On the Relationship Between Race and Disability

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For decades, legal scholars have examined the similarities between race and disability, and in particular, the similarities between the forms of social subordination, marginalization, and exclusion experienced by either racial minorities or people with disabilities. This Article builds on this existing scholarship to articulate and defend an intersectional approach to analyzing race and disability in jurisprudence, legal scholarship, and legal advocacy. In this Article, I build on the existing literature in three ways. First, building on the work of Critical Race theorists and Disability Studies scholars who have defined race and disability as social constructions, I document how, from the Founding Era to the early twentieth century, social meanings of race were influenced by social meanings of disability, and vice versa. Second, I argue that examining this co-constitutive relationship between race and disability illuminates how racist and ableist ideologies collided throughout the twentieth century, to produce, reinforce, and maintain the social marginalization and subordination of individuals who were both disabled and negatively racialized. Third, and finally, this Article demonstrates how an intersectional analysis provides not only a method for examining the relationship between race and disability, but also a historical lens through which to analyze constitutional protections and remedies. In particular, this intersectional approach can provide a historical lens for analyzing and strengthening judicial review of disability classifications under City of Cleburne v. Cleburne Living Center, Inc.*, Congress' section 5 powers, and disability discrimination claims under the Americans with Disabilities Act. Ultimately, the Article concludes with suggestions for how legal advocates can better frame legal injuries and identify legal remedies that are more attentive to the structural dimensions of racism and ableism.*

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I. INTRODUCTION

Are humans to be denied human rights? Are persons after all not to be persons if they are physically disabled? Are members of the community to be robbed of their rights to live in the community, their certificates cancelled upon development or discovery of disability? These rhetorical questions, the hallmarks of crusade and reform throughout American history, have in our generation become the plea of the disabled as well. As with the Black man, so with the blind. As with the Puerto Rican, so with the post-polio. As with the Indian, so with the indigent disabled.[1]

Within the field of antidiscrimination law, a question has long perplexed scholars and commentators: what is the relationship between race and disability? Disability rights advocates have for decades drawn analogies between race discrimination and disability discrimination.[2] Indeed, the excerpt

[1] Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 851 (1966).

[2] *See generally* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1994); Priscilla A. Ocen, *Beyond Analogy: A Response to Surfacing Disability through a Critical Race Theoretical Paradigm,* 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 255 (2010) (explaining that racial justice advocates have relied on the disability metaphor to articulate legal claims for racial equality); SAMUEL BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 66–67 (2009).

from legendary legal scholar Jacobus tenBroek is one of the most iconic formulations of the analogy between racial and disability discrimination.[3]

Comparisons between race and disability (and racial and disability discrimination) showed up not only in how legal injuries were framed, but also in how legal victories were described. After the most comprehensive federal disability law, the Americans with Disabilities Act (ADA), was passed in 1990, it was labeled by some of the leading legislators responsible for its enactment as the "emancipation proclamation" for people with disabilities.[4] *Olmstead v. L.C.*,[5] one of the Supreme Court's watershed disability-rights cases, has been heralded as the *Brown v. Board of Education* for disabled people.[6] Comparisons surfaced in response to opposition to the Americans with Disabilities Act. Indeed, not long after the passage of the ADA, resistance to, and rollbacks of, the expansive protections under the law began in earnest. In response, disability law scholars shifted their focus to defending the legitimacy of the ADA and, in particular, its reasonable-accommodation provision as an antidiscrimination law.[7] Relying on the "minority model" framework, many of these scholars identified similarities between racial and disability-based discrimination in their defenses of the ADA, drawing out similarities "between disability oppression and the prejudice and discrimination experienced by racial and ethnic minority groups, particularly by African Americans."[8]

Comparative accounts of race and disability have provided valuable rhetorical appeals for social movements, but they are not up to the task of illuminating and remedying key issues implicating race and disability discrimination today, particularly the problems of police violence, mass criminalization, and mass incarceration. Though comparative accounts of race and disability have been part of social movements seeking civil rights and legal protections for people with disabilities, it has not led to the recognition of the interests and challenges affecting all within this group.[9] In particular, some critics maintain that the disability-rights movement has been—and remains to this day—too focused on the experience of white disabled people, contributing to marginalization, or even erasure, of the experiences of disabled people of color.[10] As Angela Frederick and Dana Shifrer note, early on in the movement for disability rights "[t]he focus on independence

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[3] *See* tenBroek, *supra* note 1, at 851.

[4] Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 581 (2004).

[5] 527 U.S. 581 (1999).

[6] Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 654 (2000).

[7] *See, e.g.*, Stein, *supra* note 4, at 583 ("ADA-mandated accommodations resemble antidiscrimination remedies . . . because fundamentally they *are* antidiscrimination remedies."); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 452–65 (2000).

[8] Angela Frederick & Dara Shifrer, *Race and Disability: From Analogy to Intersectionality*, SOCIO. RACE AND ETHNICITY 200, 202 (2019).

[9] *See infra* note 14 and accompanying text.

[10] *See* Frederick & Shifrer, *supra* note 8, at 201.

and legal rights . . . reflected the cultural values of middleclass [sic] white Americans and emphasized solutions to disability injustice that most benefited those with social class privilege and those with clear-cut experiences of discrimination on the basis of the singular status of disability."[11] Both scholars called for an intersectional approach to race and disability to combat these forms of erasure. In recent years, activists and organizers in disability-justice movements have raised similar critiques, charging not only white-led disability-rights movements with failing to include racial-justice issues on their agendas, particularly those issues relating to policing and mass incarceration, but also the Movement for Black Lives with failing to recognize disability rights concerns in their platform, "Vision for Black Lives."[12] Activists have argued for an intersectional approach to issues implicating race and disability.[13]

Though legal scholars for their part have not ignored race and disability, they have largely focused on the similarities and differences between the two, rather than on their interconnectedness.[14] Furthermore, even though

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[11] *Id.* at 204.

[12] *See* Disability Solidarity: Completing the Vision for Black Lives, Women of Color in Solidarity (re-posting Disability Solidarity: Completing the Vision for Black Lives, Harriet Tubman Collective), TUMBLR, (July 27, 2017), https://wocinsolidarity.tumblr.com/post/163486425847/disability-solidarity-completing-the-vision-for [https://perma.cc/CV4P-TYTR].

[13] Sins Invalid, 10 Principles of Disability Justice (Sept. 17, 2015), https://www.sinsinvalid.org/blog/10-principles-of-disability-justice (last visited May 26, 2023).

[14] *See, e.g.*, Stein, *supra* note 4, at 612–15; Colker, *supra* note 6, at 689–93; Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987); Bagenstos, *supra* note 2, at 66–67. *See generally* Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1 (2010); Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L. J. 293 (2018). Outside of law, over the last decade, historians have surfaced histories linking race and disability in justifications for the system of chattel slavery and restrictive immigration laws of the late nineteenth and early twentieth century, as well as contemporary manifestations of both racism and ableism operating in schooling, medical care, carceral spaces, and the criminal legal system more broadly. *See, e.g.*, Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449 (2019). In the fields of disability studies and critical disability studies, there are extensive discussions on race and disability, and this Article is an effort to incorporate this existing scholarship into legal scholarship. *See, e.g.*, JENIFER L. BARCLAY, THE MARK OF SLAVERY: DISABILITY, RACE, AND GENDER IN ANTEBELLUM AMERICA (2021); LIAT BEN MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION (2020); NIRMALA EREVELLES, DISABILITY AND DIFFERENCE IN GLOBAL CONTEXTS : ENABLING A TRANSFORMATIVE BODY POLITIC 141–71 (2011); AIMI HAMRAIE, BUILDING ACCESS: UNIVERSAL DESIGN AND THE POLITICS OF DISABILITY 65–93 (2017) (discussing the rise of barrier-free design in twentieth-century United States and how the term "all" shaped the figure of the disabled user in relation to norms of race, gender, class, and age). *See generally* ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE (2014); DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION (David J. Connor, Beth A. Ferri, & Subini A. Annamma eds., 2016); BLACKNESS AND DISABILITY: CRITICAL EXAMINATIONS AND CULTURAL INTERVENTIONS (Christopher M. Bell ed., 2011); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT (2008); DOUGLAS C. BAYNTON, DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS (2016).

scholars recognize that there are pressing social problems that implicate questions of race and disability,[15] there is room for more comprehensive theorizing at the intersection of race and disability. Deeper analysis rooted in the history and social construction of race and disability would benefit the fields of race law, Critical Race Theory, and disability law in particular. In race law and Critical Race scholarship, discussions on disability tend to frame disability as a metaphor for racial discrimination or oppression.[16] Robust and critical engagement with disability is relatively limited, if acknowledged at all.[17] Critical Race scholarship does not substantially engage with structural analyses of disability, which is perplexing given its emphasis on other structural forms of social subordination, such as structural racism, patriarchy, homophobia, and class oppression.[18] To put it more directly, there is limited engagement with ableism, disability theory, and the role of law in producing disability-based subordination in Critical Race scholarship. Similarly, discussions of structural racism are limited in disability law scholarship, where engagements with race skew more toward comparative approaches between race and disability.[19] Further, disability law scholarship rarely includes sustained engagement with structural racism and its connections to disability discrimination. Taken together, Critical Race scholars and disability law scholars have yet to fully engage with how structural racism and structural ableism work to exacerbate social harms, violence, and discrimination for individuals who are both disabled and negatively racialized.

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[15] *See generally* Jasmine E. Harris, *Reckoning with Race and Disability*, 140 YALE L. J. FORUM 916, 917–19 (2021) [hereinafter *Reckoning*]; Melissa Murray, *Race-ing* Roe: *Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2059–61 (2021), Beth Ribet, *Surfacing Disability through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 209, 209–10 (2010) [hereinafter Ribet, *Surfacing Disability*]). *See generally* Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195 (2020); Paul-Emile, *supra* note 14; Adrienne Asch, *Critical Race Theory, Feminism and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 397 (2001); Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1 (1995).

[16] *See, e.g.*, Williams, *supra* note 14.

[17] *See generally* Ribet, *Surfacing Disability*, *supra* note 15. Christopher Bell made a similar claim with respect to African American Studies. *See* BLACKNESS AND DISABILITY: CRITICAL EXAMINATIONS AND CULTURAL INTERVENTIONS 3 (CHRISTOPHER M. BELL, ED., 2011) ("Too much critical work in African American Studies posits the African American body politic in ableist (read non-disabled) fashion."). This does not mean that experiences and accounts of disability are not present in Critical Race scholarship, as indeed they are. Disability is included as an axis of subordination in well-known scholarship in the field of Critical Race Theory. *See , e.g.*, Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 182 n.19 (1997); Williams, *supra* note 14.

[18] *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1245–1251 (1991) [hereinafter Crenshaw, *Mapping the Margins*]; Devon W. Carbado, *Critical What What?,* 43 CONN. L. REV. 1593, 1613–1615 (2011); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 18–19 (1999); Anthony P. Farley, *Accumulation*, 11 MICH. J. RACE & L. 51 (2005).

[19] *See, e.g.*, Stein, *supra* note 4, at 671; Bagenstos, *supra* note 7, at 402–03.

In short, these disciplines stand to benefit from a more comprehensive analysis of race and disability. Intersectionality offers such an analysis.

This Article draws from historical and sociological accounts of race, disability, and their intersections, beyond the oft-disused (and important) eugenics period, to include laws and policies related to chattel slavery, convict leasing, and immigration laws in the late nineteenth century and early twentieth century. This Article weaves together genealogies of race and disability that illuminate the legal and social meanings of race and disability, as well as racism and ableism. It offers the first comprehensive account in legal scholarship about how race and disability, and racism and ableism, were co-constructed through law; in so doing, it provides a sustained intersectional analysis of race and disability.

This Article offers a descriptive account of race and disability across American law and policy before turning to a discussion of how law worked to reinforce and legitimize racism and ableism. In Parts II and III, I examine laws and policies where racist meanings were assigned to disabilities and ableist meanings to racial identities. Through the court opinions, legislation, and policies discussed, I examine the ways in which judges, legislators, and policymakers distinguished "able" bodies and minds from "disabled" bodies and minds. In doing so, they infused racial meanings into social meanings of disability and infused ableist meanings into social meanings of race. The sections demonstrate how race and disability were historically co-constructed through law and policy. They also demonstrate how ongoing forms of racism and ableism are mutually constitutive. Second, I argue that genealogies of race and disability illuminate how racism and ableism have colluded to produce, reinforce, and maintain the forms of social marginalization and subordination experienced by individuals who are both negatively racialized and disabled.

This Article then shifts to a discussion of the normative payoff that such in-depth theorizing at the intersection of race and disability provides. As I argue in Part IV, such grounding can and should inform how courts interpret race and disability discrimination claims under antidiscrimination laws, as well as constitutional claims brought by negatively racialized and disabled people. An intersectional analysis can better inform how courts interpret race and disability claims and facilitate greater recognition of the nature and extent of racial and disability-based subordination characterized in legal claims seeking legal redress. For example, surfacing race and disability genealogies, and their intersections, can provide a historical lens through which to analyze constitutional protections and remedies, particularly judicial review of disability classifications under *City of Cleburne v. Cleburne Living Center, Inc.*,[20] Congress' section 5 powers, and disability discrimination claims under the Americans with Disabilities Act. The Article concludes with proposals for how scholars and advocates can adopt intersectional approaches when

[20] 473 U.S. 432 (1985).

litigating claims involving racial and disability discrimination, and more broadly, how advocates can better frame legal injuries and identify legal remedies that are more attentive to racism and ableism.

II. Uncovering the Relationship Between Race and Disability

Before acknowledging the merits of the intersectional approach to studies of race and disability, it is necessary to understand how to define both categories. When one looks at race and disability scholarship in tandem, one sees that Critical Race theorists view race, and many disability law scholars view disability, as social constructions. To put the point another way, Critical Race theorists and disability law scholars have emphasized, respectively, that race or disability are not solely biological impairments or fixed traits. These methods of defining race and disability inform the intersectional approach that is applied throughout the Article, so it is important to begin the discussion here. The next subpart describes how these scholars define race and disability, respectively.

A. What is Race? What is Disability?

As is most relevant to this Article, Critical Race theorists advance three primary claims about race, racism, and American law.[21] One of the primary contributions of Critical Race Theory (CRT) is the theoretical foundation and legal support for the notion that racism is an endemic and permanent feature of American society. As Adrien Wing puts it, "[a] central premise of CRT is that racism is a normal and ordinary part of our society, not an aberration."[22] A second key contribution of CRT to the legal academy and beyond is the notion that race is a social construction. Ian Haney Lopez defines a race as a "vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry."[23] Haney Lopez explains further that "[r]ace must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, faces, and personal characteristics."[24] A third key contribution of Critical Race Theory is that the law constructed racial categories largely through defining and delineating the boundaries between those persons racialized as white and those racialized as non-white.[25] In the process, laws and legal doctrine worked to not only con-

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[21] *See, e.g.*, Carbado, *supra* note 18, at 1601 (defining the contours of CRT as an intellectual movement).

[22] Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. Legal Ed. 44, 48 (2016).

[23] Ian Haney Lopez, *Social Construction of Race*, *in* Critical Race Theory: The Cutting Edge 193 (1994).

[24] *Id.*

[25] *See* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1741 (1993) [hereinafter Harris, *Whiteness as Property*]; Carbado, *supra* note 18, at 1609.

struct race but also to uphold white supremacy in part by assigning advantages and disadvantages based on these racial classifications.[26] I focus on the second and third principal contributions by CRT in my discussion below.

As noted, Critical Race theorists reject the idea of race as a biologically fixed category. Rather, race is defined as a social construction: race and racial categories are fluid, and that social meanings linked to race vary across time and place. Critical Race theorists conceive of racial categories as a product of law, as well as the ideologies and social relations that inform them.[27] As court opinions from the first few decades of the early Republic reveal, race and racial categories were fluid, not based on any set of unique biological traits or genes. As Professor Angela Onwuachi-Willig writes, racial identity was influenced by "commonly held beliefs among the judges about how [particular racial groups] looked and behaved."[28] For example, in *Hudgins v. Wrights*,[29] three women—a grandmother, a mother, and a granddaughter—brought a lawsuit to prove that they were free Native American citizens and not Black slaves by providing evidence that refuted a white slave owners' claim that they were descendants of an enslaved Black woman rather than a free Native American woman. Using the testimony of neighbors and individuals in their communities, the court was persuaded that one of the Wrights' ancestors had skin of "Indian copper color, with long black hair," and that their ancestors were regarded as and referred to as "Indians" by their neighbors. In that way, whether the Wrights were classified as free Native American women or Black slaves under law, as Prof. Onwuachi-Willig contends, "depended not just upon the fairness of their skin or the straightness of their hair but the exercise of their non-Black identity and their recognition as non-Black by neighboring whites."[30] Courts interpreted racial classifications relying on crude assessments of supposed biological differences between human populations, relying on lay witnesses, so-called academic experts, and commonly held social understandings of race—at least those understandings held by elite whites in a local or national community.[31]

Law defined the boundaries of racial categories largely by comparing one group's position relative to the white majority.[32] Historically, once these groups became racialized, or assigned a racial identity, the groups were then ordered hierarchically, with privileges and benefits assigned to those groups

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[26] *See generally* Carbado, *supra* note 18.

[27] *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 114–25 (1999); Carbado, *supra* note 18, at 1610.

[28] Angela Onwuachi-Willig, Hudgins v. Wrights, *in* RACE LAW STORIES 165 (Rachel F. Moran & Devon W. Carbado, eds. 2008).

[29] 11 Va. (1 Hen. & M.) 134 (Va. 1806).

[30] Onwuachi-Willig, *supra* note 28, at 165.

[31] *See, e.g.*, Hudgins, 11 Va. (1 Hen. & M.) 134; People v. Hall, 4 Cal. 399 (Ca. 1854); Gong v. Rice, 275 U.S. 78 (1927).

[32] *See, e.g.*, United States v. Bhagat Singh Thind, 261 U.S. 204 (1923); Takao Ozawa v. United States, 260 U.S. 178 (1922).

considered white and denied to those groups considered non-white.[33] In deciding the boundaries between Black and white, law defined the boundaries of racial categories largely by comparing one group's position relative to the white majority, often shifting and altering the definition of "white" to include additional racial and ethnic groups where politically expedient.[34] In the process, courts and legal actors constructed notions of race for the purpose of structuring a social hierarchy that distributed pain and privileges based on race.[35] Indeed, throughout most of American history, social benefits, privileges, and legal rights establishing eligibility for freedom, citizenship, and other political, economic, and social rights, were based on whether one was classified as a "white" person under law.[36]

Disability studies scholars and critical disability theorists have long-argued that though impairments are real, what is labeled as a "disability" is in large part a social construction.[37] These academic engagements sought to reject the medical model of disability as the dominant way of thinking about

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[33] *See supra* notes 24–32.

[34] *See* Subini Ancy Annamma, David Connor, & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 14 (2013) (citing RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001)). *See generally* Khaled A. Beydoun, *Without Color of Law: The Losing Race Against Colorblindness in Michigan*, 12 MICH. J. RACE & L. 465 (2007); JUAN F. PEREA, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000).

[35] As Critical Race theorist Devon Carbado puts it,

> Law has historically employed race as a basis for group differentiation, entrenching the idea that there are "in fact" different races; law has helped to determine the racial categories (e.g., Black, White, Yellow) into which institutions and individuals place people; law sets forth criteria or rules (e.g., phenotype and ancestry) by which we map people into those racial categories; law has assigned social meaning to the categories (e.g., Whites are superior; Blacks are inferiors; Japanese Americans are disloyal); law has employed those meanings to structure hierarchical arrangements (e.g., legalized slavery for inferior people (Blacks) and legalized internment for people who are disloyal (people of Japanese descent); and those legal arrangements, in turn, have functioned to confirm the social meanings that law helped to create (e.g., the people who are enslaved must be inferior; that is why they are enslaved; the people who are interned must be disloyal; that is why they are interned.

Carbado, *supra* note 18, at 1610.

[36] *See* Harris, *Whiteness as Property*, *supra* note 25.

[37] *See, e.g.*, Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. 176 (2020). Disability Studies has influenced legal scholarship and led to the development of a field known as Disability Legal Studies. Arlene Kantor describes Disability Studies as a field that "applies social, cultural, historical, legal, philosophical, and humanities perspectives to understanding the place of disability in society," and "explores disability as a social and cultural construct and as a phenomenon reflecting and constituting identity formation by incorporating the "real-lived" experiences of people with disabilities." Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 404 (2011). Disability law scholars who apply disability studies to their study of law are engaged in an analysis referred to as Disability Legal Studies. According to Kanter, Disability Legal Studies "looks beyond the traditional view of equality, as in the Lockean view that each person has the right to be treated like anyone else," and "sees disability as a social construct shaped by social systems of domination, and it seeks to challenge the way disability is constructed by law locally, nationally, and globally." *Id.* at 445. Critical disability theory subscribes to the following view:

disability.[38] The medical model of disability views disability as a deviation from a biological or genetic norm, and is, arguably, the predominant conceptual model of disability in American law and policy.[39] Under this conception, a disability is an ailment, illness, defect, or disorder to be cured, an attribute that renders a body or mind "abnormal," and a deviation from the preferred normal body.[40]

The social model of disability stands in stark contrast to the medical model of disability. Consistent with the social model of disability, "disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations."[41] Scholars Doron Dorfman and Rabia Belt write that "[t]he social model of disability distinguishes between an 'impairment,' which is a biological condition, and 'disability,' which is the social meaning given to the impairment."[42] Viewing disability as a social construction helps

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> [D]isability is not fundamentally a question of medicine or health, nor is it just an issue of sensitivity or compassion; rather, it is a question of politics and power(lessness), power over, and power to. [B]ecause of the particular needs of the disabled, critical disability theory gives rise to its own particular set of challenges to the core assumptions of liberalism. . . . [L]iberalism's approach to disability incorporates embedded assumptions that conceptualize disability as misfortune, and privilege normalcy over the abnormal. . . . The goal of critical disability theory is to challenge these assumptions and presumptions so that persons with disabilities can more fully participate in contemporary society.

CRITICAL DISABILITY THEORY 2 (Dianne Pothier & Richard Devlin eds., 2006). Both disability studies and critical disability theory scholars provide methods for analyzing disability as a category of subordination, along with race, gender, sexual orientation, and class. *See, e.g.*, Annamma, Connor, & Ferri, *supra* note 34 (discussing intersectional approaches to disability, race, gender, and class).

[38] *See* Belt & Dorfman, *supra* note 37, at 176.

[39] *See* Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1409 (2021).

[40] For classic treatment on normalcy (and abnormality) as a social construction, see LENNARD J. DAVIS, CONSTRUCTING NORMALCY: THE BELL CURVE, THE NOVEL, AND THE INVENTION OF THE DISABLED BODY IN THE NINETEENTH CENTURY 23–24 (1995).

[41] Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000); *see also* Laura Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1051–52 (2004) ("Thus the socio-political model of disability draws a distinction between 'impairments,' which it views as "the physical limitation of a particular illness or chronic physical limitation," and 'disabilities' which it defines as "the social and political conditions that place barriers in the way of that 'impairment,' thereby creating a disabling condition."). Jacobus tenBroek may have published the earliest articulation of the social model of disability in his canonical article. *See generally* tenBroek, *supra* note 1. According to Michael Ashley Stein, "tenBroek argued that disabled people's own physical limitations had far less to do with their ability to participate in society than did "a variety of considerations related to public attitudes," many of which were "quite erroneous and misconceived." Stein, *supra* note 4, at 600.

[42] Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, *in* THE OXFORD HANDBOOK OF LAW AND HUMANITIES 145, 147 (Stern et al. eds., 2020).

to emphasize its relational, contingent, fluid, and subjective nature.[43] Disability Critical Race theorists Subini Ancy Annamma, David Connor, and Beth Ferri maintain that "all dis/ability categories, whether physical, cognitive, or sensory, are also subjective," which suggests that "societal interpretations of and responses to specific differences from the normed body are what signify a dis/ability."[44] Similarly, as critical disability studies scholar Nirmala Erevelles explains, disability is "a socially constructed category that derives meaning and social (in)significance from the historical, cultural, political, and economic structures that frame social life."[45] That said, critical disability theorists do not fail to recognize variations in bodies and minds, or in particular, variations in experiences with disability, sickness, and pain. Even though the social model of disability recognizes socially constructed categories of difference, it does not reject the obvious existence of corporeal differences among people.[46] Rather, the social model attributes the meaning and import of those differences and perceived limitations to societal barriers, attitudes, and responses to disability, rather than solely to the individual's biological attributes.

For both disciplines, history provides analytical grounding for contesting ideologies that contribute to ongoing racial and disability-based subordination and marginalization.[47] For Critical Race theorists, social advantages, as well as access to political, economic, and social rights and

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[43] Belt & Dofrman, *supra* note 37, at 186–87 ("A contemporary concept of disability that draws from the 'classic' social model views the term as complex and 'fluid' rather than a dichotomous process of presence or absence. It is multidimensional, dynamic, bio-psychosocial, and interactive in nature. Disability is therefore formulated through a complex interaction between the impairment and the social environment."; Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 90–91 (2000).

[44] Annamma, Connor, & Ferri, *supra* note 34, at 2–3; *see also* Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 188–89 (2008) ("One upshot of the social model is that the experience of disability is not inherent or inevitable given a particular medical condition; rather, it depends upon the particular social context in which one lives and functions." (footnotes omitted)).

[45] Nirmala Erevelles, *Crippin' Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline, in* DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA 81, 85 (LIAT BEN-MOSHE ET AL. EDS, 2014).

[46] Elizabeth F. Emens, *Framing Disability*, 2012 ILL. L. REV. 1383, 1401 (2013) ("The social model does not necessarily reject the idea of biological impairment—in the sense of variations from a value-neutral idea of species-typical or normal functioning—but thinking through the frame of the social model makes it much harder to see limitations caused by those variations as inherent. Even if one accepts some impairments as inherently undesirable, the social model shifts the focus from whatever physical or mental variation an individual might bear, to the ways that the environment renders that variation disabling."

[47] Kimberlé Crenshaw, *Mapping the Margins*, *supra* note 18, at 1297 ("We can look at debates over racial subordination throughout history and see that in each instance, there was a possibility of challenging either the construction of identity or the system of subordination based on that identity."). As Alan Freeman argued, "[a]s a method, the white oppression of Blacks approach would ask in each case whether the particular conditions complained of, viewed in their social and historical context, are a manifestation of racial oppression." Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1070 (1978).

resources, are not "the natural result of individual agency and merit."[48] Instead, as Devon Carbado notes, "[w]e all inherit advantages and disadvantages, including the historically accumulated social effects of race."[49] Historical grounding permits a broader lens to understand and contest the accumulation of advantages and disadvantages distributed across racial groups and offers a basis for examining the ideologies and operating logics that undergird and animate the political, economic, and social institutions that serve to maintain the status quo.

B. Race, Disability, and White Supremacy

As noted, the relationship between race and disability has preoccupied the minds of scholars for some time. Indeed, the relationship between race and disability was noted by one of the greatest sociologists of the twentieth century, W.E.B. Du Bois. During the eugenics period, Du Bois noted the invidious feedback loop between ideas rooted in racism on the one hand, and ideas rooted in ableism on the other.[50] In a July 1920 essay appearing in the NAACP's *The Crisis* magazine titled *Racial Intelligence*, Du Bois wrote:

> For a century or more, it has been the dream of those who do not believe Negroes are human that their wish should find some scientific basis. . . . For years they depended on the weight of the human brain, trusting that the alleged underweight of less than a thousand Negro brains, measured without reference to age, stature, nutrition, or cause of death, would convince the world that black men simply could not be educated.[51]

Du Bois' account identifies how race and disability were linked in the dominant white supremacist ideology of the day, which was aimed at generating a scientific basis that justified the social subordination of Black people. The themes Du Bois highlights with respect to race and disability, along with racism and ableism, within white supremacist ideology warrant discussion and elaboration.

First, disability—or more precisely ableist notions of disability—was coded in descriptions of racial groups labeled as non-white to demean and

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[48] Carbado, *supra* note 18, at 1608.

[49] *Id.* ("[T]his racial accumulation—which is economic (shaping both our income and wealth), cultural (shaping the social capital upon which we can draw), and ideological (shaping our perceived racial worth)—structure[s] our life chances.").

[50] *See* Annamma, Connor, & Ferri, *supra* note 34, at 15.

[51] W.E.B. Du Bois, *Racial Intelligence*, July 1920, *reprinted in* The Crisis 326 (1970). I credit Dr. Subini Annamma for bringing this essay to my attention. *See* Annamma, Connor, & Ferri, *supra* note 34, at 1–2. At the same time, scholar Ayah Nuriddin notes that Du Bois "borrowed eugenics language in his 1903 essay on the Talented Tenth, in which he stated, "The Negro race, like all other races, is going to be saved by exceptional men." Ayah Nuriddin, *The Black Politics of Eugenics*, Nursing CLIO (June 1, 2017), https://nursingclio.org/2017/06/01/the-black-politics-of-eugenics/ [https://perma.cc/XBW5-EQXS].

dehumanize them. In other words, disability tropes became part of the way race became socially constructed. Ableist tropes were cast onto descriptions of Black people in order to "degrade [Blackness]," or as "'proof' of racial inferiority."[52] These ableist notions of disability formed a key component of what is commonly referred to as "the legal construction of race," or the legal construction of racial and biological difference.[53] In the period of chattel slavery, ableist notions of "Black disability" were incorporated into Slave Codes, warranty suits, and medical journals, even as far back as the colonial era.[54] Toward the end of the nineteenth century and early twentieth century, ableist depictions of Black people could be found in the influential texts of some of the leading social scientists of the period.[55] Khalil Gibran Muhammad's book, *The Condemnation of Blackness*, charts how, in the period following the end of chattel slavery, budding social scientists linked racist ideas about Black people's physical, mental, and moral (in)capacities with claims about their strong propensities for criminality.[56] Once Blackness was linked with criminality, as Gibran Muhammad explains, it provided a convenient justification for claims of inherent Black inferiority and inequality.[57]

Beyond anti-Black racism, at various points in history ableist notions of disability were linked to nearly all racial and ethnic groups, including some white ethnic groups.[58] According to eugenicists, an array of social problems, from social inequality, to crime or threats to public health, could be—and indeed, were—explained in part as the result of innate, biological, and cultural deficiencies of disfavored racial and ethnic groups.[59] Alexandra Minna

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[52] University of Illinois Press, *The Mark of Slavery and Between Fitness and Death Virtual Book Launch*, YouTube (Apr. 13, 2021), https://www.youtube.com/watch?v=SLJTKrre3I [https://perma.cc/WXG6-MTS7]; *see also* Ribet, *Surfacing Disability*, *supra* note 15, at 210.

[53] Barclay, *supra* note 14, at 66 (discussing "how southerners framed blackness through the prism of disability in medical discourse by looking to extant constructions of race in legal doctrine"). Here, any insights that I may have as to the legal constructions of race are in large part due to the iconic work of Professor Ian Haney Lopez. *See* López, *supra* note 27.

[54] *See* Barclay, *supra* note 14, at 64 (noting "[i]nstitutionalized notions of black disability and white ability that reached back to the colonial era.").

[55] Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America 79 (2010) ("Unmatched in his racist rhetoric by any other black writer of his day, Thomas insisted that the majority of blacks were mentally retarded, 'savage[s] at heart,' and amoral—'unable practically to discern between right and wrong.'").

[56] *See id.* at 20–34.

[57] *See id.* at 20–21 ("From the 1890s through the first four decades of the twentieth century, black criminality would become one of the most commonly cited and longest-lasting justifications for Black inequality in the modern urban world.").

[58] *See* Kristin Garrity Sekerci & Azza Altiraifi, *A U.S. Immigration History of White Supremacy and Ableism*, Aljazeera (Jan. 31, 2018), https://www.aljazeera.com/opinions/2018/1/31/a-us-immigration-history-of-white-supremacy-and-ableism. [https://perma.cc/Z87Q-LXEX] (describing historical exclusion of Southern and Eastern Europeans based on notions of disability).

[59] *See* Alexandra Minna Stern, Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America 99 (2nd ed. 2015).

Stern recounts how similar rhetoric targeting Mexicans and Filipinos in California during the eugenics period alleged that biological and cultural deficiencies explained the purportedly high birth rates among both groups.[60] Such rhetoric eventually fueled campaigns to promote their sterilization and restrict their access to social services.[61] As discussed in greater detail below, these justifications provided both legitimacy and support for eugenics policies that called for forcible sterilization of thousands of not only disabled people, but also people of color incorrectly labeled as disabled.[62]

Second, examining race and disability within white supremacist ideology provides a way to understand how ableist notions of disability were a defining feature of racialized violence and racial power. This can be seen in the history of chattel slavery and American conquest. As scholar Jenifer Barclay explains, "disability was a defining feature of slavery's violence."[63] Racist justifications for slavery were imbued with ableist understandings of disability and provided an iron-clad rationale for the dehumanizing enslavement of Black people. Racist and ableist ideas constructed enslaved Africans as intellectually inferior while at the same time characterized their bodies as abnormal and yet physically able to withstand the brutality of slavery. The violence of chattel slavery was also disability-producing: enslaved Black people were whipped, maimed, and branded in order to force them to labor and reproduce, and otherwise to prevent them from escaping the horrors of slavery. Moreover, ableist notions of disability converged in white supremacist ideologies justifying the law of conquest and the violent dispossession of land from Native Americans.[64] Racist and ableist ideas constructed indigenous peoples as unfit and degenerate savages unable to make productive use of land or govern their own communities and nations, while at the same time ceding property rights in dispossessed land to white settlers purportedly able to make productive use of the land. In both chattel slavery and the period of conquest, white racial hegemony and the maintenance of both regimes were solidified through incorporating both racist and ableist justifications for violence and dehumanization.

The foregoing demonstrates how racism was incorporated into social meanings of disability and how ableism was incorporated into definitions of race.[65] Where race and disability categories intersect, "ableist racial stereo-

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[60] *See id.* at 164.

[61] *See id.* at 119.

[62] *See* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES (2002) (explaining the history of legalized forced sterilization on mental deficiency grounds).

[63] BARCLAY, *supra* note 14.

[64] *See id.*

[65] *See* SAMI SCHALK, BODYMINDS REIMAGINED: (DIS)ABILITY, RACE, AND GENDER IN BLACK WOMEN'S SPECULATIVE FICTION 5 (2018) ("Critical disability studies as a methodology, therefore, can assess how (dis)ability as a social system worked in concert with systems of race during this period in a way that impacted all black people, both disabled and nondisabled.").

types" and "racist disability stereotypes" are at times not far behind.[66] "Ableist racial stereotypes" are racist stereotypes infused with ableism. For example, racist stereotypes that depict Black people as sub-human (e.g., animal-like or ape-like) have been reinforced by ableist terms that serve to pathologize their actual mental and psychological disabilities, particularly where these individuals are labeled as criminal suspects. In her book, *Invisible No More*, Andrea Ritchie describes how public justifications for the shooting death of Aura Rosser, a forty-year-old Black woman with psychiatric disabilities,[67] included not only racist descriptions of Rosser's animal-like and superhuman strength, but also ableist depictions of Rosser "as crazy, pathological, or abnormal."[68]

At the same time, racist ideas remain a component of social meanings of disability. "Racist disability stereotypes" include, for example, the use of false or manufactured disability labels that designate people of color as deviant or criminal when they fail to conform to societal norms or otherwise threaten the existing social order. The creation of a new type of schizophrenia for Black men who were engaged in protest during the Civil Rights era is an example of such racist disability stereotypes.[69] Here, stereotypes that create an association between people with psychiatric disabilities and characteristics like violence, hysteria, and unpredictability are related to racist stereotypes that depict Black people as prone to violence, criminality, and disorder.

Another example of a racist disability stereotype includes the original term for Down Syndrome, which was "mongoloid idiocy."[70] Professor Mel Chen's important work describes how "Down Syndrome" was in 1866 "given the name 'mongoloid idiocy' by English physician John Langdon Down."[71] As Chen explains,

> Down was interested in assimilating various kinds of intellectual disability to racial types, with the idea that each non-Caucasian

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[66] Although I maintain—consistent with Annamma, and Lewis and Gibson—that ableism incorporates racism, in thinking of the social (and legal) construction of race along with disability it is helpful to distinguish the racial and ableist stereotypes, myths, and ideas to examine how they reinforce one another. This particular heuristic draws from the work of Sumi Cho, whose intersectional analysis informs my thinking. Cho, *supra* note 17, at 182–95 (defining sexualized racial stereotypes and racialized gender stereotypes).

[67] *See* Marc Fancher & Michael J. Steinberg, *Fatal Shooting in Ann Arbor*, ACLU OF MICHIGAN, https://www.aclumich.org/en/cases/fatal-police-shooting-ann-arbor [https://perma.cc/HSF4-KYGZ].

[68] ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 198–99 (2017).

[69] *See* Mel Y. Chen, *'The Stuff of Slow Constitution': Reading Down Syndrome for Race, Disability, and the Timing that Makes Them So*, SOMATECHNICS 235, 242 (2016). *See generally* THE PROTEST PSYCHOSIS: JONATHAN METZL, HOW SCHIZOPHRENIA BECAME A BLACK DISEASE (2011) (discussing how the intersection of race and mental health altered the way that schizophrenia was diagnosed).

[70] Chen, *supra* note 69, at 236.

[71] *Id.*

> race (based on Friedrich Blumenbach's typology—Mongol, Ethiopian, Native American, Malay, Caucasian) . . . lent a white child's delay a particular character ("a classification of the feeble-minded, by arranging them around various ethnic standards").[72]

As Chen explains, for Down, intellectual disability (then termed "feeblemindedness") assumed a racial character. In naming the condition he identified, Down drew upon patently racist views of the people he referred to as "Mongols," as well as racist views of disability, common in the scientific accounts of the day, which emphasized the inherent deficiencies of nonwhite racial and ethnic groups. Down's account regarded Down Syndrome as an external threat, or a "dilatory pollutant," which threatened to invade the bodies of white children.[73]

The genealogy of race and disability centered in Chen's work on Down Syndrome illuminates the staying power of race and disability constructs in contemporary times.[74] Though such clear examples of the intersections between race and disability may not be as readily apparent as in the case of "mongoloid idiocy," this Article illuminates the interconnected, mutually constitutive relationships between social meanings of race and disability, along with racism and ableism. Indeed, over 100 years after Du Bois wrote in *The Crisis* magazine, race continues to inform notions of disability, and disability continues to be linked to racist ideas about which bodies and minds are deviant, dependent, and violent. Though openly eugenicist policies have been formally discredited, modern efforts to link race with intellectual and physical ability continue to percolate in the public sphere and academy.[75]

Beyond this, race continues to inform perceptions of disability.[76] For example, research in the field of education has shown that race informs

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[72] *Id.* at 238.

[73] *Id.*

[74] *See* Licia Carlson, *Intelligence, Disability, and Race: Intersections and Critical Questions*, 43 AM. J.L. & MED. 257, 257 (2017) ("[A]t the same time, many definitions and categories of intellectual disability bear the mark of racist ideologies and racialized notions of disease, including genetic, biological, anatomical, and physiological abnormalities.").

[75] *See generally* Dorothy E. ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY (2011) (describing the rise of genetic, rather than political, definitions of race); STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1980) (refuting the innateness of genetic gifts and limits used for classifying people).

[76] Below, I discuss disability in ways consistent with what Michael Oliver termed a "social theory of disability." Oliver proposed a model of disability consistent with the lived experiences of disabled people and drawing from a radical, UK-based disabled organization known as the Union of the Physically Impaired Against Segregation. Oliver explained,

> A social theory of disability . . . must be located within the experience of disabled people themselves and their attempts, not only to redefine disability but also to construct a political movement amongst themselves and to develop services commensurate with their own self-defined needs. This process of re-definition has already been begun by disabled people who have dispensed with the intricacies and complexities of the definitions discussed earlier and instead propose the following two-fold classification.

which students are perceived as disabled and therefore entitled to legal protections under the Individuals with Disabilities Education Act and which students are labeled as troublemakers, or even criminals, deserving of suspension, expulsion, or criminal charges.[77] Though more research is needed to determine the extent of their vulnerabilities, when it comes to disabled people of color, race may even inform whether and how disabilities (diagnosed or not) are perceived by law enforcement in police encounters.[78] It can also inform whether and how hospital staff, nurses, and physicians perceive the disabilities of people of color and whether they respond with treatment, force, or arrest.[79]

Examining race and disability as co-constructions provides breadth, depth, and materiality to white supremacy as both a racist and ableist ideology, while providing a fuller picture of the nature and scope of its grip on the social order.[80] White supremacist ideology relied on both race *and* disability to further an agenda that doled out burdens and benefits and, in so doing, solidified a racial order that ranked bodyminds[81] based on how closely they aligned with white, able-bodied, heteronormative standards and norms.[82] Professor Sami Schalk describes bodymind as "a materialist feminist disabilities studies concept from Margaret Price that refers to the enmeshment of the mind and body, which are typically understood as interacting and connected, yet distinct entities due to the Cartesian dualism of Western philosophy."[83] As will be a theme for the passages that follow, once ableist ideas were incorporated into notions of race, and racist mean-

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> Impairment: lacking part of all of a limb, or having a defective limb, organism or mechanism of the body.
>
> Disability: the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excludes them from the mainstream social activities.

MICHAEL OLIVER, THE POLITICS OF DISABLEMENT 11 (1990).

[77] *See* Annamma, *supra* note 34, at 15.

[78] *See* Morgan, *supra* note 39, at 1408.

[79] *See* Nelson, *Racializing Disability, supra* note 14; Alyssa Wright, *Police Interactions with Individuals with Developmental Disabilities: Use of Force, Training, and Implicit Bias*, STAN. INTELL. & DEVELOPMENTAL DISABILITY L. & POL'Y PROJECT (2018) https://law.stanford.edu/wp-content/uploads/2018/11/Alyssa-Wright-Police-Interactions-with-Individuals-with-Developmental-Disabilities-1.pdf [https://perma.cc/WV3G-WZWG]; *see also* Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. REV. 808 (2022); Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646 (2021).

[80] I am indebted to Dr. Subini Annamma for helping me appreciate this particular insight.

[81] *See* SCHALK, *supra* note 65 ("Bodymind is a materialist feminist disabilities studies concept from Margaret Price that refers to the enmeshment of the mind and body, which are typically understood as interacting and connected, yet distinct entities due to the Cartesian dualism of Western philosophy. The term *bodymind* insists on the inextricability of mind and body and highlights how processes within our being impact one another in such a way that the notion of a physical versus mental process is difficult, if not impossible to clearly discern in most cases. Price argues that bodymind cannot be simply a rhetorical stand-in for the phrase "mind and body"; rather, it must do theoretical work as a disability studies term.").

[82] *See id.*

[83] *Id.*

ings were incorporated into ideas of disability, it became easier to justify the violence, marginalization, deprivation, and dispossession of racialized "others," disabled people, and individuals at the intersections of both marginalized identities.

C. The Intersectional Method and Its Merits

If uncovering race and disability as co-constructions matters, what methods of analysis allow for this process of excavation—namely, how does one understand the interrelationship between race and disability? In this subpart, I argue that an intersectional approach to race and disability provides a tool for diagnosing a fuller account of the nature and scope of racism and ableism both historically and today.

Intersectionality "calls attention to how dynamics of inequality are mutually constituted" and provides a framework through which to view historical and contemporary social meanings related to race and disability.[84] Informed by Professor Kimberlé Crenshaw's path-breaking work on intersectionality and its applications to American law and politics,[85] the sections that follow examine race and disability intersectionally in a historic context. Examining case law and policy through an intersectional lens reveals how social and legal constructions of disability are informed by racist ideas and how social and legal constructions of race are informed by ableist ideas.

Unpacking these racialized meanings of disability provides a basis for engaging with, and critically examining, the lived experiences and social position of individuals at the intersection of both race and disability. As Crenshaw suggests in one of her foundational writings on intersectionality, "history and context determine the utility of identity politics."[86] Viewed in this light, history provides not only a basis for understanding the utility of practicing intersectional politics, but also provides a context for understanding intersectional identities vis-à-vis systems of power—i.e., the corresponding forms of social subordination and marginalization that accompany those identities—today.[87]

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[84] Frederick & Shifrer, *supra* note 8, at 200.

[85] *See, e.g.*, Crenshaw, *Mapping the Margins*, *supra* note 18; Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter Crenshaw, *Demarginalizing the Intersection*].

[86] Crenshaw, *Mapping the Margins*, *supra* note 18, at 1299.

[87] *See id.* Though my focus is on race and disability, consistent with an intersectional analysis, this focus does not mean that gender, sexuality, class, age, citizenship status, or other identities do not factor into the analysis. Rather, my analysis aims to "identify the axes that are most relevant to [my] investigation." *See* KHIARA BRIDGES, CRITICAL RACE THEORY: A PRIMER 243 (2019). Bridges explains: "If one is studying, say, the experiences of Medicaid-reliant women perceiving prenatal care in a public hospital in the U.S., then race, sex, class, language, and immigration status may be relevant to the investigation. But, sexuality, gender identity, religion, and age, are not. Thus, the intersectional investigation may safely ignore those characteristics." *Id.*

In a similar vein, history matters to disability studies and critical disability scholars. Disability scholars and critical disability scholars have insisted on the fluid and dynamic nature of disability over time.[88] Annamma, Connor, and Ferri note further that "[n]otions of dis/ability continually shift over time according to the social context."[89]

Like Critical Race theorists, critical disability scholars have turned to history to better understand contemporary meanings of disability, as well as to consider how race informs these contemporaneous social meanings and social norms. For example, Sami Schalk defines disability with reference to social norms and social structures, defining "(dis)ability as a system of social norms which categorizes, ranks, and values bodyminds and disability as a historically and culturally variable category[.]"[90] Moreover, as Annamma, Connor, and Ferri note, "the social construction of dis/ability depends heavily on race and can result in marginalization, particularly for people and those from non-dominant communities."[91] That is to say, how disability is perceived, responded to, and interpreted is influenced by the race of the individual labeled as having a disability.[92] These ongoing meanings and their

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[88] *See id*; *see also* Gracen Brilmyer, *Towards Sickness: Developing a Critical Disability Archival Methodology*, 17 J. of Feminist Scholarship, 26, 36 (2020) ("If we understand the experience of disability and sickness as changing in relation to social and built environments, discriminatory attitudes, materials, and power inequalities, as well as differing across individuals, time and place, then bodyminds are considered to be always in flux[,] and there is not a single or final solution, but instead an acceptance of fluidity and mutability. This stance acknowledges how sickness fluctuates, which makes space for different solutions, whether that's empathy, medical intervention, spatial reconfiguration, assistive technology, and thus political, cultural, and material change.").

[89] Annamma, Connor, & Ferri, *supra* note 34, at 3. This version of the social model of disability should not be taken to suggest that there are no tangible differences between bodies and minds in society. Rather, this version of social model of disability recognizes that what makes certain difference "disabilities" are the societal barriers, attitudes, prejudices, and responses to those differences and the extent to which variations from the norm are laden with moral, legal, or social significance.

[90] Sami Schalk, *Critical Disability Studies as Methodology*, 6.1 J. Cultural Stud. Ass'n 1, 2 (2017) (defining "(dis)ability to designate the socially constructed system of norms which categorizes and values bodyminds based on concepts of ability and disability").

[91] *Id.* at 1, 6; *see also* Kris D. Gutiérrez & Lynda D. Stone, *A Cultural-Historical View of Learning and Learning Disabilities: Participating in a Community of Learners*, Learning Disabilities Rsch. & Prac. (1997); Ray McDermott, Shelley Goldman, & Hervé Varenne, *The Cultural Work of Learning Disabilities*, Educ. Res. (2006); Gretchen Guiton & Jeannie Oakes, *Opportunity to Learn and Conceptions of Educational Equality*, 17 Educ. Evaluation & Pol. Analysis 323 (1995); Beth C. Rubin & Pedro A. Noguera, *Tracking Detracking: Sorting Through the Dilemmas and Possibilities of Detracking in Practice*, 37 Equal. & Excellence in Educ. 92 (2004); Schalk, *supra* note 61, at 2.

[92] *See* Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 Colum. J. Race & L. 265, 270 (2019) (discussing how "the construction of disability (if it exists) may be a criminalized condition 'remedied' with punishment and segregated classrooms, eventually leading to the juvenile justice system, in which children with disabilities are grossly overrepresented"); *see also* Annamma, Connor, & Ferri, *supra* note 34 ("In education, these race-disability constructs may explain in part why students of color with disabilities in particular and students with disability in general are suspended and expelled at disproportionate rates and are more likely than their nondisabled peers not to graduate.").

historical roots deserve greater consideration and examination, which this Article attempts to do.

An intersectional approach advances our understanding of race and disability, as well as racism and ableism, in several ways. First, an intersectional lens focused on race and disability illuminates how social understandings of normalcy were (and arguably remain) linked to white supremacist ideologies that construct and reify racial hierarchy.[93] Stated differently, an intersectional approach permits an uncovering of the interdependent ways that race and disability have shaped ideas about which bodyminds are considered "normal," and how law reflects, constructs, and/or reifies these notions of normalcy.

As Lennard Davis writes in his classic account, normalcy is a social construction.[94] Indeed, the modern usage of the term "normal," as in "constituting, conforming to, not deviating or differing from the common type or standard, regular, usual," only entered the English language around 1840."[95] Similarly, the term "norm" first appeared around 1855.[96] At the same time, normalcy is also connected to, and informed by, racist social meanings and racial ideology. As Douglas Baynton writes,

> Race and disability intersected in the concept of the normal, as both prescription and description. American [B]lacks, for example, were said to flourish in their "normal condition" of slavery, while the "'free' or abnormal negro" inevitably fell into illness, disability, and eventually extinction. The hierarchy of races was itself depicted as a continuum of normality.[97]

Baynton's analysis makes clear that ideas about normalcy were incorporated into understandings of racial difference and racist ideologies that empha-

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[93] *See* Annamma, Connor, & Ferri, *supra* note 34, at 19; Ribet, *Surfacing Disability*, *supra* note 15, at 210 ("[S]tereotypes are grounded in ableist racism or racist ableism regarding inferiority, incompetence and unworthiness, which are impossible to effectively combat without a dual analysis of both white supremacy and the social construction of normalcy.").

[94] LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 23 (1995) ("To understand the disabled body, one must return to the concept of the norm, the normal body. . . . I would like to focus not so much on the construction of disability as on the construction of normalcy. I do this because the 'problem' is not the person with disabilities; the problem is the way that normalcy is constructed to create the 'problem' of the disabled person.").

[95] *Id.* at 24. During this same time period, the U.S. Census began counting disabled persons in the population. In 1830, the national census started counting deaf and blind persons; in 1840, it began counting persons labeled as "idiotic" and "insane." ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE 2 (2014). Individuals with physical disabilities and "mulattoes" were added in 1850. *See id.*

[96] DAVIS, *supra* note 94, at 24.

[97] Douglas Baynton, *Disability and the Justification of Inequality in American History* 39, *in* THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES (Longmore & Umansky, eds. 2001). Similarly, Beth Ribet adds race into an intersectional analysis of disability, noting that "disability and race (and virtually every oppression or basis for subordination imaginable) embody both hierarchy and a definition of normalcy or ideal physicality that privileges the top of the hierarchy. Ribet, *Surfacing Disability*, *supra* note 15, at 212.

sized Black inferiority. At least since the late eighteenth century, "black skin itself has been treated as anomalous, a defect and a disfigurement, something akin to an all-body birthmark and often a sign of sin or degeneracy."[98] Alarmingly, in the 1840 census, all Black residents in some communities were identified as "insane" and thus abnormal.[99] These findings point to two important insights: (1) whiteness was linked to normalcy and racial "Others" were cast as abnormal, and (2) disability labels served to construct racial boundaries between whiteness and racial others. Disability itself was in some cases described as diluting the purity of the white race.[100] Taken together, white able-bodiedness became the norm against which all racialized others could be compared and ranked.[101]

Second, the "intertwining"[102] among whiteness, disability, and the idea of normalcy in particular contributed to group-based subordination on the basis of race and/or disability.[103] As Annamma, Connor, and Ferri put it, "[r]acism and ableism are normalizing processes that are interconnected and collusive, where "[r]acism validates and reinforces ableism, and ableism validates and reinforces racism."[104] Talila Lewis and Dustin Gibson's definition of ableism captures the mutually constitutive nature of racism and ableism crisply: "A system that places value on people's bodies and minds based on societally constructed ideas of normalcy, intelligence, excellence and productivity."[105] As they further explain, "[t]hese constructed ideas are deeply rooted in anti-Blackness, eugenics, colonialism and capitalism," and "[t]his form of systemic oppression leads to people and society determining who is valuable and worthy based on a person's appearance and/or their ability to satisfactorily [re]produce, excel and 'behave.'"[106] In the sections that follow, I describe how an in-depth examination of the co-construction of

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[98] Baynton, *supra* note 97, at 40.

[99] David L. Braddock & Susan L. Parish, *An Institutional History of Disability, in* HANDBOOK OF DISABILITY STUDIES 35 (Albrecht et al. eds., 2001) ("The 1840 census reflected pervasive racism. All black residents in some towns were classified as insane.").

[100] *See* Chen, *supra* note 69, at 238.

[101] *See id.* ("[T]he construct of White normalcy is synonymous with ability, and the constructions of People of Color are correspondingly synonymous with abnormalcy, dangerous deviance or (infectious) moral sickness, damaged or less worthy or inferior bodies, less capable or intelligent minds—all of which bleed into the construction of disability"); *see also id.* ("Whiteness, like 'able-bodied-ness,' represents a construct that justifies and organizes the subordination of those who fall somewhat or entirely outside of the dominant construct. . . . Specifically, . . . race can be coded as in itself a disability, and disability as evidence of inferiority, which then reinforces white supremacy[.]").

[102] Frederick & Shifrer, *supra* note 8, at 206.

[103] *See id.* ("In fact, the word *normal* in its current meaning entered the English language in the mid-1800s, as the binary between "normalcy: and "deviance" was solidified. Thus, notions of deviance, disability, and normalcy were imbued into citizenship laws, practices, and cultural values.").

[104] Annamma, Connor, & Ferri, *supra* note 34, at 6.

[105] Talila Lewis & Dustin Gibson, Ableism 2020: An Updated Definition, Talila A. Lewis (Jan. 25, 2020), https://www.talilalewis.com/blog/ableism-2020-an-updated-definition. [https://perma.cc/75M8-AMZR].

[106] *Id.*

race and disability in American law and policy demonstrates what this intertwining produced: a version of white supremacy that is constructed and reinforced by racism and ableism.

Third, examining race and disability intersectionally shows how, paradoxically, disability can be weaponized both *when recognized* in individuals from historically marginalized groups and *when not recognized* at all. Stated differently, individuals from negatively racialized groups are both (1) not recognized as disabled or (2) regarded as not disabled enough. In an essay, *Gender, Race, and Mental Illness: The Case of Wanda Jean Allen*, Michele Goodwin examines the case of Wanda Jean Allen, who the state of Oklahoma executed on January 11, 2001, after she was convicted of first-degree murder and sentenced to death for killing her partner, Gloria Leathers.[107] Allen, a low-income, Black, lesbian woman, argued that she shot Leathers in self-defense while Leathers was wielding a rake.[108] As Goodwin notes, "the lower court and jury refused to show any lenience in connection to Wanda Jean Allen's mental or psychological status," despite evidence of an IQ of 69 and brain damage due to a prior truck accident and stabbing to her head as a teenager.[109] Goodwin also notes how, taken together, Allen's "psychological status combined with gender, sexual orientation, poverty, and race seemed to further exacerbate her already vulnerable status" and "to further condemn her for arguably what was out of her control."[110] Goodwin's account demonstrates how Allen's multiple marginalized identities rendered her disabilities invisible, illegible, and inadequate, even despite the presence of at least a possible disability diagnosis. An intersectional approach—similar to the one Goodwin applies—would assess how Allen's marginalized identities contributed to the erasure of her disability, and thus explains the rationalization of her conduct by the lower court and jury on potentially racist, sexist, and ableist grounds.

Finally, an intersectional approach to race and disability fosters greater understanding of the processes of racialization and disablement.[111] To fully understand the relationship between race and disability, it is important to see both racial *and* disability categories as the products of, and interconnected with, the social process of racialization. As Omi and Winant define it,

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[107] *See* Michele Goodwin, *Gender, Race, and Mental Illness: The Case of Wanda Jean Allen*, *in* CRITICAL RACE FEMINISM 228 (2d. ed. 2003).

[108] *See id.*

[109] *Id*. at 229.

[110] *Id.*

[111] *See* Ribet, *Surfacing Disability*, *supra* note 15, at 215. According to Beth Ribet, disablement is "the process by which some disabilities are socially produced, and more specifically are produced by violence, inequity and subordination. Beth Ribet, *Naming Prison Rape As Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL'Y & L. 281, 285 (2010); *see id.* ("Not all disabilities fall into this category. For instance, disabilities which are the consequence of relatively normative aging, of accidents not exacerbated by a social vulnerability, or—in some cases—are genetic in origin, would not fit my conception of disabilities produced by disablement.").

racialization "signif[ies] the extension of racial meaning to a previously racially unclassified relationship, social practice or group," and is "an ideological process, [and] an historically specific one."[112] Martinez Hosang and Labennett, in turn, argue that adopting "static understandings of race as a universal category of analysis, racialization names a process that produces race within particular social and political conjunctures."[113] Racialization further "constructs or represents race by fixing the significance of a 'relationship, practice or group' within a broader interpretive framework."[114]

At the same time, processes of racialization map onto processes of disablement. As philosopher Joel Michael Reynolds puts it, "how the meaning of disability shapes the meaning of race—which is to say . . . how *practices* of disablement shape *practices* of racialization," offers a deeper engagement with the social, political, and economic context within which race and disability intersect.[115] Reynolds continues, asserting that "[w]hite supremacy, as a process and apparatus of making abled and disabled according to an intertwined logic of ableism and anti-Black racism, demands that Black bodies, especially Black male bodies, be rendered as lacking both due to their being and their way of being in the world; this is part of what gets claims of dehumanization, even to the point of lacking any humanity at all, off the ground."[116] To drill down on Reynolds' main point, where racism converges with ableism, the nature of dehumanization changes.[117] Examining disability along with race provides a lens for understanding the nature and scope of racism and ableism, as well as their material consequences, within a set of social and ideological processes that construct and reinforce one another.

Intersectionality provides a robust methodology for examining both what is race and disability and creating a more fulsome account of racism and ableism. Melissa Murray situates the *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*[118] opinion, involving a challenge to Indiana law restricting access to abortions, within a discussion of the "role of race, in tandem with gender and disability, in legislative efforts to restrict abortion access."[119] Jyoti Nanda uses intersectional analysis to "describe[ ] . . . the criminalization of some children, largely Black and Latinx, through the con-

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[112] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 13 (2015); *see also* Chen, *supra* note 69, at 235 ("Beyond sociology, where 'racialisation' refers to the ascription of racial characteristics to a group not otherwise known as such, it is now fairly common interdisciplinarily to use this term to express the ways that a structure has become, in some way, internally organised, informed, by race or racial difference.").

[113] Daniel Martinez Hosang & Oneka Labennett, *Racialization*, *in* KEYWORDS FOR AMERICAN CULTURAL STUDIES 202 (Bruce Burgett & Glenn Hendler eds., 3d. ed. 2020).

[114] *Id.*

[115] Joel Michael Reynolds, *Disability and White Supremacy*, 10 CRITICAL PHIL. OF RACE 48, 55 (2022).

[116] *Id.* at 54–55.

[117] *See id.*

[118] 139 S. Ct. 1780 (2019).

[119] Melissa Murray, *Race-Ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2033 (2021).

struct of disability," in "the prisonlike environment in some schools[,]" and "how this environment itself contributes to the racialized construction of disabilities."[120] Khiara Bridges similarly deploys an intersectional analysis of the sterilization of Carrie Buck, the young teenage woman labeled as an "imbecile" in the infamous *Buck v. Bell*[121] case, to argue that Buck's white privilege in part rendered Buck vulnerable to sterilization.[122] As Bridges argues, because eugenicists were fixated on purifying and perfecting the white race, Carrie Buck was especially vulnerable to sterilization as a white woman at the margins of society due to her class and alleged sexual immorality.[123] Indeed, eugenicists targeted whites at the margin of society—poor whites, criminalized whites, so-called promiscuous whites—because they posed defective traits that could be passed on genetically and could therefore pollute the white race. In 2010, Beth Ribet called for Critical Race theorists to "surface" disability in their scholarship. [124] Specifically, Ribet called for "a more deeply intersectional analysis—one that surfaces and acknowledges the salience of disability from multiple experiential standpoints and specifically unmasks the function of ableism within white supremacist systems."[125] The intersectional approach that Ribet adopts is notably distinguishable from what she terms a "'comparative subordination' approach."[126] As Ribet explains, such approaches "rel[y] on analogy and application of racially based analysis to disability, interchanging disability as a category of oppression with race as a category of oppression."[127] The same year of Ribet's publication, Camille Nelson deployed an intersectional analysis to examine police discretion in encounters involving people of color with psychiatric disabilities.[128] Nelson concludes that her analysis offers a way to understand both the exercise of police discretion and, critically, how "it appears that [police exercise discretion] in markedly different ways depending upon the race of the person [with a psychiatric disability]."[129] Even earlier, Dorothy Roberts and Jennifer Pokempner deployed an intersectional analysis of race, gender, and disability, in order to "promote a discussion of social provision that is directed at confronting the structural causes of poverty and inequality and

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[120] Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 269–70 (2019).

[121] 274 U.S. 200 (1927).

[122] Bridges, *supra* note 14, at 465.

[123] *See id.* at 465, 474–75. Other mechanisms existed to protect the so-called purity of the white from groups classified as non-whites, including state miscegenation laws and restrictive immigration laws. *See id.* at 463.

[124] Ribet, *Surfacing Disability*, *supra* note 15.

[125] *Id* at 210.

[126] *Id.* at 209.

[127] *Id.*

[128] *See* Ribet, *Surfacing Disability*, *supra* note 15; Paul-Emile, *supra* note 14; Nelson, *supra* note 14, at 4.

[129] *Id.* at 4.

attempt[ ] to reconfigure welfare's meaning away from degradation and stigma toward health and well-being."[130]

Here, it is important to note that an intersectional approach is different from accounts recognizing racial identities as akin to disabilities.[131] To say that race is linked to notions of disability is not to say that race is like disability, but rather to note how social meanings related to disability were incorporated into definitions of race. Further, this is not to suggest that racism is just like ableism, or that ableism is just like racism, but rather to acknowledge the interlocking and mutually constitutive nature of the two. Pressing issues facing disabled people and disabled people of color necessitate moving beyond comparative subordination approaches. Indeed, as critical disability scholars have argued, metaphors and analogies for disability in race scholarship risk marginalizing the lived experiences of disabled people of color.[132] Moreover, though simplified comparative approaches can foster shared solidarity and affinity,[133] failure to adopt an intersectional lens can lead to mischaracterizing the lived experiences of people who live at the intersections of both race and disability identities.[134]

In the sections that follow, I discuss how the law co-constructed *racial* meanings while defining, or interpreting, meanings of *disability*, and vice versa, as well as how social meanings of race and disability served to main-

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[130] Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 427 (2001); *see also* Dorothy Roberts and Sujatha Jesudason, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 10 DU BOIS REV. 313, 313–34 (2013) (discussing how "organizing based on an intersectional analysis can help forge alliances between reproductive justice, racial justice, women's rights, and disability rights activists to develop strategies to address reproductive genetic technologies.").

[131] *See, e.g.*, Paul-Emile, *supra* note 14. *But see* Nelson, *Racializing Disability, supra* note 25 (discussing "racializing disability, disabling race").

[132] *See* Sami Schalk & Jina B. Kim, *Integrating Race, Transforming Feminist Disability Studies*, 46 SIGNS 31, 41–42 (2020).

[133] *See, e.g.*, Ribet, *Surfacing Disability*, *supra* note 15, at 209 ("Although some aspects of this kind of analysis can be productive, I also note its limitations. This kind of comparative analysis, as represented in Asch's work, often treats race and disability as relatively discrete categories, focusing on how the two compare, and in some moments degenerating into a debate about which oppression or experience is harder or worse. The unspoken and presumably unconscious assumption in this kind of analysis is that disability is within the terrain of Whiteness, and is either not experienced or not worth articulation for People of Color. More broadly, one might imagine a White disabled person sharing notes with a non-disabled Person of Color, with each noting, 'yes, I too have struggled with equal access to bathrooms and water fountains,' 'yes, I too have sought remedies through civil rights legislation, with disappointing results,' and 'yes, people perceive me as lazy, or deviant, less worthy, less capable.' "). *But see* Jasmine E. Harris, *The Aesthetics of Disability,* 119 COLUM. L. REV. 895 (2019) (disputing contact theory).

[134] *See, e.g.*, Ribet, *Surfacing Disability*, *supra* note 12 at 210 ("For instance, the denial and erasure of disabled people as sexual is a related but different form of sexual oppression than exoticization or demonization of the sexualities of some People of Color. These demographics—the Person of Color without disability, the White person with disability—are the only ones that fit this kind of discourse, because only when the categories are strictly separated or constructed unilaterally does comparison alone, rather than intersection, make any sense.").

tain and reinforce racism and ableism both then and now. Specifically, I map out some of the ways in which social meanings and definitions of race and disability were co-defined in legal opinions, as well as federal, state, and local policies governing a wide array of social institutions and legal regimes, including law pertaining to chattel slavery, convict leasing, immigration laws, and eugenics. I show how, when viewed intersectionally, each case, law, or policy is situated in "historical contexts and structural conditions within which the identity categories of race and disability intersect."[135]

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Before turning to the substantive discussion, a few caveats are in order. First, the sections that follow are by no means a complete historical analysis, but instead provide a genealogy that can inform future engagements with race and disability in legal advocacy and legal scholarship.[136] Second, although this Article is framed around race and disability, the goal is not to deemphasize identities such as gender, sexuality, or class. Indeed, in adopting an intersectional approach, I aim to focus on the relevant marginalized identities that feature in each of the topics that I address below.[137] Third, this Article rejects the view that ableism is simply a variant of racism, particularly where ableist discourses and ideologies were deployed to target the bodies and minds of so-called racial "Others." The move to characterize racial "Others" is not just about characterizing these groups as biologically distinct, but also as biologically inferior. The latter allows for an ordering of human bodies and minds in comparison to a white, able-bodied norm. In so doing, it permits an ordering not just as between whites and non-whites, but an ordering within racial groups, both white and non-white.

Fourth, it is important to respond to criticisms of intersectionality as a tool for legal analysis.[138] As Jasmine Harris contends in recent work, although "intersectionality tells us to focus on all identities and how they come together to form a distinct, new type of experience of discrimination," intersectionality "does not, in the case of race and disability, tell us about the source of intersectional marginalization or the tension between identity labels in communities of color—all necessary insights to help design more accurate legal remedies."[139] Harris proposes that "[a]esthetic theories of discrimination . . . can supplement the vagaries surrounding intersectionality

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[135] Nirmala Erevelles & Andrea Minear, *Unspeakable Offenses: Why is Disability Missing in Discourses of Intersectionality in Critical Race Theory*?, 4 J. of Lit. & Cultural Disability Stud. 127, 131 (2010).

[136] *See generally* Michel Foucault, "Society Must Be Defended": Lectures at the College de France, 1975-176 (2003).

[137] *See* Bridges, *supra* note 87.

[138] For a helpful overview of some of the criticisms, see *id.* at 238–47.

[139] *Reckoning*, *supra* note 15, at 918–19.

as an analytical lens to understand race and disability,"[140] give meaning and nuance to intersectional analyses about disability and race," "further advance a disability-justice framework," and "help us understand the nature and process of subordination because of disability."[141]

Harris's critique is correct where intersectional analyses focus on identities rather than power. Yet intersectional analysis attuned to power can overcome some of the shortcomings Harris identifies (i.e., identify the "source of intersectional marginalization" or the "tension between identity labels in communities of color").[142] As Barbara Tomlinson put it, "[i]f critics think intersectionality is a matter of identity rather than power, they cannot see which differences make a difference. Yet it is exactly our analyses of power that reveal which differences carry significance."[143] Intersectionality tuned into an analysis of power can surface sources of intersectional marginalization,[144] and tensions with, for example, acquiring or claiming disability labels, within and among negatively racialized groups.[145] Beyond this, an intersectional approach is simply a tool for analysis; it is not a proposal or political agenda on its own. To offer concrete and useful proposals, the intersectional method must be deployed within a political context that is attuned to the concrete demands of the movements, political organizations, and groups that adopt the method. This is because intersectionality is a tool that should be adopted by these movements, political organizations, and groups as a means to diagnose more robust, structural accounts of social problems, or to identify structural remedies that are comprehensive and do not exclude particular groups from the benefit of these remedies.

To say intersectionality does not lead to a set of proposals is to disconnect identity analysis from structure or power analysis is to unmoor it from what theory was intended to do.[146] Intersectionality is an analytical tool that allows for identifying vulnerabilities and marginalization rooted in subordination, avoiding erasures, and remedying these harms through realigning social structures to correct for power imbalances, deprivations, violence, and

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[140] *Id.* at 919 ("First, an aesthetics lens shows how deeply rooted biases mark people of color with and without disabilities as deviant, incompetent, and unequal. These biases trigger affective responses that, at first blush, appear to be biological and visceral when, in fact, they are the product of centuries of structural subordination. Second, aesthetics help explain why norms of race and disability together are especially resistant to change. Third, aesthetic theories surface a misplaced faith in training and education as a prescription for inequality, particularly in the context of the criminal-justice system.").

[141] *Id.* at 945.

[142] *Id.* at 918–19.

[143] Barbara Tomlinson, *To Tell the Truth and Not Get Trapped: Desire, Distance, and Intersectionality at the Scene of Argument*, 38 SIGNS 993, 1012 (2013).

[144] *See* Crenshaw, *Mapping the Margins*, *supra* note 18, at 1248–49 (identifying one source of vulnerabilities of undocumented survivors of intimate partner violence in immigration laws).

[145] Ribet, *Surfacing Disability*, *supra* note 15, at 227.

[146] *See, e.g.*, Sumi Cho, Kimberlé Williams Crenshaw, & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 785, 797 (2013).

other harms. It was never designed to point to specific outcomes unmoored from specific political platforms or organizing. It was designed to surface what had been submerged, or as Crenshaw put it in her classic text, "demarginaliz[e] the intersection."[147] Sumi Cho, Crenshaw, and Leslie McCall maintain that "[i]ntersectionality is inextricably linked to an analysis of power," and that "intersectionality . . . is not exclusively or even primarily preoccupied with categories, identities, and subjectivities," but "[r]ather, the intersectional analysis foregrounded here emphasizes political and structural inequalities."[148] In a similar vein, noted sociologist Patricia Hill Collins writes, "[a]s opposed to examining gender, race, class, and nation, as separate systems of oppression, intersectionality explores how these systems mutually construct one another, or, in the words of Black British sociologist Stuart Hall, how they 'articulate' with one another."[149] In law in particular, these intersections of overlapping social structures must be interrogated to understand how the cisgender, heterosexual, white, non-disabled body functions as a baseline for individual rights, limiting the scope of available legal protections and remedies for those who fall outside that norm.

III. On the Relationship Between Race and Disability

This section looks to legal doctrine and policy to illuminate the relationship between race and disability in law. Of course, the cases, laws, and policies discussed cannot capture the entire universe of potential cases that could serve to illuminate the relationship between race and disability in law. Rather, the cases, laws, and policies discussed in the sections that follow serve to illustrate the argument presented in Part II—namely, that there are mutually constitutive relationships between (1) legal interpretations of race and disability and (2) racism and ableism. Part III.A demonstrates this relationship in the context of state-court opinions resolving legal disputes in breach of warranty suits involving enslaved Black people.

A. The Mutual Constitutive Nature of Race and Disability: "Defective Negroes," Disability, and American Slavery

The connections between race and disability appear most starkly under the system of American chattel slavery. The next section turns to the period of chattel slavery where Blackness and disability emerge as both mutually constitutive and subordinated categories. Blackness and disability emerge also as legal and social meanings that served to (1) justify the system of chattel slavery and (2) assign and assess the value of enslaved Black people

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[147] Crenshaw, *Demarginalizing the Intersection*, *supra* note 85.

[148] Cho, *supra* note 146, at 797.

[149] Patricia Hill Collins, *It's All in the Family: Intersections of Gender, Race, and Nation, Border Crossings: Multicultural and Postcolonial Feminist Challenges to Philosophy*, Hypatia 63 (Summer 1998).

in market transactions. Both aspects of this interrelationship are discussed in turn below. As I maintain, focusing on how racism and ableism shaped rationales for dehumanization that undergirded the regime of chattel slavery, and how both shaped market values for enslaved Black people, can provide insights into the mutually constitutive nature of race and disability.

During the period of chattel slavery, white supremacists justified Black people as suitable for enslavement in large part due to biological traits and physical predispositions that purportedly made them uniquely conditioned for physically arduous labor.[150] Over time, physical traits became linked to Blackness, including skin color, hair texture, eye shape, facial features, among other traits.[151] Race became the mechanism by which to distinguish free peoples from enslaved peoples and, ultimately, became the mechanism through which groups were classified, ranked, and organized hierarchically within the social order. In this way, racial classifications were reified in order to reinforce the regime of chattel slavery. As Dorothy Roberts put it, "[t]he physical differences between Africans, Indians, and whites separated them into distinct "races" that, in turn, evinced a natural ordering of human beings in which whites were created superior to Blacks and Indians."[152] Through depicting certain non-white persons as subhuman, savages, or brutes, human beings were classified as at once racial "Others" and racial subordinates.

Social meanings of race and disability, legitimized through law, provided dual justifications for chattel slavery. Blackness was coded as "disabling" in two main ways. First, pro-slavery physicians turned to science to argue that the physical and mental composition of enslaved Black people made them well-suited for slavery. As Jenifer Barclay explains, "[t]hese notions rested on imagined, embodied pathologies supposedly inherent in 'the Negro constitution' that made blacks susceptible to a range of hereditary mental and physical defects."[153] Samuel A. Cartwright, a well-known plantation physician, theorized that, given what he considered the physical and mental defects of Black people, including a cranium that was ten percent smaller than normal (read: European) skulls, Black people could not survive without the care of white enslavers. Even attempts to escape slavery's brutality—for example, by running away or avoiding strenuous workloads through feigning illness—were medicalized as disabling pathologies.[154] As Harriet Washington recounts in her book *Medical Apartheid*, physicians in

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[150] Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 224 (1995) (noting that "the racial myth asserted that nature had perfectly adapted Africans' bodies to the heavy agricultural lab needed in the South, as well as fitted their minds to bondage"); *see also* Licia Carlson, *Intelligence, Disability, and Race: Intersections and Critical Questions*, 43 AM. J.L. & MED. 257, 257 (2017) ("Historically, many theories of racial inferiority have been articulated in terms of intellectual and cognitive incapacity[.]"

[151] *See, e.g.*, Hudgins v. Wright, 11 Va. 134, 134 (1806).

[152] Roberts, *supra* note 150, at 224.

[153] BARCLAY, *supra* note 14, at 65.

[154] WASHINGTON, *supra* note 14, at 36.

the South who supported slavery promoted the idea that Black people seeking freedom were afflicted with medical conditions or disabilities that caused them to run away.[155] Cartwright is best known for discovering a number of "diseases" that plagued Black people specifically and which made them predisposed to running away. His list of discovered diseases included *drapetomania*, a diagnosis that included the intense desire to run away; *hebetude*, a laziness that caused the mishandling of an owner's property; *dysthesia aethiopica*, a desire to destroy an owner's property; and *cachexia africana*, a propensity to eat nonfood substances.[156] Medicalized labels, such as "rascality" or "drapetomania," appeared in medical publications as conditions to be treated in order to prevent escape, to maintain forced labor standards and quality, and to uphold the regime of chattel slavery.[157] Cartwright's recommended treatment for these alleged debilitating diseases reflected the brutality of the system he sought to justify: corporal punishment or internment camps.[158]

Beyond this, southern physicians contributed to the legal construction of race by incorporating into those definitions ableist understandings of disability. Southern physicians and legal regimes that sanctioned slavery operated in a kind of symbiotic relationship. Barclay explains in recent work that "southern physicians . . . borrowed and added to existing frameworks of racial difference from the legal system into which they sought acceptance," and "[i]n the process, . . . forged a dialogic relationship between medicine and law, producing a juridico-medical discourse that established them as 'experts.'"[159] Southern physicians introduced into legal cases and opinions discourses that produced racial meanings that linked Blackness with "innate . . . defectiveness."[160] Taken together, Southern physicians helped to shape ableist understandings of disability that served to label deviations from the white, male, able-bodied norm as differences that were at once "disabilities" (justifying Black dehumanization and suitability for slavery) and "abilities" (justifying Black physical composition and strength and suitability for slavery).

Second, the regime of chattel slavery involved a series of market transactions that literally and figuratively valued enslaved Black people based on their perceived physical and mental abilities. Under the American system of chattel slavery, Black people were brutally exploited in a system that extracted labor from their bodies for economic gain. The value of each enslaved Black person was determined by anticipated productivity based on

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[155] *See id.*
[156] *See id.*
[157] *See id* at 25–51.
[158] *See id* at 36–37.
[159] BARCLAY, *supra* note 14, at 64.
[160] *Id.* at 64 ("As southern physicians anxiously sought the courts' recognition and approval, they produced discourses of innate black defectiveness.").

assessments as to physical and mental traits and abilities.[161] Enslaved Black people were assigned monetary value in markets based on size, strength, and, for enslaved women, reproductive capability. Productivity potential was derived from assessments into the physical health and vitality of enslaved Black people, as well as their mental stability. Finally, slavery's brutal and harsh conditions themselves produced forms of physical and mental disablement that were also factored into assessments as to the market values of enslaved Black persons.

Legal constructions of race and disability can be uncovered through close reading of early cases involving breach of warranty.[162] In these legal opinions, social meanings of disability, alongside race, informed how enslaved bodies were valued in public markets, and litigants often relied on testimony from medical doctors to verify the nature of debilitating conditions, or the scope of impairments. Physical and mental debilities, whether in the form of physical attributes or conditions labeled as "illnesses," or "defects," functioned to discount the market values of enslaved Black persons. In breaches of warranty cases, where an enslaver-purchaser sued on the grounds that the presence of illness or defect (not disclosed by the seller-enslaver) rendered the sale void, or entitled the enslaver to compensatory damages, medical conditions, physical disabilities, and mental disabilities were discussed in considerable detail.[163] These cases shed insight into how meanings of disability were defined and elaborated upon in opinions that reinforced racial categories and white supremacist ideology that contested Black humanity. These court opinions demonstrate how ableist meanings of disability were incorporated into definitions of race and how racist meanings were incorporated into definitions of disability.

In *Thompson v. Botts*,[164] the legal dispute centered on jury instructions regarding whether there had been a breach of warranty following the sale of an enslaved woman and her child who appeared to have "scrofula." "Scrof-

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[161] James D. Foust & Dale E. Swan, *Productivity and Profitability of Antebellum Slave Labor: A Micro-Approach*, 44 AGRIC. HIST. 39, 39–40 (1970).

[162] The methodology I employ in uncovering these racial and disability meanings is akin to what Bennett Capers called, "reading back, reading black." I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9 (2006). Interpreting legal opinions through a race-and-disability lens is part of obtaining a deeper understanding of these cases and the ideologies—racial, gender, ableist— that informed them. As Capers explains: "Far from diminishing these opinions-these grand narratives, these master texts reading black reveals other layers, other meanings, and in the process deepens and widens our understanding not only of the holdings of these opinions, but also the how and why of them." *Id.* at 18.

[163] *See, e.g.*, Jordan v. Foster, 11 Ark. 139 (Ark. 1850) (affirming award of damages to enslaver because enslaved child had physical disabilities); Pyeatt v. Spencer, 4 Ark. 563 (Ark. 1842) (reversing a lower court's decision that enslaver was entitled to damages due to alleged mental illness of the enslaved woman and remanding for new trial). *See generally* DEA H. BOSTER, AFRICAN AMERICAN SLAVERY AND DISABILITY: BODIES, PROPERTY AND POWER IN THE ANTEBELLUM SOUTH, 1800–1860 (2013).

[164] 8 Mo. 710, 713 (Mo. 1844).

ula" is defined as "tuberculosis of lymph nodes especially in the neck." [165] However, the term derives from scrofulous, meaning "having a diseased run-down appearance" or "morally contaminated."[166] Given this condition, the buyer-enslaver sought to return the enslaved mother and child after purchase, but the seller-enslaver refused, and so the buyer sued. At trial, the buyer-enslaver sought to introduce jury instructions to probe whether the woman was "unsound" or unhealthy at the time of purchase.[167] The seller-enslaver wanted jury instructions to probe whether the swelling on the enslaved woman's neck was visible at the time of purchase.[168] In particular, the seller-enslaver-defendant asked for the following instruction:

> If the swelling on the slave's neck was visible to the plaintiff at the time of the purchase, and the plaintiff, before the purchase, saw or examined it, at the instance of the defendant, such swelling is not an unsoundness within the meaning of the warranty, for or on account of which the plaintiff can recover.[169]

According to the evidence introduced at trial, "it appeared, that the negro woman, at the time of the sale, had a swelling on the side of her neck, about the size of a pea, which was shown to the purchaser (Botts), with assurances from Thompson (the defendant below)" that it "would not hurt her and if it did, he would make it good."[170]

The lower court declined to side with the seller-enslaver and delivered the plaintiff's requested instructions, which the state supreme court affirmed.[171] The Missouri Supreme Court reasoned that the alleged condition "scrofula," as well as other malignant diseases, might be difficult to detect by mere inspection and, thus, were not subject to the visual defects rule that voids a general warranty of soundness.[172] As the Missouri Supreme Court explained, "[i]t is true, that a general warranty of soundness will not cover a defect visible to the senses; but the existence of a malignant disease, such as scrofula, is not a matter which can always be detected by mere inspection, even by the most skillful or scientific examiner."[173] Thus, the general rule that visible defects applied to render an enslaved person "unsound" did not apply. Such unsoundness was not "within the meaning of the warranty" as the defendant had argued.[174] The court made it clear to emphasize that "an

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[165] *Scrofula*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/scrofula [https://perma.cc/A76Y-JW52].

[166] *Scrofulous*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/scrofulous [https://perma.cc/923K-QCPR].

[167] *Thompson*, 8 Mo. at 713.

[168] *Id.*

[169] *Id.* at 712.

[170] *Id.* at 713.

[171] *Id.* at 713–14.

[172] *Id.* at 714.

[173] *Id.* at 713 (citing Dooly v. Jinnings, 6 Mo. 61 (Mo. 1839)).

[174] *Id.* at 712.

express warranty does not cover a defect that is so apparent as to be obvious upon careless inspection, and to every observer, requiring no skill or pains for its detection."[175] In citing authority from the Arkansas Supreme Court, the court noted that "[a buyer-enslaver] could rely on 'ordinary diligence' in examining the negro . . . [and that] he was not bound to strip the boy; he might rely upon the warranty."[176]

In doing so, the *Botts* court construed visible and invisible impairments to have different legal significance for the purposes of interpreting the express warranty. The binary the court constructed between invisible and visible impairments within the context of a warranty governing legal remedies for alleged breaches of contracts for enslaved people also constructed a particular social meaning of disability. Distinctions between visible and invisible impairments, and the social meanings that attach to them (and construct them as disabilities), informed whether disabilities would be recognized within negatively racialized persons. However, scrofula was a condition associated with enslaved Black persons, and plantation physicians like Cartwright argued that the disease was more prevalent among enslaved Black persons.[177] The general warranty of soundness could be extended to a visible defect because the defect here, scrofula, could not typically be detected through inspection by lay persons. Not extending this rule could destabilize the market for buyers-enslavers who might miss the telltale visible signs of scrofula and yet be unable to claim coverage under the general warranty. Disability meanings were forged in a context of maintaining the racist system of chattel slavery. How these early cases might influence the way disability is perceived within negatively racialized bodies today is beyond the scope of this Article and is a topic for future research. For now, what can be gleaned from this case is one way of understanding disability, albeit shaped during a period of extreme racial violence and oppression, that may still influence ways of understanding disability today.

Legal and social understandings of disability were not just developed alongside meanings of race. They were developed alongside (and with explicit reference to) white supremacist ideologies. The plaintiff in *Bell v. Jeffreys*[178] alleged that the seller he purchased an enslaved woman from for a "fair price" breached the terms of the general warranty requiring that the

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[175] Thompson v. Bertrand, 23 Ark. 730, 734 (Ark. 1861).

[176] *Id.* at 713 (citing Thompson v. Bertrand, 23 Ark. 730, 734 (Ark. 1861)).

[177] *See* Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro*, 11 AM. ECON. ASSOC. 87 (1896) ("It has often been asserted that scrofula was a common disease among the colored population before the war. Dr. Cartwright has stated that it was extremely common among the colored children. I have found little statistical proof of an excessive mortality from either scrofula or syphilis. In the Charleston mortality reports for 1822–1848, mention is made of only two deaths from syphilis among the white and of four among the colored population. Both scrofula and syphilis may, however, have been frequent as diseases but of less fatality.").

[178] 35 N.C. 356 (N.C. 1852).

enslaved person be "sound and healthy."[179] The plaintiff alleged that the enslaved person was "near-sighted" and that that condition fell within the terms of the general warranty, while the defendant argued that that condition was not included within the warranty. The trial court sided with the plaintiff and instructed the jury that if nearsightedness was the "defect," it did not fall under the general warranty, and that the jurors were to find for the plaintiff if the nearsightedness made it so that the enslaved person was unable to perform the ordinary duties that enslaved persons were able to perform. The defendant appealed.

To resolve the dispute, the court looked to identify the meaning of the word "sound" in the warranty by examining how the term was used to describe animals, vegetables, and organs. Beyond this, the *Bell* court appealed to the dominant view regarding the racial superiority of white people in its attempt to discuss individuals who might be classified as "low vision":

> It is known, that there are more myopic persons, among the more educated and refined classes, than in others, and many more among the white than the black race, according to their relative numbers. I never knew a white person rendered unfit for the offices of life by this defect of vision: at least, not so far as not to be within the remedial operation of glasses; and I confess it never occurred to me to call such a person unsound, or to consider that defect different from that of a failing of the sight from age.[180]

Here, the prevalence of "myopia" among "refined" and "more educated" white classes is part of the court's reason for determining that defects in vision that may be remedied with glasses do not constitute a basis for unsoundness. Again, unsoundness is a basis for identifying "defects" or impairments that were debilitating enough to constitute a basis for invalidating the sale and recovering in court. The *Bell* court's analysis indicates that where impairments are prevalent across white persons—and may be remedied—those impairments should not be used as a basis for finding that the enslaved person could not perform their ordinary duties of field or housework. Impairments that were common among white persons (and thus not linked to mental deficiency as the reference to educated and refined classes implied) and that were able to be mitigated by remedial measures did not constitute unsoundness. Here again, "unsoundness" constituted a catch-all label for all impairments and bodily variations that impeded the ability of enslaved persons to produce and labor. In this way, racialized meanings of disability may be surfaced from judicial interpretations of impairments and bodily variations that were deemed significant enough to determine whether an enslaved person was sound or unsound in interpreting clauses in general warranties.

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[179] *Id.* at 356.
[180] *Id.* at 360.

In another case, *Icar v. Suares*,[181] the plaintiff alleged that days after purchasing an enslaved woman from the defendant, it was discovered that she was "crazy and [a] run away"—facts the plaintiff alleged the defendant was aware of at the time of sale.[182] In the court below, the plaintiff maintained that the enslaved woman was "very stupid," while the defendant argued that the plaintiff had simply purchased two enslaved people for a trial period and then decided to buy that particular woman.[183] The lower court judge held that the enslaved woman was "so far destitute of mental capacity" that it could be presumed the plaintiff would not have purchased her with that knowledge.[184] The court ruled that the plaintiff should prevail.

On appeal by the defendant, the state supreme court affirmed. The definition of soundness in the warranty, the court reasoned, referred to an enslaved person with "only such a degree of mental capacity as rendered him fit for the ordinary duties of a slave."[185] According to the court, the enslaved woman was not "crazy," but rather "stupid"—a defect addressed in the state code. The state code provided that "a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice."[186] "[W]ith regard to the mental malady of the slave," the court reasoned, "the evidence and a personal inspection satisfied him, she was so far destitute of mental capacity, as to render her either absolutely useless, or the use so inconvenient, that it was to be presumed the buyer would not have purchased, had she known of the vice."[187] Social meanings of race and disability show up in the court's interpretation of the enslaved woman's mental capacity and whether that amounted to a vice or defect in the terms of the statute. Specifically, intellectual capacity was racialized (with high intellectual capacity linked to whiteness) and then conflated with definitions of (un)soundness.

And in *Simpson v. McKay*, [188] the baseline for assessing mental capacity was the enslaved person's capacity to perform the ordinary duties expected of enslaved persons. The North Carolina Supreme Court advised that fitness for the ordinary duties of a slave "did not imply that he was very bright or intelligent."[189] Indeed, the racist discourses of the day pointed away from such a conclusion. Rather, "if, from the evidence, they believed, that the slave, although dull and below the ordinary standard of human intellect . . . possessed sufficient capacity to perform the ordinary duties of a slave, the

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[181] 7 La. 517 (1835).
[182] *Id.* at 517.
[183] *Id.* at 518.
[184] *Id.* at 519.
[185] *Id.* at 518.
[186] *Id.* at 520.
[187] *Id.* at 518.
[188] 34 N.C. 141 (1851).
[189] *Id.* at 142.

warranty in that respect was not broken[.]"[190] In other words, to determine if the enslaved person had a defect that constituted unsoundness, the question was whether or not the particular condition impeded the enslaved person's ability to perform the ordinary duties of an enslaved person. Such racially inflected views of impairments served to imbue bodily differences with social meanings that produced and reinforced disability as a social category, while also linking definitions of disability with capacity to perform forced labor.

Definitions of disability that emerge through close analysis of the breach of warranty cases decided during this era are examples of what Beth Ribet describes as disability as "explicitly marked."[191] Ribet explains that "[r]ace-conscious analyses of the history of disability in the United States indicate that disability can also be explicitly invoked and attributed to People of Color in order to normalize racist discourse."[192] Indeed, this is true with respect to how enslavers deployed race-disability constructs to provide a medicalized (albeit non-scientific) explanation for Black resistance.

Dea Boster's work on "soundness" illuminates how notions of disability and ability influenced American chattel slavery and how enslaved people navigated the terrain of this brutal regime. Reviewing primary sources, Boster shows how enslaved Black people, shy of escape, maneuvered through the brutal system of chattel slavery and attained some measure of agency by feigning disability.[193] These acts of resistance also found their way into legal opinions into breach of warranty disputes. Indeed, in a number of these opinions, courts viewed resistance as both a vice (i.e., deviance) *and* disability (i.e., mental deficiency).[194]

Breach of warranty cases show both how courts helped to define and shape definitions of disability in a racial context and how race was incorporated into definitions of disability. Because evidence of "disability" would determine whether a breach had occurred or what evidence of a breach would be introduced, reviewing courts often had to formulate, explicitly or

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[190] *Id.*

[191] Ribet, *Surfacing Disability*, *supra* note 15, at 213.

[192] *Id.*

[193] *See generally* DEA H. BOSTER, AFRICAN AMERICAN SLAVERY AND DISABILITY: BODIES, PROPERTY AND POWER IN THE ANTEBELLUM SOUTH, 1800–1860 (2013); ARIELA GROSS & ALEJANDRO DE LA FUENTE, BECOMING FREE, BECOMING BLACK (2020) (discussing freedom suits and the meaning of Blackness in the law of freedom).

[194] *See, e.g.*, Fortier v. Labranche, 13 La. 355, 355 (1839) ("The defendant admits the capacity of the plaintiffs to sue, and, also, that the slave was adjudicated to him, as they allege, but avers that he is not bound to pay the price, because at the time of and before the sale, the slave was affected with the redhibitory vice of habitually running away, and that said vice was not declared at the sale."); Icar v. Suares, 7 La. 517, 517 (1835) ("This is a redhibitory action, to annul the sale of a slave, and recover back the price, with the fees and costs of sale, on the ground of the redhibitory vices of craziness and running away."); *see also id.* at 517–18 ("The plaintiff showed that the slave was very stupid; that on being told to do one thing she would do another; that she was unsafe to be trusted about the house, on account of the danger of setting fire to it; that she wandered off, and was finally put in the parish jail of an adjoining parish, as a runaway.").

implicitly, their own definitions of "disability"—albeit ableist understandings of disability.

In their crass valuing of bodies, judges deciding breach of warranty cases demonstrated how social meanings associated with disability existed alongside the racist ideologies that justified the system of chattel slavery. Physical and psychiatric disability labels characterized enslaved Black people as less valuable in part because of the perception that such disabilities (real or feigned) rendered them unable to perform the arduous and brutal work that slave labor entailed.[195] Legal opinions decided during the period of chattel slavery produced perceptions of disability that linked to notions of defectiveness, while masking the violent processes of disablement that produced it. This historical context suggests a connection between social meanings of race and social meanings of disability that developed in legal opinions. Within the system of chattel slavery, race and anti-Black racism is the lens through which disability was perceived. This is significant because it suggests that even today, social and legal meanings of disability may have been influenced, partially though not exclusively, by race—and more specifically, anti-Black racism.[196]

B. How Racism and Ableism Operated in Tandem to Subordinate Marginalized Groups

The prior section demonstrated how racist beliefs informed legal interpretations of disability and how ableist beliefs informed legal interpretations of race. The legal construction of race and disability meanings—or, the interplay between how courts constructed meanings of race and how those racial meanings were connected to legal interpretations of disability—reflected broader social and structural processes that rendered negatively racialized persons and disabled people vulnerable to state control and even physical violence. In other words, judges formed their beliefs about race and disability within a social context where racist and ableist ideologies were prevalent. Policymakers were similarly informed by the dominant white supremacist ideologies of the era. To say that policymakers were informed by racist and ableist ideologies is not to identify either ideology as the sole cause or primary motivator for any and all legislative decisions, policies, or proposals. That said, an intersectional analysis of policies and practices across an array of sites and institutions demonstrates how racist and ableist ideologies served at least, in part, to justify an array of legal and policy choices across areas of law, whether criminal laws, policing practices, citi-

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[195] *See, e.g.*, Bell v. Jeffreys, 35 N.C. 356, 356–57 (1852) ("The plaintiff paid a sound (fair) price for the slave, and the jury find, that, by reason of a defect in her eye-sight, she was unfitted for the services ordinarily expected of slaves.").

[196] *See* Talila Lewis, *January 2021 Working Definition of Ableism*, TALILA A. LEWIS (Jan. 1, 2021) https://www.talilalewis.com/blog/january-2021-working-definition-of-ableism [https://perma.cc/Z5TJ-XBX3].

zenship laws, or public health policies. The sections that follow explore how racism and ableism operated in tandem through law to subordinate marginalized groups, whether freed Black people after the Civil War, indigenous communities and itinerant white male laborers in the American West, or people labeled as "feebleminded" and segregated in state-run institutions. It is to demonstrate what Annamma, Connor, and Ferri describe as the "collusive" effect of racism and ableism. [197] Exploring these intersections permits a more robust account of the nature and specific contours of subordination as it impacted people labeled as "not white" or constructed as not able-bodied, or not of sound mind.

1. From Vagrancy Laws to Ugly Laws

The Black Codes passed in the years immediately following the Civil War contained specific codes strictly regulating the movement of Black people and criminalizing nearly all manner of Black existence.[198] They restricted the rights of freed Black people to own property, conduct business, buy and lease land, as well as move freely through public spaces. More broadly, the Codes functioned as coercive labor control, regulating Black laborers and locking them into coercive labor arrangements that benefited local white landowners and the budding Southern industrial sector. As Priscilla Ocen explains, these laws were "promulgated against the backdrop of anxieties stemming from the abolition of slavery, the industrial revolution, and immigration from Europe," and "were used to assist in the maintenance of the prevailing social order."[199] These laws also ensured an available supply of Black laborers on lands held by the former planter class struggling to reestablish new systems of racial, political, economic, and social subordination following the Civil War.[200] For example, vagrancy laws enforced in the South served to reinforce racist ideas linking Blackness with criminality and justified the effective re-enslavement of, and forcible extraction of labor from, Black people through convict leasing regimes that closely mirrored conditions found under the system of chattel slavery.[201]

These brutal and carceral labor arrangements traded on not only racial but also ableist ideologies. And these vagrancy regimes targeted newly freed Black people and groups classified as non-white in the American Southwest.

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[197] *See* Annamma, Connor, & Ferri, *supra* note 34, at 6.

[198] *See* Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2258–59 (1998) ("The Black Codes . . . epitomized the region's dogged efforts to retain control of its black labor population, despite that group's nominal change in status from slaves to freedmen.").

[199] Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1193 (2017).

[200] *See* Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CAL. L. REV. 1637, 1671 (2021).

[201] *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 1–2 (2008).

In the middle of the nineteenth century, racist and ableist stereotypes were first deployed against indigenous people and Mexican nationals to justify the dispossession of lands from these groups living in the Tongva region. In the Tongva region, or what is now Los Angeles, convict leasing built the backbone of what would become the city's principal infrastructure.[202] Kelly Lytle Hernandez's work discusses how what she terms "eliminatory tactics" served to provide white settlers with legal and illegal mechanisms for disposing indigenous people of their lands while also providing a readily available, unfree, and precarious work force to construct the infrastructure of Los Angeles.[203]

Settler colonialism is a racial project rooted in the acquisition of land as a primary objective.[204] As Professor Lytle Hernandez explains:

> [S]ettler societies strive to block, erase, or remove racialized outsiders from their claimed territory. Even as many settler societies depend on racialized workforces, settler cultures, institutions, and politics simultaneously trend toward excluding racialized workers from full inclusion in the body politic . . . deporting, hiding, or criminalizing them or otherwise revoking the right of racialized outsiders to be within the invaded territory.[205]

Professor Lytle Hernandez explains how white settlers deployed criminal laws in early Los Angeles as part of a strategic campaign to dispossess Indigenous people of their lands:

> [T]he Californios of Los Angeles had concerns about the growing number of Indigenous peoples living in and around Los Angeles. Too many *indios*, they complained, spent their days playing peon (gambling) at the village or drinking in *gros* shops near the plaza. . . . In January 1836, the *ayuntamiento* (city council) required all Californios to sweep across the town every Sunday night to arrest "all drunken Indians." The [mayor] required all those

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[202] *See* KELLY LYTLE HERNANDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965 5 (2017).

[203] *See id.* at 8.

[204] Unlike colonialism, which is "organized around resource extraction or labor exploitation," Lytle Hernandez notes that "[r]esource extraction (such as mining) and labor exploitation (such as chattel slavery) can and certainly do occur in settler societies, but neither extraction nor exploitation is the principal objective of settler colonial projects. Rather, settler colonial projects seek land." *Id.* at 7. Lytle Hernandez explains settler colonialism's violence technologies as follows: "Determined to build a homeland in a conquered land, [white settlers] funded massive and diverse programs of Native elimination, ranging from waging wars of removal to operating schools of cultural extinction. The goal was to replace Indigenous societies on the land." *Id.* at 7. "On that land, colonialists envision building a new, permanent reproductive, and racially exclusive society. . . . [S]ettlers invade in order to stay and reproduce while working in order to remove, dominate, and ultimately, replace the Indigenous populations." *Id.* at 12.

[205] *Id.* at 7–8.

> arrested to pay a fine or be subject to forced labor on public works projects.[206]

The above excerpt illuminates how enforcing order-maintenance style laws that criminalized vagrancy and public intoxication simultaneously reinforced racist beliefs and stereotypes that linked Indigenous people to criminality, immorality, drunkenness, and laziness, while also providing a legal basis for their imprisonment and the forced extraction of their labor.[207]

Racialized disability stereotypes characterized early justifications for aggressive enforcement of what we might refer to now as order-maintenance laws, including vagrancy. Professor Lytle Hernandez writes that in early Los Angeles, racialized disability stereotypes justified a series of ordinances and enforcement policies targeting indigenous persons. Once detained, Mexican and indigenous persons were forced into convict labor regimes that conscripted their labor to build major cities. Professor Lytle Hernandez explains further that "[Anglo-American settlers] invested in imprisonment, spur[ring] a phenomenal carceral boom by broadly caging a diverse cast of Native landholders and racialized outsiders variously criminalized, policed, and caged as vagrants, drunks, hobos, rebels, illegal immigrants, and illegitimate residents trespassing in their white settler society."[208]

Professor Darren Hutchinson describes similar racialized disability stereotypes that were also sexualized stereotypes. He writes that, when "California passed the 'Greaser Act,' purportedly a vagrancy law, which expressly applied to 'all persons who are commonly known as 'Greasers' or the issue of Spanish and Indian blood . . . and who go armed and are not peaceable and quiet persons," the law relied on and reinforced "negative portrayals of Latinos, including sexualized imagery."[209] These stereotypes linked Mexican and Indigenous peoples with idleness, an ableist trope. Drawing from one contemporary account, Hutchinson demonstrates "the role of sexualized and gendered racism" and how it furthered the budding nation's imperialist objectives:

> No one acquainted with the *indolent*, mixed race of California, will ever believe that they will populate, much less, for any length of time, govern the country. The law of nature which curses the

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[206] *Id.* at 33.

[207] Order maintenance policing refers to a constellation of polices that grew out of the now-discredited broken windows theory. *See* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 276 (2009) ("[T]he Broken Windows theory encourages police to focus on maintaining order both to counteract fear of crime and to combat crime itself. Prevention of petty offenses to order will, the theory predicts, reduce fear and win community confidence, while also reducing serious crime attracted by disorder. Whether aggressive order-maintenance policing is responsible for any part of the drop in index crimes in the last fifteen years is highly contested.").

[208] HERNANDEZ, *supra* note 202, at 12–14.

[209] Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 87–88 (1999).

> mulatto here with a *constitution less robust* than that of either race from which he sprang, lays a similar penalty upon the mingling of the Indian and white races in California and Mexico. They must fade away . . . The old Saxon blood must stride the continent, must command all its northern shores, must here press the grape and the olive, here eat the orange and the fig, and in their own *unaided might*, erect the alter [sic] of civil and religious freedom on the plains of the Californias. [210]

Hutchinson documents the racist and sexist nature of "constructs [of] Mexican American males as 'emasculated," while "portray[ing] white (not "Spanish," but "old Saxon") males as 'true men,' worthy of exercising dominion over the western territories."[211] But beyond this, relying on gendered, racialized constructs served to explain that "white conquest of California was appropriate because native Californians '[we]re an imbecile, pusillanimous race of men, and unfit to control the destinies of that beautiful country.'"[212] Such terms also reflect racialized, gendered, ableist stereotypes reflecting within these historical tropes of Mexican intelligence and disposition. These tropes were deployed to justify the violent expropriation of Mexican and indigenous land under the operating logics of a white heteropatriarchal settler colonialism.

Vagrancy laws in particular helped to reinforce associations between disorder and disability by linking idleness with immorality and characterizing both as risks to public order.[213] As part of a larger scheme to regulate unsecured, intransient labor, vagrancy laws were also aimed specifically at the "criminalization of the condition of being able-bodied, propertyless, and unemployed[.]"[214] Toward the end of the nineteenth century, these laws swept up transient white laborers who wandered across the country on railroads, many disabled physically and psychologically by the Civil War or by harsh employment conditions, and stranded without work, due in part to the cyclical nature of work in industrial capitalism.[215] The surge in what was referred to at the time as "hoboeing," or unauthorized railroad travel, and "tramping," or committing crimes as a labeled vagrant, triggered an array of acts passed by legislatures in Northern states.[216] These acts were aimed at regulating vagrancy and tramping, and were, in large part, a response to fears that such crimes posed a risk to public order.[217]

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[210] *Id.* at 88.
[211] *Id.*
[212] *Id.* at 87–88.
[213] Morgan, *supra* note 195, at 1654–60.
[214] Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. Colo. L. Rev. 667, 683 (2004).
[215] *See id.* at 682.
[216] *Id.* at 682–83.
[217] *See id.* at 683.

Ableist social meanings explicitly linked people with physical disabilities and deformities to disorder or the risk of disorder through laws criminalizing those persons labeled as "unsightly" and seen begging in public spaces. Susan Schweik has documented how "unsightly beggar ordinances," also known as "ugly laws" criminalized the sight of "unsightly disabled folk" and "disabled beggars" in cities across the United States in the late nineteenth and early twentieth centuries.[218] San Francisco passed the first unsightly beggar ordinance in 1867.[219] In this way, ugly laws (like vagrancy laws) functioned as a legal mechanism for removing unwanted and marginalized groups from public spaces. These laws demonstrate the mutually constituted nature of racism and ableism. As Schweik puts it, "ugly law[s] . . . provided one more tool for debasing and delimiting subordinated racial groups."[220] Priscilla Ocen characterizes these ordinances as status offenses, "illegal only for people without means,"[221] and notes that they included groups "viewed as probable criminals or persons likely to become public charges."[222] Furthermore, as Ocen explains, "the criminalization of the poor, racially subordinated, and disabled populations naturalized inequality, marked groups as perpetual dangers, and rationalized social hierarchy as a function of individual or cultural pathology."[223]

2. Eugenics

The eugenics period also marks the height of state-sponsored efforts to localize social problems within *racialized* bodies and minds labeled as defective, ill, insane, disordered, and feeble. Once social problems became linked to *those* bodies and minds, those groups could be more readily managed and controlled pursuant to the state's police power and *parens patriae*.[224]

In *Buck v. Bell*, the Supreme Court decided that the forcible sterilization of Carrie Buck did not deprive her of the right to equal protection and due process under the Fourteenth Amendment.[225] Carrie Buck was seventeen years old when she was labeled by the state of Virginia as "feebleminded" and sent to the State Colony for Epileptics and Feeble Minded. In 1924, the Colony's superintendent, Dr. Albert Priddy, selected Carrie Buck as the first person to be sterilized pursuant to a Virginia law passed that same year.[226]

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[218] SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 161, 236 (2006).
[219] *See id.* at 24.
[220] *Id.* at 184.
[221] Ocen, *supra* note 199, at 1197–98.
[222] *Id.*
[223] *Id.*
[224] *See* Subini Ancy Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L. & SOC. CHANGE 471, 489 (2022) ("Parens patriae is a legal doctrine premised on the duty of the state to protect the interests and general welfare of the populace.").
[225] *See Buck*, 274 U.S. at 200.
[226] *See* ADAM COHEN, IMBECILES, THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 7 (2016).

The law professed that the "health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives" and permitted sterilization of men and women where the procedure could be safely performed "without serious pain or substantial danger to life."[227] Virginia justified such invasive and drastic action as necessary to protect society from would-be "menaces," who if released would procreate and, consistent with the eugenics logic of the period, transmit to their offspring such undesirable traits as insanity and imbecility.[228]

The litigation challenging the constitutionality of sterilization law was staged. Coordinated by Dr. Priddy; Harry Laughlin, head of the Eugenics Record Office; and Aubrey Strode, the lawyer responsible for drafting the Virginia sterilization legislation, Carrie's legal team was far from a model of zealous advocacy.[229] The Supreme Court, in an opinion written by Justice Oliver Wendell Holmes, after describing in a paragraph the procedures governing the sterilization process, dismissed Buck's due process claim.[230] In similarly summary fashion, the Court dismissed Buck's challenge to the law on substantive grounds. In the now infamous passage, Justice Holmes concluded as follows:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.[231]

Central to the eugenics project was the notion that by controlling reproduction, policymakers could promote human advancement. Proponents of eugenics, including many prominent U.S. scientists, argued that genes determined traits relevant to what eugenicists believed made for fit citizens.[232] By controlling reproduction through the selection of individuals who were

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[227] *Buck*, 274 U.S. at 205.

[228] *Id.* at 206 ("[T]he Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc.").

[229] *See* COHEN, *supra* note 226, at 8.

[230] *Buck*, 274 U.S. at 207.

[231] *Id.*

[232] *See* COHEN, *supra* note 226.

deemed fit for procreation, eugenicists contended that the beneficial traits could be passed on to subsequent offspring.

Disability in bodyminds—whether white or non-white—historically, and during the eugenics period, have been linked to immorality, sin, deviance, criminality, and sexual promiscuity.[233] Specifically, the term "feeble-mindedness" was linked to notions of immorality, criminality, and/or sexual promiscuity and, in turn, used as justification for institutionalizing women.[234] After they were institutionalized, women so labeled could then be forcibly sterilized on the grounds that the state had a legitimate interest in preventing women from reproducing children with "undesirable traits" and from supporting disfavored groups that were presumed to be public charges, and strains on the public fisc.[235]

Native Americans were similarly targeted by eugenicist propaganda. Eugenicists, insistent on linking individual and group behavior to genetic traits, identified Native Americans as displaying a predisposition to so-called biologically defective traits. Eugenicists in particular targeted Native Americans as biologically defective based on their "mixed race" ancestry. In one 1912 book, two eugenicists and renowned biologists Arthur Estabrook and Charles Davenport "studied" members of the Nam Family, a family that included members of Mohican-Stockbridge and German ancestry.[236] In their book, the authors linked Native American's "mixed-race" ancestry to biologically defective genes, which resulted in the prevalence of heritable traits of indolence, feeble-mindedness, licentiousness, alcoholism, and criminality within the family.[237] According to anthropologist Robert Jarvenpa who studied the Nam family's history and circumstances surrounding the Estabrook-Davenport study, the eugenicists' "portrait of innate degeneracy was a grotesque mischaracterization."[238] Tucked away in the study, Estabrook and Davenport included a subtle recommendation for sterilization, noting that

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[233] This is not to suggest that these associations are merely relics of the far-off past. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 436 (1985) (requiring special use permits for "[h]ospitals for the insane or feebleminded or alcoholic [sic] or drug addicts, or penal or correctional institutions").

[234] Goodwin, *supra* note 107, at 234–35 ("Asylums served a repressive function for the sexualized woman. Asylums served the invaluable purpose of thwarting or even punishing sexual nonconformity. They could house the disruptive black woman who asserted her own identity and independence. Theoretically, promiscuity, unwed pregnancy, and sexual abuse were social and psychological contaminants requiring strict quarantine, lest the socially and psychologically dysfunctional behavior infect other women.").

[235] STERN, *supra* note 59, at 107–09 ("Particularly novel was the way in which eugenicists linked biological inferiority to the abuse of state resources, a connection reinforced by the deportation agent and during the exclusionary purge of the Great Depression.").

[236] *See* ARTHUR ESTABROOK & CHARLES DAVENPORT, THE NAM FAMILY: A STUDY IN CACOGENICS 5–6 (1912).

[237] *Id.*; ROBERT JARVENPA, DECLARED DEFECTIVE: NATIVE AMERICANS, EUGENICS, AND THE MYTH OF NAM HOLLOW 109–10 (2018).

[238] Kathleen Moore, *Nam Hollow family's honor restored, 100 years later*, POST STAR (May 5, 2018), https://poststar.com/news/local/nam-hollow-family-s-honor-restored-years-later/article_fc659576-c6d5-51e9-85fc-27f06b189be6.html [https://perma.cc/25A2-HG3H].

four young girls in the Nam family "will, doubtless, soon be reproducing their kind unless society does its duty."[239]

Latino men also faced an increased risk of sterilization, particularly in California. Researchers have shown that "[f]rom 1920 to about 1926, men had higher sterilization rates than did women. After 1926, women were sterilized at higher rates than were males."[240] Further, these researchers found that "Latino men were at 23% greater risk of sterilization than were non-Latino men, accounting for age and period of sterilization[.]"[241] The authors described the societal factors that may have contributed to this heightened risk of sterilization in the following way: "[e]ugenic thinking inscribed 'scientific' legitimacy to racial stereotypes of Latinas/os as inferior and unfit to reproduce."[242] As they note,

> [i]n California, eugenics programs were linked to efforts to reduce immigration, particularly from Mexico, during a time when growing anti-Mexican sentiment manifested in school segregation and racial housing covenants. Mexican American women and adolescents were particularly stereotyped as 'hyperfertile,' inadequate mothers, criminally inclined, and more prone to feeblemindedness.[243]

During this period, the predominant notion of disability was that disability distorted not only the normalized *white* bodymind, but also the *ideal* white bodymind.[244] That is because, under the racist logic of eugenics, disability corrupted the *purity* of the white race by introducing mental and physical defects that detracted from eugenicist conceptions of whiteness as physically fit, intelligent, industrious, and moral. By contrast, negatively racialized groups were positioned as lacking in those desirable and—under common eugenicist conceptions—inheritable traits. Racist stereotypes of Black people as unintelligent, criminal, or infantile, Native Americans as lazy, and Chinese people as vectors of disease worked to construct and reify racial categories and stereotypes through physical and mental attributes that distinguished white from non-white and subjugated so-called racial others within the social order. Though historically these conceptions have long ex-

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[239] ESTABROOK & DAVENPORT, *supra* note 236, at 18.

[240] Nicole L. Novak, Natalie Lira, Kate E. O'Connor, Siobán D. Harlow, Sharon L. R. Kardia, & Alexandra Minna Stern, *Disproportionate Sterilization of Latinos Under California's Eugenic Sterilization Program, 1920–1945*, 108 AM. J. PUB. HEALTH 611, 612 (2018).

[241] That said, bias against Latina women was greater, "with Latinas at 59% greater risk of sterilization than non-Latinas[.]" *Id.* at 611.

[242] *Id.* at 613.

[243] *Id.*; *see also* Jess Whatcott, *Sexual Deviance and "Mental Defectiveness" in Eugenics Era California*, NOTCHES (Mar. 14, 2017), https://notchesblog.com/2017/03/14/sexual-deviance-and-mental-defectiveness-in-eugenics-era-california/ [https://perma.cc/V8V7-R3LH] ("Gosney and Popenoe also targeted racial minorities and immigrants noting 'an excess of insanity among the foreign born' and claiming that 'the rate of mental disease among Negroes is high' thus 'Negroes exceed their quota,' in the overall population.").

[244] *See, e.g.*, Bridges, *supra* note 14, at 455.

isted to dehumanize racial "others," the period of eugenics represents a dramatic expansion of state power to discipline bodies (including to prevent certain white people from reproduction or to incapacitate them in state institutions) and to prevent the kind of racial mixing that was regarded as a threat to white racial purity. Forced sterilizations, the rise of state mental hospitals, and the proliferation of anti-miscegenation laws reflect a coordinated set of state policies designed to "whiten" the increasingly racially and ethnically diverse American society.[245]

3. Sex Regulation

From the late nineteenth century through the eugenics period, women labeled as sexually promiscuous or regarded as violating social norms around sexuality were often also labeled mentally defective. Though the label "mentally defective" does not closely trace definitions of disability today, at the time such labels incorporated meanings of disability in that they linked sexual deviance to inherent physiological abnormalities.[246] As Jess Whatcott explains in a study of California eugenics practices in the early

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[245] Sterilization laws aligned with goals of anti-miscegenation laws. *See City of Cleburne*, 473 U.S. at 463–64 ("Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the "basic civil rights of man"—the right to marry and procreate. Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense. The purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating. To assure this end, States enacted compulsory eugenic sterilization laws between 1907 and 1931.") (citations omitted). On the same day that Virginia passed the Racial Integrity Act—the law struck down by *Loving*—it also passed a law allowing the forced sterilization of disabled people. *See id. See generally* Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS. L. REV. 421 (1987); *see also* Christian B. Sundquist, *The Meaning of Race in the DNA Era: Science, History & the Law*, 27 TEMP. J. SCI. TECH. & ENV'T. L. 231, 246 (2008). Christian Sundquist explains that eugenicists thought "inferior genetic material" to be a threat and, accordingly, supported "immigration restrictions, anti-miscegenation laws, Jim Crow policies, and forced sterilization policies in the United States." *Id.* at 246; *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 61–62 (1998) (discussing how Charles Davenport, the catalyst of the study of eugenics in America, advocated for "preventing the reproduction of bad stock through a selective immigration policy, discriminating marriages, and state-enforced sterilization."). Sundquist also wrote about how German scientists proposed sterilization programs, while the government proposed anti-miscegenation laws—both modeled after the United States—to maintain Nordic and Aryan purity. Sundquist, *supra*, at 250–51. Policies aimed at preserving the white race also justified legal prohibitions on interracial relationships in the form of anti-miscegenation laws. For example, Dorothy Roberts argues that in a society marked by racial hierarchy, deterring the reproduction of socially disadvantaged women quickly turns into policies aiming to reduce the fertility of Black women. *See* ROBERTS, *supra*, at 81; *see also* Lombardo, *supra*. Like sterilization laws, anti-miscegenation laws passed in the early twentieth century were animated by an underlying goal of avoiding so-called degenerate offspring. *Id.* at 423. Examining the justifications for these sterilization and anti-miscegenation laws together permits a more fulsome account of the racist and ableist underpinnings and broader social context that produced laws aimed at curtailing the reproductive capacities of so-called "defectives." *See id.*

[246] *See* Whatcott, *supra* note 243 ("The historical category of 'mentally defective' doesn't map neatly onto how we might define 'disabled' today.").

twentieth century, "the categories of sexual deviance and disability were so interrelated that they were almost indistinct."[247]

In the same period, the social purity movement established itself as a social movement focused on eradicating prostitution, or what movement crusaders dubbed "white slavery."[248] As Paul Lombardo explains, "[t]he Purity Crusade's anti-prostitution movement coincided with the increasing eugenic fixation on feeblemindedness, and the claim was commonly accepted that most prostitutes were in fact mentally defective."[249] Lombardo explains that the term "moral degenerate," which was often deployed against women accused of engaging in prostitution or labeled as sexually promiscuous, combined mental disability with moral reproach fueling moral panics against the twin threat to public morality and female sexual purity.[250] Such fear, which traded on ableist tropes, also provided a banner under which so-called reformers could unite. Indeed, as Lombardo notes, "[t]he image of the "moral degenerate," a woman defective in mind as well as morals, remained a powerful rallying point for various kinds of reformers who would ultimately endorse the twin policies of segregation and sterilization."[251] Uniting under the banner of public health and morality, public campaigns supported by advocates in the Purity Crusade and social hygienist movements "echoed among eugenicists, who saw eugenic reforms like segregation and sterilization as remedies that addressed both morals and medicine."[252] As Lombardo notes, these proponents came to realize "a eugenic program could address goals of both the Purity Crusade and the social hygiene movement."[253] In other words, removing women labeled as feebleminded from society by segregating them in institutions and then sterilizing them to prevent them from reproducing so-called "defective" children satisfied the goals of preserving and promoting white racial purity.[254]

Similar but distinct goals spurred the rise of reformatories in the nineteenth century.[255] Policymakers explained both the medical and morals problems afflicting young girls using ableist notions of disability. Young girls sent to reformatories were regarded as needing to be cured of their alleged sexual deviancy and moral deficiencies that were viewed as leading

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[247] *Id.*
[248] LOMBARDO, *supra* note 62, at 15.
[249] *Id.* at 16.
[250] *Id.*
[251] *Id.*
[252] *Id.* at 17.
[253] *Id.*
[254] *Id.*
[255] *See* Moira O'Neill, *Delinquent or Disabled? Harmonizing the IDEA Definition of "Emotional Disturbance" with the Educational Needs of Incarcerated Youth*, 57 HASTINGS L.J. 1189, 1193 (2006) ("[T]he youth reformatories in the nineteenth century were meant to rehabilitate by removing the youth from poverty, a poor family life, and any other corrupting influences.").

to such immoral behaviors or vices in the first place.[256] In this way, reformatories originated as sites for "curing" or "rehabilitating" white girls labeled as promiscuous, immoral, delinquent, or otherwise in need of rehabilitation.

Beyond this, the disciplining of young, white, single women through contrived disability labels was readily deployed against Black girls who were at times tracked into the few reformatory schools for Black girls at disproportionately high rates.[257] For example, as Kayla Smith explains, the mission of the Missouri State Home for Negro Girls ("State Home") was to "refashion 'incorrigible,' or deviant, girls into 'useful citizens.'"[258] Charges for girls sent to the State Home included the following: delinquency, associating with immoral persons, and incorrigibility.[259] In addition, Smith notes that contained within many of the case histories for the girls who resided at the institution were the labels "sex pervert" or "sex problems."[260] Consistent with these pathologizing frames, Smith's research points to the way that Black girls were constructed as concerned primarily with their bodies and as lacking in intelligent mental capacities:

> The African American staff also believed that the girls only cared about their bodies and therefore didn't have intelligent mental capacities: "Some of our girls come to us wholly untrained, unbelievably near the animal stage without the least rudimental knowledge of clean and decent living and with no respect for law and order." Saying these girls were "near the animal stage" is an "othering" tactic that is used to imply the "other" is more dangerous and vicious than any "ordinary" human. These assumptions are debilitating and harmful, and the Superintendents, who were

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[256] *See, e.g.*, Lisa Pasko, *Damaged Daughters: The History of Girls' Sexuality and the Juvenile Justice System,* 100 NW. J. OF CRIM. L. AND CRIMINOLOGY 1099 (2010) (discussing the relationship between reformatories and policing of girls' morals and sexuality and chronicling a shift in modern juvenile justice from a moral basis to a medical basis); Alexander Pisciotta, *Race, Sex, and Rehabilitation: A Study of Differential Treatment in the Juvenile Reformatory, 1825–1900,* 29 CRIME & DELINQUENCY 254 (1983) (reviewing nineteenth-century reformatories and the goals of reforming Black and female children and positing that girls were viewed as more difficult save because they had deviated more from their inherently pious constitution); *see also* John C. Ball & Nell Logan, *Early Sexual Behavior of Lower-Class Delinquent Girls*, 51 NW. J. OF CRIM. L., CRIMINOLOGY & POLICE SCI. 209 (1960) (studying girls in juvenile to explore the social causes of their incarceration, and finding that many were incarcerated for sexual activity).

[257] For example, the Missouri State Home for Negro Girls in Tipton, Missouri was, as Kayla J. Smith notes, "one of the few reformatories for [B]lack girls in the country." Kayla J. Smith, *Reforming Black Girlhood and Sexuality at the Missouri State Industrial Home for Negro Girls, 1930–48*, 2021 CRIMSON HIST. REV. 77–78; *see also* Bennett Miller, *"Try this Experiment": Empowering Black Women Reformers at Washington's National Training School for Girls*, 4 COLUM. J. HIST., 62, 69 (2019) ("With no other places to be sent by the city's juvenile courts, black female 37 girls typically made up between 85 and 95 percent of the [National Training School] population at any given time.").

[258] Smith, *supra* note 239, at 82.

[259] *See id.*

[260] *Id.*

> sworn to protect them, "cared for" these girls with these biased assumptions in mind.[261]

Indeed, as Smith explains, for Black girls, racist and ableist labels provided grounds for purported reformation and justified corrective punishment.[262]

4. Forcible Sterilization After the Eugenics Period

By the 1970s, state-sponsored sterilization programs—laws, policies, and practices steeped with the ideological remnants of eugenics theories of an earlier era—led to what researchers have identified as the forcible sterilization of thousands of men and women, and in particular women of color, across the United States.[263]

Based in part on the legacies of eugenics logic, indigenous women were sterilized at alarming rates. A 1976 study by the U.S. General Accounting Office ("GAO") found that four of the twelve Indian Health Service regions sterilized 3,406 Native American women without their permission between 1973 and 1976.[264] During that same period, the GAO found that thirty-six women under the age of twenty-one had been forcibly sterilized despite a court-ordered moratorium on sterilizations of women younger than twenty-one.[265]

Forcible sterilization targeted Black women, many of whom were low income and residing in rural, southern communities. Reporting by *The New York Times* shed light on the Relf sisters, Minnie Lee and Mary Alice, who were involuntarily sterilized when they were teenagers at a federally funded clinic in Alabama in 1973.[266] Staff members labeled both women as intellectually disabled and intimated that the women were engaged in improper sexual relations with boys in their neighborhood.[267] The Southern Poverty Law Center eventually filed a lawsuit in federal court, which led to a district court order enjoining the Department of Health, Education and Welfare from utilizing federal funds to sterilize people with intellectual disabilities without their consent.[268] What happened to the Relf sisters was not an isolated occurrence. Under North Carolina's aggressive system of "active eugenics," over 7,666 sterilizations were justified as measures to prevent the reproduction of

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[261] *Id.* at 81–82.

[262] *See id.*

[263] *See, e.g.*, Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974).

[264] *See Government admits unauthorized sterilization of Indian Women*, NAT'L LIBR. OF MED., https://www.nlm.nih.gov/nativevoices/timeline/543.html%20 [https://perma.cc/CD4U-QPF6].

[265] *See id.*

[266] *See* Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html%20 [https://perma.cc/J9H9-KZHZ].

[267] *See id.*

[268] *See generally Relf v. Weinberger*, S. POVERTY L. CTR., https://www.splcenter.org/seeking-justice/case-docket/relf-v-weinberger%20 [https://perma.cc/E4X4-32U7].

"mentally deficient persons," and about 5,000 of those sterilized were Black.[269] The North Carolina state program targeted young women deemed to be "promiscuous" or" "feebleminded," epileptics, and women who had been deemed by social workers to have undesirable traits.[270] In another example, state officials threatened to discontinue eighteen-year-old Nial Ruth Cox's family's welfare payments if she refused to submit to surgical sterilization. Cox submitted to a sterilization procedure at Plymouth State Hospital in 1965. Cox sued the state of North Carolina, but the lawsuit was later dismissed.[271]

Forcible sterilization policies similarly targeted Black and Latino men. In *Unspeakable: The Story of Junius Wilson*, authors Susan Burch and Hannah Joyner write that Junius Wilson, a Black deaf man from North Carolina, was not only "incarcerated in an insane asylum merely because he was deaf, black, and poor," but also that "bureaucratic inertia and staff paternalism helped keep him there for [more than] sixty-five years."[272] The authors emphasize that Wilson's deafness rendered him isolated culturally and linguistically, as no one in the facility where he was housed was able to communicate in his specific dialect of "Raleigh signs" that Wilson learned while at the North Carolina School for the Colored Blind and Deaf in Raleigh.[273] The signs were specific to the deaf Black community of the School for the Colored Blind and Deaf but did not transfer to either the deaf or Black communities outside of that school.[274] Racist ideologies forged with ableism to structure the nature of the education that Wilson received, which meant that Wilson was exposed to vocation work rather than classroom work and, as a result, was illiterate.[275] Arguably, racism and ableism may have contributed to Wilson's incarceration in the first place. Nirmala Erevelles and Andrea Minear note that "Wilson's habits of 'touching or holding people, stamping feet and waving arms' constructed him as a threatening figure in a society ruled by Jim Crow laws—habits that could compromise the safety of himself, his family, and his community."[276] Wilson was charged with assault and attempted rape, then committed to the North Carolina State Hospital for the Colored Insane because he was deemed both dangerous and feebleminded.[277]

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[269] *See* ANGELA Y. DAVIS, WOMEN, RACE AND CLASS 217 (1981). According to one of the ACLU attorneys representing Ms. Cox—a legal team that included former Justice Ruth Bader Ginsburg—"since 1964, approximately 65% of the women sterilized in North Carolina were Black and approximately 35% were white." *Id.*

[270] *Id.*

[271] *See id.* at 216–17.

[272] SUSAN BURCH AND HANNAH JOYNER, UNSPEAKABLE: THE STORY OF JUNIUS WILSON 129 (2007).

[273] Erevelles & Minear, *supra* note 132, at 134.

[274] *See id.*

[275] *See id.*

[276] *Id.*

[277] *See id.* at 134.

Wilson endured castration in 1932, following the passage of the state's sterilization law.[278] His segregation into a psychiatric facility and castration during his horrifying institutionalization reflect the full embodiment of this mode of social control: control over reproductive capacities. Castrating Wilson meant that he was, as Erevelles and Minear explain, "no longer perceived as a danger," but had instead become "a submissive black man . . . [with] eyes downcast, silent, and reserved . . . a gentle childlike patient."[279] Although the sexual assault charges were eventually dropped, Wilson remained incarcerated for twenty additional years before officials determined he should be released.[280]

5. Citizenship and Immigration Law

Nation-building at the end of the nineteenth century and the turn of the twentieth century was not just a project preoccupied with race; it was also a project preoccupied with physical and mental fitness.[281] Those individuals defined as physically and/or mentally unfit were regarded as unfit for citizenship.[282] In his research on the subject, Douglas Baynton charts immigration laws and enforcement policies that explicitly targeted disabled people—known as "defectives"—for exclusion.[283] As Baynton's work reveals, immigration law and policies embedded ableist as well as racist notions of which citizens were made eligible for American citizenship.[284] Similarly, Haney Lopez explains that "[t]o be fit for naturalization—that is, to be non-white—implied a certain degeneracy of intellect, morals, self-restraint, and political values; to be suited for citizenship—to be White—suggested moral maturity, self-assurance, personal independence, and political sophistication."[285] Indeed, some of the so-called prerequisite cases demonstrate how, as courts delineated the characteristics of whiteness, they also helped incorporate similar ideas about race and disability into legal definitions of whiteness, and decisions determining racial identity for the purpose of deciding whether a petitioner was white, and thus, eligible for citizenship.[286]

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[278] *See id.* at 135 (describing "An Act to Provide for the Sterilization of the Mentally Defective and Feeble-Minded Inmates of Charitable and Penal Institutions of the State of North Carolina").

[279] Erevelles & Minear, *supra* note 132, at 135.

[280] *See id.*

[281] *See* Isidro Gonzalez, *Symposium (II) – Eugenics in California and the World: Race, Class, Gender/Sexuality, and Disability*, UNIV. OF CAL., SANTA BARBARA, (June 5, 2021), https://www.youtube.com/watch?v=FZU2OHcVV50&t=1931s%20 [https://perma.cc/UZ7S-ZFXJ].

[282] *See id.*

[283] *See generally Douglas C. Baynton*, *Defectives in the Land: Disability and American Immigration Policy, 1882–1924*, 24 J. OF AM. ETHNIC HIST. 31 (2005).

[284] *See id.* at 35.

[285] IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 11–12 (2006).

[286] In re Mohan Singh, 257 F. 209, 209 (S.D. Cal. 1919) (brief mention of intellectual competency); Ex Parte Dow 211 F. 486 (E.D.S.C. 1914) (mention of mental faculties); In re

Beginning in the late nineteenth century and continuing through to the early twentieth century, the surge in immigration from Eastern and Southern Europe fueled nativist consternation and backlash.[287] As the numbers of immigrants increased, eugenicists allied themselves with other interest groups to provide biological arguments to support their campaigns to restrict immigration. During this period, immigration restrictions in the United States were intended to keep people with disabilities from entering the country.[288] The list of those eligible for exclusion was long: the deaf, blind, epileptic, and mobility impaired; people with curved spines, hernias, flat or club feet, missing limbs, and short limbs; those unusually short or tall; people with intellectual or psychiatric disabilities; intersexuals; men of "poor physique" and men diagnosed with "feminism."[289] Not only were disabled individuals explicitly excluded, but particular racial groups and nationalities were also labeled as undesirable based on their supposed susceptibility to mental, moral, and physical defects.[290]

Discriminatory rhetoric against immigrants was accompanied by eugenicist justifications. Immigrants racialized as non-white were labeled as at once socially and biologically inferior—socially undesirable burdens on public resources and prone to sickness.[291] Immigrant groups, including Chinese, Mexican, and Filipino immigrants, were labeled as unfit or likely to become disabled because of sickness or chronic disease.[292] In California, immigrants were blamed for the outbreak of disease. These same groups were diagnosed as having high rates of insanity.[293] Concerns about mental illness and disability among immigrant groups were so strong among eugenicists

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Halladjiian, 174 F. 834, 840 (C.C.D. Mass. 1909) (finding Armenians are white and mentioning differences in "mental development" between races); In re Kanaka Nian, 21 P. 993, 993–94 (Utah 1889) (with reference to an intelligence prerequisite and no reference to disability per se, excluding petitioner as not sufficiently intelligent to understand governance and American morals); Petition of Easurk Emsen Charr 273 F. 207, 209–12 (W.D. Mo. 1921) (holding Koreans are not white and referring to attributes leading to "racial disqualification" as "disabilities," though unclear if the use of "disability" at all relates to the functioning of mind or body); In re Rodriguez, 81 F. 337, 344 (W.D. Texas 1897) (discussions of "degree[s] of intelligence"); De Cano v. State 110 P.2d 627, 632 Wash. 1941 (holding Filipinos are not white and referring to requirement to be free from "serious physical defect, deformity, or disease" for military enlistment); In re Knight 171 F. 299, 300 (E.D.N.Y. 1909) (holding that persons who are one-half white, one-quarter Japanese, and one-quarter Chinese are not white and reference to Petitioner possessing the requisite intelligence).

[287] In the late 1870s, the annual average number of immigrants fell just short of 150,000. *See* Becky Little, *How the Immigrants Who Came to Ellis Island in 1907 Compare to Arrivals Today*, HIST. (Apr. 22, 2019) https://www.history.com/news/ellis-island-immigrants-compare-today-study [https://perma.cc/9DGB-MU8F]. By the turn of the century, that number had increased to almost 800,000, and in 1907 it passed 11.4 million. *See id.*; *see also* ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA 85–87 (2015) (describing nativism in California).

[288] *See generally* Baynton, *supra* note 278.

[289] Immigration Act of 1924, Pub.L. No. 68–139.

[290] *See id.*

[291] *See generally* ALEXANDRA MINNA STERN, *supra* note 282.

[292] *Id.* at 87.

[293] *See id.* at 83; *see also* DAVIS, *supra* note 40, at 9–10.

and policymakers that the California Department of Institutions opened its own deportation office.[294]

At the same time, even negatively racialized groups were often characterized as desirable immigrants based on their fitness or capacity for manual labor, as these groups filled gaps within the labor market. As Professor Natalie Molina notes, "[b]ecause immigrants were considered advantageous only to the extent they filled critical gaps in the labor market, physical fitness was central to gauging a group's desirability."[295] Yet, when the demand for labor subsided, as was the case for Chinese laborers, a group largely responsible for constructing the transcontinental railroad, anti-immigrant rhetoric and violence rose.[296] For example, racist narratives of the "yellow peril" depicted Chinese laborers, primarily working on railroads and mines, as threats to white labor.[297] Chinese workers were accused of stealing jobs, accepting work for low wages and in poor conditions, and crossing picket lines.[298] Such narratives were common during periods of economic recession, and such narratives contributed to the passage of the Chinese Exclusion Act of 1882.[299] A decade later, the Geary Act, enacted in 1892, prohibited "Chinese laborers and all prostitutes," "convicts," "lunatics," "idiots," contract laborers, and those "liable to become public charges" from entering the United States."[300]

Racist and ableist tropes provided fodder for nativist campaigns that culminated in one of the most restrictive immigration laws in U.S. history. The Immigration Restriction Act of 1924 provided that "[i]t shall also be unlawful for any such person to bring to any port of the United States any alien afflicted with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living[.]"[301] In statements in support of the Act of 1924, one representative leading efforts to pass the bill noted: "it has become necessary that the United States cease to become an asylum."[302] Racist and ableist tropes seem to have a gatekeeping function here that is not exclusively restrictionist.

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[294] *See* STERN, *supra* note 282, at 87. As Stern explains, "[o]riginally formed in 1896 as the Commission in Lunacy, this department (renamed the Department of Institutions in 1920) created the Office of the Deportation Agent in 1915, whose responsibility was to expel foreigners and nonresidents confined in state asylums and mental hospitals, a practice that had begun sub silentio as early as 1905." *Id.*

[295] Natalie Molina, *Medicalizing the Mexican: Immigration, Race, and Disability in the Early-Twentieth-Century United States*, 94 RADICAL HIST. REV. 22, 24 (2006).

[296] *See* Robert Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1254–55 (1993).

[297] *Id.* at 1291.

[298] *See* HERNANDEZ, *supra* note 202.

[299] *See id.*

[300] *Id.*

[301] Immigration Act of 1924, Pub.L. No. 68–139.

[302] *Historical Highlights: The Immigration Act of 1924*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1901-1950/The-Immigration-Act-of-1924/ [https://perma.cc/TW2H-CCZ2].

They are used to both exclude and include (when non-white migrants show "physical fitness."

IV. The Intersectional Approach: A Focus on Legal Advocacy

The prior sections have applied intersectionality as a methodology in order to provide a provisional account of the relationship between race and disability, as well as racism and ableism. Beyond uncovering these relationships, an intersectional approach to race and disability provides a more fine-tuned analysis of structural racism and ableism as they functioned collusively to both define race and disability and shape their social meanings in American society. This fine-tuned analysis has important implications for how advocates may advance arguments to protect the rights of disabled people.

A. The Merits of the Intersectional Approach

The prior sections articulated how race and disability, along with racism and ableism, bear a mutually constitutive relationship in areas within and across American law. This section now turns to concrete applications framed by a couple of key questions: How does an intersectional approach advance legal advocacy challenging racial and disability discrimination? What does an intersectional framework that is sufficiently attentive to racial- and disability-based subordination look like in legal analysis?

An intersectional approach can and should inform how legal injuries are framed. Structural racism produces disabilities, and these harms produce, in some cases, legal injuries. Indeed, as Critical Race Theory scholar Khiara Bridges puts it, race is a "system of meaning" and "although race has always been about physical bodies, it has never been solely about bodies . . . it always has been about what those bodies mean in terms of mental, emotional, and political capacities."[303] But to fully understand the nature of disability, disability discrimination (individual disparate treatment), and disability-based subordination (group-based subordination), it is important to understand racism and how racist meanings infiltrate social meanings of disability. That is what the preceding sections have attempted to do.

To begin, laws, policies, and practices lacking an intersectional lens will fail to appreciate the full scope of the harms—from health care discrimination to institutionalization and policing—affecting disabled people, and in particular, will marginalize disabled people of color in multiple ways. By contrast, an intersectional approach to race and disability helps us uncover both the limits and possibilities of a rights-centered framework. In the sections that follow, I show what an intersectional approach to litigation involving racial and disability discrimination might look like in practice.

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[303] Bridges, *supra* note 87, at 128.

Peter P. v. Compton Unified School District[304] provides a helpful example. Litigators challenging disability discrimination by school officials within the Compton Unified School District framed the school district's failure to address the needs of students of color who experienced trauma as a type of disability discrimination in part by documenting how social and structural conditions resulted in students of color experiencing high levels of trauma. In their class action complaint, Plaintiffs alleged "that the neurobiological effects of the complex trauma" made it so that they were not able to "perform activities essential to education—including, but not limited to, learning, thinking, reading, and concentrating—and thus constitute a disability under" the Rehab Act and the ADA.[305] Plaintiffs alleged that the Defendants' failure to "accommodate students whose access to education is fundamentally impaired by reason of the trauma they have endured"[306] resulted in these students' "exposure to punitive and counter-productive suspensions, expulsions, involuntary transfers, and referrals to law enforcement that push them out of school, off the path to graduation, and into the criminal justice system."[307] Connecting the racialized social and structural conditions to the production of disability permitted litigators in this case to demonstrate that the school district had the legal duty to accommodate student disabilities in a more systematic way, as opposed to an individual, case-by-case basis.

Framing disability discrimination claims intersectionally—that is, framing alleged legal injuries experienced by students of color with disabilities in a way that was attuned to the broader social and structural context—permitted a more robust and accurate account of the extent of the harms for which legal remedies were sought and the social structures alleged to have caused that harm. As the intersectional method teaches, incorrect legal framing and diagnosis of the problem will lead to inadequate legal remedies.[308] Of course, the framing of the precise legal injury is only half the battle; unavailable or inadequate remedies will not eliminate racial and disability-based legal injuries. Yet by adopting an intersectional approach, the complaint moved beyond the typical legal liberal account of harm—individualized and focused

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[304] 135 F. Supp. 3d 1098 (C. D. Cal. 2015).

[305] *Id.* at 1131 (citing Compl. ¶¶ 2, 4, 54–66, 71). Specifically, complainants alleged that CUSD "failed to 'train and sensitize teachers or administrative personnel to recognize, understand, and address the effects of complex trauma'; provide staff and teachers with 'training in evidence-based trauma interventions that have been demonstrated to reduce the effects of trauma'; 'notify parents of its obligation to identify and provide accommodations to students whose learning may be impaired due to the experience of trauma'; 'implement restorative practices necessary to support healthy relationships'; 'address conflict and violence in a manner that recognizes the impact of complex trauma on the ability to self-regulate in high stress or anxiety situations'; or provide adequate (or any) mental health support." *Id.* (citing Compl. ¶ 7).

[306] *Id.* (citing Compl. ¶ 7).

[307] *Id.* (citing Compl. ¶ 8).

[308] *See* Crenshaw, *Mapping the Margins*, *supra* note 18, at 1250.

on a singular perpetrator—to an account that captured structural harms.[309] By examining the way disability intersected with race (as well as class), plaintiffs were able to document, in a more comprehensive way, the structural aspects of the harms they alleged. Looking at race or disability separately (and alleging racial or disability discrimination separately) would have left plaintiffs with limited legal remedies under Equal Protection Law (for race-based claims) or with an underinclusive account of the disability discrimination which might have failed to see how racialized social and structural conditions, like poverty and gun violence, produce disabilities.

B. Intersectionality in "Disability Constitutional Law"

An intersectional approach illuminates viable doctrinal and policy justifications for broad protections and legal remedies that protect the rights of all disabled people. An intersectional approach can provide an analysis for more *robust* legal protections and remedies, particularly, as I discuss below, in the area of constitutional law. Of course, constitutional law is not the only area of law impacting the rights of disabled people, and thus the analysis below is not an exhaustive list of the areas of law where an intersectional approach would be beneficial. I use constitutional law as one useful illustration of the merits of the intersectional approach to strengthen constitutional protections and remedies for disabled people.

An intersectional analysis of race and disability has significance for legal doctrine. Consider *City of Cleburne*.[310] Respondents, Cleburne Living Center ("CLC") sought a special permit from the City of Cleburne to open a home for individuals with intellectual and developmental disabilities ("IDD"), but the City Council denied CLC a permit based on the zoning ordinance that required special use permits for group homes for individuals with IDD.[311] CLC then sued the City alleging that the ordinance was invalid on its face and as applied because it violated the Equal Protection Clause.[312] The Supreme Court held in an opinion by Justice White that people with IDD are not a suspect class for Equal Protection purposes. The Court made several findings regarding how to classify people with IDD under the Equal Protection Clause. It reasoned that people with IDD "have a reduced ability

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[309] *See, e.g.*, *Legitimizing Racial Discrimination through Antidiscrimination law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–53 (1978) ("From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual. The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.").

[310] 473 U.S. 432 (1985).

[311] *See id.* at 435–37.

[312] *See id.* at 437.

to cope with and function in the everyday world," and that "[t]hey are thus different, immutably so."[313] In reaching its holding, the Supreme Court concluded that the state had a legitimate interest in caring for people with IDD and that the legislative branch was better suited to make policy determinations that impact the lives of people with IDD.[314] Moreover, people with disabilities were not a politically powerless group according to the Court, as indicated by ongoing responsiveness by the legislature.[315] Finally, heightened scrutiny would impede the legislature's ability to make policies concerning individuals with IDD.[316]

Nonetheless, even though it held that IDD was not a suspect class, the Court held that the ordinance at issue in the case was unconstitutional. In applying what could be termed "second order rational basis" scrutiny, the Court determined that because the proposed group home would not threaten the City's interests in a way that uses by other groups would not, the ordinance violated the Equal Protection Clause.[317]

In dissent, Justice Marshall argued the correct standard of review should have been strict scrutiny given the history of discrimination against people with disabilities.[318] Marshall's opinion documented the extensive history of discrimination against disabled people, including compulsory sterilization laws, segregation, and institutionalization.[319]

Had the *Cleburne* Court recognized not only the connections between race and disability, but also the histories of racism and ableism, there would be even more justification for identifying disability as a suspect classification. Indeed, the respondents in *Cleburne* recognized as much. Respondents *Cleburne Living Center* argued in their brief that a heightened standard of scrutiny should apply in part by recognizing the connections between disability-based subordination and racial subordination:

> The stigmatization that was the cause and the effect of the mistreatment and isolation of . . . people [with IDD] has been deep and thoroughgoing. It is exemplified by the phenomenon that, as the Fifth Circuit observed, "[o]nce-technical terms for various degrees of [intellectual disability]—e.g. 'idiots,' 'imbeciles,' 'morons'—have become popular terms of derision." . . . [Intellectual

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[313] *Id.* at 442.
[314] *Id.* at 442–43.
[315] *See id.* at 445.
[316] *See id.* at 445–46.
[317] *See id.* at 448.
[318] *See id.* at 474 (Marshall, J., concurring in the judgment in part and dissenting in part). In any event, Marshall argued that the court was actually not applying the rational basis standard of review. *See, e.g.*, Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793–96 (1987); Nancy M. Reininger, *Note*, *City of Cleburne v. Cleburne Living Center: Rational Basis with a Bite?*, 20 U.S.F. L. REV. 927 (1985-1986).
[319] *See Cleburne*, 473 U.S. at 455–78 (Marshall, J., concurring in the judgment in part and dissenting in part).

> disability] is so stigmatizing that its label has been used to further stigmatize groups this Court already has found to be especially vulnerable to stereotypical views. There have been persistent efforts during America's history to establish links between [intellectual disability] and race, national origin, immigrants, illegitimate children, and women. . . . These efforts betoken an additional reason for viewing discriminatory classifications based on retardation with suspicion.[320]

The Court did not acknowledge what Respondents termed the "links between" IDD and "race, national origin, immigrants, illegitimate children, and women"—i.e., the Court did not recognize the Respondents' intersectional account of disability.[321] Despite this astute briefing, the Supreme Court's opinion in *Cleburne* reflects neither a sophisticated analysis of race and disability nor a sophisticated account of disability itself. In the *Cleburne* opinion, even though the Supreme Court ultimately held that the zoning ordinance violated the Equal Protection Clause, it relied on outdated, ignorant stereotypes about intellectual disability.[322] As Michael Waterstone noted:

> Infused in the Court's opinion is a pitying notion, so rejected by the modern disability rights movement, that 'one has to feel sorry for a person disabled by something he or she can't do anything about,' and that 'legislators would and had appropriately responded with remedial legislation intended to help this group.'[323]

While relying on these ableist notions of disability, the Court determined that heightened scrutiny was not warranted.

Given the doctrinal landscape after *Cleburne*, it is unlikely that disabled people as a class will receive heightened scrutiny under the Equal Protection Clause.[324] Yet, as Waterstone argued years ago, disability advocates should not lose sight of constitutional protections for disabled people as a class.[325] I agree with Waterstone that disability rights advocates should not lose sight of constitutional rights and remedies and I build on this argument by maintaining that an intersectional approach to race and disability provides a pathway to strengthening constitutional legal protections for disabled people.

When judges, commentators, and advocates fail to analyze race and disability intersectionally or fail to appreciate the ways in which race and disa-

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[320] Resp. Br., City of Cleburne v. Cleburne Living Center, Inc., 1985 WL 668980, *32–*33 (1985).

[321] *Id.* at *33.

[322] *See* Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 537–38 (2014).

[323] *Id.*

[324] *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

[325] *See* Waterstone, *supra* note 317, at 558.

bility genealogies are connected, explicit and implicit ways by which new and old forms of race and disability discrimination and subordination manifest today can go undetected or unappreciated. For example, an intersectional approach to race and disability (particularly one attentive to history) could help identify and distinguish meanings of disability in court opinions (in disability law, constitutional law, and beyond) that are the product of harmful stereotypes. Courts could apply greater scrutiny (e.g., rational basis with a bite) to social meanings of disability that depict disability as a source of "pity" or "tragedy," and lesser scrutiny (rational basis) to those social meanings that do not further demeaning stereotypes.

Second, an intersectional approach to disability provides a doctrinal path to a more robust, contextualized rational basis review of state laws that facially discriminate against *all* disabled people, including disabled people of color, or those governmental actions that reinforce racial and ableist social meanings.[326] Uncovering histories of prejudice and discrimination against disabled people and the intersections with histories of race and racism permits a more contextual review—even where courts apply the highly deferential standard of review under rational basis analysis. Waterstone made a similar argument when he called for a "more contextualized Equal Protection review for state laws that facially discriminate against people with disabilities (most often, people with mental disabilities.)"[327] He maintained that "[a] contextualized review would acknowledge the history of prejudice and segregation against people with disabilities, as well as recognize the important ways that state classifications operate to their detriment."[328] This is not to say that identifying disability as a protected class is the only preferable method to "meaningful scrutiny outside the heightened tiers,"[329] or that the animus doctrine is a preferred pathway to robust rational basis review.[330] Rather, such an approach would be geared toward identifying and scrutinizing the relationship between the disability discrimination at issue and the legitimacy of the government's purpose.

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[326] My argument builds on Waterstone's previous argument. *See* Waterstone, *supra* note 317, at 533 ("I argue that, prompted by advocates, courts should adopt a more contextualized Equal Protection review for state laws that facially discriminate against people with disabilities (most often, people with mental disabilities.").

[327] *Id.*

[328] *Id.*

[329] Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 226 (2019). As Katie Eyer has argued, social movements have successfully challenged government actions relying on rational basis review. Eyer rejects proposals by scholars to use animus as a "gatekeeper to meaningful rational basis review" arguing that such a move would produce "nothing more than a new gatekeeping doctrine, barring the way to the last remaining accessible form of meaningful Equal Protection review." *Id.* at 233; *see also* Yoshino, *supra* note 324 (arguing that protected class canon has closed).

[330] As Eyer has carefully documented, "[m]any of the rational basis victories that social movements have secured during the last fifty years have not mentioned animus doctrine at all." Eyer, *supra* note 324, at 224.

An intersectional approach permits a more searching judicial review even under rational basis. As Katie Eyer has noted in her work, where progressive and social movements have prevailed in cases involving rational basis review, courts have "typically rel[ied] on a more back-end focused review (finding no rational relationship between the discrimination at issue and a legitimate government purpose)."[331] That is to say, courts have applied more rigorous scrutiny to even more groups that are not formally entitled to heightened scrutiny.[332] Eyer's work explains that unlike canonical accounts of the rational basis doctrine, which maintain that the standard of review is highly deferential and rarely, if ever, results in an invalidation of governmental action, rational basis review "constituted one of the principal entry points for social movements seeking to effectuate constitutional change."[333] Even though, as Eyer explains, in applying rational basis review courts have "never consistently applied one single doctrinal formulation,"[334] a precise recounting of the modern history of the canon of rational basis review "could be reimagined in a way that more accurately represents rational basis review's actual role in the process of constitutional change."[335] Despite the canonical account of groups achieving social change through obtaining protected class status and heightened review as Eyer maintains, "it is rational basis review, not the posited objective criteria for protected class status, that has ordinarily played the most prominent role in opening the doors to more sustained constitutional change."[336] Consistent with Eyer's account, it makes sense for disability rights advocates to push for more rigorous rational basis review, even while in ultimate pursuit of forms of heightened scrutiny.

I build on Katie Eyer's work and argue that a more robust understanding of the histories and relationship between race and disability permits courts to engage in more rigorous "back end focused review."[337] Stated dif-

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[331] *Id.*; *see also* Waterstone, *supra* note 317, at 533 ("Applying *Cleburne* in disability law cases as it has been applied elsewhere corrects its primary error of refusing to acknowledge the role of stigma and prejudice against people with disabilities, and assuming that disability classifications are based on benevolent attitudes instead of being reflective of a history of discrimination.").

[332] *See* Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 576–77 (2014) ("Thus, where group or rights-based concerns are implicated—including but not limited to the early sex, illegitimacy, and sexual orientation cases—there is a robust history of the Court applying more than de minimis rational basis review, even outside of the formally heightened tiers. And, emphasizing those "meaningful review" cases—cases like *Weber* and *Reed*, *Romer* and *Windsor*, *Cleburne*, *Moreno*, *Eisenstadt*, and *Plyler*—rather than (or at least in addition to) cases like *Rodriguez*, *Murgia*, or *Beazer*—creates a vision of equal protection doctrine that simply looks different."). *Id.*

[333] Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319–20 (2018).

[334] *Id.* at 1320.

[335] *Id.*

[336] *Id.* at 1333.

[337] *Id.*; *see also id.* at 1358 ("[E]ven where present and/or acknowledged, courts often do not apply a "front-end" analysis—requiring a showing of animus or "quasi-protected class status" as a prerequisite—of the kind the canon suggests should be determinative. Rather, many of the cases in which social movements have successfully made use of rational basis

ferently, an intersectional analysis may allow for a more robust rational basis review by courts. An intersectional lens focused on race and disability helps courts identify "relevant characteristics" and "delineate . . . principles" under the rational basis test.[338] It could provide for a way to smoke out racist or ableist meanings of disability and thus surface disability-based animus, even where the government alleges a rational basis for its actions. Acknowledging the histories of racial and disability discrimination permits a basis for challenging the legitimacy of the government's alleged interest in protecting disabled people where the government's rationale reflects ableists understandings of disability.[339] For example, an intersectional approach provides race- and disability-focused historical grounding that permits a more rigorous back-end review of state laws that facially discriminate against people with mental disabilities by denying them the right to vote. State laws that deny individuals with mental and/or intellectual and developmental disabilities the right to vote is one example of a set of laws that might be rendered constitutionally suspect, where such laws provide no exceptions from blanket prohibitions on the ability to vote based on, for example, the particular abilities of the individual voter with IDD. An intersectional approach to race and disability provides disability rights advocates with a basis to surface animus and prejudicial attitudes rooted in histories of race- and disability-discrimination—attitudes that are connected to racialized and ableist notions of citizenship—and contest the legitimacy of the (purportedly benign) governmental purpose in denying all disabled people under conservatorship the right to vote.[340]

Beyond this, intersectional approaches grounded in accurate historical accounts provide a limit to the alleged lack of limiting principle for height-

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review have rested on messier, "back-end" findings of a lack of rational basis, without any front-end, prerequisite showing of the kind that the canonical accounts suggest is required.").

[338] *See* Eyer, *supra* note 332, at 1319–20.

[339] *See* Waterstone, *supra* note 317, at 533 ("Applying Cleburne in disability law cases as it has been applied elsewhere corrects its primary error of refusing to acknowledge the role of stigma and prejudice against people with disabilities, and assuming that disability classifications are based on benevolent attitudes instead of being reflective of a history of discrimination.").

[340] In this way, my arguments here are similar those made by Charles Lawrence in his iconic work, *The Id, the Ego, and Equal Protection*. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 327–28 (1987). In that article, Lawrence argued against the intent requirement announced in *Washington v. Davis* and called for a more robust test under the Equal Protection Clause focused on social meanings that attached to race and race-based disadvantage. Lawrence maintained that the Supreme Court in *Washington v. Davis* ignored the "constitutional injury in the cultural meaning of racially discriminatory impact." Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 940 (2008) (discussing Washington v. Davis, 426 U.S. 229 (1976)). Beyond this, the Court's colorblind jurisprudence that subjected all explicit racial classifications to strict scrutiny improperly ignored questions of racial meaning. Lawrence maintained that "[d]esegregation can only inflict the same injury as segregation if we ignore the question of what each signifies. Only in this Alice in Wonderland world, where racial classifications are devoid of meaning, can a remedy to the injury identified in *Brown v. Board of Education* become the injury itself." *Id.* at 940–41.

ened scrutiny for disabled people. The Court in *Cleburne* identified this concern in the following passage:

> [I]f the large and amorphous class of the [intellectually disabled] were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[341]

Yet an intersectional approach could establish limits by identifying and distinguishing policies warranting a more rigorous back-end review (even under rational basis) from those that would not warrant such review by focusing on government actions that reinforce (rather than alleviate) group-based subordination for people with disabilities.[342] Classifications that restrict access to rights, privileges, services and programs, or classifications that evince stereotypical assumptions or reflect historic tropes of disability would be subjected to more searching scrutiny. Classifications that reflect racialized disability stereotypes, on account of embedded racial stereotypes, should arguably receive strict scrutiny. Classifications that are beneficial or benign could continue to be evaluated under rational basis review. Importantly, while this more rigorous back-end review (as distinguished from heightened scrutiny classifications) could provide meaningful scrutiny, it would not risk activating what Kenji Yoshino referred to as the courts' "pluralism anxiety" and its aversion to adding more groups to constitutional protection.[343]

An intersectional approach to race and disability also has implications for the court's analysis of Congress' section 5 enforcement powers.[344] A

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[341] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985).

[342] The respondents in *Cleburne* argued that even under a form of heightened scrutiny, laws that benefited individuals with mental disabilities would pass constitutional scrutiny. *Id.* at 444 ("It may be, as CLC contends, that legislation designed to benefit, rather than disadvantage, the [intellectually disabled] would generally withstand examination under a test of heightened scrutiny."). Equal Protection jurisprudence has since evolved away from distinguishing benign from invidious classifications under strict scrutiny, which would make it imprudent to adopt heightened scrutiny for all disability classifications.

[343] Yoshino, *supra* note 324, at 759.

[344] *See* Waterstone, *supra* note 317, at 553–54 ("The constitutionality of the ADA is part of a larger struggle going on in the federal courts about Congress' ability to legislate pursuant to its powers under Section 5 of the Fourteenth Amendment. While there may not be an organized "anti-disability rights" movement with a primary agenda of limiting Congress' ability to legislate to protect the rights of people with disabilities, in cases involving damages challenging a state's classification of people with disabilities, state actors typically challenge the ADA's constitutionality. And because of *Cleburne*, the ADA remains uniquely vulnerable to these attacks. In an environment where government enforcement officials and public interest organi-

quick primer on cases examining the constitutionality of the ADA in light of Congress' enforcement powers might be helpful here. Congress may abrogate states' immunity if it "unequivocally expresse[s] its intent to abrogate that immunity" and "act[s] pursuant to a valid grant of constitutional authority."[345] Stated differently, "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment."[346] But that is not without limits. In *City of Boerne v. Flores*,[347] the Court held that to be a valid exercise of Congress' Fourteenth Amendment enforcement authority there must be "congruence and proportionality" between the statute and a history or threat of constitutional violations.[348]

In *Garrett v. Alabama*,[349] *Tennessee v. Lane*,[350] and *United States v. Georgia*,[351] the Supreme Court considered whether the remedies under Title I and Title II were valid abrogations of state sovereign immunity under Congress' section 5 enforcement powers. In *Garrett v. Alabama*, the Court held that suits for damages against states under Title I of the ADA are barred by the Eleventh Amendment. [352] The Supreme Court considered the question of whether Title II of the ADA exceeded Congress' section 5 enforcement powers in *Tennessee v. Lane*. In reaching its holding that Title II is congruent and proportional to its objective of enforcing the right of access to courts, the Court set forth the following test for determining whether Congress validly abrogated state sovereign immunity: identify (1) which "constitutional right or rights that Congress sought to enforce when it enacted Title II,"[353] (2) whether there was a history of unconstitutional disability discrimination to support Congress' determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation,"[354] and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment."[355]

The Supreme Court once again revisited the constitutionality of Title II in *United States v. Georgia*.[356] In that case, the Supreme Court held that "insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II

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zations have limited resources, restrictions on a damage remedy create a powerful incentive for underenforcement of key guarantees of the statute.").

[345] Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000).
[346] Tennessee v. Lane, 541 U.S. 509, 518 (2004).
[347] 521 U.S. 507 (1997).
[348] *Id.* at 521.
[349] 531 U.S. 356 (2001).
[350] 541 U.S. 509 (2004).
[351] 546 U.S. 151 (2006).
[352] *Garrett*, 531 U.S. at 356.
[353] *Lane*, 541 U.S. at 522.
[354] *Id.* at 529.
[355] *Id.* at 530.
[356] 546 U.S. 151 (2006).

validly abrogates state sovereign immunity."[357] Courts must decide whether there is a violation of Title II before turning to the question of whether there was a valid abrogation of the state's sovereign immunity. To decide the question of state sovereign immunity, a court must determine: (1) whether the plaintiff states a claim under Title II, (2) whether any valid Title II claim would independently state a constitutional claim, and finally, (3) whether the plaintiff has alleged a valid Title II claim that is not also a constitutional violation.[358]

An intersectional approach to race and disability provides a more robust and inclusive account of the contours of the social group—disabled people—under constitutional inquiry. Returning to the test from *Tennessee v. Lane*, an intersectional approach to disability highlights the fact that at each stage of the test, Congress' calculus *included disabled people of color*.[359] In other words, an intersectional approach to race and disability pushes back against the notion that white disabled people were the only group histories and experiences that Congress protected when it enacted the ADA. Congress considered disabled people as a class, which included disabled people of color (whether Congress was conscious of this reality or not). Therefore, Congress' concerns about disabled people must be regarded as applying to disabled people *of color*. Congress' extensive discussion of the harms of unjustified institutionalization, segregation, and isolation are examples of the type of disability discrimination that disabled people of color are uniquely vulnerable to—in large part due to the racialized nature of mass criminalization and mass incarceration. In light of the heightened vulnerabilities of disabled people of color, courts should recognize broad prophylactic measures under Congress' section 5 powers to remedy disability-based discrimination, especially considering the racially inflected harms that lead to ongoing forms of disability discrimination.

That Congress, at least implicitly, viewed disability discrimination claims intersectionally finds some support in the congressional record. Congress recognized that disability discrimination claims did not exist in isolation and more directly acknowledged that disabled people of color might allege both race and disability discrimination. In discussing the decision to change the phrasing in Section 504 from "solely by reason of his or her handicap" to "by reason of such disability," the Committee on Education and Labor explained the reasoning for the change in the following way and with a nod toward intersectional analysis:

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[357] *Id.* at 159.

[358] *See id* at 159.

[359] *Lane*, 541 U.S. at 522 (First, whether the "constitutional right or rights that Congress sought to enforce when it enacted Title II"; second, whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation,"; and third "whether Title II is an appropriate response to this history and pattern of unequal treatment."). *Id.* at 530.

> A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. For example, assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability.
>
> In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued that he would not have a claim under section 504 because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation.[360]

The Committee went on to note that in adopting the new language it was rejecting a race-or-disability outcome.[361] At least with respect to its assessment as to the appropriate causal standard, the Committee anticipated that disability discrimination would not occur in isolation. Of course, this is not to suggest that the committee intended to provide for intersectional claims, but at the very least the Committee decided that the fact that discrimination also occurred on the basis of another protected class trait should not undermine the discrimination claim based on disability.

To adequately address ongoing forms of disability-based discrimination, it matters that the disability histories and stories told represent the diversity of the entire disability community. Without inclusivity, there is the risk that past and ongoing forms of marginalization, subordination, and discrimination will be erased and go unaddressed. With these race and disability genealogies in mind, courts should affirm Congress' broad remedial powers under section 5 to prevent discrimination on the basis of disability in public activities, programs, and services under federal disability laws.

Pursuing transformative change through federal courts may appear unrealistic to some given the rise of the conservative majority on the Supreme Court. Moreover, under *City of Boerne v. Flores*, Congress lacks the ability to define constitutional rights through statute, and it may enact laws to remedy violations of section 1 of the Fourteenth Amendment only insofar as there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.[362]

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[360] H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 85–86 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 303, 368.

[361] *See id.*

[362] *City of Boerne*, 521 U.S. at 520; *see also id.* at 529–30.

Given the likely aversion to intersectional approaches among federal judges, state courts and state legislatures may be more appropriate venues. Writing on possible equality law claims to challenge racial bias and racial subordination in criminal justice practices, Professor Darren Hutchinson notes that, "[w]hile many states follow Supreme Court precedent when they interpret analogous state constitutional provisions, some state courts depart from federal doctrines and apply more expansive notions of equal protection."[363] State courts have ruled that heightened forms of scrutiny apply to disability-based classifications. For example, state courts in New Mexico and Connecticut's state constitution have adopted heightened scrutiny for disability classifications.[364]

Beyond the courts, federal agencies, whether the Department of Justice, Department of Health and Human Services, Department of Education, Equal Employment Opportunity Commission, and Department of Labor, may be more appropriate venues to start implementing or increasing efforts to apply intersectionality. Most importantly, federal agencies, as well as state agencies, can provide greater protections than current equal protection jurisprudence—indeed some already do.[365] The National Council on Disability, the independent federal agency charged with advising the President, Congress, and other federal agencies regarding policies, programs, practices, and procedures that affect people with disabilities, already has an "Equity Action Plan" that specifically includes intersectional practices.[366] For example, the Council's report on the environmental impacts of climate change will include information on "the intersectionality of disability and how the individual's specific intersectionality impacts their ability to mitigate and access resources to mitigate the impact of environmental injustice or the increased frequency of extreme weather events."[367] Ultimately, federal agencies can promote intersectionality through litigation, regulations, guidance documents, reporting, data collection, and other venues, to name a few.

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[363] Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371, 421 (2022).

[364] *See* Breen v. Carlsbad Mun. Sch., 120 P.3d 413, 422–23 (N.M. 2005) (adopting intermediate scrutiny for mental disability classifications under New Mexico state constitution); Conn. Const. art. 1, § 20 (amended 1984) ("No person shall be denied the equal protection of the law . . . because of religion, race, color, ancestry, national origin, sex or physical or mental disability.").

[365] *See, e.g.*, Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807, 1811 (2017) (describing how the Department of Education "sought to impose a form of heightened protection for the poor by using its discretion to interpret the relevant federal funding statutes").

[366] NAT'L COUNCIL ON DISABILITY, *Equity Action Plan*, https://ncd.gov/equity [https://perma.cc/MY96-MXUD].

[367] *Id.*

V. Conclusion

That race and disability were not only each socially constructed, but also co-constructed has important implications for scholars and advocates deploying legal strategies for challenging racial and disability discrimination. Recognizing these connections offers opportunities for effective and comprehensive advocacy aimed at holding state and private actors accountable for unlawful acts of racial and disability discrimination. Scholars and advocates should acknowledge these overlapping meanings and understandings of race and disability and recognize the collusive nature of racism and ableism. It is imperative to do so as these interlocking ideologies of subordination—and the material conditions they produce—contribute to the ongoing forms of violence and physical harm, as well as economic and social disadvantages, that disabled people experience today. Legal rights and remedies can prevent and rectify these harms—but not without intersectional approaches that accurately characterize the nature and scope of legal injuries necessary for identifying meaningful remedies.