

## Reckoning with Race and Disability

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**ABSTRACT.** Our national reckoning with race and inequality must include disability. Race and disability have a complicated but interconnected history. Yet discussions of our most salient socio-political issues such as police violence, prison abolition, healthcare, poverty, and education continue to treat race and disability as distinct, largely biologically based distinctions justifying differential treatment in law and policy. This approach has ignored the ways in which states have relied on disability as a tool of subordination, leading to the invisibility of disabled people of color in civil rights movements and an incomplete theoretical and remedial framework for contemporary justice initiatives. Legal scholars approach the analysis of race and disability principally as a matter of comparative subordination (race and disability; race as disability; disability as race). More recent scholarship, however, incorporates critical race and intersectionality to identify connections and center those most marginalized within racial justice and disability rights movements. This body of emerging legal scholarship creates fruitful points of entry, but still situates disability as an analytical tool for understanding racial subordination without due attention to disability's co-constitutive function and its remedial lessons.

This Essay argues that aesthetic theories of disability discrimination offer a comprehensive, unifying lens to understand the roots of both race and disability discrimination, the nature of the harms experienced by those with intersectional identities, and, perhaps most useful, the construction of remedies that can meaningfully address the endemic aesthetic origins of inequality. 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 products 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 the quintessential socio-legal prescription for inequality: training and education. While such interventions may be necessary, this Essay cautions against their remedial sufficiency and calls for training and education designed with due attention to the lessons of aesthetics.

### INTRODUCTION

Reginald Latson, known as “Neli,” sat in the grass in front of his local public library in Stafford County, Virginia, waiting for the building to open. While he

waited, a “concerned citizen” called the local police department about a suspicious person with a “hoodie” perhaps “with a gun” who was “loitering outside the library.”<sup>1</sup> Latson, an unarmed eighteen-year-old, had done nothing illegal.<sup>2</sup> When the police officer arrived and ask him his name, he did not answer. Instead, believing he was in danger, Latson “responded with a ‘fight or flight’ reaction.”<sup>3</sup> The officer arrested Latson and the Commonwealth of Virginia charged him with felony assault on a law-enforcement officer, for which he received a sentence of more than ten years in prison.<sup>4</sup>

The prosecutor gave short shrift to claims that the charges and noncompliant behaviors documented by the officer were manifestations of Latson’s autism, preferring to frame disability as a “convenience.”<sup>5</sup> In Virginia, *Stamper v. Commonwealth* precluded Latson’s lawyer from presenting evidence of Latson’s disabilities—lay or expert testimony, documentary testimony, all prohibited—to contextualize the facts presented at Latson’s bail hearing and criminal trial.<sup>6</sup> Furthermore, while detained, the corrections officers also declined to acknowledge

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1. Ruth Marcus, *Ruth Marcus: In Virginia, a Cruel and Unusual Punishment for Autism*, WASH. POST (Nov. 14, 2014), [https://www.washingtonpost.com/opinions/ruth-marcus-in-virginia-a-cruel-and-unusual-punishment-for-autism/2014/11/14/9d7f6108-6c3b-11e4-b053-65cea7903f2e\\_story.html](https://www.washingtonpost.com/opinions/ruth-marcus-in-virginia-a-cruel-and-unusual-punishment-for-autism/2014/11/14/9d7f6108-6c3b-11e4-b053-65cea7903f2e_story.html) [<https://perma.cc/N4G7-6KXW>]; Theresa Vargas, *Remember Neli Latson, the Black Teen with Autism Who Seemed ‘Suspicious’ Sitting Outside a Library? Ten Years After His Arrest, He Still Isn’t Fully Free*, WASH. POST (June 10, 2020), [https://www.washingtonpost.com/local/remember-neli-latson-the-black-teen-with-autism-who-seemed-suspicious-sitting-outside-a-library-ten-years-after-his-arrest-he-still-isnt-fully-free/2020/06/10/53565cec-ab39-11ea-a9d9-a81c1a491c52\\_story.html](https://www.washingtonpost.com/local/remember-neli-latson-the-black-teen-with-autism-who-seemed-suspicious-sitting-outside-a-library-ten-years-after-his-arrest-he-still-isnt-fully-free/2020/06/10/53565cec-ab39-11ea-a9d9-a81c1a491c52_story.html) [<https://perma.cc/X3Y8-7W96>] (detailing how the incident and his incarceration continue to affect Latson).
  2. Letter from Lamont Bagby, Virginia Delegate, et al., to Ralph Northam, Governor, Virginia & Kelly Thomasson, Sec’y of Commonwealth (July 7, 2020) [hereinafter Northam Letter], <https://www.centerforpublicrep.org/wp-content/uploads/Letter-to-Governor-Northam-Re-Neli-Latson-final.pdf> [<https://perma.cc/VND4-QNTA>].
  3. *Id.* at 1-2. Evidence of flight (broadly defined) is admissible in court as circumstantial evidence of guilt; the fact finder must make the following inferential leaps: Latson’s behavior to his attempts to flee; from his attempts to flee to consciousness of Latson’s guilt; from consciousness of Latson’s guilt to “consciousness of guilt concerning the crime charged” in the case; and from Latson’s “consciousness of guilt concerning the crime charged” to his “actual guilt of the crime charged.” *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977) (emphasis added). *But see* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2269-70 (2017) (arguing that courts assume evidence of flight to be relevant, and noting that “[w]here people of color flee from police, a critical race inquiry reveals structural racial bias entrenched in the evidentiary doctrine of flight”).
  4. Northam Letter, *supra* note 2, at 2.
  5. *Id.*
  6. 324 S.E.2d 682, 688 (Va. 1985) (holding that “evidence of a criminal defendant’s mental state at the time of the offense is, in the absence of an insanity defense, irrelevant to the issue of guilt”).

Latson's disabilities and denied him necessary accommodations.<sup>7</sup> Officers subjected Latson to prolonged restraints and seclusion; for example, he spent 182 out of a total of 243 days (approximately eight months) in solitary confinement for up to twenty-four hours per day.<sup>8</sup>

Neli Latson is a Black, autistic man.<sup>9</sup> How do we make sense of the role of race<sup>10</sup> and disability<sup>11</sup> in the discrimination experienced by Neli? This Essay argues that current comparative and intersectional lenses offer an incomplete picture of the nature of the harm and how best address it. While intersectionality<sup>12</sup> certainly captures Neli Latson's experience by shifting the focal point of analysis to the cross-sections of race and disability (Neli's experience as a Black, autistic man),<sup>13</sup> it does less work as a diagnostic and prescriptive lens. In other words, intersectionality tells us to focus on all identities and how they come together to

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7. Northam Letter, *supra* note 2, at 2.
  8. *Id.* at 2; see also Brief Amici Curiae of American Civil Liberties Union et al. in Support of Plaintiff-Appellant and Reversal at 6-8, *Latson v. Clarke*, No. 1:16-cv-0039 (W.D. Va. Feb. 11, 2019) (describing the conditions of Latson's confinement including almost complete isolation and deprivation of access to sensory stimuli, basic hygiene products, and regular nutrition).
  9. Northam Letter, *supra* note 2, at 1. This Essay moves between person first language and identity first language to illustrate the current conversations taking place in disability communities about self-identification and the role of the impairment in identity. People's First/Person First language came out of the self-advocates' movement primarily among people with intellectual and developmental disabilities. Identity First language is a more contemporary move to recognize the importance of disability in their identity and move from person with autism, for example, to autistic or autistic person. See Lydia X.Z. Brown, *The Significance of Semantics: Person-First Language: Why It Matters*, AUTISTIC HOYA (Aug. 4, 2011), <https://www.autistichoya.com/2011/08/significance-of-semantics-person-first.html> [<https://perma.cc/TB5L-VS7W>].
  10. This Essay primarily discusses the relationship between "blackness" and disability. I recognize that the experiences of other historically marginalized groups are important and may be different. In future work, I will explore these different relationships with disability, for example, constructions of disability in Latinx communities and law's role in that construction.
  11. I adopt a broad socio-legal definition of disability informed but not limited by the federal definition of disability under the Americans with Disabilities Act: a person with a disability is one who has "a physical or mental impairment that substantially limits" their lives in some way. 42 U.S.C. § 12102 (2018).
  12. Intersectionality brings a degree of vagueness as to what it is exactly. Is it theory, perspective, methodology, or a general perspective by which to view the world? It can be all of the above though such nuances matter to how we think about its application and whether it can produce plausible remedies in law and society.
  13. Gender also plays an important role here but will not be addressed in depth; however, given its intimate connection to other axes of subordination, I will briefly offer some thoughts. The fact that Neli is a Black autistic *male* triggers particular aesthetic and emotional responses in the aggregate. See Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895 (2020) (constructing a theory of the "aesthetics of disability" as a more comprehensive way to understand the deep aesthetic and emotional roots of disability discrimination in society).

form a distinct, new type of experience of discrimination. But it 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.

Aesthetic theories of discrimination, this Essay contends, can supplement the vagaries surrounding intersectionality as an analytical lens to understand race and disability.<sup>14</sup> 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.

This Essay proceeds in three parts. Part I offers a descriptive account of the existing legal scholarship<sup>15</sup> on race and disability. Part II then uses the opening example of Neli Latson to explain what is missing from the current scholarship. Part III argues that aesthetic and affective theories of discrimination offer a unifying lens that further develops the meaning of intersectionality in the context of race and disability. I then apply an aesthetic lens to Neli Latson’s case to begin to build a broader remedial framework for intersectional discrimination.<sup>16</sup> I conclude with a few questions to consider as legal scholars continue to cultivate critical disability frameworks in law.

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14. Aesthetic theories concern what we see as beautiful and pleasurable. I am interested in how we render aesthetic judgments and how these assessments influence human behavior and proclivity to discriminate against those bearing non-normative markers of beauty. See, e.g., Dominic Mciver Lopes, *Aesthetic Experts, Guides to Value*, 73 J. AESTHETICS & ART CRITICISM 235, 237 (2015) (“Aesthetic evaluations are . . . dispositional states of mind attributing aesthetic merits or demerits . . . . [T]he agent attributes aesthetic values to the object of the act, so that, were different values attributed to the object, then the act would have gone differently.”). My work most closely aligns with aesthetics scholars thinking about “body aesthetics” – how we evaluate and respond to certain physical, behavioral, and auditory markers of difference – as sources of socio-political oppression. See, e.g., Sherri Irvin, *Introduction: Why Body Aesthetics*, in BODY AESTHETICS 1-10 (2016) (“Aesthetic standards thus serve a disciplinary function, maintaining oppressive norms of race, gender, and sexuality.”). See generally Harris, *supra* note 13.

15. I include some disability-justice work in here as well because, while the authors are not legal scholars, they analyze critical disability legal issues and belong in this group.

16. Part III sets up future work in this area.

**I. SURVEY OF LEGAL SCHOLARSHIP ON RACE AND DISABILITY**

In 2010, Beth Ribet reviewed existing scholarship on race and disability.<sup>17</sup> She argued that disability scholarship required greater theorizing about intersectionality and association with critical race studies (CRS) and that “[r]elatively few” CRS scholars have incorporated disability into their scholarship.<sup>18</sup> Part I primarily builds upon Ribet’s discussion of scholarship. It picks up where her analysis left off to capture more recent scholarly conversations that respond to the past decade’s transformative movements.<sup>19</sup>

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17. Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J. L. & MOD. CRITICAL RACE PERSP. 209, 209 (2010). Her review was not limited to legal scholarship and engaged with a broader swarth of interdisciplinary scholarship. See, e.g., *id.* at 213-14 (discussing the work in this area by Douglas Baynton, Susan Schweik, and Gregory Michael Dorr).

18. *Id.*

19. I frame scholars and scholarship broadly considering the roadmaps to the papers and overall methodology. As a result, the list of scholars is not exhaustive but illustrative and meant to open the conversation on what scholarship already exists, its limitations, and identity holes not explored. Contemporary civil-rights movements have emerged since 2010 including the expansion of United We Dream (DREAMers), Black Lives Matter, a resurgence of feminism including the “fourth wave” that surfaced in 2012, the Women’s marches, and MeToo. See, e.g., Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/5QHC-WFUL>] (calling the Black Lives Matter Movement’s protests after George Floyd’s death the largest social movement in U.S. history with somewhere between 15 and 26 million participants over the course of a short period of time in about 4,700 protests nationwide); *id.* (comparing the Black Lives Matter protests to the Women’s March on Washington in 2017 that had between three and five million people); *id.* (noting that the civil-rights marches in the 1960s were “considerably smaller in number” such that if you add up all of the marches the numbers of people are a few hundred thousand); see also Bonnie Chiu, *2020s Mark a New Wave of Feminist Mobilization*, FORBES (Mar. 8, 2020), <https://www.forbes.com/sites/bonniechiu/2020/03/08/2020s-mark-a-new-wave-of-feminist-mobilization/?sh=378558de485e> [<https://perma.cc/AD6V-PRSV>] (discussing the rise of new forms of feminist activism and organizing to be both “intersectional and intergenerational”). The past decade brought Donald Trump to the White House and with it visible conservative and white-supremacy movements, culminating in the riots at the Capitol on January 6, 2021. See, e.g., Walter J. Nicholls & Tara Fiorito, *Dreamers Unbound: Immigrant Youth Mobilizing*, 24 NEW LAB. F. 86, 86 (2015) (describing the DREAMers as “[o]ne of the most important social movements in the United States”); Rob Cameron, *White Supremacy Created the Capitol Assault*, FOREIGN POL’Y (Jan. 11, 2021), <https://foreignpolicy.com/2021/01/11/white-supremacy-capitol-assault-trump-supporters> [<https://perma.cc/4S4D-4NR3>] (“[T]he modern conservative movements have always been a safe space for the privileges of white rage . . . . What happened on Capitol Hill was not an accident. It wasn’t an act of God. This wasn’t an aberration; it was part of a pattern.”); Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers> [<https://perma.cc/UC6M-8PEW>] (discussing the advent of the #MeToo movement).

### A. Comparative Subordination

Comparative subordination scholarship notably treats disability and race as distinct categories. Ribet describes “comparative subordination” as scholarship that primarily “relies on analogy and application of racially based analysis to disability, interchanging disability as a category of oppression with race as a category of oppression.”<sup>20</sup> Adrienne Asch, according to Ribet, falls into this category because she “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.”<sup>21</sup> The identifying feature of this category, irrespective of the identity gate one enters, is the treatment of disability and race as separate categories.

Many foundational disability law-review articles adopted a comparative approach to race and disability, in part, because that was where the law was developing. For example, disability legal scholars like Ruth Colker and Sam Bagenstos have argued, a shift from individual conceptions of discrimination to a structural subordination approach allows for greater theorizing across categories and possibilities for coalition-building.<sup>22</sup> In the 1990s and early 2000s, this position in legal scholarship tracked the goals of the disability-rights movement seeking to develop a broader socio-political disability identity.<sup>23</sup> In fact, narratives of

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20. Ribet, *supra* note 17, at 209.

21. *Id.*; see Adrienne Asch, *Critical Race Theory, Feminism and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391 (2001).

22. Ruth Colker authored a series of highly influential articles making the move from individual rights to group anti-subordination efforts. See Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (theorizing across race and sex); Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN’S L. J. 59 (1987) (distinguishing between anti-differentiation whose goal is assimilationist to absorb difference into existing norms and anti-subordination which is not opposed to difference unless it results in subordination of historically marginalized groups such as women and Black Americans); see also Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397 (2000) (arguing that “an understanding of disability as subordination . . . should frame the approach of courts in interpreting the statutory ‘disability’ definition”). I would count my own work in this category though my aesthetics article brought the need for intentional engagement with race into view for me. I make note of future work to wrestle with questions of race and disability. This Essay is the beginning of that work.

23. See, e.g., Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (rooting disability within the broader civil-rights framework).

“sameness” among neatly packaged, protected classes may have helped move the Americans with Disabilities Act through Congress from bill to law.<sup>24</sup>

Since 2010, legal scholars within disability law and equality law more broadly have further developed the comparative model. The legal scholarship largely falls into three subcategories under the comparative type:<sup>25</sup> (1) Disability and Race; (2) Disability as Race; and (3) Race as Disability. I describe and offer an example of work in each category below.

### 1. *Disability and Race*

The scholarship in this category is largely consistent in form and focus as described previously; it compares race and disability discrimination in service of situating disability within the broader civil-rights paradigm and offering insights about the disability “perspective” in the race context or vice versa. Mark Weber, for example, pinpoints critical comparisons and points of departure among disability, race, and sex discrimination laws.<sup>26</sup> For instance, Weber describes that while animus drives discrimination in the race (and sex) context, animus does less work in the disability space. Attitudes about disability may be driven by a different emotion entirely such as by pity or benevolence. Therefore, disability law may require different designs than race and other areas of antidiscrimination law.<sup>27</sup>

Disability activists framed disability rights as an extension of the Civil Rights Act. They drew power, broad-based support, and issue legitimacy from cross-movement analogies. However, there were some civil-rights leaders who, cognizant of the discursive use of disability language as a tool of subordination to disenfranchise Black people, rejected associations with disability and sought distance from an emerging disability-rights movement.<sup>28</sup> Historical references to

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24. See generally LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* 9-10 (2015) (emphasizing the deliberate adoption of a civil-rights frame for disability rights at least in part to make disability rights appear to be a simple extension of other civil-rights protections from the 1964 Civil Rights Act).

25. These subtypes are my addition to Ribet’s more general “comparative subordination” category.

26. Mark C. Weber, *Intent in Disability Discrimination Law: Social Science Insights and Comparisons to Race and Sex Discrimination*, 2016 U. ILL. L. REV. 151, 162.

27. *Id.* at 167-68.

28. See, e.g., Jeffrey A. Brune, *Blind Like Me: John Howard Griffin, Disability, Intersectionality, and Civil Rights in Postwar America*, 50 AFR. AM. REV. 203, 215 (2017); Josh Lukin, *Disability and Blackness*, in *THE DISABILITY STUDIES READER* 308, 309 (Lennard J. Davis, Ed., 4th ed., 2013) (quoting Black disabled activist, Johnnie Lacy) (“I believe that Black Americans see disability in the same way that everybody else sees it— [perceiving people with disabilities as] worthless,

race in disability emphasize the role of the Black Panthers in the San Francisco 504 sit-ins in 1977 – a formative moment in the disability-rights movement’s history.<sup>29</sup> For more than three weeks, people with disabilities occupied the offices of the Department of Health Education and Welfare (HEW) to protest HEW Secretary Joseph Califano’s delay in issuing regulations to enforce section 504 of the Rehabilitation Act of 1973, which prohibited recipients of federal dollars from discriminating on the basis of disability.<sup>30</sup> Blind Black activist Donald Galloway worked at the Center for Independent Living in the early 1970s. He described the support Black leaders gave to disability-rights activists, particularly in the San Francisco Bay area. This included support from the Black Panther Party.<sup>31</sup>

## 2. *Disability as Race*<sup>32</sup>

Craig Konnoth advances an interesting descriptive and normative claim in his recent work.<sup>33</sup> He describes a shift from social constructivism at the heart of

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mindless – without realizing that this is the same attitude held by others toward Black Americans. This belief, in effect cancels out the black identity they share with a disabled black person, both socially and culturally, because the disability experience is not viewed in the same context as if one were only black, and not disabled. Because of this myopic view, I as a black disabled person could not share in the intellectual dialogue viewed as exclusive to black folk. In other words, I could be one or the other but not both.”).

29. See FRED PELKA, *WHAT WE HAVE DONE: AN ORAL HISTORY OF THE DISABILITY RIGHTS MOVEMENT* 220–222; 268–74 (2012); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 67 (1993).
30. Lukin, *supra* note 28, at 310.
31. *Id.*; see also Susan Schweik, *Lomax’s Matrix: Disability, Solidarity, and the Black Power of 504*, 31 *DISABILITY STUD. Q.* (2011) (arguing that the Black Panther Party did much more than “bring[] food” for the 504 protestors; they adopted a “‘frame extension’ from their previous struggles to the arena of disability rights protest,” in particular, because of Bradley Lomax, “a disabled Panther and a Panther disability rights/independent living movement leader”); Eileen AJ Connelly, *Overlooked No More: Brad Lomax, a Bridge Between Civil Rights Movements*, *N.Y. TIMES* (July 20, 2020), <https://www.nytimes.com/2020/07/08/obituaries/brad-lomax-overlooked.html> [<https://perma.cc/37JH-HWCH>] (discussing Brad Lomax, a Black wheelchair user with multiple sclerosis, as a bridge between the Black Panther Party and the disability-rights movement in the 1970s and describing, for example, how, in 1975, Lomax approached Ed Roberts, the director of the Center for Independent Living in Berkeley and suggested that the Center for Independent Living join forces with the Black Panthers to assist disabled Black people in East Oakland).
32. A more appropriate label for this section is “Medicalization” as Race. For purposes of continuity with the other section headers, however, I use “disability” in quotations.
33. Craig Konnoth, *Medicalization and the New Civil Rights*, 72 *STAN. L. REV.* 1165, 1171 (2020).



civil rights to a proliferation of what he calls “medical civil rights,”<sup>34</sup> or legal rights (and entitlements) that flow from one’s individual medical status.<sup>35</sup> Whereas disability and race scholars tend to reject (with good reason) medical diagnostic-driven approaches to rights given the troubled history of medicine as a means of pathologizing difference, Konnoth argues that this coercion is no different from the highly assimilationist antidiscrimination frameworks operating right now.<sup>36</sup> He encourages us to embrace rather than shun medicalization because “problems framed as medical are relatively insulated from political tides,” problems such as poverty, food insecurity, lack of access to health insurance or care, or homelessness (issues that disproportionately affect people of color).<sup>37</sup> In other words, framing racial-justice issues in medical terms (around specific diagnoses) offers, on balance, according to Konnoth, a fruitful direction for an already problematic body of civil-rights law.

### 3. *Race as Disability*

Kimani Paul-Emile has framed race as disability to draw on the remedial benefits of disability antidiscrimination law to mitigate racial injustice.<sup>38</sup> More specifically, Paul-Emile focuses her attention on Title II of the Americans with Disabilities Act as a tool for addressing discriminatory state action against Black people such as material inequities in education and policing practices like racial profiling and stop and frisk.<sup>39</sup> Paul-Emile’s framing of blackness as disability emphasizes the ideological and remedial ineffectiveness of “race law,” or civil-rights laws and Supreme Court equal-protection jurisprudence focused on race.<sup>40</sup> She argues for greater use of disability law, not only remedially, but also ideologically

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34. *Id.* at 1171; see also Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 177 (2020) (arguing that “[t]he advancement of the medical civil rights approach reflects the tension between the older model of disability advocacy and the newer disability rights activism”); Allison K. Hoffman, *How Medicalization of Civil Rights Could Disappoint*, 72 STAN. L. REV. ONLINE 165, 166 (2020) (responding to Konnoth’s article and arguing that, on balance, the medicalized frame will cause more harm than good).

35. Konnoth, *supra* note 33, at 1172.

36. *Id.* at 1173-74.

37. *Id.* at 1128, 1134-37.

38. See Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 296 (2018) (“[B]lackness in the United States has an independent disabling effect distinct from the effects of socioeconomic status . . . . Understanding blackness as disabling, however, brings to the fore a surprising new approach to addressing discrimination and systemic inequality that has been hiding in plain sight: disability laws.”).

39. *Id.* at 297, 352-60.

40. *Id.* at 293, 296. However, disability law is not without its flaws.

to “capture the historical meaning and contingencies of race in ways that race law does not allow.”<sup>41</sup>

Importantly, this framework fits within the broader comparative subordination frame precisely because it too treats race and disability as distinct.<sup>42</sup> Paul-Emile’s argument is not that a disproportionate number of Black people are also people with disabilities who might meet the statutory definition and thus be entitled to disability legal remedies for discrimination under Title II. Instead, Paul-Emile posits that Black people might argue that blackness itself meets the threshold definition of disability under the Americans with Disabilities Act: “a physical or mental impairment that substantially limits one or more major life activities.”<sup>43</sup>

Ann C. McGinley and Frank Rudy Cooper seek to expand the concept of intersectionality to include race and disability by organizing the protected group around shared experiences of childhood trauma. They draw on *P.P. v. Compton Unified School District (Compton case)*,<sup>44</sup> to argue that cases seeking remedies for structural racial discrimination might reframe these cases as a disability cases.<sup>45</sup> The *Compton* case held that school districts had an affirmative responsibility to serve the majority students of color (57% Latinx, 40% Black, 1% Asian) in the community who were, as a group, subjected to “adverse childhood events” on the basis of violence, poverty, and social determinants of health that produced long-term trauma.<sup>46</sup> Under Title II of the Americans with Disabilities Act, for example, these students met the legal definition of “qualified individual with a disability” and, as a group, had standing to challenge Compton Unified School District’s (CUSD) failure to modify the curriculum and programming (and promote trauma-informed education) to meet the needs of the students.<sup>47</sup> McGinley and Cooper seek a structural remedy for a harm that has led to extended trauma.

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41. *Id.* at 289-99.

42. See Lukin, *supra* note 28, at 309 (quoting Black disabled activist, Johnnie Lacy) (“I also discovered . . . that many African-Americans consider being black as having a disability, and so they didn’t really identify with disability as a disability but just as one other kind of inequality that black people had to deal with.”).

43. Paul-Emile, *supra* note 38, at 328 (citing Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1)(A) (2012)). Paul-Emile goes into greater detail in her paper connecting “blackness” to each element of the legal definition. Thereafter, she moves to the substantive discussion of whether Title II of the ADA could offer structural reforms when race law cannot. *See id.* at 331-60.

44. 135 F. Supp. 3d 1126 (C.D. Ca. 2015).

45. See Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Dis/ability, and Class*, 47 *FORDHAM URB. L.J.* 293, 297 (2020).

46. *Id.* at 297-98.

47. *Id.* at 306-07, 307 n.53.

They use the concept of “intersectional cohort” that would, according to their argument, advance group-based claims through class actions recognizing that the students of color in these communities are similarly situated and mutually affected by adverse childhood events, namely trauma.<sup>48</sup>

While McGinley and Cooper deploy an intersectional lens to their analysis of trauma and race, their main engagement with disability studies and legal scholarship is to think of disability law as a remedy and a hook. In this sense, this type of scholarship may fall more squarely in the “race as disability” camp.

### B. Intersectionality<sup>49</sup>

Kimberlé Crenshaw’s groundbreaking work on intersectionality unearthed critical voids in antidiscrimination law and policy related to race and gender.<sup>50</sup> Yet, but for a handful of exceptions, discussions of race and disability do not use a critical-intersectional lens to interrogate inequities or a central subject of legal

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48. *Id.* at 296, 304 (“Recognizing poor, Black or Latinx students in violence-torn urban environments as a class in cases like *Compton* is appropriate because of their shared self-identities and identity performances in response to their common attributed identities, especially given that their claim is backed by the science of ACEs.”).

49. There are many areas of legal scholarship that apply a critical-race lens and discuss disability less directly including race and medicine in reproductive justice, eugenics, genetic discrimination, criminal law, and psychiatric disabilities. See MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020); DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011) [hereinafter ROBERTS, *FATAL INVENTION*]; DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 *FORDHAM URB. L.J.* 615 (2016); Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 *BERKELEY J. CRIM. L.* 1 (2010); Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 *OHIO ST. L.J.* 425 (2001).

50. See Kimberlé 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 of Race and Sex*]; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241(1991) [hereinafter Crenshaw, *Mapping the Margins*]; see also Regina Austin, *Sapphire Bound!*, 1989 *WIS. L. REV.* 539, 542 (arguing that “minority feminist legal scholar[s] . . . must document the material legal existences of minority women” and “explore their concrete problems and needs, many of which are invisible even to minority lawyers because of gender and class differences”); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 *B.U. L. REV.* 713, 719 (2015) (“[O]ften spoken of the ‘twin immoralities’ of ‘Jim and Jane Crow,’ [Pauli Murray] theorized black women’s singular experience in language that anticipated the concept Crenshaw would term ‘intersectionality’ a quarter-century later.”).

inquiry.<sup>51</sup> Crenshaw argued that our system of protected classifications artificially siloed a person's identity such that one could be a woman or Black person but, at least categorically for antidiscrimination purposes, not both.<sup>52</sup> Importantly, Crenshaw surfaced a central insight, that intersectional discrimination operated independent of its components such that the experience of subordination could not simply be captured by any one classification. Intersectionality, in that vein, also became a tool to highlight the experiences of women of color who are not represented discretely in the discourse of either feminism or antiracism.<sup>53</sup> Crenshaw's work "highlights the need to account for multiple grounds of identity when considering how the social world is constructed."<sup>54</sup>

Other scholars like Dorothy Roberts – an expert in race, gender, health law, and bioethics – have studied the construction of race through medicine.<sup>55</sup> Roberts directly challenges the use of race as natural biological division. Race, according to Roberts, is an invention that justifies political inequality by pretending it is a natural, scientifically supported, division of human beings.<sup>56</sup> Roberts critiques the emphasis on comparative subordination to the exclusion of intersectionality:

Disability rights discourse largely has failed to encompass racism, and anti-racism discourse largely has failed to encompass disability. The disability rights and civil rights movements are often compared as two separate struggles that run parallel to each other, rather than struggles that have constituents and issues in common, even as both people of color

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51. For one exception, see *BLACKNESS AND DISABILITY: CRITICAL EXAMINATIONS AND CULTURAL INTERVENTIONS* (Christopher M. Bell ed., 2011). Other literature on intersectionality in the context of gender and disability or disability and sexual identity has offered interesting parallels and points of departure. See, e.g., ROBERT MCRUER & MICHAEL BÉRUBÉ, *CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY* (2006); ROBERT MCRUER, *An Austerity of Representation; or, Crip/Queer Horizons: Disability and Dispossession*, in *CRIP TIMES: DISABILITY, GLOBALIZATION, AND RESISTANCE* 55 (2018); Rosemarie Garland-Thomson, *Misfits: A Feminist Materialist Disability Concept*, 26 *HYPATIA* 591 (2011).
52. See Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 50, at 139-40 (arguing that some experience compounded subordination because they exist at the intersections of multiple marginalized identities).
53. *Id.*
54. Crenshaw, *Mapping the Margins*, *supra* note 50, at 1245.
55. See, e.g., Dorothy E. Roberts, *Is Race-Based Medicine Good for Us?: African American Approaches to Race, Biomedicine, and Equality*, 36 *J. L., MED. & ETHICS* 537 (2008).
56. See ROBERTS, *FATAL INVENTION*, *supra* note 49, at 4 ("Like citizenship, race is a political system that governs people by sorting them into social groupings based on invented biological demarcations. Race is not only interpreted according to invented rules, but, more important, race *itself* is an invented political grouping. Race . . . is a political category that has been disguised as a biological one.").

and people with disabilities share a similar experience of marginalization and “othering” and even though there are people of color with disabilities . . . .<sup>57</sup>

Returning to Ribet’s work, she seeks to import disability studies into CRS to show how it can challenge and “dismantl[] White supremacy.”<sup>58</sup> Ribet examines how race and disability are both concepts that are socially constructed. She also highlights the interconnectedness of race and disability by people who hold both identities.<sup>59</sup> Disability and race are both channels through which “normalcy or ideal physicality” are funneled.<sup>60</sup> Ribet, working from a disability-studies position, asks why disabled people are marginalized in the first place, rather than solely analyzing why people of color are treated like disabled people.<sup>61</sup> This move centers not only those people of color who may not have impairments but are treated like they do, but it also includes people of color with impairments and those with severe disabilities.

Notably, much of the work on intersectionality in the context of race and disability has taken place in the realm of disability studies and not disability law. Yet disability legal scholars have begun to embrace intersectionality and, in doing so, apply it selectively to discrete issues disproportionately affecting disabled people of color such as special education, policing, and prison abolition work.

For example, disability studies scholars, Subini Ancy Annamma, David Connor, and Beth Ferri coined the term “DisCrit” in 2013: a dual analysis of race and ability they apply to education.<sup>62</sup> Annamma, Connor, and Ferri believe that racism and ableism work in ways that validate and reinforce each other, and for

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57. Dorothy Roberts & Sujatha Jesudason, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 10 DE BOIS REV.: SOC. SCI. RES. ON RACE 313, 317 (2013) (citing Pokempner & Roberts, *supra* note 49).

58. Ribet, *supra* note 17, at 212.

59. *See id.* at 211. This intersectionality approach is similar to that of Crenshaw.

60. *Id.* at 212-13 (describing “White deviance” as being explained by disability while “the constructions of People of color are correspondingly synonymous with abnormalcy, dangerous deviance or (infectious) moral sickness,” all of which bleed into “disabled”). This idea is a part of my aesthetics theory explored in Part III, *infra*.

61. *See id.* at 213.

62. *See* Subini Ancy Annamma, David Connor & Beth Ferri., *Dis/ability Critical Race Studies (Dis-Crit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 1, 4 (2013) (acknowledging that recent scholars have taken more valuable intersectional approaches and identifying the following: “(1) anticategorical frameworks that insist on race, class, and gender as social constructs/fictions; (2) intracategorical frameworks that critique merely additive approaches to differences as layered stigmas; and (3) constitutive frameworks that describe the structural conditions within which social categories in the above models are constructed by (and intermeshed with) each other in specific historical contexts”).

students of color, the two do not exist apart from each other.<sup>63</sup> Similar to other intersectional thought leaders in disability studies, they use DisCrit as a lens to show how race and ability are “intertwined in terms of identity.”<sup>64</sup> One of the tenets of DisCrit is that it “values multidimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on.”<sup>65</sup> Furthermore, DisCrit scholars show that the tension that exists between disability studies and critical race theory comes from a longstanding history of treating Black Americans as disabled to justify denying the group rights — a history that has caused Black Americans especially to push back against voluntarily identifying as disabled.<sup>66</sup>

Other scholars use critical race theories to understand disability-specific issues where people of color are more present. Brianne Dávila, for example, applies an intersectional lens to special education and Latinx students. “Disability,” she argues, “does not simply replace race . . . but represents a complex interplay of race and disability in the lives of Latina/o students in special education.”<sup>67</sup> Applying intersectionality to data collection, Beth Ferri and David Connor comment that data on “‘racial inequalities in special education’ . . . is not sufficiently disaggregated to fully tease out how the problem of overrepresentation impacts students differently across disability category, race, class, gender, and school context.”<sup>68</sup> In part, this tracks a general belief that race and ability overlap and provide a useful way for sorting students.<sup>69</sup>

Collectively, these scholars link disability and race through the prevalence of disability *within* race (that is, race is the dominant lens),<sup>70</sup> but also note that the

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63. *See id.* at 2-5.

64. *Id.* at 8.

65. *Id.* at 11.

66. *See id.* at 18-21; *see also* Jamelia N. Morgan, *Toward a DisCrit Approach to American Law*, in *DISCRIT EXPANDED: INQUIRIES, REVERBERATIONS & RUPTURES* (Annamma, Connor, Ferri, et al. forthcoming 2021) (describing Annamma et al.’s work on intersectionality and advocating for its application to particular areas of law).

67. Brianne Dávila, *Critical Race Theory, Disability Microaggressions and Latina/o Student Experiences in Special Education*, 18 *RACE ETHNICITY & EDUC.* 443, 454 (2014).

68. Beth A. Ferri & David J. Connor, *Special Education and the Subverting of Brown*, 8 *J. GENDER RACE & JUST.* 57, 61, 63 (2004).

69. *See id.* at 63.

70. *Id.* at 61-62 (“In fact, black students remain the most over-represented of all groups, especially in the more subjective disability categories of MR, ED, and LD (learning disability) in nearly every state.”).

relationship between the two is not absolute: “For example, racial disparities are not apparent in less subjective categories, such as blindness or deafness.”<sup>71</sup>

Liat Ben-Moshe advances perhaps the most Crenshaw-consistent approach to disability-race intersectionality in legal scholarship right now. Ben-Moshe’s scholarship, like that of other scholars writing in the intersectional (race-disability) space, examines education as a site of critical analysis.<sup>72</sup> Ben-Moshe explains the need for an intersectional analysis, in part, comes from the disability-rights movement’s adoption of the civil-rights blueprint as a model for antidiscrimination efforts.<sup>73</sup> As a result, Ben-Moshe aligns her work with a growing disability-justice movement rooted in intersectionality.<sup>74</sup> Ben-Moshe applies intersectionality not only to education but also to family law<sup>75</sup> and, most recently,

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71. *Id.* at 63. Amanda Merkwae also treats intersectionality as a gateway through which to enter the discussion of discipline of disabled students of color in school: “Compared with their White peers, Black students are ‘twice as likely to be identified as ED [emotionally disturbed] and 2.7 times as likely to be identified as CI [cognitively impaired]’ and Native American students are ‘nearly twice as likely to be identified as SLD [specific learning disability] and 60% more likely to be identified as CI.’” Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 156 (2015) (quoting Amanda L. Sullivan & Aydin Bal, *Disproportionality in Special Education: Effects of Individual and School Variables on Disability Risk*, 79 EXCEPTIONAL CHILD. 475, 476 (2013)). The diagnoses might be valid, due to socioeconomic circumstances that impact brain development during an early age, or may be misapplied, due to race-based cultural or linguistic differences. *Id.*
72. Liat Ben-Moshe & Sandy Magaña, *An Introduction to Race, Gender, and Disability: Intersectionality, Disability Studies, and Families of Color*, 2 WOMEN GENDER & FAMILIES COLOR 105, 107 (2014) (referencing “the term ‘DisCrit’ to denote the need for connecting critical race theory with disability studies to highlight the interdependent, intersecting, and mutually constitutive aspects of race and disability in education and beyond”); see also DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA 165 (Liat Ben-Moshe, Chair Chapman & Allison C. Carey, eds., 2014) (examining the ways in which disability and race operate in carceral spaces as mutually constitutive: prison is at once “detrimental for people with disabilities and responsible for creating new experiences of disabilities”).
73. *Id.* at 108; see Harris, *supra* note 13, at 916–31 (2019) (discussing “the logic of disability law” based on the civil-rights blueprint centering integration).
74. SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER 10–20 (2d ed. 2019) (discussing the origins of disability justice from the shortcomings of disability rights); see also *id.* at 68 (“Simultaneously, disability justice is ultimately about re-imagining and reinventing all of our relationships with one another, as well as with our own bodyminds. It is about transforming the very material and psychic frameworks that designate some bodies and minds as normative, valuable, and acceptable and others as deviant, worthless, or dangerous.”).
75. *Id.* at 108–09. Family law offers an interesting point of analysis because non-Western cultural approaches do not always align with the assumption that disabled people “should be independent from their families” as opposed to the interdependence sometimes celebrated in “more collective[ist] cultures[s].” *Id.*

the carceral state (prisons and psychiatric hospitals).<sup>76</sup> She posits that, like disability, race should be viewed as a fluid and changing construct not limited to color but also culture.<sup>77</sup> Importantly, Ben-Moshe notes the lack of representation of race in disability scholarship while commenting that

scholars performing intersectional analysis . . . may not choose to identify as disability studies scholars; they see these issues as part of their overall racial, cultural, and sometimes marginalized experiences – an example of how disability identity is experienced in different ways by persons with disabilities who are not white and middle class.<sup>78</sup>

Other disability law scholars have started to wrestle with intersectionality in specific areas of disability law.<sup>79</sup> First, Katherine Pérez argues that disability justice requires a union of critical race and disability studies.<sup>80</sup> She offers an example of such union: the history exclusion of disabled people likely to become “public charges.” This disproportionately affects people with disabilities who may need access to economic or healthcare supports to work independently, making the regulation itself a self-fulfilling prophecy and grounds for exclusion.<sup>81</sup>

Second, Jamelia Morgan, another disability law scholar – who, like Ben-Moshe and Pérez, actively engages the tenets of disability justice – applies an intersectional lens to policing. Morgan refers to “disability in public.”<sup>82</sup> These the-

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76. See LIAT BEN-MOSHE, *supra* note 72; DISABILITY INCARCERATED (Liat Ben-Moshe, Chris Chapman & Allison C. Carey, eds. 2014); Liat Ben-Moshe, *Dis-epistemologies of Abolition*, 26 CRITICAL CRIMINOLOGY 345 (2018).

77. Ben-Moshe & Magaña, *supra* note 72, at 110.

78. *Id.* at 111; see also Ashmeet Kaur Oberoi, Fabricio Balcazar, Yolanda Suarez-Balcazar, F.L. Fredrik G. Langi & Valentina Lukyanova, *Employment Outcomes Among African American and White Women with Disabilities: Examining the Inequalities*, 3 WOMEN GENDER & FAMILIES COLOR 144 (2015) (showing how white disabled women and black disabled women experience employment discrimination differently because of race).

79. See, e.g., Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195, 200 (2020) (discussing the shared subordination of Black women and disabled women in reproductive justice – the right not to have a child, the right to have a child, and the right to parent that child).

80. See, e.g., Katherine Pérez, *A Critical Race and Disability Legal Studies Approach to Immigration Law and Policy*, UCLA L. REV.: L. MEETS WORLD (Feb. 2019), <https://www.uclalawreview.org/a-critical-race-and-disability-legal-studies-approach-to-immigration-law-and-policy> [<https://perma.cc/L998-YHTC>].

81. *Id.*

82. Jamelia Morgan, *Policing Under Disability Law*, 73 STAN L. REV. (forthcoming 2021) (manuscript at 13-23) (on file with author).



ories of policing non-normative bodies, behavior, and minds, however, are fundamentally aesthetic and affective theories of disability.<sup>83</sup> That is, the social model of disability alone does not address the roots of why policing and officer training, for example, are unlikely to make meaningful dents in sedimented biases that have shaped law-enforcement institutions from their onset. In fact, as I have argued elsewhere, while the social model of disability underwrites disability antidiscrimination statutes, at least aspirationally, it does not explain the aesthetic-affective responses people experience in the presence of race and disability and, therefore, is incomplete as a descriptive or normative approach.<sup>84</sup>

## II. EVALUATING CURRENT APPROACHES TO RACE AND DISABILITY

Part II analyzes existing approaches to race and disability in three steps. First, I synthesize the current literature and extract three key lessons in the aggregate. Second, I take these lessons and revisit Neli Latson's story to illustrate their analytical value and highlight the differences between the two meta-approaches (comparative subordination and intersectionality). Third, I identify three critical omissions in the current literature to facilitate the development of a more comprehensive intersectional approach to race and disability.

### A. From Comparative Subordination to Intersectionality

Overall, the comparative subordination literature on race and disability takes as its starting point existing antidiscrimination laws and seeks to maximize its utility. For example, the *disability and race* subcategory maintains existing siloes in law – codified in statutes or common law as protected classes. Scholars compare disability with race and gender discrimination to illustrate the structural and institutional roots across areas. The goal of this type of scholarship is to mine individual classes – race, gender, disability, sexuality – for similarities that can be used to cross-pollinate and generate remedial theories – such as anti-subordination – to unite protected classes within existing doctrinal constraints.

Comparative subcategories such as *disability as race* further entrench medical frames historically used to marginalize racially disfavored groups. Scholars in this camp encourage the use of medical frames, in part, to access public benefits and social supports to mitigate the effects of structural racism on communities of color. Over one million Black Americans, for example, reside within a half mile

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83. Harris, *supra* note 13, at 945-46 (offering policing as an ideal example of where race and disability intersect to create aesthetic-affective discrimination) and 950-63 (reframing disability discrimination in aesthetic-affective terms).

84. See *infra* Part III (discussing the benefits of aesthetic theories).

of natural gas facilities and, the toxic emissions from those facilities place them at higher risks of cancer.<sup>85</sup> Rates of asthma are also high in Black communities;<sup>86</sup> in fact, one study by the Clean Air Task Force and the NAACP found that Black children in these communities experience 138,000 asthma attacks, translating into roughly 101,000 lost school days each year.<sup>87</sup> The harm itself is the existence of disability in this subcategory; in the example above, the harm is asthma among Black children. Asthma diagnoses, therefore, may offer families of children with asthma greater access to scarce economic supports or public benefits such as Supplemental Security Income (SSI), or monthly cash assistance, as well as, in some states, simultaneous access to Medicaid as health insurance.<sup>88</sup> Race, however, continues to be the dominant lens to define the problem (i.e., how do we solve the problem of race discrimination) and “disability” (more accurately medical diagnosis), a means to an end. As a result, this utilitarian approach rooted in welfare law does not recognize or advance disability as a valued socio-political identity axis.

By contrast, the *race as disability* comparative subcategory recognizes the limitations of the current antidiscrimination framework for race discrimination and seeks to reframe the harm. Unlike the previous framework (*disability as race*), however, this approach emphasizes the role of disability civil-rights laws, specifically, rather than public welfare as remedies for race discrimination. Reasonable accommodations and the removal of access barriers become ways to mitigate race discrimination, under this approach, particularly in the context of public programs and services such as carceral spaces (jails, prisons, detention centers) and education.

Intersectionality takes one major step that distinguishes it from the scholarship in the comparative subordination category: both race and disability operate as constructed identities and mutually reinforcing elements for critical reflection. This scholarship, however, while developing within specific issue areas, lacks a

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85. Lesley Fleischman & Marcus Franklin, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities*, NAACP & CLEAN AIR TASK FORCE 4 (2017), <https://www.catf.us/wp-content/uploads/2017/11/catf-rpt-naacp-4.21.pdf> [<https://perma.cc/2KM6-XRMC>].

86. “Approximately 13.4% of African American children have asthma (over 1.3 million), compared to 7.3% of white children.” *Id.* at 8.

87. *Id.* at 4.

88. See *Understanding Supplemental Security Income SSI and Other Government Programs – 2021 Edition*, SOC. SECURITY ADMIN., <https://www.ssa.gov/ssi/text-other-ussi.htm#:~:text=In%20most%20States%2C%20if%20you,for%20Medicaid%20with%20another%20agency> [<https://perma.cc/8PXV-7QYC>] (“In most States, if you are an SSI recipient, you may be automatically eligible for Medicaid; an SSI application is also an application for Medicaid.”).

unifying theory of discrimination that captures the specific nature of the subordination, its methods and forms, and, consequently, specific ways to address it.<sup>89</sup>

*B. Three Key Lessons from Existing Scholarship*

Three key lessons emerge from the current scholarship on race and disability. First, disability and race are more similar than dissimilar when understood in tandem. That is, both are socially constructed categories manipulated by state and private actors to maintain socio-political and economic power by framing both categories in the language of biological determinism.

Second, legal scholars outside of disability law have increasingly reached for disability remedies in the absence of viable curative pathways in the existing civil-rights canon.<sup>90</sup> These limitations are clear, yet selective deployment of disability law creates a tension between short term gains (receipt of benefits) and the negative effects of long-term framing (disability is an individual deficit and tragedy). For example, Rabia Belt and Doron Dorfman have argued that the “medicalization of civil rights” while perhaps fruitful for individuals seeking income supports through access to welfare benefits, may, in the long-term, undermine broader normative gains of the disability movements (disability rights, disability justice) to move away from biological frames of disability.<sup>91</sup>

Third, the emergence of Disability Justice as a movement and critical frame is a contemporary example of intersectionality.<sup>92</sup> Organically grown from the experiences of people with multiple marginalized identities, disability justice is a powerful antisubordination lens that “marks a point of departure rather than a destination.”<sup>93</sup> That is, Disability Justice is a movement away from disability-rights frames; it is about the process of reframing more than any one end product. Much like intersectionality, therefore, the intentionality of centering historically marginalized voices itself is transformative, much more than any one static

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89. See *infra* Section II.C.

90. BELT & DORFMAN, *supra* note 34, at 176 (“Disability law seems seductive. Despite the general parsimoniousness of U.S. welfare benefits, disabled people can receive tax breaks, financial payments, and health care. Disability accommodations and modifications oblige employers, government programs, and purveyors of public accommodations to provide remedies to the mismatch between people’s disabilities and their services and programs.”).

91. *Id.* at 181.

92. SINS INVALID, *supra* note 74, at 10–20 (discussing the origins and meanings of “disability justice” and its relationship to the disability-rights movement); see also Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 570 n.157 (2021) and accompanying text (discussing the birth of Disability Justice as an alternative model).

93. SINS INVALID, *supra* note 74, at 10.

by-product. The following Section returns to Neli Laton's story to consider contemporary approaches and these three core lessons.

*C. Application of Existing Approaches to Neli Latson's Experience*

How do existing approaches to race and disability help us understand Neli Latson's experience? First, consider a comparative-subordination approach that, separately, applies a CRS lens and a critical disability lens. Using a CRS lens, we can see the structural racism operating throughout—from the phone call to the police that triggered the series of events to the lengthy sentence imposed and likely his treatment in the detention facility that relied on restraint and seclusion to control Latson.<sup>94</sup> Documentation over the last few years highlights the disproportionate impact “concerned citizens” calls to police have on people of color, especially Black Americans, for “existing while Black.”<sup>95</sup> Studies on the exercise of prosecutorial discretion reveal that prosecutors—who also happen to be predominantly white<sup>96</sup>—disproportionately charge people of color for similar conduct relative to white people.<sup>97</sup> The effects of systemic racism may also affect the

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94. See Marcus, *supra* note 1.

95. See, e.g., Chan Tov MacNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 337-41 (2019) (cataloguing recent incidents of innocuous behavior by people of color that triggered phone calls to the police including “sitting in Starbucks; playing golf; eating at a Waffle House; sleeping in university common rooms; eating in university class rooms; making purchases; returning purchases; smoking cigarettes; moving into apartments; leaving apartments; going for walks; doing their jobs; eating in restaurants; barbecuing; going to the gym; attending funerals; using too many or the wrong coupons; swimming in pools; playing basketball; canvassing for political reelection; doing community service; mowing the lawn; sheltering from the rain; getting into their cars; sitting in their cars; not listening to a neighbor’s problems; walking their dogs; wearing costumes; wearing a bandana; and selling bottled water on a hot summer’s day” (citations omitted)).

96. See Katherine J. Bies, Darryl G. Long Jr., Megan S. McKoy, Jimmy S. Threatt & Joshua D. Wolf, *Diversity in Prosecutors’ Offices: Views from the Front Line*, STAN. CRIM. JUST. CTR. 8-9 (2016), <https://law.stanford.edu/wp-content/uploads/2015/07/Diversity-Case-Studies-Final-3.12.16.pdf> [<https://perma.cc/MRU4-CDAC>] (discussing the racial composition of District Attorney Offices in California and showing that even when selecting for those offices with the largest percentages of non-white prosecutors, the range of white prosecutors was still between 53% and 81%).

97. See Timothy Williams, *Black People Are Charged at a Higher Rate than Whites. What if Prosecutors Didn’t Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html> [<https://perma.cc/8YP4-J72C>]. Williams describes the experience of Michael Smith, a twenty-three-year-old Black American man in the Bay Area. Smith was “riding a train in San Francisco when a white man told him that he smelled bad and should move away from him.” *Id.* The two men exchanged words and Smith, ultimately, was restrained by police officers who accused Smith of assaulting them.

length of the sentence imposed and how corrections officers interact with Latson relative to white detainees.<sup>98</sup> For example, police and corrections officers may have perceived Latson's behavior as unruly and insolent, motivating them to exercise control over Latson's "non-compliant" Black body.<sup>99</sup>

Applying a critical disability lens, we see other sources of subordination at work. First, Latson's failure to give the officer his name when asked and subsequent flight, taken together, are common manifestations of a "fight or flight" response associated with people on the autism spectrum, particularly when they are afraid.<sup>100</sup> Second, the state of Virginia appears to have denied Latson his right under Title II of the Americans with Disabilities Act to be placed in the most integrated setting appropriate.<sup>101</sup> Virginia's Department of Behavioral Health and Disability Services offered to help the facility holding Latson determine what supports and modifications would be appropriate; however, "this offer was

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The District Attorney's Office "charged Smith with seven counts, including battery on a police officer and resisting arrest." *Id.*

98. See, e.g., *Written Submission on Racial Disparities in Sentencing*, AM. CIV. LIBERTIES UNION (Oct. 27, 2014), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_o.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_o.pdf) [<https://perma.cc/MQK5-ZJ2R>] ("Sentences imposed on Black males in the federal system are nearly 20 percent longer than those imposed on white males convicted of similar crimes."). While not specific to Virginia, the Commonwealth has recognized the existence of disparate treatment in sentencing and, and Governor Northam assembled a Commission to look at racial injustice in the criminal-justice system. See Press Release, Office of the Governor, Governor Northam Signs Executive Order Establishing Commission to Examine Racial Inequity in Virginia Law (June 4, 2019), <https://www.governor.virginia.gov/newsroom/all-releases/2019/june/headline-840916-en.html> [<https://perma.cc/6DW5-X68C>]; The Commission to Examine Racial Inequity in Virginia Law, *Identifying and Addressing the Vestiges of Inequity and Inequality in Virginia Laws*, GOVERNOR VA. (Nov. 15, 2020), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/2020-Commission-Report---Inequity-and-Inequality-in-Virginia-Law.pdf>
99. See David M. Perry & Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability*, RUDERMAN FAM. FOUND. 12, 14-15, 39 (2016), [https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability\\_final-final.pdf](https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf) [<https://perma.cc/Q9UN-Y5WD>] (discussing Latson's story and police response to "non-complaint" behavior by individuals with disabilities generally).
100. See Marcus, *supra* note 1.
101. See 42 U.S.C. § 12132 (2018) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); 28 CFR § 35.130(d) (2021) ("A public entity shall administer services, programs, and activities in the *most integrated setting appropriate* to the needs of qualified individuals with disabilities.") (emphasis added); 28 CFR § 35, App. B (2021) (defining the "most integrated setting appropriate" as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible").

inexplicably refused” and, instead, the prison placed Latson in solitary confinement, one of the most restrictive settings possible in the prison setting.<sup>102</sup> Relatedly, the Department of Justice entered into an *Olmstead* settlement agreement with Virginia in 2012 to ensure that people with intellectual and developmental disabilities did not experience “unnecessary institutionalization” when less restrictive community-based placements might be more appropriate.<sup>103</sup>

A comparative-subordination approach, therefore, analyzes Latson’s story through two separate lenses—critical race and disability—and then identifies what insights each critical lens offers into the discrimination experienced by Latson. But such an approach is unable to fully capture how Latson experiences the harm *and* how the different community and institutional actors in this story see him. Also, when we turn to remedies, a comparative-subordination approach falls short because current legal frameworks require disaggregation of the harms experienced by Latson.<sup>104</sup> Latson, for example, may file a complaint in federal court under Title II of the Americans with Disabilities Act to address the *Olmstead* enforcement claims discussed above. He may file federal (and perhaps state) constitutional claims such as cruel and unusual punishment or failure to provide safety and minimal habilitation. He may have due process claims as well. The point is that it would be difficult to fully compartmentalize the harm and certainly none of the legal options available reflects his actual experience.

Using an intersectional, disability-justice approach certainly helps locate the compounded harms experienced by Latson as an autistic Black man. Intersectionalists might argue, for instance, that Latson’s blackness and disability place him at heightened risks for extreme treatment and marginalization. The fact that Latson was a tall Black male teenager at the time, much like Tamir Rice, likely affected how the officer responding to the community call perceived Latson’s manifestations of his autism.<sup>105</sup> For example, fifty-five percent of disabled Black

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<sup>102</sup>. Northam Letter, *supra* note 2, at 2.

<sup>103</sup>. Settlement Agreement at 3, *United States v. Virginia*, No. 3:12-cv-00059-JAG (E.D. Va. Jan. 26), [https://www.justice.gov/sites/default/files/crt/legacy/2012/01/26/va-ada\\_settlement\\_1-26-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/01/26/va-ada_settlement_1-26-12.pdf) [<https://perma.cc/AJ6Z-9UD8>]; see *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (“Unjustified isolation, we hold, is properly regarded as discrimination based on disability.”).

<sup>104</sup>. This legal analysis does not depend on damages, which would raise questions about sovereign immunity under the Eleventh Amendment.

<sup>105</sup>. See Finn Gardiner, Manuel Díaz & Lydia X. Z. Brown, *Charles Kinsey’s Story Is About Race. It’s Also About Ableism*, SOJOURNERS (July 27, 2016), <https://sojo.net/articles/charles-kinseys-story-about-race-its-also-about-ableism> [<https://perma.cc/K4MP-NXW9>].

people are arrested by age twenty-eight, a risk that is compounded for Black disabled men.<sup>106</sup> Further disaggregation by disability shows that “people with autism spectrum disorders are seven times more likely to interact with police over their lifetimes, compared with people without a cognitive disorder.”<sup>107</sup>

Other research shows that police officers have a skewed perception of the criminality of young Black people relative to young white people.<sup>108</sup> “[P]olice interactions are part of a broader set of social practices that reconstitute black boys so that they barely have currency as troubled teens, let alone children in need of protection. Rather, they are seen as putative black men – or black men in waiting – who deserve discipline, social control, and punishment.”<sup>109</sup>

Similarly, a young Black man seated on the grass in front of a library in a white neighborhood may be about race, and the call by the community member may have tipped the first domino. However, Latson’s actions to withhold his name and flee – two behaviors more associated with disability than race – kept the dominos in motion. Consider “the talk” that Black mothers have with their Black children, in particular, Black boys, about interactions with police officers.<sup>110</sup> “The precarious nature of police interactions forces Black parents to disregard the age of their children and implore them to engage in self-monitoring behaviors (e.g., emotional regulation, image management) that are beyond their developmental purview.”<sup>111</sup> Latson’s mother may have had a similar talk with

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106. Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, 107 AM. J. PUB. HEALTH 1977, 1980 (2017).

107. Rebecca Hersher, *For Parents of Young Black Men with Autism, Extra Fear About Police*, NAT’L PUB. RADIO (Aug. 23, 2014), <https://www.npr.org/sections/codeswitch/2014/08/23/342688183/for-parents-of-young-black-men-with-autism-extra-fear-about-police> [<https://perma.cc/H8R9-78WW>].

108. Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?* 51 HARV. C.R.-C.L. REV. 159, 172 (2016).

109. *Id.* at 173. See also Jamelia Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. (forthcoming 2021) (discussing the discriminatory effect of disorderly-conduct laws and the ways they are utilized to police behavior in ways that reinforce “racism, sexism, and ableism”).

110. See Abril Harris & Ndidiamaka Amutah-Onukagha, *Under the Radar: Strategies Used by Black Mothers to Prepare Their Sons for Potential Police Interactions*, 45 J. BLACK PSYCH. 439, 440 (2019) (“The unique socialization process that occurs between Black mothers and their children incorporates learning about societal norms while accounting for implicit and explicit racism.”); Alicia Montgomery, *Autism, Like Race, Complicates Almost Everything*, NAT’L PUB. RADIO (Apr. 12, 2014), <https://www.npr.org/sections/codeswitch/2014/04/12/301814519/autism-like-race-complicates-almost-everything> [<https://perma.cc/2J6P-XTFS>] (describing her experience as a Black mother of a Black son on the spectrum: “[T]here’s that fear—the one that I used to think only black parents really understood—that you could do *everything* right, spend every dime, minute, ounce of energy on your child, and it still might not be enough”).

111. Harris & Amutah-Onukagha, *supra* note 110, at 441.

him about how he would be perceived and what to do. However, in the moment, under stress, his fight or flight impulse won out.

#### *D. What's Missing?*

Existing analytical approaches to race and disability offer important insights into discrimination at the intersection of the two identity axes. However, we are missing some critical points of nuance. This nuance matters because we want to understand the nature of discrimination at the intersection, who it affects, and how it operates. Such a diagnostic assessment then best positions us to develop legal and policy solutions to respond to the structural issues driving the bus. A comparative-subordination lens captures only one form of subordination at a time (race or disability and how one can inform the other), one identity axis, to the exclusion of the other. Intersectionality, as currently constructed, while shifting the analytical center to ask how race and disability together affect Latson's experience, does not fully address three issues: people at the intersections, tensions at the intersections, and the aftermath of intersectional discrimination.

##### *1. People at the Intersections*

Current approaches apply a one-dimensional approach to disability that does not account for the specific relationship people of color have to disability. We can think of the intersection of race and disability in at least three ways. First, states and private actors have used disability labels to subordinate people of color who have no impairment to maintain institutions and practices of white supremacy. These are people of color without any actual physical or mental impairment who are nevertheless "regarded as" disabled and disenfranchised accordingly.<sup>112</sup>

Second, disability can be a direct by-product of structural racism. Consider here the most literal forms of states creating impairments through wars, police violence, incarceration, as well as through the less direct but nonetheless powerful social determinants of health such as barriers to meaningful access to health care, education, employment, housing, wealth accumulation, and political power. Similarly, environmental justice concerns show the ways environmental hazards fall disproportionately on people of color, resulting in short- and long-

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<sup>112</sup>. A particularly unique innovation of the ADA is the "regarded as" prong of the definition of disability. This offers a remedy for disability discrimination to people without disabilities or those whose disabilities do not meet the statutory definition of disability but who nonetheless experience discrimination based on a perception that the person is disabled. 42 U.S.C. §§ 12102(1)(C), (3)(A), (B) (2018).



term disability.<sup>113</sup> The Flint, Michigan water crisis is such an example.<sup>114</sup> People of color in this category may have a difficult relationship with disability. If a person's respiratory conditions, for example, can be traced to the failure of a landlord to remove asbestos, or intellectual disability can be traced to failure to remove lead-based paint, how do they negotiate their relationship with disability?<sup>115</sup>

Third, and relatedly, race and disability can mean both. Some people of color are also disabled with chronic illnesses and impairments that may or may not need accommodation. These individuals may have different disability origin stories not necessarily tied to the social determinants of health. These differences matter, for example, for how the individual experiences harm and what legal remedies might make them whole if they experience individual or group discrimination. From a movement perspective, these distinctions matter too with respect to whether individuals will embrace or reject disability identity (or something in between).<sup>116</sup>

These three groups appear to be dissimilar at first according to their relationship with disability (no impairment, congenital impairment that may or may not be a direct result of state violence and discrimination). However, understanding the connections and nuance allows us to identify the unifying thread – subordination and the social model of disability. The people regarded as disabled are labeled as such because of the historical association of blackness with disability and disability as an accepted proxy for incapacity or deficiency. A second category of disabled people of color may acquire disability because of structural inequities in the allocation of resources or, for example, poor housing located on or near environmental toxins. With respect to the third and overlapping category, peo-

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113. See SINS INVALID, *supra* note 74, at 95 (“As survivors of environmental injury, we are planetary whistle blowers; we are the canaries in the coal mine that our planet is becoming after 500 years of colonist destruction and capitalist expansion.”).

114. See Michael Martinez, *Flint, Michigan: Did Race and Poverty Factor into Water Crisis?*, CNN (Jan. 28, 2016), <https://www.cnn.com/2016/01/26/us/flint-michigan-water-crisis-race-poverty/index.html> [<https://perma.cc/UX7Q-2AB2>]; Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315> [<https://perma.cc/V7GB-Y9W7>].

115. See, e.g., Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007) (challenging the conventional view in torts law that disability undermines one's enjoyment in life and citing social science research to paint a different picture than the one advanced by plaintiffs' lawyers in tort cases); Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383 (describing the discrepancy between the “outside” view of disability as a tragedy and the “inside” view that reflects the same levels of happiness that nondisabled people have).

116. See Eyer, *supra* note 92, at 557, 567.

ple with disabilities, according to the social model, are disabled by society's responses to their different capabilities. Integrating race and disability should not mean the elimination of one identity; that is, any intersectional theory must see both race and disability theories as critical to understanding what happens with multiply marginalized individuals and groups. While existing theories may advance the social model as a diagnostic or remedial lens, they do not capture how people's relationships to disability (direct, familial, none, congenital, acquired) affect their willingness to engage with or claim disability as a socio-political identity.

## 2. *Tensions at the Intersections*

Conversations about disability among the three groups listed above – people of color without disabilities treated as disabled; people of color who become disabled because of state action (or inaction), and disabled people of color with longer histories of disability (congenital, early acquisition) – are complicated by the difficult relationship between state subordination of people of color by and through disability as well as the use of state institutions – medicine, police, prisons.

For example, some parts of the civil-rights movement for racial justice who sought to portray Black people as “just like” White people, reached for public images to explicitly counter existing narratives of incapacity and incompetence.<sup>117</sup> Discussions of disability within communities of color, according to some activists, could undermine broader civil-rights advocacy and were to be avoided. For example, in 1986, Bob Kafka, the founder of American Disabled for Attendant Programs Today (ADAPT)<sup>118</sup> requested assistance from legendary civil-rights icon, Rosa Parks, to lead ADAPT's protest of Detroit's Public Transit Association.<sup>119</sup> The account of this story states that Rosa Parks declined the request because she did not want to “embarrass the black political establishment of her hometown, including Coleman Young, the city's first African American mayor.”<sup>120</sup> Another example of the tension between racial justice and disability relates to the political alignment with rhetorical libertarian and fiscal conservative positions that stressed the value of disability rights as moving people from

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117. See Lukin, *supra* note 28, at 312 (“[A]s postwar civil rights agitations grew, the stakes surrounding public portrayals of blackness also increased.”).

118. See ADAPT, <https://adapt.org> [<https://perma.cc/GL6G-XVZL>].

119. See Jennifer L. Erkulwater, *How the Nation's Largest Minority Became White: Race Politics and the Disability Rights Movement, 1970-1980*, 30 J. POL'Y HIST. 367, 368 (2018).

120. *Id.*

welfare rolls to financial independence.<sup>121</sup> This discursive move, in some ways, pitted disability rights against those conversations in the late 1980s around Black Americans and welfare dependence that Congress would respond to with comprehensive welfare reforms in 1996.<sup>122</sup> A third example, Black American novelist and activist, John Oliver Killens, tried to convince literary giant, Ralph Emerson, not to include Black, disabled veterans with psychiatric disabilities in his work precisely because of a fear of entrenchment of associations between disability and race.<sup>123</sup>

Consider the ways disability sometimes operates within communities of color through the loss of actor Chadwick Boseman to colon cancer.<sup>124</sup> The tributes to Boseman poetically (and rightfully) honored his power, talent, and dignity.<sup>125</sup> Yet, they also almost consistently glorified (and noted) – as an example of this fortitude and dignity – his private battle to conquer his disability without public attention and without requesting assistance. He gracefully painted a visual homage to Black icons, Thurgood Marshall, Jackie Robinson, and Marvel Comics’ fictional King T’Challa (also known as the Black Panther), while privately managing chemotherapy and living with a chronic illness.<sup>126</sup> This is not

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121. *Id.* at 369. This included watching “bi-partisan” coalitions form around disability rights while civil-rights laws narrowed in hostile courts and Congressional committees. Recall as well that many of the sponsors of the Americans with Disabilities Act were veterans and longstanding members of the Republican Party, like Bob Dole, with aggressive views on racial-justice initiatives. LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST U.S. MINORITY ITS RIGHTS* 8, 100-114 (2015) (describing the bipartisan group of sponsors of the ADA); *id.* at 82 (quoting disability rights leader Justin Dart on the challenge of shrinking civil rights overall at the time when disability advocates worked to advance disability rights: “The day of civil rights is gone; there will never be another civil rights law passed”).

122. See Vanessa D. Johnson, *Impact of Race and Welfare Reform on African American Single Mothers’ Access to Higher Education*, 40 J. BLACK STUDS. 1041, 1041-42 (2010) (discussing stereotypes of Black Americans on welfare in the 1980s and 1996 welfare-reform legislation).

123. Lukin, *supra* note, 28, at 312.

124. Reggie Ugwu & Michael Levenson, ‘Black Panther’ Star Chadwick Boseman Dies of Cancer at 43, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/08/28/movies/chadwick-boseman-dead.html> [<https://perma.cc/CXM3-UD7A>].

125. See, e.g., Adrian Matejka, *Variations on a Lead: For Chadwick Boseman*, N.Y. TIMES, <https://www.nytimes.com/2020/09/04/movies/chadwick-boseman-adrian-matejka.html> [<https://perma.cc/L8HL-8Q3S>]; Barack Obama (@BarackObama), TWITTER (Aug. 29, 2020, 7:39 AM), <https://twitter.com/BarackObama/status/1299718379440398337> [<https://perma.cc/5BED-CJTV>] (“To be young, gifted, and Black; to use that power to give them heroes to look up to; to do it all while in pain – what a use of his years.”).

126. See *id.*

to say that Boseman was required to disclose his chronic illness to anyone; rather, the operative question is whether Boseman had any choice in the matter.<sup>127</sup>

Two important facts emerged after Boseman's death. First, Chadwick Boseman was a Black man with a disability.<sup>128</sup> Second, Boseman could not be Black *and* disabled *and* a superhero. It is hardly a stretch to say that had Boseman come to the table with an apparent disability (for example, if he were a wheelchair user), or disclosed a less apparent one, studios would likely have passed on making him Hollywood's leading man.<sup>129</sup>

When news of Boseman's death went viral on Twitter, a hostile debate ensued in response to a post by the Black Disability Collective that Chadwick Boseman was a Black man with a disability.<sup>130</sup> Some people of color responded with contempt chastising the Black Collective and others for calling him "disabled," a perceived slight to his strength and legacy. In response, the Black Disability Collective tweeted: "So many of y'all hate disabled people so much that you're deeply uncomfortable with Chadwick Boseman being referred to as disabled and his experiences being discussed through a disability lens. Cancer is a disability. Unpack your discomfort with this."<sup>131</sup>

This tension played out in the largely parallel development of the racial justice and disability-rights movements.<sup>132</sup> The independent-living movement, for

127. See Jasmine E. Harris, *Taking Disability Public*, 160 U. PA. L. REV. (forthcoming 2021) (manuscript at 38-49) (on file with author) (arguing that existing privacy incentives in disability law and society undermine the broader normative shifts required to advance disability justice).

128. Boseman's colon cancer likely met the legal definition of disability under the Americans with Disabilities Act: "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1) (2018); see U.S. EQUAL EMP. OPPORTUNITY COMM'N, CANCER IN THE WORKPLACE AND THE ADA (May 15, 2013), <https://www.eeoc.gov/laws/guidance/cancer-workplace-and-ada#> [<https://perma.cc/FC5M-JD9H>] ("As a result of changes made by the ADAAA, people who currently have cancer, or have cancer that is in remission, should easily be found to have a disability within the meaning of the first part of the ADA's definition of disability because they are substantially limited in the major life activity of normal cell growth or would be so limited if cancer currently in remission was to recur.").

129. Ari Saperstein, *The Challenges of Being Disabled in Hollywood*, WALL ST. J. MAG. (July 28, 2020) (discussing the existence of disability discrimination in Hollywood), <https://www.wsj.com/articles/disabled-actors-hollywood-ada-30-11595939824> [<https://perma.cc/F3WN-XFU4>].

130. Black Collective (@BlackDisability), TWITTER (Aug. 28, 2020, 7:29 PM), <https://twitter.com/BlackDisability/status/1299534563815948294> [<https://perma.cc/N9AE-SFMP>].

131. Black Collective (@BlackDisability), TWITTER (Aug. 28, 2020, 10:59 PM), <https://twitter.com/BlackDisability/status/1299587426231431173> [<https://perma.cc/FNL9-EBFZ>].

132. There were certainly important overlaps, in part, because people who participated in both movements shared both identities; however, for the most part, disability rights progressed as a "white" movement and was understood to be different from "race." See Erkulwater, *supra* note 119, at 272-73 ("The [early campaigns of disability organizations in the 1930s through the 1950s] were waged largely, though not exclusively, by white men demanding access to a labor market where race dictated the jobs available, the working conditions, and the prevailing

example, made significant headways with white disabled people after its founding in Berkeley, California, but had more trouble with outreach into Black American communities. Disabled Black activist, Johnnie Lacy has explained this difficulty, in part, as a result of different cultural conceptions of community and what “independence” means.<sup>133</sup>

### 3. *The Aftermath of Intersectional Discrimination*

Consider the compounded effects of structural race and disability subordination on the opportunities available for people at the intersections after they experience the effects of structural discrimination in their lives. For example, in the case of Neli Latson, advocates successfully negotiated a conditional pardon in 2015 from former Virginia Governor, Terry McAuliffe and transferred him to a less restrictive setting, a stepdown program in Florida.<sup>134</sup> On June 21, 2021, Neli Latson received a full pardon from Governor Ralph Northam.<sup>135</sup>

Even with a full pardon, an apology, and access to ongoing community supports, Latson’s life will never be the same. According to Latson’s mother, Lisa Alexander:

Every aspect of [Neli’s] life is supervised . . . . He’s not able to live in society. He’s not able to get a job and have a girlfriend. He hasn’t had an opportunity to learn how to drive, to get a license. . . . These are rites of passage, natural progressions you get to experience as a human being. All of those things were stripped away from him.<sup>136</sup>

Whereas Latson once showed potential for independent, community living, sources report that his continued trauma and fears make him more dependent on assistance from others.<sup>137</sup>

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wages.”). Tensions arose between the goals of the independent living movement calling for a move away from dependence on government benefits towards a rights-based model of self-sufficiency and inclusion and the broader civil-rights movement for racial justice seeking to enhance public income supports. *Id.* at 273.

<sup>133</sup>. Lukin, *supra* note 28, at 310.

<sup>134</sup>. Northam Letter, *supra* note 2, at 2-3.

<sup>135</sup>. Theresa Vargas, *Neli Latson Is—Finally—Free. It Only Took 11 years, Two Governors and a National Conversation About Race and Disability*, WASH. POST (June 23, 2021, 4:23 PM EDT), [https://www.washingtonpost.com/local/neli-latson-black-autistic-free/2021/06/23/1024d4e4-d446-11eb-a53a-3b5450fdca7a\\_story.html](https://www.washingtonpost.com/local/neli-latson-black-autistic-free/2021/06/23/1024d4e4-d446-11eb-a53a-3b5450fdca7a_story.html) [https://perma.cc/T43R-KGUZ].

<sup>136</sup>. Vargas, *supra* note 1.

<sup>137</sup>. *Id.*

### III. TOWARD AN AESTHETICS OF RACE AND DISABILITY

Part III offers an aesthetics lens to give meaning and nuance to intersectional analyses about disability and race and further advance a disability-justice framework. I build on my prior theoretical work around aesthetics, specifically, the importation of aesthetics theory into antidiscrimination law to help us understand the nature and process of subordination because of disability.<sup>138</sup>

#### A. Defining Aesthetics

I have argued in other work that one of the reasons that disability norms have not shifted as Congress intended is that “[d]isability legal theories do not account for the ways in which the *aesthetics of disability* mediate rights and the integrative ideal.”<sup>139</sup> The aesthetics of disability are those “visible sensory and behavioral markers that trigger particular aesthetic and affective judgments about marked individuals.”<sup>140</sup> Contact theory—the core driver of law’s focus on integration as remedial—specifically, does not account for the ways that socially constructed markers of disability—for example, assistive devices like wheelchairs or canes, non-normative speech and behaviors<sup>141</sup>—trigger what I describe as an “aesthetic-affective” process that makes it difficult for nondisabled people to overcome deeply rooted and seemingly intuitive aesthetic judgments.<sup>142</sup>

Aesthetics theories developed in the context of art and philosophy, two disciplines concerned, in part, with theorizing human embodiment. Classically focused on artworks, recognition of the beautiful and aspirations of the sublime, contemporary scholars of aesthetic theories—especially critical aesthetics and everyday aesthetics—challenge the notion of a single, universal standard of

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<sup>138</sup>. See Harris, *supra* note 13.

<sup>139</sup>. *Id.* at 897.

<sup>140</sup>. Harris, *supra* note 13, at 897 (“Disability rights law, like other areas of antidiscrimination law, relies on contact theory and its chosen prescription, integration. The contact hypothesis posits that increasing opportunities for interactions between diverse groups can, under the right conditions, foster greater acceptance.”). See also Thomas F. Pettigrew & Linda R. Tropp, *Allport’s Intergroup Hypothesis: Its History and Influence*, in *ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT* 263-73 (John F. Dovidio, Peter Glick & Laurei A. Rudman eds., 2005) (discussing the evolution of Gordon Allport’s intergroup contact hypothesis in social psychology, its preconditions, and its progeny). Allport opined that four positive features of intergroup contact could reduce prejudice between groups: “(a) equal status between the groups, (b) common goals, (c) intergroup cooperation, and (d) the support of authorities, law or custom.” *Id.* at 264.

<sup>141</sup>. See Harris, *supra* note 13, at 953-57 (offering a chart of examples of aesthetic markers of disability—both appearance-based and behavioral-based).

<sup>142</sup>. *Id.* at 931.

beauty.<sup>143</sup> They also confront the ways in which these standards developed by a few for a few, much in the way that critical legal scholars argue that the normative baseline underwriting law and its institutions was established by a few white men, for a few white men. On the disability front, aesthetics offer not only a space to question (and trace) existing norms of beauty but also how bodies function, perform, and move in the world, as well as which capabilities are privileged and why. The primary aesthetic values associated with disability are beauty, health, and effortlessness.<sup>144</sup>

Aesthetic judgements about bodies<sup>145</sup> can subordinate, oppress, or reinforce existing structures of hegemony. Attraction, repulsion, anger, and disgust are all ways of responding to bodies. The structural roots of what we see and feel in response to certain aesthetic markers reflect well-sedimented values. They serve “a disciplinary function.”<sup>146</sup> Those unable to meet those standards are “condemned” and incur penalties in areas “unrelated to attractiveness: worse education, parental care, and healthcare; diminished employment prospects and earnings; harsher punishment in schools during childhood and in the criminal-justice system in adulthood; and reduced likelihood of receiving needed help, among many others.”<sup>147</sup>

### B. The Benefits of Aesthetic Theories

Aesthetic theories can help us unpack intersectional discrimination. A comparative-subordination lens remains useful to understand how concerns about preserving white control over power and wealth shaped the meaning of both race

143. See, e.g., YURIKO SAITO, *EVERYDAY AESTHETICS* 11 (2007) (discussing the classic hierarchies that limit aesthetics to Western fine art or the experience of art more broadly while neglecting “other dimensions of our aesthetic life that we engage in almost daily, in forming preferences, judgments, design strategies, or courses of action”). Critical aesthetics question the classic normative focus of this interdisciplinary area on fine art with the goal of creating a sublime, though distant, relationship with a work of fine art. Everyday aesthetics is one type of critical aesthetic scholarship that shifts our attention to everyday experiences and objects.

144. See Harris, *supra* note 13, at 959. Disability scholars such as Tobin Siebers and Rosemarie Garland-Thomson have discussed the ways art and literature manifest aesthetic values such as beauty and health. See, e.g., TOBIN SIEBERS, *DISABILITY AESTHETICS* 1-20 (2010) (introducing and defining the concept of “disability aesthetics” as an “attempt to theorize the representation of disability in modern art . . . [a refusal] to recognize the representation of the healthy body—and its definition of harmony, integrity, and beauty—as the sole determination of the aesthetic.”); ROSEMARIE GARLAND THOMSON, *EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE* (1997).

145. By “body” I mean the physical, mental, and behavioral.

146. Sherri Irvin, *Introduction: Why Body Aesthetics?*, in *BODY AESTHETICS* 1 (Sherri Irvin, ed. 2016).

147. *Id.* at 1-2.

and disability. Segregation and invisibility in both the race and disability contexts were state sponsored attempts to move that which society deemed “ugly” or “disgusting” and hide it away to appease white fears. Law and legal institutions adjudicated aesthetic markers and imposed penalties on those deviating from well-guarded norms. For example, early local ordinances known as the “ugly laws” regulated the visibility and movement of those bearing socially and politically disfavored marks – criminality, poverty, physical or mental disabilities.<sup>148</sup> Contemporary local ordinances<sup>149</sup> regulating homelessness in public spaces share many of the same substantive goals of disciplining non-normative bodies and minds and protecting the public from discomfort and, perhaps, from triggering existential fears and dread.<sup>150</sup>

Incorporating aesthetic theories into current discussions of intersectionality and disability justice adds to the literature in the following ways:

1. *Helps Us Understand the Aesthetic-Affective Process Taking Place*

Encounters with and interpretation of the body are central goals of disability studies. More accurately, disability studies interrogates the “idea of the norm . . . [as] less a condition of human nature than . . . a feature of a certain kind of society.”<sup>151</sup> How we perceive other bodies and minds – including which

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148. See SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 3-5 (2009).

149. See *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, NAT'L CTR. ON HOMELESSNESS & POVERTY 7-9 (2014), [https://nlchp.org/wp-content/uploads/2019/02/No\\_Safe\\_Place.pdf](https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf) [<https://perma.cc/2PCC-LEB>] (describing laws that criminalize homelessness). In Santa Cruz, California, for example, the National Law Center on Homelessness and Poverty reported that 83% of homeless people in the area lack shelter or housing options. *Id.* at 8. Yet, Santa Cruz has strict punitive codes that impose criminal and civil penalties for camping, lying down or sleeping in public places or vehicles. See SANTA CRUZ MUNICIPAL CODE, ch. 6.36, § 6.36.060 (“Any campsite established in the city in violation of this chapter is declared to be a public nuisance, and the chief of police, . . . upon a determination that such a campsite constitutes an immediate threat to the health, safety or welfare of persons in the city, including persons using the campsite, is authorized and empowered to remove any such campsite forthwith.”).

150. See Theri A. Pickens, *Blue Blackness, Black Blueness: Making Sense of Blackness and Disability*, 50 AFR. AM. REV. 93, 98-99 (2017) (“It is a hallmark of disability experience that one is sequestered away (often in institutions and private homes). This is of course a different kind of segregation from Jim Crow, but the two have an odd similarity in that they attempt to publicly erase instantiations of disability and blackness so that those who fear, dislike, or misunderstand them do not have to come into contact with them.”).

151. Lennard J. Davis, *Introduction: Normality, Power, and Culture*, in *DISABILITY STUDIES READER 1* (Lennard J. Davis ed., 4th ed., 2013). Davis describes the shift from an Aristotelian focus on the ideal man to a statistically constructed “normal” man. *Id.* This emphasis on the natural existence of a “norm” implies that a majority of people should be part of the norm and, by definition, non-normative bodies of people with disabilities are deviations from a norm, and,



ones we notice<sup>152</sup>—are central questions of inquiry for critical race and disability studies scholars.<sup>153</sup> Disability-studies scholar Rosemarie Garland Thomson’s conception of “staring” directly relates to critical aesthetician and philosopher, George Yancy’s “white gaze.” Yancy describes deeply rooted histories of structural discrimination baked into the acts of staring or white gazing as “a violent process . . . not an atomic or an inaugural event that captures, in an unmediated fashion, the bareness, as it were, of ‘objects.’”<sup>154</sup>

Perceptions of whiteness as a universal norm set up not only blackness as nonnormative, but also disability. Yancy explains that deviance from whiteness, therefore, “the Black body as ersatz, aesthetically deformed, morally disabled (think here of the curse of Ham or Canaan), excessive, monstrous, disgusting, that is *distasteful*.”<sup>155</sup> Whiteness, accordingly, creates the normative baseline by establishing proper mannerisms, comportment, acceptable aesthetic and emotional responses to certain images and stimuli, triggers for images and emotions defining “threat” and danger, and even acceptable behavioral and sensory responses.<sup>156</sup> Contrary to theories of scientific racism, “whiteness” is not a fixed experience but a “perceptual practice . . . that constructs the Black body as an object of disgust and fear” when, for example, a black person simply enters what are considered white spaces and “disrupt[s] the harmony and symmetry.”<sup>157</sup>

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by extension, those who possess bodily differences are deviants. “An important consequence of the idea of the norm is that it divided the total population into standard and nonstandard subpopulations.” *Id.* at 3. This standardization offered a ready tool of disenfranchisement that connects disability with other historically marginalized groups such as Black, Indigenous, and Latinx people, immigrants, women, and sexual minorities.

152. See GARLAND-THOMSON, *supra* note 144, at 6 (2009); *id.* at 18 (“Social expectations shape our ocular sorting processes, making certain appearances and actions unusual and cataloguing people as alien or native, extraordinary or ordinary. Zora Neale Hurston wrote, for instance, that she became ‘colored’ only when she was surrounded by white people.”).

153. See, e.g., ROSEMARIE GARLAND-THOMSON, *STARING: HOW WE LOOK* 6 (2009) (describing “staring” as “[a] flare up when we glimpse people who look or act in ways that contradict our expectations.”); George Yancy, *White Embodied Gazing, the Black Body as Disgust, and the Aesthetics of Un-Suturing*, in *BODY AESTHETICS* 243 (Sherri Irvin, ed., 2016).

154. *Id.* at 243.

155. *Id.* at 245.

156. *Id.* (defining the scope of proper reactions including: “the activation of sweat glands, breathing patterns, heart rate, auditory and olfactory responses”).

157. Irvin, *supra* note 146, at 8 (citation omitted).

2. *Demonstrates the Role of Law in Defining Aesthetic Markers of Race and Disability as Tools of Subordination*

Laws have created and reinforced aesthetic markers of race and disability. Legal historians Ariela Gross and Alejandro de la Fuente discuss the ways that early colonists “created race through law.”<sup>158</sup> This process of “[l]egal race making,” as they describe it, was a distinctive feature of the evolution of slavery in the United States. “[T]he law constituted “‘blacks’ as social outcasts, conflating their social existence with enslavement” such that “blackness, rather than enslavement, [became] the mark of degradation,” and outlasted slavery.<sup>159</sup>

Aesthetics allow us to understand compounded effects of racism and ableism and interdependence as diametrically opposed to “whiteness,” competition, and independence. The marks of blackness (and to some degree, race more broadly), at times, mapped onto disability and vice versa. “If, in the dominant culture’s vocabulary, blackness signified subhumanity, it also came to signify congenital ‘disability,’ another form of “‘difference” that further marked black bodies for expulsion.”<sup>160</sup> One example of law’s early construction of blackness as disability is military enlistment that prohibited “lunatics, idiots, and Negros.”<sup>161</sup> “[I]t was imperative that the black body and the black ‘mind’ be portrayed as uninjured by the injuring institution of slavery in order to disprove one of the main antiblack arguments that surfaced after emancipation—that slavery had made blacks ‘unfit’ for citizenship.”<sup>162</sup>

State institutions and actors policed the line between whiteness and blackness through rhetorical and legal declarations of the biological differences and inferiority of Black people that made them unable to manage participation in democratic governance and civic duties. Medical and scientific “proof” then became the means of marking people.<sup>163</sup> Scientists and thought leaders at some of the nation’s top universities went to great lengths to make blackness a concrete, identifiable, and thus, biological category including dissecting black bodies and announcing such biological markers as cranial measurements proved Black people had smaller skulls and, thus, lower intellect, poor moral barometers, and

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158. ALEJANDRO DE LA FUENTE & ARIELA GROSS, *BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA* 15 (2020).

159. *Id.* at 15-16.

160. JENNIFER C. JAMES, *A FREEDOM BOUGHT WITH BLOOD: AFRICAN AMERICAN WAR LITERATURE FROM THE CIVIL WAR TO WORLD WAR II* 13 (2007).

161. Lukin, *supra* note 28, at 311-12 (quoting JAMES, *supra* note 160, at 15).

162. JAMES, *supra* note 160, at 15.

163. See Erkulwater, *supra* note 119, at 371 (“Between 1880 and 1920, theories of scientific racism equated whiteness with physical fitness, mental rigor, and genetic superiority.”).

were “not of the same blood” as white people.<sup>164</sup> “Whiteness,” therefore, became synonymous with health, “physical fitness, mental rigor, and genetic superiority.”<sup>165</sup>

These constructed markers of blackness—“constructed” in that they had no inherent meaning or value—became “legitimate” justifications for restrictions on access to public spaces, travel, as well as the denial of legal personhood.<sup>166</sup> One interesting historical insight offered by de la Fuente and Gross is the framing of physiological and moral inferiority provided a seemingly “neutral” and fact-based justification for slavery and close management of Black people. In this way, the arguments for slavery relied more on manufactured physiological differences than on politics or philanthropy.<sup>167</sup>

Tying freedom of movement, economic livelihood, and socio-political participation to race rather than status heightened the stakes for legal recognition as white (and able-bodied) identity as opposed to Black (or disabled) identity.<sup>168</sup>

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164. DE LA FUENTE & GROSS, *supra* note 158, at 178 (explaining the lengths white southerners went to show that Black people were “a different species, or that they had degenerated to such a degree that they were biologically different and hopelessly handicapped”); *see also id.* at 179–80 (citing John Calhoun’s speech to Congress in 1837 where he claimed that there are “two races of different origin, and distinguished by color, and other physical differences, as well as intellectual are brought together”).

165. Erkulwater, *supra* note 119, at 371.

166. *See, e.g.,* FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 129 (2012) (describing how race is not a biological marker or category, but rather a political category that has “staggering biological consequences” because of the effects of social inequality on health); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 3–4 (2016) (explaining scientific racism and biological determinism as the roots of segregationist and assimilationist ideologies); DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 61 (2d ed. 2017) (“White Americans had for over two centuries developed an understanding of the races as biologically distinct groups, marked by inherited attributes of inferiority and superiority.”); THE TROUBLE WITH POST-BLACKNESS 15 (Houston A. Baker & K. Merinda Simmons, eds. 2017) (“My own conclusion is one that suggests there is no a priori blackness, no blackness removed or separate from the discourses—and imbedded interests—naming it. When we think of code-switching and racial performativity as innocuous or objective terms used to describe certain actions within a universe of personal experience, we forget that all descriptions are situated and decidedly not neutral.”); Heather M. Kleider-Offutt, Alesha D. Bond & Shanna E. A. Hegerty, *Black Stereotypical Features: When a Face Type Can Get You in Trouble*, 26 CURRENT DIRECTIONS PSYCH. SCI. 28, 28 (2017) (discussing empirical research on stereotypical “Black faces” with a “combination of facial features including full lips, wide nose, dark eye color, coarse hair, and dark complexion”).

167. DE LA FUENTE & GROSS, *supra* note 158, at 179 (internal citation omitted). In this vein, slavery was advanced as a positive good precisely because it offered structure and a path to “civilization not ‘through a process of freedom’ but rather ‘through long periods of servitude.’” *Id.* at 179.

168. *Id.* at 178.

Self-identification did not matter in this story. It was about how courts and communities perceived you.

What evidence became relevant to and probative of whiteness or blackness in trials on racial identity? Aesthetics help us understand how courts and procedural rules allowed people to move across the racial categories. In addition to the “biological” markers of race noted above, litigants relied on the performance of acts of citizenship – serving in a militia, as a witness, or on a jury; voting; or carrying a handgun – associated with whiteness as probative evidence of white racial identity.<sup>169</sup> This move created a bright line between those who performed citizenship (and, thus, were racially “white”) and those who did (or could) not (and, thus, were racially “Black”). As a result, disabled people of color in this schematic offered two axes for civic exclusion – blackness and disability – which were mutually constitutive and reinforcing.

Witnesses offered evidence of appearances and reputation, probative of white racial identity. Performing social acts of whiteness included Black men marrying white women; “associating with white people or black people on a social level;” “attending parties;” and even dancing.<sup>170</sup> Notably, “[b]y deferring to juries, judges allowed evidence of racial performance to become as important to the definition of race as fractions of ancestry were in the statutory law.”<sup>171</sup>

The probative value of the evidence of whiteness was highly gendered. While performances of citizenship lent credence to claims of “white manhood,” women’s whiteness relied on “sexual purity and moral character.”<sup>172</sup> de la Fuente and Gross tell the story of two of the most widely followed racial-identity trials in New Orleans. Two women – Sally Miller and Alexina Morrison – claimed they were “white” and sued for their freedom. Despite a written record that might suggest otherwise, they claimed victory, in part, by advancing evidence of their markers as white women: “beauty, sexual purity, and moral character” such as industriousness and cooperation.<sup>173</sup> Physiological evidence of racial differences – for example, eyes, teeth, or bone structure – could be countered successfully, as Alexina Morrison showed, with a proffer of association with white

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169. *Id.* at 203 (offering examples of identity performances intended to demonstrate one’s ‘whiteness’); see also Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1524-26 (2010) (describing how courts interpreted the Second Amendment’s right to bear arms as inapplicable to disfavored, marginalized populations and regulated the line between citizenship (white) and non-citizenship (non-white)).

170. DE LA FUENTE & GROSS, *supra* note 158, at 200-01, 207.

171. *Id.* at 201.

172. *Id.*

173. *Id.* at 208.

women, including attendance at social events such as dances.<sup>174</sup> The litigation of racial identity in Virginia and New Orleans, for example, “helped to constitute whiteness as a category of social superiority, inseparable from the privileges of citizenship and from gendered notions of purity, beauty, and propriety.”<sup>175</sup>

3. *Creates an Extralegal Means of Public Enforcement of Aesthetic Norms that Reinforces Structural Subordination*

Tying rights and privileges to specific identity categories (directly or indirectly) can (and did) deputize the public to surveil and police non-normative Black and disabled bodies. Directly, local ordinances like the “ugly laws” emboldened private individuals to police non-normativity. Similarly, local ordinances allowed private individuals to police blackness, in part, because of the association of “blackness” with slavery and disenfranchisement. This “empowered whites to stop” Black people “at any time to verify that they were in possession of a written pass to be in the streets of New Orleans or on the ‘public roads.’”<sup>176</sup> Stand your ground laws like the one in Florida that led George Zimmerman to pursue Trayvon Martin are the progeny of these early ordinances and practices.<sup>177</sup> Similarly, local ordinances that encourage private individuals to report alleged abuses of disabled parking, for example, should be viewed in this light.<sup>178</sup>

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174. *Id.* at 209.

175. *Id.* at 217-18.

176. *Id.* at 35.

177. See, e.g., FLA. STAT. § 776.013(1) (2020) (“A person who is in a dwelling or residence in which the person has a right to be has no duty to retreat and has the right to stand his or her ground and use or threaten to use.”); Eyder Peralta, *Trayvon Martin Killing Puts ‘Stand Your Ground’ Law in Spotlight*, NAT’L PUB. RADIO (Mar. 19, 2012), <https://www.npr.org/sections/thetwo-way/2012/03/19/148937626/trayvon-martin-killing-puts-stand-your-ground-law-in-spotlight> [<https://perma.cc/GC3K-7S69>]. See generally CAROLINA LIGHT, A HISTORY OF AMERICA’S LOVE AFFAIR WITH LETHAL SELF-DEFENSE (2017) (explaining the history of stand your ground laws and the role race played).

178. See, e.g., *Disabled Placard Abuse*, CITY SACRAMENTO, <https://www.cityofsacramento.org/Public-Works/Parking-Services/Disabled-Person-Parking/Placard-Abuse> [<https://perma.cc/X2QU-JAKY>] (“To help reduce the misuse of disabled placards, the Sacramento Task Force On Placard ABUSE (STOP ABUSE) was formed on November 12, 1996. STOP ABUSE consists of specially trained Parking Enforcement Officers who investigate complaints on disabled placard abuse and issue misdemeanor citations of the California Vehicle Code when necessary. . . . If you feel someone is misusing a disabled placard, or if you have any information regarding DP placard abuse, you may contact one of the following agencies.”).

4. *Helps Explain the Longevity and Resistance to Change of Racism and Ableism but Also Offers Remedial Paths Forward*

The deep aesthetic and emotional responses suggest that the normative shifts sought by antidiscrimination laws may be more difficult than social-justice proponents understand. Intersectionality locates the harm at the intersection, the person who is both a person of color and disabled. Aesthetics help us understand why, how deep this discrimination runs, what exclusion and reactions might look like at those intersections and then how to think about meaningful remedies.

One practical implication of aesthetics research is to challenge the effectiveness of “awareness” and “training” prescriptions that do not adjust for aesthetic and affective biases. For example, in the context of police reforms to promote racial and disability justice, Devon Carbado and Patrick Block describe a cyclical feedback dynamic such that increased contact or exposure to Black men and awareness of biases may actually reinforce assumptions of Black men as dangerous and “render black boys less cognizable as youth.”<sup>179</sup>

Aesthetics scholars suggest that attention to aesthetic-affective processes can promote change. George Yancy, for example, describes a process of “suturing” and “un-suturing”:

Because white people collectively engage in habituated embodied white racist practices that are mutually reinforcing within the context of socially quotidian spaces, and that are further supported by deeply ingrained and sedimented historical, institutional structures, the assumption that white people can engage in practices of un-suturing solely through the act of intention, as one might change his/her clothes at will, is misleading.<sup>180</sup>

Un-suturing, then, is not easy, automatic or magical, but, instead, requires “‘the active repetition of acts, verbal and nonverbal, that continues to communicate’ the responsibility to engage opportunity for creating fissures in the system, disruptions in one’s mode of being white.”<sup>181</sup>

Because disability is often understood as an aesthetic disruption when it is “visible”<sup>182</sup> or intentionally made hyper-visible through performance, disability itself can create the conditions for un-suturing described by George Yancy, the kind required to disrupt the fraught status quo. This is yet another reason to

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179. Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?* 51 HARV. C.R.-C.L. REV. 159, 173 (2016) (citation omitted).

180. Yancy, *supra* note 153, at 257.

181. *Id.* at 257 (citation omitted).

182. Tobin Siebers, *In/Visible*, in *BODY AESTHETICS* 141-42 (Sherri Irvin, ed. 2016).

center and move out of the way for disabled people of color, in particular, disabled women of color to generate not basic cognitive dissonance that can be swept away, but an aesthetic-affective process that offers an opportunity to grapple with and un-suture ties to white, ableist histories and institutions.

A.W. Eaton offers a non-legal intervention to change the aesthetic-affective process triggered by non-normativity. She argues that “resistance to fat oppression” in society, for example, can take shape in the “Aristotelian strategy of altering bodily taste through the skillful selection and use of representations” – quite literally diverse images in media but also representations in places of power.<sup>183</sup> “[T]he strategy of consciously altering the kinds of representations consumed by an individual or a society can be extended to other forms of appearance-related oppression based in race, disability, age, gender identity and other visible markers of ‘difference.’”<sup>184</sup>

### C. *Application of Aesthetics*

#### 1. *Debunking Police Training as a Panacea for Police Violence*

There are well-known incidents of police violence against people of color who also are people with disabilities – for example, Sandra Bland was a person with psychiatric disability.<sup>185</sup> However, police do not see the disability; rather, police only see a Black or brown body and its movements as threats through the lens of race. Officers, trained and equipped to enforce compliance,<sup>186</sup> have a distorted view of the situation because they have mistakenly applied a flawed lens to the person’s behavior. Yet media reports continue to discuss police shootings of people of color with disabilities through the singular lens of race.

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<sup>183</sup>. Irvin, *supra* note 146, at 3 (describing Eaton’s work); see A.W. Eaton, *Taste in Bodies and Fat Oppression*, in *BODY AESTHETICS* 48-53 (Sherri Irvin, ed. 2016).

<sup>184</sup>. Irvin, *supra* note 146, at 3.

<sup>185</sup>. See Perry & Carter-Long, *supra* note 99, at 7 (noting that police departments were not required before 2014 to report voluntarily on killings, so the authors collected data based on public news stories, available public records, and other sources); see also Kate Masters, *Police Kill Far More People with Guns than Key Federal Data Sources Show*, TRACE (Jan. 17, 2021), <https://www.thetrace.org/2016/03/police-fatal-shootings-federal-data-fbi-cdc> [<https://perma.cc/6K4Q-7CEZ>] (discussing problems in collecting data from federal sources about the police’s use of fatal force).

<sup>186</sup>. See Ibram X. Kendi, *Compliance Will Not Save Me*, ATLANTIC (Apr. 19, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/compliance-will-not-save-my-body/618637> [<https://perma.cc/6ZW7-86RM>] (rejecting the notion that greater compliance with police by people of color will resolve or at least mitigate the violence).

I want to return to Neli Latson. Aesthetics offer at least two unique insights here. First, research on associations between dangerousness and Black men suggests that the “faces of black men attract more visual attention from white respondents than comparable faces of white men” even when those Black men’s faces are neutral without showing signs of anger.<sup>187</sup> Carbado and Block draw the following conclusion from these studies: “a black man who is providing literally no evidence of threat is nonetheless likely to attract the attention of police officers, so ingrained are the stereotypes linking him with threat.”<sup>188</sup> When the community member called the police to report Neli Latson, the person noted that he might have a gun (something ultimately shown to be false).<sup>189</sup> This person and the officer who responded may have looked at Neli sitting on the grass and noticed he was in a predominantly white neighborhood, which may have triggered aesthetic associations of disgust and threat; they responded accordingly. Because Neli Latson did not show the aesthetic markers of disability in an obvious way, the dominant frame of reference was race.<sup>190</sup>

Second, debates about the proper legal and policy solution for police violence are front and center. Some who wish to adopt a more reformist approach to address police violence tout training as an important point of intervention. The aesthetics literature discussed above cautions against a traditional transfer of information as a fix. Would better training have spared Neli Latson from harm? Not necessarily—at least not in the current format. One idea for meaningful training for those who adopt this position that actively engages aesthetic and affective dimensions of race and disability may be the use of technology like virtual reality. This can simulate (or recreate) past encounters between police and communities of color, disability, and those at the intersection and, as a result, trigger sensory and cognitive aspects of observation and action.<sup>191</sup> Only a handful of police departments have started to experiment with virtual reality in their

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187. Carbado & Rock, *supra* note 179, at 168-69.

188. *Id.* at 169.

189. See Vargas, *supra* note 1.

190. Of course, the behavioral response of “fight or flight” is very common among autistic people but was not recognized.

191. I am not adopting a position on the abolition/reformist continuum. Rather, for those advocating training, I invoke the aesthetics literature to show that most training out there today is not going to be effective because it fails to engage the emotional reactions.



training,<sup>192</sup> but these trainings appear to be designed to address biases on the basis of race or disability (like autism or psychiatric disabilities) but not both.<sup>193</sup>

## 2. *Intersectional Race and Disability Discrimination in Employment*

Aesthetics theories also help us better understand intersectional discrimination in other areas such as employment. Consider workplace appearance or grooming codes.<sup>194</sup> In *Cleveland C. v. Department of Defense*, complainants, Black men, worked for the Pentagon Force Protection Agency (PFPA) and had pseudo-folliculitis barbae (PB), a skin condition caused by shaving which is more common among Black men because of their curly hair.<sup>195</sup> One way to manage this condition is to keep a short beard rather than to regularly shave. PFPA had a no facial hair policy; they previously granted medical waivers but then suddenly stopped granting such waivers citing concerns about complainants' abilities to use respirators with their beards even though they never faced an emergency when they needed respirators *and* they "all passed standard respirator fit tests with short beards."<sup>196</sup> Complainants then requested a reasonable accommodation but PFPA denied their requests categorically without conducting individualized assessments.<sup>197</sup>

Pre-2008 Amendments to the Americans with Disabilities Act (ADAAA), plaintiffs alleging discrimination on the basis of PB did not succeed in court and post-2008, there were no EEOC decisions about PB and disability discrimination under the ADAAA.<sup>198</sup> To fully understand the nature of the harm experienced by the complainants, we need to apply an intersectional lens that shows why they faced both race and disability discrimination as Black men with PB subjected to

192. Emma Tucker, Ryan Young & Julia Jones, *With Virtual Reality Police Training, Sacramento Tries to 'Get to a Much Better Place'*, CNN (Apr. 27, 2021), <https://www.cnn.com/2021/04/27/us/virtual-reality-police-training-sacramento/index.html> [<https://perma.cc/P5TT-RZ8J>].

193. Alex Pasternack, *VR Is Training Cops to Empathize with the People They Might Kill*, FAST COMPANY (June 17, 2019), <https://www.fastcompany.com/90353647/police-virtual-reality-empathy-training-mental-health> [<https://perma.cc/45DK-22Q4>].

194. See, e.g., Mayeri, *supra* note 50, at 730 (discussing how intersectionality works in employment and its roots).

195. *Cleveland C. v. Dep't. of Def.*, EEOC Appeal No. 0120170405-0120170414 (2017); see *Developments at the EEOC: P&K Wins Reasonable Accommodation Case*, PASSMAN & KAPLAN (Oct. 16, 2018), <https://www.passmanandkaplan.com/blog/2018/10/developments-at-the-eeoc-pk-wins-reasonable-accommodation-case> [<https://perma.cc/T7EQ-45B4>].

196. *Id.*

197. *Id.*

198. *Id.*

grooming codes based on white men's facial hair. Grooming codes are rooted in aesthetic norms that privilege whiteness.<sup>199</sup>

## CONCLUSION

The growing body of scholarship focused on race and disability signals a new direction for critical legal scholarship. This intersectionality revolution has only scratched the surface in disability law and requires further theorizing. This Essay begins a broader scholarly agenda in this arena. Aesthetics theories of discrimination offer a useful lens to wrestle with both race and disability as a common point of analysis and as a diagnostic lens to understand how society has constructed disability and racial markers and has used them against the other.

I want to share one concluding question, the answers to which can further advance critical race and disability justice: how do we track race-disability (and other axes of) intersectionality in law? Disability data are hard to come by, in part, because of an association of disability with medical data and, thus, health privacy laws.<sup>200</sup> The need for intersectional public data collection and dissemination could not be more important. Racial *and* disability justice are at the forefront of the major issues of the day—police violence, coronavirus, access to healthcare, gig employment, and living wages. Calls for standardized intersectional data collection remain largely unheeded, but the regular collection and public dissemination creates opportunities for future research and public accountability in policing, healthcare, and employment.<sup>201</sup>

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199. See, e.g., D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?* 79 U. COLO. L. REV. 1355 (2008) (arguing that grooming codes around hair are a form of race discrimination).

200. See Harris, *supra* note 127 (manuscript at 21-57) (discussing the ways law and society have treated disability as a private fact subject to public protection and regulation).

201. See, e.g., *id.* (manuscript at 160-65) (arguing for greater public data collection disaggregated to better understand intersectionality); see also Josh Dubrow, *Why Should We Account for Intersectionality in Quantitative Analysis of Survey Data?*, in *INTERSECTIONALITY UND KRITIK: NEUE PERSPEKTIVEN FÜR ALTE FRAGEN* (Vera Kallenberg, Jennifer Meyer & Johanna M. Müller, eds., 2013) (arguing the need for intersectional approaches not only in qualitative but especially in quantitative research); Jenny K. Rodriguez, *Intersectionality and Qualitative Research*, in *THE SAGE HANDBOOK OF QUALITATIVE BUSINESS AND MANAGEMENT RESEARCH METHODS: HISTORY AND TRADITIONS* (2018) (discussing the potential for the development of intersectional qualitative research methods).

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