospitals that violated the prohibition of Title VI thus risked losing federal funding.[23] When Medicare and Medicaid were passed a year later, the significant federal funds associated with those programs gave the Title VI threat real consequences.[24] For the first time, the federal government had the power to pull a state's funding in response to race discrimination, rather than waiting for victims of race discrimination to file litigation under Title VI.[25]

As facilities run by the State, Bryce and Searcy were clearly bound to comply with the requirements of the Constitution.[26] They also received federal funding.[27]

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17. *See* Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959 (4th Cir. 1963) (reversing the district court in a 3-2 decision).

18. *Id.* at 965.

19. *Id.* at 969.

20. *Simkins*, 323 F.2d 959, *cert. denied*, 376 U.S. 938 (1964).

21. *See generally President Johnson signs Civil Rights Act,* HISTORY (June 29, 2021), https://www.history.com/this-day-in-history/johnson-signs-civil-rights-act.

22. 42 U.S.C. § 2000d (1964).

23. 45 C.F.R. § 80.4(a) (2021); *see also* 7 C.F.R. § 15.4(a) (2021).

24. John McDonough, *Looking Back on the Desegregation of U.S. Hospitals in 1966*, HEALTHSTEW BLOG (Mar. 24, 2018), https://healthstew.com/2018/03/24/looking-back-on-the-desegregation-of-u-s-hospitals-in-1966/.

25. *Id.*

26. Marable v. Ala. Mental Health Bd., 297 F. Supp. 291, 295–96 n.4 (M.D. Ala. 1969).

27. *Id.*

Like many southern states, Alabama had resisted integrating its state hospitals.[28] After the passage of the Civil Rights Act and indications that the Department of Health, Education and Welfare intended to enforce its provisions,[29] the Alabama Mental Health Board in the spring of 1966 swallowed the "bitter pill": to receive federal funding, some gesture would have to be made at integrating Bryce and Searcy.[30]

In March 1966, Superintendent Tarwater moved 30 African American women from Searcy to Bryce and 30 white patients from Bryce to Searcy.[31] The hospitals informed family members, the media, and judges about the move but not Governor Wallace.[32] Governor Wallace learned of the patient exchange when a white family petitioned him to have their relative released from Searcy.[33]

On April 27, 1966, the *Montgomery Advertiser* top-of-the-fold headline read "Bryce, Searcy Inmates Swapped In Forced Integration Attempt."[34] Governor George Wallace immediately called an emergency meeting of the Board and ordered them to undo the transfer.[35] Bryce and Searcy Hospitals were resegregated.[36]

In 1967, the Office of Equal Health Opportunity within the Department of Health, Education and Welfare (HEW) sent inspector Marilyn Rose to the South to ensure that federally funded hospitals were integrated.[37] To no one's surprise, she found that state psychiatric hospitals (particularly in Alabama and Mississippi)

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28. *See* Peter Ubel, *Medicare and the Desegregation of American Hospitals*, FORBES (Jan. 30, 2014), https://www.forbes.com/sites/peterubel/2014/01/30/medicare-and-the-desegregation-of-american-hospitals/?sh=205325422e1b; Thomas J. Ward, Jr., *Black Hospital Movement in Alabama*, ENCYC. OF ALA. (Mar. 22, 2019), http://encyclopediaofalabama.org/article/h-2410.

29. Ubel, *supra* note 28.

30. Kylie Smith, *"A Rather Straightforward Problem": Unravelling Networks of Segregation in Alabama's Psychiatric Hospitals, 1966–1972*, *in* VIRAL NETWORKS: CONNECTING DIGITAL HUMANITIES AND MEDICAL HISTORY 31, 35 (E. Thomas Ewing & Katherine Randall eds., 2018) [hereinafter *A Rather Straightforward Problem*]. Board Member Robert Parker recalled, "[T]he consensus of the Board was that in order to get federal funds it was necessary to agree to comply with the Civil Rights Act of 1964." *Id.* Parker added that "it was a bitter pill to take, but the decision was unanimous among the members present that the action should be taken." *Id.*

31. *Id.*

32. *Id.* at 36.

33. *Id.*

34. Photograph of *The Montgomery Advertiser*, *in A Rather Straightforward Problem*, *supra* note 30.

35. *See A Rather Straightforward Problem*, *supra* note 30, at 36.

36. Marable v. Ala. Mental Health Bd., 297 F. Supp. 291, 296 (M.D. Ala. 1969).

37. *See A Rather Straightforward Problem*, *supra* note 30, at 44–46.

continued to operate in breach of the Civil Rights Act.[38] Of Searcy, Rose wrote that, "the general wards were horrid."[39] Rose explained that:

> [T]here were only five doctors, four of whom were foreign. They were not licensed in the U.S. and did not have credentials as psychiatrists in their native country. The fifth psychiatrist was the administrator, obviously not conversant with modern psychiatry, and seemed to be running a southern plantation.[40]

After receiving Rose's report, and holding administrative hearings, HEW suspended all new federal mental health funds to Alabama for Bryce, Searcy, and Partlow until it was satisfied that the institutions were not operated in a racially discriminatory fashion.[41]

Governor Wallace sued HEW in October 1967, claiming it had exceeded its authority in terminating federal funds.[42] Shortly after, litigation against the Alabama Mental Health Board challenging the segregated facilities as unequal was filed by Searcy patients represented by Jack Greenburg.[43]

Although the *Marable* case was supposed to integrate Searcy Hospital, the obituary of James Folsom, a leading mental health figure in Alabama, gives Folsom credit for integration of the state mental hospitals as a personal and individual decision four years after the court's decision.[44] This recounting is certainly possible, since Judge Johnson explicitly noted in *Wyatt* that Bryce was not receiving federal funds under Medicare or Medicaid because of its failure to conform to the required federal standards, possibly in the area of integration.[45] It is not clear when Searcy

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38. Kylie M. Smith, *Discrimination and Racism in the History of Mental Health Care*, NAMI.ORG (July 6, 2020), https://www.nami.org/Blogs/NAMI-Blog/July-2020/Discrimination-and-Racism-in-the-History-of-Mental-Health-Care.

39. *Id.*

40. *Id.*

41. *Marable*, 297 F. Supp. at 296–97.

42. *See Id.* at 296; *A Rather Straightforward Problem*, *supra* note 30, at 36.

43. *Marable*, 297 F. Supp. at 296.

44. Gilbert Cruz, *Folsom, Who Helped Improve Care of Mental Patients, Dies*, TUSCALOOSA NEWS (Feb. 9, 2004, 10:00 PM), https://www.tuscaloosanews.com/story/news/2004/02/10/folsom-who-helped-improve-care-of-mental-patients-dies/27858317007/ ("In 1973, Folsom took a trip to Searcy Hospital near Mobile, which, at the time, housed the black mentally ill population of Alabama. Unbeknownest [sic] to most—including then-Gov. George Wallace—Folsom decided to integrate Bryce Hospital with patients from Searcy, thereby ending the de facto segregation that still existed in Alabama's mental hospitals.").

45. *See* Wyatt v. Stickney, 325 F. Supp. 781, 784 n.4 (M.D. Ala. 1971).

actually was integrated, but it was operating as an integrated hospital when it closed in 2012.[46]

III. WHY HAS THE *MARABLE* CASE VANISHED IN MENTAL HEALTH LAW?

It is clear that the first case challenging conditions in a state psychiatric facility as violative of the Constitution was *Marable v. Alabama Mental Health Board*, not *Wyatt v. Stickney*. Yet *Marable* is virtually unknown. It cannot be found in Mental Health Law or Disability Rights textbooks.[47] It is not taught in Mental Health Law or Disability Rights courses.[48] Nor can it be found in the few textbooks on race discrimination.[49]

Marable took place at an intersection of two legal fields that—ironically—were and continue to be almost as segregated from each other as Bryce and Searcy, both in academia and in civil rights practice: mental health/disability rights law and race discrimination law.

Mental health lawyers were, from the beginning, interested in articulating and affirming the rights of people diagnosed with mental illness with theories and arguments that based these rights in adverse treatment arising out of the diagnosis of mental illness, including loss of liberty, loss of agency, and discriminatory treatment.[50] This focus, necessary to achieve the purposes of mental health law, erases other aspects of the identities of people with psychiatric disabilities: race, gender, sexual orientation, religious and spiritual practices, and parental status.[51]

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46. Katherine Sayre, *Searcy Hospital to Shut Down as Part of Statewide Mental Health Closures*, AL.COM (Feb. 15, 2012, 7:30 PM), www.al.com/live/2012/02/searcy_hospital_to_shut_down_a.html.

47. The *Marable* case is not referred to in leading Mental Health Law textbooks, including: CHRISTOPHER SLOBOGIN ET. AL, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS (3d ed. 2020); MICHAEL PERLIN, MENTAL DISABILITY LAW: CASES AND MATERIALS (3d ed. 2017); CHRISTOPHER M. WEAVER & ROGER G. MEYER, LAW AND MENTAL HEALTH: A CASE BASED APPROACH (2d ed. 2019); RUTH COLKER & PAUL GROSSMAN, THE LAW OF DISABILITY DISCRIMINATION (8th ed. 2013).

48. E-mail from Professor Christopher Slobogin, Professsor, Vanderbilt Law School, to Susan Stefan (Jan. 25, 2022, 8:22 EST) (on file with author); e-mail from Professor Michael Perlin, Professor Emeritus, New York Law School, to Susan Stefan (Jan. 25, 2022, 7:14 EST) (on file with author). In addition, I myself taught Mental Health Law over a twenty-year period and only taught the *Marable* case once.

49. DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (6th ed. 2008); RALPH BANKS ET. AL, RACIAL JUSTICE AND LAW: CASES AND MATERIALS (2016).

50. *See, e.g.*, BRUCE ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRY (1972) (describing the founding and principles of the Mental Health Law Project); PAUL APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE (1994) (same points made from a different perspective).

51. MICHAEL PERLIN, SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER? (2016); Robert L. Hayman Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1205 (1990).

Mental health lawyers pursuing mental health claims had no legal avenue available to connect race to disability issues, even though many of the lead plaintiffs in their cases were Black.[52]

It is equally true that lawyers involved in the civil rights movement for racial justice were focused on exposing inequality based on race anywhere it could be found and remedied by litigation (a much greater limitation). People in the racial justice movement were not focused on mental disability issues, even with mounting evidence that racism caused emotional trauma and disturbance, that people of color were misdiagnosed as having mental disabilities, and that this misdiagnosis created enormous and life-long problems.[53]

Legal and social science academics have analyzed and compared disability and race, but until the last decade have rarely examined the intersection of the two.[54] Starting around 2010, the academy exploded with the brilliant work of Prof. Camille A. Nelson, Prof. Liat Ben-Moishe, Prof. Alice Abrokwa, and many others.[55]

Attorneys practicing civil rights and disability rights law have been slower to follow, for practical reasons relating in part to the fact that the law does not recognize intersectional claims. Yet understanding the combined and intertwined impact of a person's race and perceived disability is required to even make sense of many clients' situations. People would not have been at Searcy but for their perceived disability *and* their race. A recent case decision denying class certification to a putative class of disabled children challenging segregation and

52. In *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), the leading case on the right to refuse psychotropic medication in Massachusetts, the lead plaintiff, Ruby Rogers, was Black in a state with a small African-American population. Although none of the cases associated with her mentions her race, her obituary confirms it. *See* Bryan Marquard, *Ruby Rogers: Helped Win Key Rights for Mentally Ill*, BOS. GLOBE, (Feb. 20, 2009). In *Washington v. Harper*, the lead U.S. Supreme Court case on the rights of prisoners to refuse medication, the plaintiff was Black in a state (Washington) with a small African-American population. 494 U.S. 210 (1990). In *State ex.rel. Jones v. Gerhardstein*, the leading right to refuse treatment case in Wisconsin, the plaintiff was Black. *See generally* Susan Stefan, *Women and Ethnic Minorities in Mental Health Treatment and Law*, *in* LAW, MENTAL HEALTH AND MENTAL DISORDER 240, 264 n.60 (Bruce Sales and Daniel Shuman, eds. 1996).

53. Larry P. v. Riles, 793 F.2d 969, 972 (9th Cir. 1984) (stating Black children were being disproportionately placed in special education classes for "the educable mentally retarded" on the basis of flawed testing).

54. *See, e.g.*, Michelle Jarman, *Coming Up from Underground: Uneasy Dialogues at the Intersections of Race, Mental Illness, and Disability Studies*, *in* BLACKNESS AND DISABILITY: CRITICAL EXAMINATIONS AND CULTURAL INTERVENTIONS 9 (Christopher Bell ed., 2011).

55. *See* Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1 (2010) [hereinafter *Racializing Disability*]; Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 FORDHAM URB. L.J. 615 (2016); LIAT BEN-MOISHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION (2020); Alice Abrokwa, *When They Enter, We All Enter: Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 MICH. J. RACE & L. 15 (2018).

abusive treatment by a school system on the basis of disability never mentions that every single named plaintiff is African-American, or that the vast majority of these students who are being isolated and taught separately are not only disabled but also African-American.[56]

What we know today is that the most profound truths about loss of life and liberty and coercive and discriminatory treatment are to be found at the intersections of race and psychiatric disability. Mental health lawyers have followed people with psychiatric disabilities out of the coercion and neglect of psychiatric institutions and into the coercion and neglect of the penal system, where the sufferings described in *Wyatt* continue and are in many ways are worse.[57] People of color with psychiatric disabilities are at the epicenter of the use of coercive force to detain and control people, and even kill them.[58]

It is welcome news that on the fiftieth anniversary of the *Wyatt* decision, Searcy is closed, and desirable community mental health services are available.[59] It is not surprising that, with mental health services available in the community, African Americans with psychiatric disabilities remain disproportionately institutionalized at Bryce, in jail, or in prison. Although Alabama's African-American residents constitute 26.64% of its population,[60] Bryce's population is over 50% African-American.[61] Alabama prisons and jails also have disproportionate populations of African-Americans with psychiatric disabilities.[62] The incarceration rate for Black

56. S.S. v. City of Springfield, 146 F. Supp. 3d 414 (Mass. Dist. Ct. 2015). Confirmation about the race of the plaintiffs and putative plaintiff class, not evident in the court's decision, came from plaintiffs' attorney Robert Fleischner. E-mail from Robert Fleischner, Attorney for the Plaintiff Class in S.S. v. City of Springfield, to Susan Stefan (April 1, 2021, 19:57 EST) (on file with author).

57. James Tucker, Presentation at Alabama Law & Psychology Review Symposium: 50 Years Later: Revisiting Wyatt v. Stickney (Mar. 19, 2021).

58. *See Racializing Disability*, *supra* note 55.

59. Katherine Sayre, *Searcy Hospital to Shut Down as Part of Statewide Mental Health Closures*, AL.COM (Jan. 14, 2019, 11:21 AM), https://www.al.com/live/2012/02/searcy_hospital_to_shut_down_a.html.

60. *Alabama Population 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/states/alabama-population (last visited Apr. 19, 2021).

61. *See* Marion Johnson, Jr., Slide Presentation, Mental Health in the State of Alabama for African American Men (Apr. 21, 2010), https://www.alabamapublichealth.gov/alphtn/assets/042110bjohnson.pdf (showing that in 2009, Bryce had 523 African-American patients and 393 white patients). By 2019, there were approximately 387 patients at Bryce. ALA. DEP'T MENTAL HEALTH, ANNUAL REPORT 13 (2020). Diligent research efforts by this author failed to unearth the racial composition of the current Bryce campus. There is no reason to think the 2009 proportions have changed. As of January 27, 2022, the census at Bryce Hospital was 241; 136 of these patients were African American, making them 56% of the census in a state with a 25% African American population. E-mail from Christy Johnson, Investigator Supervisor, Alabama Disabilities Advocacy Program, to Susan Stefan (Jan. 27, 2022, 12:38 EST) (on file with author).

62. *See* AMERICAN CIVIL LIBERTIES UNION, BLUEPRINT FOR SMART JUSTICE: ALABAMA 15 (2018).

people in Alabama is three times higher than the incarceration rate for white people; although they represent 27% of the state's population, they represent 56% of Alabama prison inmates.[63]

Recently, Judge Myron Thompson, who succeeded Judge Frank Johnson in overseeing the *Wyatt* case, found that plaintiffs had standing to show that Alabama prisons violated the Constitution in their treatment of the many inmates diagnosed with mental illness.[64] In contrast to the minimal psychiatric staff at Bryce and Searcy chronicled in *Wyatt* and *Marable*, the Alabama prison system housed at least 1166 prisoners with serious mental illness in a facility with no access to psychiatrists at all.[65] Judge Thompson, echoing the words of Marilyn Rose about Searcy more than fifty years ago, characterized the mental health care received by psychiatrically disabled prison inmates, most of whom are African-American, as "horrendously inadequate."[66]

In 2015, Judge Thompson heard a case called *United States v. Johnson*.[67] Courtney Johnson was a defendant with an intellectual disability who was facing revocation of his probation for failing to complete a drug treatment program.[68] The government sought to imprison him for this violation. Judge Thompson wrote:

> Years ago, we would not have had this discussion, because Courtney Johnson would have been put in a mental-health facility and would not have received any treatment at all. He would have just been housed away as someone who is perhaps 'mentally retarded,' forgotten and potentially abused. We no longer do that.
>
> And yet, Johnson was still before this court, with the potential of being locked up. The court refused to sentence Johnson to custody, reasoning that we should not take people with intellectual disabilities out of mental-health facilities simply to put them in prison instead. We cannot just substitute one institution for another.[69]

Judge Thompson gives a heart-rending recital of the poverty and deprivation of Mr. Johnson's upbringing, the inadequacy of his schooling, and the difficulty of

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63. *Search for Inmates*, ALA. DEP'T OF CORR., http://doc.state.al.us/InmateSearch (last visited Apr. 23, 2021).

64. Dunn v. Dunn, 219 F. Supp. 3d 1163, 1174 (M.D. Ala. 2016).

65. *Id.* at 1174; *see also* Braggs v. Dunn, 367 F. Supp. 3d 1340 (M.D. Ala. 2019).

66. Braggs v. Dunn, 257 F. Supp. 3d 1171, 1267 (M.D. Ala. 2017).

67. United States v. Johnson, 122 F. Supp. 3d 1313, 1314 (M.D. Ala. 2015).

68. *Id.*

69. *Id.*

complying with requirements that he control his addiction given his intellectual disability.[70] What Judge Thompson never mentions is Mr. Johnson's race. It is not surprising that Mr. Johnson is African-American,[71] nor that the vast majority of the named plaintiffs in the case challenging mental health treatment in Alabama's prison system were African-American.[72]

People's lives—and the injustices they experience—do not fit into the neat and orderly silos of legal claims. If we are going to recognize and remedy people's pain and suffering, we need to at least begin to understand and describe the lives that people live in this country, and that requires understanding the degree to which people perceived as different and threatening are subject to social control, coercion, and worse. When people are perceived as different and threatening in multiple ways at the same time, their lives and liberty are in real peril, both in crisis moments such as encounters with the police, and over their lifetimes in the everyday burdens they must face.

Legal claims and remedies make no room for such a shift now, because the Americans with Disabilities Act and Section 504 of the Rehabilitation Act as well as various prohibitions on race discrimination do not permit consideration of the convergence of intersectionality in shaping force, coercion, and discrimination.[73] Nor is there space for structural consideration of how people came to be disabled in the first place, and what keeps them "substantially limit[ed in] one or more major life activities."[74]

IV. CONCLUSION

We must now imagine the claims and remedies of the future. At the time *Simkins v. Moses H. Cone Memorial Hospital* and *Wyatt v. Stickney* were litigated, their respective legal theories were novel, innovative, and trailblazing.[75] In considering future litigation, maybe scholars and public interest lawyers can begin by recognizing how state systems that purport to protect and support people may actually harm and endanger them.

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70. *Id.*

71. Telephone Interview with Stephen P. Ganter, Assistant Fed. Pub. Def., in Montgomery, Alabama (April 6, 2021).

72. E-mail from James Tucker, Director, Alabama Disabilities Advocacy Program, to Susan Stefan (April 11, 2021, 11:24 EST) (on file with author). The Alabama Disabilities Advocacy Program was the organizational plaintiff in Dunn v. Dunn, 219 F.Supp.3d 1163 (M.D. Ala. 2016).

73. *See* Abrokwa, *supra* note 55.

74. 42 U.S.C. §12102(1)(A).

75. *See* Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959 (4th Cir. 1963); *see also* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

Wyatt asked the question "what process is due" to people who were involuntarily institutionalized.[76] When the question before a court is "what process is due," the person is already being "processed."[77] If you are privileged in this country, you probably have never had occasion to have first-hand experience of a court considering what process is due to you. Of course, having a court consider what process is due to you represents progress, compared to simply being killed[78] or left to spend decades abandoned in a crowded and noisy institution.

The attorneys who litigated *Wyatt*, *Marable*, and other subsequent cases used due process arguments to ensure that institutionalized and powerless people were neither ignored nor abandoned.[79] Judges Frank Johnson and Myron Thompson tried to protect those people within the limits of the power they had been granted. Moving powerless people from one institutional and carceral system to another is not the solution any of them sought. Let us applaud the tireless and inventive work in *Wyatt* and *Marable* and mark the occasion of their victories while also supporting the continuing work for justice that never ends.

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76. *Wyatt*, 325 F. Supp. 781.

77. *Id.*

78. *See* Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020). In 2020, the Alabama Appleseed Center for Law and Justice advocacy group examined six years' worth of the state's prison homicides. HANNAH KRAWCZYK, CARLA CROWDER & DANA SWEENEY, DEATH TRAPS (2020), https://www.alabamaappleseed.org/wp-content/uploads/2020/11/Death-Traps-Report-2020-FINAL.pdf. There were forty-eight killings behind penitentiary walls between June 2014 and September 2020. *Id.* at 3. Black men were the victims in thirty-seven of the homicides, while eleven white prisoners were killed in that span, the study revealed. *Id.* It showed that Black inmates were 3.3 times more likely than their white counterparts to die violently in Alabama prisons. *Id.*

79. *See Wyatt*, 325 F. Supp. at 785; Marable v. Ala. Mental Health Bd., 297 F. Supp. 291 (M.D. Ala. 1969).