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Blackness as Disability?

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Recent incidents of police violence against unarmed African-Americans and the lead-filled water of Flint, Michigan are only the most recent reminders of what it means to live as a black person today in the United States. Being black increases the odds of living in poverty, attending failing schools, experiencing housing discrimination, being denied a job interview, being stopped by the police, receiving inferior medical care, living in substandard conditions and polluted environments, being unemployed, receiving longer prison sentences, and, ultimately, having a lower life expectancy. Although we do not think of being black in the United States as disabling, this Article argues that it may be appropriate to do so.

As provocative as it might seem, understanding the black racial designation as disabling can bring new clarity to the reality that racial categories in the United States were created explicitly to serve as a caste system to benefit some and disable others. It also opens up an entirely new approach to how the law should attend to race discrimination and structural inequality: disability law.

This Article uses the doctrinal framework and normative commitments of disability law, notably the Americans with Disabilities Act, as an analytical lens for examining race and as a practical means for addressing discrimination and structural inequality. This model fundamentally reframes race jurisprudence in ways that other antidiscrimination laws—such as the Civil Rights Act of 1964 and equal protection jurisprudence—do not allow. Traditional race jurisprudence focuses on malicious intent and promotes the impractical norm of color-blindness. Disability law, in contrast, does not require a showing of intent and is disability conscious. Indeed, disability law more constructively speaks in the language of reasonable modification and balancing remedial justice against social and economic cost. This legal framework allows for serious engagement with the reality of structural inequality, opening new possibilities for social reform foreclosed by current race jurisprudence, and offers a meaningful legal path to advancing racial equality.

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INTRODUCTION

Is being black in the United States today a disability? This may seem a startling question, but it accurately reflects what black, as a racial designation, is and was designed to be: disabling. Racial categories were created explicitly to serve as a caste system to privilege some and disadvantage others.[1] Within this system, racial minority status was devised to limit opportunity, participation, and achievement, and it continues to do so in many areas of social and economic life.

This is particularly true for black people, whose racial status is disabling in myriad specific ways. To be black means to face increased likelihood, relative to Whites, of living in poverty,[2] attending failing schools,[3] experiencing discrimination in housing,[4] being denied a job interview,[5] being stopped by the police,[6] being killed during a routine police encounter,[7] receiving inferior medical care,[8]

1. *See infra* Section III.A.

2. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014 51–53 (2015).

3. *See generally* Sean F. Reardon et al., *The Geography of Racial/Ethnic Test Score Gaps* (Ctr. for Educ. Pol'y Analysis, Working Paper No. 16-10, 2016), http://cepa.stanford.edu/sites/default/files/wp16-10-v201604.pdf [https://perma.cc/4ZNA-3YSU] (examining racial and ethnic differences as the strongest links to academic achievement gaps among children).

4. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 222 (1st ed. 2006) ("[A]bout half of all Black and Hispanic home seekers experience discrimination in the housing market . . . .").

5. S. Michael Gaddis, *Discrimination in the Credential Society: An Audit Study of Race and College Selectivity in the Labor Market*, 93 SOC. FORCES 1451, 1465 (2015); Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 777 (2009); *see also* Patricia Cohen, *For Recent Black College Graduates, a Tougher Road to Employment*, N.Y. TIMES (Dec. 24, 2014), https://www.nytimes.com/2014/12/25/business/for-recent-black-college-graduates-a-tougher-road-to-employment.html [https://nyti.ms/1B6Obso] (examining the challenges that recent black college graduates face in seeking employment compared to that of their white counterparts).

6. *See infra* Section III.B.

7. *See infra* Section III.B.

8. CHRISTINE BAHLS, HEALTH AFFAIRS, HEALTH POLICY BRIEF: ACHIEVING EQUITY IN HEALTH 2 (2011).

living in substandard conditions and in dangerous and polluted environments,[9] being un- or under-employed,[10] receiving longer prison sentences,[11] and having a lower life expectancy.[12] These increased risks are not fully explained by income: blackness in the United States has an independent disabling effect distinct from the effects of socioeconomic status.[13]

Both race-focused civil rights laws and the Supreme Court's equal protection jurisprudence, which I will refer to as "race law," have not offered effective means of addressing race discrimination and systemic racial inequality. Although race law has been relatively effective at countering intentional discrimination, such as Jim Crow, it has failed to combat the predominant forms of discrimination that harm minority populations: unconscious bias, stereotyping, and structural inequality—inequities rooted within social systems and institutions that create inequality in the absence of intentional discrimination.[14]

As interpreted today, race law tends to require plaintiffs to prove that perpetrators acted with malicious intent,[15] but this misses the most common types of modern discrimination and does not begin to address structural inequality. Similarly, race law now tends to focus on colorblindness, conceptualizing all race-based distinctions as equally harmful, regardless of whether they are intended to perpetuate discrimination or remedy the effects of past discrimination.[16] Together, the intent doctrine and colorblindness render race law radically inadequate to address the discrimination and cumulative disadvantage that impair the lives of black people. Further, even the disparate impact cause of action, although more far-reaching, does not effectively attend to the now dominant modes of race discrimination.[17]

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. Several statutes, most notably the

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9. *See* David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH S115, S116 (2011) ("AHS data indicated that 7.5% of non-Hispanic Blacks reside in moderately substandard housing, compared with 2.8% of non-Hispanic Whites . . . .").

10. Valerie Wilson, *Black Unemployment is Significantly Higher Than White Unemployment Regardless of Educational Attainment*, ECON. POL'Y INST. (Dec. 17, 2015), http://www.epi.org/publication/black-unemployment-educational-attainment/ [https://perma.cc/GN6U-XWJB] ("Over the last 12 months, the average unemployment rate for black college graduates has been 4.1 percent—nearly two times the average unemployment rate for white college graduates (2.4 percent) . . . .").

11. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 108 (2012) (finding that prison sentences of black men were nearly 20% longer than those of white men for similar crimes between 2007 and 2011).

12. *See infra* Section III.B.2.

13. *See infra* Section III.B.1.

14. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (arguing that courts have "failed to develop doctrinal models capable of addressing such phenomena" thus far); *see also infra* Section I.A.

15. *See infra* Section I.B.1.

16. *See infra* Section I.B.2.

17. *See infra* Section I.B.3.

Americans with Disabilities Act (ADA)[18] and the Rehabilitation Act of 1973 (Rehabilitation Act),[19] were drafted to remedy discrimination and structural inequality affecting individuals with disabling conditions. These laws do so by targeting stigma and identifying conditions that "substantially limit a major life activity."[20] Moreover, through "reasonable accommodation" and "reasonable modification" mandates, disability laws shift antidiscrimination measures away from zero-sum battles over liability and blame toward balancing efforts to ensure full equality with any burden such efforts may impose.[21]

This Article focuses on Title II of the ADA (Title II)[22] and Section 504 of the Rehabilitation Act (Section 504),[23] which I will refer to jointly as "disability law." I center these provisions in my analysis because of their scope and the breadth of their remedial mandate: together they bar discrimination against individuals with disabilities by all entities that receive federal funding, as well as all state and local government entities. In contrast to other provisions of the ADA, which focus on particular contexts, such as employment, the sweep of Title II and Section 504 extends beyond discrete areas to address the experience of exclusion and disadvantage in society writ large.

Unlike race law, disability law rarely requires aggrieved parties to show that the exclusion or harm they suffered was intentional—a showing of disparate impact is almost always enough.[24] Rather than focusing on malicious intent, disability law accepts the impact of even neutral actions, policies, and programs, directly confronting the ways in which social structures, institutions, and norms can "substantially limit[]" a person's ability to perform "one or more of the major life activities."[25] Thus, disability law requires that even discrimination based on unacknowledged bias be addressed.

From a remedial perspective, disability law is explicitly disability-conscious and requires that disability be considered when remedies are devised.[26] For example, the ADA's reasonable modifications mandate makes clear that public and private entities must consider disability when removing barriers to access and opportunity.[27] In keeping with this anti-subordination focus, disability law expressly prohibits so-called "reverse discrimination" claims, requires integration, and provides a mechanism for the allocation of remediation costs.[28]

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18. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101–12213 (2012), *amended by* ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008).

19. Rehabilitation Act of 1973 (RA), Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. §§ 701–796 (2012)).

20. *See infra* Part II.

21. *See infra* Part II.

22. ADA, 42 U.S.C. §§ 12132 (2012).

23. *See* RA § 794(a).

24. *See infra* Section II.C.

25. ADA § 12102(2)(A), *amended by* ADAAA; 28 C.F.R. § 35.108(a) (2016).

26. *See infra* Section II.D.

27. *See infra* Section II.D.

28. *See infra* Part II.

Ironically, the entire apparatus of contemporary disability antidiscrimination law better captures the nature of racial inequality than race law and offers a more nuanced and effective way to confront modern race discrimination, including implicit bias and stereotyping.

I use the term "blackness" in this Article to capture the various combinations of particular physical, cultural, and linguistic features that Americans have been socialized to recognize and correlate with people racially designated in the United States as black. Blackness, of course, is not by itself an impairment. However, disability law recognizes that many traits understood as disabling do not necessarily arise from a medical condition, but instead are simply traits that create disadvantage when combined with an inhospitable social or physical environment.[29] This "social model" of disability offers a critical lens into the meaning, production, and cultural relativity of disability that is useful for thinking about race. For instance, it allows us to see how some disabilities are quite literally manifestations of socio-cultural forces, as is the case with anorexia nervosa.[30] It also illuminates the temporality of some conditions or traits understood as disabilities. Thus, a child now diagnosed with attention deficit disorder may have been characterized as hyperactive or unfocused a century ago.[31] The social model also demonstrates that whether a trait operates as a disability may depend on one's objectives. For example, if one's aim is to excel at reading, then dyslexia functions as a disability. Yet if one's goal is to excel at causal perception—an ability necessary for success in many professions—then having dyslexia may be beneficial.[32]

The social model of disability does not contest the idea that some disabilities are profoundly limiting, real, and meaningful consequences of biology, such as severe neurodevelopmental disorders, degenerative medical conditions, or catastrophic brain injuries. Rather, the central and paradigm-shifting contention of this model, which was ultimately embraced by disability law, is that society is not neutral and that biases are built into its very structures, norms, and practices, which can then produce disability.

This understanding of disability should inform how we conceptualize race and racial inequality. Disability law's appreciation of the constructed nature of

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29. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 430 (2000) (noting that when disability is understood as "arising primarily from the human environment, rather than from anything inherent in an individual's physical or mental condition, it 'becomes a problem of social choice and meaning, a problem for which all onlookers are responsible.'" (quoting MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 119 (1990))).

30. *See* Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347, 368 (2011) (explaining that a consideration of cultural conditions in America helps to explain anorexia nervosa's symptomology and rise in occurrence).

31. *Cf. id.* at 364 ("For example, a child who 100 years ago might have been described as a 'bad student' might today be described as having dyscalculia (a learning disorder associated with comprehending mathematics) or dysgraphia (a deficiency in the ability to write).").

32. *See* Matthew H. Schneps, *The Advantages of Dyslexia*, SCIENTIFIC AMERICAN (Aug. 19, 2014), https://www.scientificamerican.com/article/the-advantages-of-dyslexia/ [https://perma.cc/LV7U-RXZD].

some disabilities and its focus on groups that have long experienced subordination enables it to capture the historical meaning and contingencies of race in ways that race law does not allow. Racial categories were created explicitly to establish hierarchies of difference.[33] Disability law provides a mechanism for identifying how social institutions, policies, and norms have been shaped consciously or unconsciously in a way that reflects this stratified notion of racial categories, and how being black, as a basic fact of daily life, now poses barriers to equality in employment, education, housing, medicine, and many other contexts.[34] Race law, on the other hand, erases this history. It flattens racial difference and gives all race-based distinctions a false equivalence. This makes racial categories appear innocuous, neutral, and natural, rather than socially constructed and often fraught. Applying disability law's doctrinal framework and normative commitments to the problem of racial inequality forces us to see how blackness operates as a disabling condition, creates opportunities to rethink the discrimination and structural inequities that disable, and provides powerful tools to challenge them.[35]

The notion of "blackness as disability" may be troubling to some. This discomfort likely stems from popular perceptions of racial inequality and common misconceptions of disability. With respect to racial inequality, for some people, acknowledging the ways in which discrimination and structural inequities continue to negatively affect the lives of black people raises uncomfortable questions about the privilege of Whites in relation to the status of Blacks. Indeed, an understanding of blackness as a disabling condition challenges the standard notion that racial inequality is an unfortunate relic of United States history that has been largely overcome because of legal developments and social policies intended to increase access and opportunity.[36] By recognizing blackness as a disability, we acknowledge the ways in which racial hierarchies and white privilege persist and are embedded within these laws, policies, and practices such that they reify the very inequities they seek to eliminate.

With respect to disability, black people have long had to contend with negative preconceptions and stereotypes about their abilities; therefore, an association with disability may be difficult for some people to accept. This concern, however, is misplaced, as it is based on antiquated, stigmatizing preconceptions of persons with disabilities.[37] These negative preconceptions include perceiving individuals with disabilities as completely incapacitated, or

33. *See infra* Section III.A.

34. *See infra* Section III.A–B.

35. This Article's analysis has broader application. However, for conceptual clarity and force of argument, I am focusing on individuals categorized as black in the United States.

36. *See, e.g.*, Mario L. Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 972–73 (2010).

37. *See* Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 207, 230 (2012) ("Disability is rarely understood as a positive state or identity with social or cultural benefits to its bearers or those around them.").

assuming that they are impaired in all contexts and in ways that extend beyond their particular disability.[38] As this Article shows, disability often affects only a discrete life function or a specific aspect of an individual's existence. Disability can occur at any point in one's life due to chance, age, illness, or accident, and disability exists on a spectrum that encompasses a broad array of conditions, from mobility impairments and learning disabilities to HIV/AIDS, diabetes, and asthma.[39] Still, when we think about disability, we may envision the most extreme impairments, and ignore the breadth of the category and the contextual ways in which many disabilities manifest. Thus, for a black person with a dyscalculia, her difficulty with math may be disabling in particular settings, such as in school or in situations that requires her to engage in mathematical computation, but, as I will explain, her blackness may limit opportunity and advancement in virtually every aspect of her life, from education and employment to housing and political participation.

Disability also does not necessarily mean that an individual cannot function and contribute fully to society. Just as Judge David S. Tatel, who is blind, can serve a distinguished career as a judge on the D.C. Circuit Court of Appeals,[40] and David Boies, who has dyslexia,[41] can be recognized as one of the most esteemed litigators of our time, for many individuals to have a disability simply means that such individuals have a particular barrier to reaching their full potential in society as it is currently structured.

When we stop thinking about disability in a pejorative, stigmatized way and acknowledge the reality and effect of structural race-based inequality, the relationship between blackness and disability becomes clear. Disability law allows us to do this. Once blackness is understood as disabling in many contexts and a marker of stigma around which virtually all social institutions were conceptualized and structured, we can see distinct legal solutions to the persistent and seemingly intractable problem of racial inequality.

Antidiscrimination scholarship has explored the potential utility of using a disability framework to address discrimination in other forms and contexts: some antidiscrimination scholars have compared and contrasted disability laws with race- and gender-based civil rights laws generally;[42] others have applied

38. *See* Bagenstos, *supra* note 29, at 423.

39. *See* Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 513 (2008) ("[V]ulnerability to disability and the vulnerabilities disabled individuals experience more acutely than those without disability are both universal and constant.").

40. Jeffrey Rosen, *The Next Court*, N.Y. TIMES MAG. (Oct. 22, 2000), http://www.nytimes.com/2000/10/22/magazine/the-next-court.html [https://nyti.ms/2zsSbZW].

41. MALCOLM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS AND THE ART OF BATTLING GIANTS 107 (2013); *see also* Aaron M. Kessler, *The Legal Odds Are Shifting in the A.I.G. Case*, N.Y. TIMES: DEALB%K (Apr. 21, 2015), https://www.nytimes.com/2015/04/22/business/dealbook/the-legal-odds-are-shifting-in-the-aig-case.html [https://nyti.ms/1DbBJqr].

42. *See* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1436–40 (2015) (comparing and contrasting disability laws with race- and gender-based civil rights laws); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil*

disability laws to gender discrimination, and disability laws' norms to intimate association discrimination;[43] while still others have relied upon aspects of disability laws to address race discrimination in employment.[44] The literature, however, lacks any sustained endeavor to examine the broad theoretical and practical implications of using disability law to understand the meaning of race and respond to racial discrimination and structural inequality in contexts beyond the workplace, a gap this Article fills. The extensive reach of remedial innovations in Title II and Section 504—from "reasonable modifications" to mandated integration—allows for pragmatic solutions to the problem of racial inequality across significant areas of public life.

This Article proceeds in four parts. Part I identifies the dominant forms of discrimination with which black people must contend today and outlines the flaws in race law that hinder its ability to effectively combat modern race discrimination. Part II introduces laws from the disability context and discusses the overarching aims of disability antidiscrimination law, the social and medical understandings of disability embraced under disability law, and possible justifications for why Congress decided that meaningful equality means different treatment in the case of disability but not for race. Part III shows how disability law provides a better approach to addressing race discrimination and structural disadvantage than current race law and illustrates how a blackness-as-disability model would work by applying it to two areas where race discrimination and systemic inequities have been particularly intractable problems: education and policing. Part IV addresses the potential challenges and practical implications of the blackness-as-disability framework as well as expected benefits.

Rights Model, 21 BERKELEY J. EMP. & LAB. L. 19, 23–24 (2000) (discussing the analogy between disability law and the civil rights movement and its limitations).

43. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1330 (2009) (applying ADA norms to intimate association discrimination); Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297, 1297 (2008) (using disability studies to examine the built environment as an agent of sex discrimination).

44. *See generally* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV 642 (2001) (documenting the overlap between disparate impact in employment antidiscrimination law and statutes requiring accommodation); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 10–11 (1996) (using reasonable accommodation as a model for rethinking employment antidiscrimination law); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1365 (1991) (deploying disability law to consider accent bias in the workplace); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005) (applying the "regarded as disabled" definition of disability to discrimination claims based on proxies for race, such as black sounding names, voice, or accent); Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893 (2014) (using aspects of disability law doctrine and norms to address employment discrimination against individuals with criminal records); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (relying upon aspects of disability law to address discrimination in the workplace); Amy L. Wax, *Disability, Reciprocity, and "Real Efficiency": A Unified Approach*, 44 WM. & MARY L. REV. 1421 (2003) (same).

Ultimately, the move that I am making with this blackness-as-disability framework is more conceptual than doctrinal, and it serves two important purposes.[45] First, it allows us to rethink our basic assumptions about racial categories by forcing us to consider the historical and contemporary contingencies of race. Second, this analysis makes explicit the inability of current race law to counter modern race discrimination and suggests possibilities for interpreting race doctrine in a way that better addresses the causes and consequences of discrimination and systemic disadvantage. Thus, this framework offers a new, repurposed paradigm for understanding how the law can address the way blackness operates as a barrier to equality while avoiding the doctrinal impasses that now plague race law, thereby enabling meaningful structural reform.

I. RACIAL DISPARITIES AND THE LIMITS OF RACE LAW

The hard-fought movement for civil rights in the United States forced lawmakers to recognize race discrimination as a scourge in American society and led to the passage of the Civil Rights Act of 1964 (Civil Rights Act), a remedial law that barred discrimination against individuals on the basis of race, color, or national origin.[46] The Civil Rights Act (CRA) and other antidiscrimination laws brought penalties and eventually moral condemnation against those who perpetrated overt acts of racial hostility. However, decades after the passage of this landmark legislation, race discrimination and structural inequality remain startlingly commonplace.[47]

This Part begins with a brief summary of the cumulative disadvantage experienced by black people in the United States and then outlines the most common forms of race discrimination with which black people must contend, including implicit bias, stereotyping, and structural inequality. This recounting of the challenges black people face is not meant to suggest black victimhood or ignore the many accomplishments achieved by black people in spite of these hardships. Rather, the aim of this section is to identify and acknowledge the full effect of the real and sustained challenges that black people have confronted

45. The argument in this paper is grounded in the ADA and Rehabilitation Act, but it opens up a dialogue and an understanding of the boundaries of disability intentionally beyond that which the Congresses that enacted each statute likely contemplated. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.") As I explain in Section IV.B and as courts have made clear, "that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books." *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017); *see also* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (holding that statutory prohibition against sex discrimination reaches workplace sexual harassment).

46. *See* Civil Rights Act of 1964 (CRA), 42 U.S.C. §§ 1981–2000 (2012). Titles II and VII also protect against discrimination based on sex and religion. *See id.* at §§ 2000a(a) (Title II), 2000e-2(a) (Title VII). Of the CRA's many titles, Title II prohibits discrimination by public accommodations, Title VI forbids discrimination by any entity receiving federal funds, and Title VII precludes discrimination in employment. *See id*. at §§ 2000a(a) (Title II), 2000d (Title VI), 2000e-2(a) (Title VII).

47. *See also infra* Part III.

both historically and at this moment of increasing racial inequality. This Part concludes by demonstrating how many seminal antidiscrimination laws and doctrines are ill-equipped to address the challenges of modern racial discrimination and inequality.

A. RACE DISCRIMINATION IN THE TWENTY-FIRST CENTURY UNITED STATES: IMPLICIT BIAS, STEREOTYPING, AND STRUCTURAL INEQUALITY

Historically, discrimination against members of racial minority populations was practiced openly in virtually every aspect of public and private life. Such discrimination limited, and often completely foreclosed, access to public establishments,[48] employment,[49] educational and economic opportunities,[50] and fair treatment in the criminal justice system.[51] From Native Americans and Africans forcibly brought to the United States to serve as slaves, to Asian and some Latin American immigrants, a racial designation as "nonwhite" meant social marginalization and economic inequality.[52] These effects were and remain particularly pronounced for individuals categorized as black. Individuals in this disfavored racial minority group faced extreme and long-standing restrictions on their bodily integrity and ability to form familial, social, and economic relationships, including prohibitions on whom they could marry, where they could live, what employment they could obtain, whether they could participate politically, and

48. Being denied access to public establishments was common for all black people in America, as illustrated by the experience of Vice President Lyndon Johnson's black cook. Even though she was both college educated and driving the official Cadillac limousine of the Vice President of the United States, she was unable to find either motels or restaurants that would serve her during a trip from Washington to Texas. *See* Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change*, 74 LA. L. REV. 1039, 1039–40 (2014).

49. *See* Jared Bernstein, *The Black-White Unemployment Gap Is at an All-time Low. Here's How to Keep It There.*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/07/13/the-black-white-unemployment-gap-is-at-an-all-time-low-heres-how-to-keep-it-there/ [https://perma.cc/KEK5-29AC] (stating that, even today when the unemployment gap between black and white people is at an all-time low, employment for black individuals remains much more sensitive to market fluctuations).

50. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (upholding the constitutionality of property-tax-based school funding schemes favoring predominantly white, affluent communities over low-income communities of color).

51. *See* Angela Anita Allen-Bell, Comment, *The Birth of the Crime: Driving While Black (DWB)*, 25 S.U. L. REV. 195, 198 (1997) ("[T]he slave codes created a separate set of crimes for slaves which were sanctioned by public punishments not applicable to whites . . . . [T]he codes punished blacks more harshly for committing crimes against white people than for committing crimes against another black person."); Jamal Hagler, *8 Facts You Should Know About the Criminal Justice System and People of Color*, CTR. FOR AM. PROGRESS (May 28, 2015), https://www.americanprogress.org/issues/race/news/2015/05/28/

113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/ [https://perma.cc/DAG8-RVV3] ("According to the U.S. Sentencing Commission, between 2007 and 2011, sentences for black males were 19.5 percent longer than those for whites. Furthermore, black men were 25 percent less likely to receive sentences below the sentencing guidelines for the crime of which they were convicted.").

52. *See, e.g.*, Antonio McDaniel, *The Dynamic Racial Composition of the United States*, 124 DAEDALUS 179, 192–93 (1995).

what schools, if any, they could attend.[53]

Today, the law prohibits formal racial discrimination, but blackness continues to be a salient category, with Blacks facing substantial barriers to social and economic advancement. Black children, for example, are over three times more likely than white children to live in poverty, and the number of indigent black children exceeds that of poor white children, even though there are significantly more white than black children in the United States.[54] This is due largely to discrimination and inequities that negatively affect black people, often without regard to their socioeconomic status.

For example, a recent meta-analysis of field experiments of hiring trends conducted by researchers at Harvard and Northwestern Universities found no decline in racial discrimination against black people in hiring over the past twenty-five years.[55] According to the study's authors, "at the initial point of entry—hiring decisions—blacks remained substantially disadvantaged relative to equally qualified Whites and we see little indication of change over time."[56] The authors suggest that the lack of improvement in the hiring rates for Blacks may be due to "subtle forms of racial stereotypes and measures of unconscious bias."[57] Thus, Blacks are about twice as likely as Whites to be unemployed,[58] and Blacks with some college education are unemployed at the same rate as Whites who have *never completed* high school.[59] This holds true despite findings by researchers Devah Pager from Harvard and David Pedulla from Stanford that "black applicants cast a wider net in their search than similarly situated Whites, including a greater range of occupation types and occupational

53. *See* Amir Marvasti & Karyn McKinney, *The Work of Making Racism Invisible*, *in* HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 67, 69 (Hernán Vera & Joe R. Feagin eds., 2007); *cf.* Norrinda Brown Hayat, *Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. U. J.L. & POL'Y 61, 70 (2016) (explaining that black individuals moving into predominantly white suburbs are often presumed to rely on Section 8 housing vouchers and are subject to discriminatory Section 8 enforcement schemes by municipal actors, which may include "surveillance, levying of fines, . . . and the institution of ordinances designed to penalize landlords for renting to voucher holders").

54. *See* DENAVAS-WALT & PROCTOR, *supra* note 2, at 52–53 (finding 11.9%, approximately 4.4 million, white children live below the poverty line as compared to 37.1% of black children, approximately 4 million).

55. Lincoln Quillian et al., *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time*, 114 PROCEEDINGS OF THE NAT'L ACAD. SCI. 10870 (2017).

56. Lincoln Quillian et al., *Hiring Decisions Against Black Americans Hasn't Declined in 25 Years*, HARVARD BUS. REV. (Oct. 11, 2017), https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years [https://perma.cc/9UE7-AFF4].

57. *Id.*

58. As of the third quarter of 2017, the unemployment rate for Blacks was 7.5% and 3.8% for Whites. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT. (Oct. 6, 2017), http://www.bls.gov/web/empsit/cpsee_e16.htm [https://perma.cc/TJV2-R64J].

59. Whites with no high school education and Blacks with some college education are both unemployed at 6.5%. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT. (Feb. 8, 2017), http://www.bls.gov/web/empsit/cpsee_e16.htm [https://perma.cc/7L47-EM8G].

characteristics in their search pool."[60] In fact, in a study where "bright, articulate"[61] black college students posed as high school graduates applying for jobs, researchers found that these black individuals who did not have criminal records were less likely to get a job callback than Whites *with* a reported recent felony criminal conviction record.[62] The resulting delay in finding a job can have downstream effects, reducing wages over the course of an individual's lifetime.[63]

Black people are also hindered by race discrimination in housing. Carefully controlled audit studies have found that when sent by the Department of Housing and Urban Development to visit homes for rent or sale, Blacks were shown fewer properties than Whites.[64] Realtors often refused "to show properties to black customers who were better qualified than Whites, with higher incomes, better credit scores and more savings for down payments."[65] Plus, Blacks were "denied information about special incentives that would have made the purchase easier, and were required to produce loan pre-approval letters and other documents when Whites were not."[66]

With respect to home financing, banks continue to employ "redlining" practices that discriminate against black customers seeking to live in specific neighborhoods.[67] Redlining, introduced by the Federal Housing Authority (FHA) during the 1930s, allowed for the restriction or rejection of home financing to certain neighborhoods based on their racial constitution, irrespective of the residents' creditworthiness or qualifications.[68] Between 1934 and 1962, of the $120 billion in taxpayer funds used by the federal government to underwrite

60. Devah Pager & David S. Pedulla, *Race, Self-Selection, and the Job Search Process*, 120 AM. J. SOC. 1005, 1030 (2015).

61. *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 964 (2003).

62. *See id.* at 958.

63. *See* Sarah Ayres Steinberg, *The High Cost of Youth Unemployment*, CTR. FOR AM. PROGRESS, (Apr. 5, 2013, 11:19 AM) https://www.americanprogress.org/issues/economy/reports/2013/04/05/59428/the-high-cost-of-youth-unemployment/ [https://perma.cc/97NJ-7YVF] ("[W]orkers who are unemployed as young adults earn lower wages for many years following their period of unemployment due to forgone work experience and missed opportunities to develop skills.").

64. U.S. DEP'T HOUSING & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xvii (2013).

65. Editorial, *How Segregation Destroys Black Wealth*, N.Y. TIMES (Sept. 15, 2015), https://www.nytimes.com/2015/09/15/opinion/how-segregation-destroys-black-wealth.html [https://nyti.ms/1KPNpK4].

66. *Id.*

67. *See* Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau and Department of Justice Action Requires Bancorpsouth to Pay $10.6 Million to Address Discriminatory Mortgage Lending Practices (June 29, 2016), http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-department-justice-action-requires-bancorpsouth-pay-106-million-address-discriminatory-mortgage-lending-practices/ [https://perma.cc/TNH9-5XW6]; *see also* George White, *Governments Cracking Down on Fraudulent Mortgage Practices*, NEW AM. MEDIA (Sept. 16, 2015), http://newamericamedia.org/2015/09/governments-cracking-down-on-fraudulent-mortgage-practices.php [https://perma.cc/87R7-8HPW] (describing the large settlements by banks and real estate companies for redlining practices and fraudulent activity against black customers who seek to live in specific neighborhoods).

68. *See* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 103–13 (2017).

new houses, less than 2% went to non-Whites.[69] FHA underwriters, relying upon racist assumptions regarding the inferiority of black people, made clear that a neighborhood with as few as one or two black families could jeopardize local real estate values.[70] Middleclass Whites abandoned urban neighborhoods for the burgeoning suburbs where FHA financing was plentiful, while many savings and loans associations, following the example set by the FHA, denied loans to Blacks in white neighborhoods.[71] The resulting economic disinvestment in inner cities created racialized ghettos and areas of urban blight.[72] The so-called "war on drugs" followed in short succession, targeting these areas and inaugurating a new period of repressive laws that criminalized many aspects of black life[73] and contributed to the mass incarceration that devastated black communities.[74]

The legacy of the FHA policies can now be seen in the gentrification and associated mass-dislocation of Blacks occurring in urban areas throughout the country. Most Americans' wealth is linked to their homes through their ability to sell, buy, and borrow against them. The property itself or the wealth it generates can also be passed on to relatives and descendants. Many Blacks were denied the American dream of homeownership, and thus the chance to earn equity in their homes, the opportunity to pass the ensuing wealth along to future generations, and the ability to benefit from the increased property values that are now contributing to their own displacement. Exacerbating the wealth gap between Blacks and Whites is the reality that black households at the 20th and 40th percentiles of household income in 2015 "earned an average of 55% as much as white households at those same percentiles," which is precisely the same figure

69. ANN G. WINFIELD, INSTITUTING A HIERARCHY OF HUMAN WORTH: EUGENIC IDEOLOGY AND THE ANATOMY OF WHO GETS WHAT 33 (2010).

70. *See* Jonathan Kaplan & Andrew Valls, *Housing Discrimination as a Basis for Black Reparations*, 21 PUB. AFF. Q. 255, 262–63 (2007). "Using this scheme, federal investigators evaluated 239 cities across the country for financial risk." Dr Rhymes, *Losing What We Never Had: The Deferred Dreams of Black America Part Two*, DAILY KOS (Aug. 10, 2011, 2:22 PM), http://www.dailykos.com/story/2011/8/10/1005417/ [https://perma.cc/D32C-CDVU].

71. *See* BARADARAN, *supra* note 68, at 107–09.

72. *See* GERALD HORNE, FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S, at 31 (1995); Tony L. Whitehead, The Formation of the U.S. Racialized Urban Ghetto 15–16 (Sept. 15, 2000) (unpublished working paper), http://www.cusag.umd.edu/documents/workingpapers/rugone.pdf [https://perma.cc/LW5C-UJAS].

73. *See* Allen-Bell, *supra* note 51, at 207 (explaining that the racial component of the drug courier profiles used by law enforcement in the "war on drugs" brought about the increase in "driving while black" stops); Taylor Pendergrass, *In New York, A Rogue Wave of Criminal Injustice*, AM. C.L. UNION (June 23, 2011, 12:54 PM), https://www.aclu.org/blog/new-york-rogue-wave-criminal-injustice [https://perma.cc/3TFG-3Z7K] (reporting that "Broken Windows" policing, which focuses on the aggressive enforcement of quality of life laws against minor offenses such as loitering, led to the NYPD's racially biased "stop-and-frisk" policies).

74. *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks,"* 6 J. GENDER, RACE & JUST. 381, 393 (2002).

as in 1967.[75] Likewise, for the past fifty years, the incomes of upper- and middle-class Blacks have remained two-thirds that of similarly situated Whites.[76] Today, for every $100 of wealth accumulated by a white American, a black American has only $5.04.[77]

The devastating effect of past and contemporary redlining practices is compounded by the fact that black borrowers, even after controlling for "credit profiles, down payment ratios, personal characteristics, and residential locations, . . . were much more likely to receive subprime loans."[78] This means that Blacks were more likely to lose their homes to foreclosure "with serious long-term consequences for . . . credit scores and home ownership rates," which "can be expected to exacerbate existing wealth gaps."[79] These discriminatory practices and their effects continue today.[80]

These practices not only deny black people the chance to purchase homes in "high-value areas that would provide better educations for children and greater return on their investments,"[81] but also contribute to black people living in some of the most dangerous, dilapidated, and polluted environments in the United States.[82] From Flint, Michigan's poisonous, lead-filled water—the long-term health effects of which will remain unknown for years—to Louisiana's factory-clogged "Cancer Alley" and the flood-prone areas of New Orleans, black people are disproportionately exposed to substandard housing and environmental toxins.[83]

All of the factors considered thus far that contribute to black people's social and economic disadvantage have negative consequences for black children's

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75. Paul F. Campos, *White Economic Privilege is Alive and Well*, N.Y. TIMES (July 29, 2017), https://www.nytimes.com/2017/07/29/opinion/sunday/black-income-white-privilege.html [https://nyti.ms/2u8ywez].

76. *See id.*

77. Michael W. Kraus, Julian M. Rucker, Jennifer A. Richeson, *Americans Misperceive Racial Economic Equality*, 114 P. NAT'L ACAD. SCI. 10324, 10326 (2017) (documents how white Americans overestimate improvements in the economic circumstances of black people).

78. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 632 (2010); *see also* Greger Calhan, *The Racial Wealth Accumulation Gap and Why ACLU is Suing Morgan Stanley for Racial Discrimination*, AM. C.L. UNION (May 6, 2013), https://www.aclu.org/blog/lgbt-rights/racial-wealth-accumulation-gap-and-why-aclu-suing-morgan-stanley-racial [https://perma.cc/34Y2-CQ8M] (noting that even after controlling for income, employment, and education, black borrowers are significantly more likely than Whites "to receive subprime loans with destructive features . . . to lose their homes to foreclosure, and, because homeownership represents a comparatively greater share of black and Hispanic families' wealth, to feel that loss more deeply").

79. Patrick Bayer et al., *What Drives Racial and Ethnic Differences in High Cost Mortgages? The Role of High Risk Lenders* 29 (Nat'l Bureau of Econ. Res., Working Paper No. 22004, 2016), http://www.nber.org/papers/w22004 [https://perma.cc/6DAL-PGKC].

80. *See, e.g.*, Rugh & Massey, *supra* note 78, at 646.

81. Editorial, *supra* note 65.

82. John Eligon, *A Question of Environmental Racism in Flint*, N.Y. TIMES (Jan. 21, 2016), https://www.nytimes.com/2016/01/22/us/a-question-of-environmental-racism-in-flint.html [https://nyti.ms/2k42iN5].

83. *Id.*

educational opportunities. And the inequities that black children face, which result from both de facto and de jure discrimination, are further entrenched by laws that base school funding on local property tax revenue. These laws overwhelmingly benefit children in affluent, predominantly white communities over children in communities of color, which tend to be lower-income.[84] Today, a disproportionate number of black children attend segregated, chronically underfunded, poor-quality schools.[85] In school districts across the country, black children "are the least likely to be taught by a qualified, experienced teacher; to be offered courses such as chemistry and calculus; or to have access to technology."[86]

As recent high profile incidents of police violence against unarmed black people have made abundantly clear, Blacks are also subject to heightened police surveillance, violence, and abuse compared to their white counterparts.[87] Indeed, street encounters are how most Americans interact with law enforcement; however, for Blacks more often than for Whites, these encounters lead to unwarranted stops, searches, arrests, fines, and the resulting days of "sitting in courtrooms."[88] These encounters are also more likely to turn deadly for black people, particularly for black men.[89]

This brief summary of the challenges faced by black people in the United States demonstrates that years after the enactment of historic civil rights laws, blackness continues to mean social, economic, and civic disadvantage. How-

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84. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding the constitutionality of property-tax-based school funding schemes favoring predominantly white, affluent communities over low-income communities of color).

85. *See* Nicholas Kristof, *A History of White Delusion*, N.Y. TIMES (July 14, 2016), https://www.nytimes.com/2016/07/14/opinion/a-history-of-white-delusion.html [https://nyti.ms/2kCHfFr] (noting that the American education system "routinely sends the neediest black students to underfunded, third-rate schools, while directing bountiful resources to affluent white schools," and labeling this a "civil rights outrage").

86. Nikole Hannah-Jones, *How School Segregation Divides Ferguson—and the United States*, N.Y. TIMES (Dec. 19, 2014), https://www.nytimes.com/2014/12/21/sunday-review/why-are-our-schools-still-segregated.html [https://nyti.ms/2k1KCBF]. Housing immobility for black individuals exacerbates this gap because school funding is often tied to property taxes, and areas with lower property values and ownership rates accordingly receive less funding per pupil. *See* Rachel R. Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban and Migrant School Children*, 2015 B.Y.U. EDUC. & L.J. 271, 294–95 (2015).

87. *See infra* Section III.B.

88. Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html [https://nyti.ms/2kbVd0l]; *see also* Jon Swaine & Ciara McCarthy, *Young Black Men Again Faced Highest Rate of US Police Killings in 2016*, GUARDIAN (Jan. 8, 2017, 7:00 AM), https://www.theguardian.com/us-news/2017/jan/08/the-counted-police-killings-2016-young-black-men [https://perma.cc/A32R-GX4Y] (finding young black men in the United States were nine times more likely to be killed by the police than other Americans).

89. *See infra* Section III.B (examining the practice and effect of racial profiling by law enforcement); *see also* Ronald Weitzer, *American Policing Under Fire: Misconduct and Reform*, 52 SOCIETY 475, 477 (2015) ("Not only are armed and unarmed black and Hispanic individuals shot by police at much higher rates, in most counties, than their armed and unarmed white counterparts, but in some counties unarmed blacks are shot at significantly higher rates than armed white civilians.").

ever, contemporary race discrimination, rather than being perpetrated overtly by bigots, is typically subtler but no less harmful. De jure segregation and blatant discrimination have largely given way to more muted and less obvious forms of discrimination, such as structural inequality, stereotyping, and implicit bias or unacknowledged prejudice. Numerous studies identify all of these as driving forces behind much of the discrimination black people now experience.[90]

1. Stereotyping and Implicit Bias

Researchers who examine implicit associations that affect behavior, judgment, and perception have found that people can harbor unconscious and thus unexamined private, pejorative attitudes about people based on race.[91] These implicit associations often take the form of attitudes and stereotypes. An attitude is an association between a concept (such as a group) and "an evaluative valence, either positive or negative."[92] Stereotypes are associations between a concept and a trait.[93] According to Jerry Kang et al.,

> "[a]lthough interconnected, attitudes and stereotypes should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them."[94]

This new social science research challenges the deeply held assumption that those who discriminate do so only openly and with conscious animus. It also reveals that even well-intentioned people can behave in ways that discriminate against black people without knowing that their actions are based upon racial stereotypes or biases, with the results being as debilitating as discrimination

90. *See* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998); *see also* R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1172–73 (2006).

91. *See, e.g.*, Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1476–78 (1998) (introducing the Implicit Association Test and discussing its usefulness in measuring implicit attitudes); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. REV. 1124 (2012) (examining the scientific literature on implicit bias and applying it in the courtoom context); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010) (noting that study "participants held an implicit association between Black and Guilty."); Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 905–06 (2015) (discussing how black derogation and white favoritism work in tandem to bias decision makers involved in the criminal justice system against black individuals); Sophie Trawalter et al., *Attending to Threat: Race-based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008) (explaining that research shows that young, black men are "stereotyped as violent, criminal, and dangerous").

92. Kang et al., *supra* note 91, at 1128.

93. *Id.*

94. *Id.* at 1129.

based upon injurious intent.[95]

Overwhelming data show that medical practice, for example, remains rife with racial bias[96] and that minority patients often receive substandard healthcare because of conscious and unconscious prejudice among physicians.[97] This has been shown to cause poorer health outcomes among minority patients.[98]

In the criminal justice setting, Stanford University social psychologist Jennifer Eberhardt has shown how police officers' implicit associations and stereotypes of black people as dangerous and violent influence their encounters with

95. *See* Ralph Richard Banks & Richard Thompson Ford, *Does Unconscious Bias Matter?*, 20 POVERTY & RACE, no. 5, Sept./Oct. 2011, at 1, 2 (2011) (discussing scholars' new focus on unconscious bias and identifying ways in which that focus may be harmful in achieving racial justice goals).

96. *See, e.g.*, Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235 (2007) (finding that physicians' implicit biases showed strong associations with their decisions whether to perform medical procedures on particular patients); Adil H. Haider et al., *Association of Unconscious Race and Social Class Bias with Vignette-Based Clinical Assessments by Medical Students*, 306 J. AM. MED. ASS'N 942, 949 (2011) (analyzing unconscious race and social-class bias among medical students and finding that 69% of medical students surveyed exhibited implicit preferences for white people); William J. Hall et al., *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review*, 105 AM. J. PUB. HEALTH e60, e72 (2015) (finding widespread implicit racial biases among healthcare providers); Michelle van Ryn & Jane Burke, *The Effect of Patient Race and Socio-economic Status on Physicians' Perceptions of Patients*, 50 SOC. SCI. & MED. 813, 823 (2000) (finding that doctors' opinions regarding their African American patients tend to be more negative than those regarding their white patients).

97. Vence L. Bonham, *Race, Ethnicity, and Pain Treatment: Striving to Understand the Causes and Solutions to the Disparities in Pain Treatment*, 29 J.L. MED. & ETHICS 52, 52 (2001) (citing "[n]umerous studies [that] have revealed that racial and ethnic minority groups often receive different and less optimal management of their health care than white Americans" and finding such disparities to be "the legacy of a racially divided health system."); Green et al., *supra* note 96, at 1231–38 (finding physicians' implicit biases produce inferior health outcomes for black patients); Janice A. Sabin & Anthony G. Greenwald, *The Influence of Implicit Bias on Treatment Recommendations for 4 Common Pediatric Conditions: Pain, Urinary Tract Infection, Attention Deficit Hyperactivity Disorder, and Asthma*, 102 AM. J. PUB. HEALTH 988, 992 (2012) (finding pediatricians' demonstrating pro-white implicit biases were more likely to prescribe pain medication to white patients than black patients); Joshua H. Tamayo-Sarver et al., *Racial and Ethnic Disparities in Emergency Department Analgesic Prescription*, 93 AM. J. PUB. HEALTH 2067, 2067 (2003).

98. Green et al., *supra* note 96, at 1237 (finding physicians' implicit biases produce inferior health outcomes for black patients); Haider et al., *supra* note 96, at 949 ("Unconscious or implicit bias among physicians has recently been suggested as another important factor contributing to racial disparities in health care."); Sabin & Greenwald, *supra* note 97, at 988–93 (finding pediatricians' demonstrating pro-white implicit biases were more likely to prescribe pain medication to white patients than black patients); Janice A. Sabin et al., *Physician Implicit Attitudes and Stereotypes About Race and Quality of Medical Care*, 46 MED. CARE 678, 678 (2008) (discussing health care disparities in a pediatric context); Kevin A. Schulman et al., *The Effect of Race and Sex on Physicians' Recommendations for Cardiac Catheterization*, 340 NEW ENG. J. MED. 618, 618, 623–24 (1999) (discussing how race and sex influence physician recommendations in the treatment of cardiovascular disease); Michelle van Ryn & Steven S. Fu, *Paved with Good Intentions: Do Public Health and Human Service Providers Contribute to Racial/Ethnic Disparities in Health?*, 93 AM. J. PUB. HEALTH 248, 252 (2003); Melba J.T. Vasquez, *Cultural Difference and the Therapeutic Alliance: An Evidence-Based Analysis*, 62 AM. PSYCHOLOGIST 878, 881–82 (2007); David R. Williams, *Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination*, 896 ANNALS N.Y. ACAD. SCI. 173, 183–85 (1999).

members of the black population.[99] Through a series of empirical studies, Eberhardt and her research team demonstrate that law enforcement officers are more likely to erroneously identify faces with features suggestive of black heritage as criminal, than faces with features suggestive of white ancestry.[100] Blacks are so strongly correlated with violent crime that "[t]he more stereotypically Black a face appears, the more likely officers are to report that the face looks criminal."[101] According to studies, "[t]he mere presence of a Black man . . . can trigger thoughts that he is violent and criminal"[102] and "simply thinking of crime can lead perceivers to conjure up images of Black Americans that 'ready' these perceivers to register and selectively attend to Black people who may be present in the actual physical environment."[103]

These implicit associations help explain the results of a recent study that manipulated the racial composition of prisons and found that when penal institutions were "represented as 'more Black,' people were more concerned about crime and expressed greater acceptance of punitive policies than when the penal institution was represented as 'less Black.'"[104] The researchers concluded that information about racial disparities in the penal system prompted people "to support the very policies that produce those disparities, thus perpetuating a vicious cycle."[105]

2. Animus-Based Prejudice and Explicit Bias

Although much of race discrimination is based upon stereotyping and unacknowledged racial bias,[106] this does not mean that Americans no longer harbor conscious, animus-based prejudice against certain racial minority groups. Explicit biases are "attitudes and stereotypes that are consciously accessible through introspection and endorsed as appropriate."[107] If these biases are consonant with social norms, then the holder of these views may feel comfortable expressing them openly.[108] However, if explicit biases run counter to social norms, the holder may conceal them in order to avoid negative perceptions and

99. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY SOC. & PSYCHOL. 876, 890 (2004).

100. *Id.*

101. *Id.* at 878.

102. Jamelle Bouie, *White People Are Fine With Laws That Harm Blacks*, SLATE (Aug. 7, 2014, 5:45 PM), http://www.slate.com/articles/health_and_science/science/2014/08/racial_bias_in_criminal_justice_whites_don_t_want_to_reform_laws_that_harm.single.html [https://perma.cc/5A65-XPM4] (quoting Eberhardt et al., *supra* note 99, at 876).

103. *Id.* (quoting Eberhardt et al., *supra* note 99, at 877).

104. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1949 (2014).

105. *Id.*

106. *See generally* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE (2016) (examining how cultural attitudes about race shape judgments about people's character, ability, and potential).

107. Kang et al., *supra* note 91, at 1132.

108. *Id.*

moral condemnation.[109]

Recent surveys conducted by the Associated Press reveal that 51% of Americans "express explicit anti-black attitudes" and "[w]hen measured by an implicit racial attitudes test, the number of Americans with anti-black sentiments jumped to 56[%]."[110] The effect and reach of these pejorative perceptions can be significant, leading to discrimination against black people, influencing laws and policies, and affecting people's everyday lives in material ways—from children's experiences in the classroom to people's experiences in the workplace, at medical institutions, and during police encounters, commercial transactions, and interactions with landlords and realtors.[111]

3. Structural Inequality

Black people also face structural or institutional inequities: inequalities that are entrenched within social systems and structures such that they create and reproduce disadvantages in the absence of intentional discrimination.[112] Structural inequality is often the result of unaddressed racial stratification caused by prior legally sanctioned restrictions on black people. These inequities were ultimately frozen in place when the restrictions were lifted but no reparations were ever made.[113] Despite their discriminatory effects, these structural inequities frequently go unchallenged because we tend to see "the status quo as good, natural, and freely chosen."[114]

These inequities are often reinforced through facially neutral policies, practices, or rules that have a disproportionately negative impact upon members of a protected group. The placement of environmental hazards, such as polluting facilities, landfills, and contaminated land, within or close to communities of color, serves as an example. Early twentieth-century zoning rules explicitly segregated black populations, including through the construction of low-income

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109. *Id.*

110. Dennis Junius, *AP Poll: U.S. Majority Have Prejudice Against Blacks*, U.S.A. TODAY (Oct. 27, 2012), http://www.usatoday.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067/# [https://perma.cc/SS83-HLQE].

111. *See supra* notes 48–51 and accompanying text.

112. *See* SHIRLEY BETTER, INSTITUTIONAL RACISM: A PRIMER ON THEORY AND STRATEGIES FOR SOCIAL CHANGE 24 (2002) (explaining how the persistence of racism is not the result of individual discrimination, but rather the consequence of a system that burdens some and advantages others on the basis of race); EDWARD ROYCE, POVERTY AND POWER: THE PROBLEM OF STRUCTURAL INEQUALITY 13 (2009) (describing several manifestations of structural inequality, including the way that "poverty is a function of power, and people are poor because of inequities in government policy and labor market institutions").

113. *See, e.g.*, WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 4 (2008) (discussing how the "white frame" on which elite law schools were built continues to disenfranchise students of color even though explicit racial antagonism has been eliminated); Jonathan Kaplan & Andrew Valls, *Housing Discrimination as a Basis for Black Reparations*, 21 PUB. AFFS. Q. 255, 258–59 (2007) (explaining how the effects of then-legal housing discrimination continue to impact the ability of black people to gain wealth).

114. Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 55 (1987).

housing in industrial areas.[115] By mid-century, black communities were predominantly zoned for mixed residential, industrial, and commercial uses, whereas white communities were typically zoned primarily for residential use.[116] Today, "[m]odern zoning and land use laws, although embedded in the history of racially biased zoning, are largely governed by local administrative processes . . . attentive to special interests like developers and homeowners who push hard to bend the rules to suit their particular interests."[117] These interests often include ensuring that environmental hazards are not placed in wealthier, and typically whiter, communities.[118] As a result, Blacks continue to be overexposed to environmental toxins and disproportionately bear the resulting health consequences.[119] However, the processes that currently contribute to the siting of environmental hazards in black neighborhoods, although based in explicitly discriminatory practices, are now facially neutral and thus more difficult to challenge.

B. THE LIMITS OF RACE-BASED ANTIDISCRIMINATION LAW AND DOCTRINE

Over the past thirty years, the United States Supreme Court has incrementally adopted malicious intent as the standard for liability in most race discrimination cases. This standard, which requires direct proof that a particular defendant's behavior was motivated by an invidious intent to disadvantage the plaintiff because of her race—or what Laurence Tribe calls "a search for a bigoted decision-maker"—has proven to be an extraordinarily difficult standard for plaintiffs to satisfy.[120] Indeed, in the absence of intent, a perpetrator may

115. Sheila R. Foster, *Vulnerability, Equality, and Environmental Justice: The Potential and Limits of Law*, *in* HANDBOOK OF ENVIRONMENTAL JUSTICE (Jayajit Chakraborty & Gordon Walker eds., forthcoming 2017) (manuscript at 1).

116. *Id.*

117. *Id.* (manuscript at 2). Legacy admissions at colleges and universities that give admission preferences to students who have a parent who attended the same institution serves as another example of neutral rules that disproportionately burden black people. Indeed, many universities did not admit black students until the 1960s. Not surprisingly, this has downstream effects on black college applicants. For example, 20% of white members of Harvard University's 2014 graduating classes followed a parent to the institution. This is in contrast to 4.5 % of nonwhite or multiracial students. *See* Andy Thomason, *20% of White Members of Harvard's Class of 2014 Followed a Parent There*, CHRONICLE OF HIGHER EDUC. (May 27, 2014), http://www.chronicle.com/blogs/ticker/20-of-white-members-of-harvards-class-of-2014-followed-parents-there-survey-shows/78607 [https://perma.cc/4ANM-37RJ].

118. *See* Paul Mohai et al., *Environmental Justice*, 34 ANN. REV. ENV'T & RESOURCES 405, 417–18 (2009) ("[P]eople of color face greater toxic threats than middle-class and affluent whites . . . includ-[ing] hazardous waste sites, landfills and waste transfer stations, polluting industrial facilities, power plants, incinerators, and measures of cumulative environmental hazards.").

119. *Id.* at 413 ("[M]etropolitan areas that were the most racially segregated were also the metropolitan areas with the greatest cancer risk from air pollution . . . . African Americans and Latinos were found to face the greatest cancer risk in the segregated metropolitan areas."). In another example, the location of six bus depots in predominantly black communities in Harlem and Washington Heights contributed to increased exposure to polycyclic aromatic hydrocarbons. *See* Kenneth Olden et al., *The Role of the Epigenome in Translating Neighborhood Disadvantage into Health Disparities*, 2 CURRENT ENVTL. HEALTH REP. 163, 164 (2015).

120. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1509 (2d ed. 1988).

provide any plausible rationale (or no justification whatsoever) for its practice or policy that disproportionately harms people of color. As I will explain, this standard, based on an outmoded search for an intentional evil-doer, does not reflect the reality of contemporary race discrimination, which tends to be based upon unconscious bias, stereotyping, structural inequality, and facially neutral actions that have a discriminatory effect.[121] Even the disparate impact cause of action, although more expansive, does not effectively combat modern race discrimination. As a result, racism and discrimination remain enduring and pernicious problems. Current race law, however, deprives aggrieved individuals of a fully effective legal remedy.

In addition, when state actors seek to rectify long-standing structural inequities, their efforts are hindered by colorblindness, which precludes the government from taking account of race, even to make up for past racial discrimination. This section maps the evolution of race laws and doctrine to demonstrate the ways in which they have come to subvert efforts to achieve racial equality.

1. The Intent Doctrine

In the period immediately following the *Brown v. Board of Education* decision, the Supreme Court's approach to race cases brought under the Constitution's Equal Protection Clause did not require a finding of evil motive. Prior to the mid-1970s, the Court used a more expansive approach, which involved inferring a discriminatory motive from the totality of the facts in the case.[122] This approach considered the harms caused by discriminatory conduct and allowed for an evaluation of circumstantial evidence from a broad array of sources to glean evidence of a discriminatory purpose.[123]

The Court began to change course a few years later in *Washington v. Davis*, which involved a qualifying exam for the Washington, D.C. police force that tested recruits' vocabulary and reading comprehension—skills that the lower court found to be largely irrelevant to policing.[124] This test excluded four times as many black as white job candidates.[125] Government officials were aware that

121. *See supra* Section I.A.

122. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."); Eubanks v. Louisiana, 356 U.S. 584, 587–88 (1958) (inferring discrimination in jury selection); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (same); *see also* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1796 (2012) (describing the Supreme Court's "contextual approach" to determining intent in race cases).

123. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198–99 (1973) (rejecting a requirement of discriminatory motive and instead relying upon a school district's "undeviating purpose to isolate Negro students"); Palmer v. Thompson, 403 U.S. 217, 224 (1971) (noting that malicious motive was not required and stating instead that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it"); Brown v. Bd. of Educ., 347 U.S. 483, 494 & n.11 (1954) (relying upon social science data to chronicle the detrimental effects of racial segregation).

124. 426 U.S. 229, 234–35 (1976).

125. *Id.* at 237.

the test would likely disqualify more Blacks than Whites but maintained that this was not their intent.[126] In upholding the test, the Court stopped short of requiring proof of malicious intent, but nonetheless determined that a showing of disparate impact alone was not sufficient to make out an equal protection violation.[127] In *Davis*, the Court maintained that "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts" but left open how one might infer intent.[128] Four years later, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court, building upon *Davis*, articulated a framework for determining when a discriminatory purpose could be inferred from a facially neutral law enacted with discriminatory intent.[129]

The Court, however, retreated from using context to determine intent in a gender case that established and imputed the necessity of invidious intent into the race context. In *Personnel Administrator of Massachusetts v. Feeney*, the Court reviewed an equal protection challenge involving a facially neutral job preference scheme for military veterans that had a significant adverse impact on female job candidates.[130] Ninety-eight percent of the veterans were male,[131] and according to the scheme, the veteran with the lowest score was ranked above the highest-scoring nonveteran.[132] In upholding this scheme, the majority observed that despite the foreseeable negative consequences of the law, the outcome was unintended.[133] Thus, to prevail, the plaintiffs had to show that the alleged discrimination occurred "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[134] The Court continued, "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[135] In other words, the plaintiffs were required to prove injurious intent by the legislators.

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126. Although conceding the disparate impact of their test, D.C. officials claimed that use of the test was permissible under Title VII, which allows disparate impacts warranted by business necessity. *See id.* at 238 n.8.

127. *Davis*, 426 U.S. at 242; *see also* Haney-López, *supra* note 122, at 1806 (describing the *Davis* Court's adoption of a "contextual approach" to determining intent).

128. *Id.* at 242.

129. 429 U.S. 252, 266 (1977) (suggesting the use of "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").

130. 442 U.S. 256, 259–60 (1979).

131. *Id*. at 270.

132. *Id.* at 263.

133. *Id.* at 278–79 ("[I]t cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable. 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.").

134. *Id.* at 279 ("'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

135. *Id.* at 272 (citations omitted).

By the 1980s, the Court was reading the malicious intent requirement into statutory anti-discrimination law, specifically Title VI of the Civil Rights Act, which proscribes race discrimination by federal grantees.[136] For example, in *Guardians Ass'n v. Civil Service Commission*, the Court ruled that Title VI itself reached only intentional discrimination.[137] Although its implementing regulations could be drafted by agencies to address discrimination where no explicit intent is proven, monetary damages are unavailable without a showing of intent.[138]

2. Impact-Based Civil Rights Law

The disparate impact theory of liability offers a modest departure from the unforgiving intent doctrine and is available under a few statutory provisions pertaining to voting,[139] housing,[140] and employment law.[141] Disparate impact under race law ostensibly allows liability to be found absent a direct showing of intentional discrimination. For example, in the housing law context disparate impact has been an important tool for addressing exclusionary zoning practices,[142] and employment law has allowed plaintiffs to rely in part on statistical data to show discrimination.[143] However, disparate impact's narrow conceptualization of disparities undermines its utility as a mechanism for addressing much

136. Title VI expressly provides only for administrative enforcement, but Supreme Court has implied a private cause of action for individuals to enforce the statute and the implementing regulations that prohibit intentional discrimination. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 597 (1983). The Court has not implied a private cause of action to enforce the regulations that prohibit disparate impact discrimination. *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001).

137. 463 U.S. 582, 597 (1983). A majority of the Court held that proof of discriminatory intent is necessary for a violation of the statute itself, while a different majority held that discriminatory impact is sufficient to state some type of claim under Title VI. *See id.* at 608 n.1 (Powell, J., joined by Burger, C.J., concurring); *id.* at 612 (Rehnquist, J., concurring); *id.* at 612 n.1 (O'Connor, J., concurring); *id.* at 642 (Stevens, J., joined by Brennan, J. and Blackmun, J., dissenting). *But see Alexander*, 532 U.S. at 293 (holding that there is no private right of action to enforce the Title VI disparate impact regulations).

138. *Id.* The Court had previously allowed private litigants to enforce claims through Title VI regulations. *See* Lau v. Nichols, 414 U.S. 563, 568–69 (1974) (holding that city failed to provide a meaningful public education to students who only spoke Chinese).

139. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (finding that plaintiffs need not demonstrate causation or intent for a prima facie case of racial bloc voting, and that defendants may not rebut that case with evidence of causation or intent).

140. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (violations of the Fair Housing Act can be shown either by proof of intentional discrimination or by proof of disparate impact).

141. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that lack of discriminatory intent is not a defense in employment discrimination contexts because courts are required to look to the consequences of the employment practices); *see also* CRA, 42 U.S.C. § 2000e-2(a) (2012) (prohibiting discrimination in employment).

142. *See Inclusive Cmtys. Project*, 135 S. Ct. at 2525.

143. *See* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1492 (1996) (explaining how courts made establishing proof of differential impact more onerous under Title VII).

of the structural inequality it was designed to remedy.[144] For instance, a showing of racial imbalance is not enough to make a prima facie case of discrimination under housing and employment law because aggrieved parties must not only amass statistical evidence of racial disparities, but also establish a "robust" connection between the disparity and a specific policy or practice.[145] Because decision making in these contexts involves multiple and often complex factors, establishing the requisite nexus can be difficult for most plaintiffs.[146] The high level of particularity with which plaintiffs are required to plead a disparate impact claim operates as a significant constraint to surviving summary judgment.[147]

Further diminishing the efficacy of disparate impact is its requirement that remedial measures be colorblind. Thus, for example, in *Ricci v. DeStefano*, the Supreme Court held that a state's decision to acknowledge and remedy the racially disparate impact of its own practices—in this case, a firefighters' exam—was itself unlawful discrimination.[148] Moreover, as explained earlier, although agencies can devise Title VI's implementing regulations in a way that reaches disparate impact discrimination, there is no private right of action to enforce these provisions.[149] As a result, the decision of whether to enforce Title VI is left to the whims of federal authorities who may or may not consider civil rights enforcement a priority.[150]

3. Race Jurisprudence and the Norm of Colorblindness

Since the 1970s, the Supreme Court's remedial race jurisprudence has increasingly become characterized by a norm of colorblindness, which has significantly constrained state uses of race to address race discrimination. At once an

144. *See, e.g.*, Amy M. Glassman & Shanellah Verna, Commentary, *Disparate Impact One Year After* Inclusive Communities, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 11 (2016) (discussing difficulties plaintiffs face making a prima facie showing of disparate impact).

145. *Inclusive Cmtys. Project*, *Inc.*, 135 S. Ct. at 2523. In the employment context, see 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (Plaintiffs must identify "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.").

146. *See* Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 256–68 (4th Cir. 2005).

147. This substantial evidentiary burden that courts have placed on plaintiffs bringing disparate impact cases is likely a means of avoiding the "constitutional questions" that some Justices have warned are raised by disparate impact as applied to race discrimination. *See Inclusive Cmtys. Project*, 135 S. Ct. at 2551 (Scalia, J., concurring) (emphasizing that disparate impact invites the use of "racial quotas"); *see also* Ricci v. Destefano, 557 U.S. 557, 593 (2009) (granting summary judgment for the petitioners without addressing the constitutional question). Indeed, a few members of the Court contend that unencumbered use of disparate impact to address racial disparities may violate the Equal Protection Clause. *See Inclusive Cmtys. Project*, 135 S. Ct. at 2551 (Scalia, J., concurring); *Ricci*, 557 U.S. at 595 (Scalia, J., concurring).

148. 557 U.S. at 592.

149. *See* Alexander v. Sandoval, 532 U.S. 275, 285 (2001).

150. *See, e.g.*, Matt Apuzzo, *Under Trump, Approach to Civil Rights Law Is Likely to Change Definitively*, N.Y. TIMES (Jan. 19, 2017), https://www.nytimes.com/2017/01/19/us/politics/civil-rights-justice-department-donald-trump.html [https:/nyti.ms/2K3luHJo] (observing that civil rights enforcement differs by administrations and noting that while President Obama expanded enforcement, President Reagan's administration was criticized for refusing to enforce civil rights laws).

ideology, discursive practice, and the Supreme Court's dominant analytical approach to antidiscrimination case law, colorblindness represents the principle that state action invoking racial categories is harmful and normatively ill-advised, regardless of whether that action is taken to remedy past structural, race-based discrimination or to remedy social inequality.[151] Under colorblindness, race is considered presumptively irrelevant to government decision making.[152]

The Court initially ruled that in some contexts, race could be considered when addressing prior racial discrimination.[153] Beginning in the 1970s, however, the Court began to shift away from determining whether the state acted with a malicious purpose to whether it merely invoked race.[154] In this way, the Court began incrementally curtailing the use of race-conscious policies to correct racial disparities.[155] During the 1980s and 1990s, the Court applied a colorblind approach to race-based classifications regardless of whether the government action was intended to rectify or perpetuate discrimination on the basis of race.[156] Notably, in *Feeney*, Justice Stewart maintained that even when used to address past discrimination, racial classifications were "presumptively invalid and [could] be upheld only upon an extraordinary justification."[157]

Colorblindness became the analytical norm in race jurisprudence six years later when, in *Adarand Constructors, Inc. v. Peña*, the Court maintained that race-based classifications created by the state to *benefit* groups that have been historically subject to discrimination would be assessed under the same standard

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151. *See generally* Haney-López, *supra* note 122 (detailing the advent and operation of colorblindness in the Supreme Court's race discrimination cases).

152. *Id.* at 1783, 1827.

153. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 177 (1980) (voting); United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (employment); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 406–07 (1978) (Blackmun, J., concurring) (education).

154. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 245–48 (1976) (permitting the use of a District of Columbia police officers' exam that disproportionately excluded African Americans from the police force); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198 (1973) ("[P]laintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."); *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (finding that a neutral law that has a disproportionately adverse effect upon a racial minority will violate the Equal Protection Clause only if it results from a discriminatory purpose).

155. *See Bakke*, 438 U.S. at 265 (fractured Supreme Court was unable to produce a majority opinion on the use of an affirmative action program, with some Justices arguing that much more needed to be done before victory could be declared in the effort to end racial discrimination).

156. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477, 510–11 (1989) (rejecting a minority set-aside program modeled on a plan that it upheld just a few years earlier). In the redistricting context, the Court has rejected the use of race as a factor in the drawing of voting districts to maintain effective political participation for blacks. *See* Shaw v. Reno, 509 U.S. 630, 657 (1993). The Court held that strict scrutiny would apply to race-based congressional districting decisions. *Id.* at 657. The Court has also rejected redistricting plans on the ground that they failed to satisfy the "narrowly tailored to serve a compelling interest" prong of the strict scrutiny analysis. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

157. *Feeney*, 442 U.S. at 272.

as classifications intended to burden such groups.[158] The Court ruled that all state race-based classifications must be subject to "strict scrutiny" review, which is the highest level of judicial review in the graduated review system for equal protection cases.[159] This demanding standard requires the government to prove that its action or law serves a "compelling governmental interest" and is essential to achieving that interest—that is, the least restrictive means of realizing that interest.[160] Strict scrutiny review has proven to be "strict in theory, but fatal in fact" because few laws survive this standard.[161] Since colorblindness became the Supreme Court's dominant approach to evaluating race-based remedial measures, only two such measures have been upheld.[162]

The Court's acceptance of colorblindness is evident in its recent decisions severely restricting the state's use of race-based classifications to rectify centuries of government-sanctioned race discrimination. In his majority opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, for example, Chief Justice Roberts explained that race-conscious policies are "extreme measure[s]" that are presumptively invalid.[163] Roberts concluded with the now famous directive: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[164]

4. Race Law's White Normative Baseline

The shortcomings of disparate impact, compounded by colorblindness and the modern intent doctrine, together allow race law to be interpreted in a narrow, formalistic way, making relief difficult to obtain for black people. Under the intent doctrine, a policy or practice that adversely affects racial minorities is typically struck down by courts only when intentional discrimination is found, whereas actions that adversely affect white people are typically struck down regardless of their intent. And under colorblindness, plaintiffs

158. 515 U.S. at 227.

159. *Id.* This graduated review system for equal protection cases which involves two analytically distinct steps: the reviewing court must first determine whether the government's action implicates a constitutionally suspect classification (for example, race or gender), and then it must apply the appropriate level of judicial scrutiny. *Id.* at 219–20. If the government's action involves a racial classification, the court will apply strict scrutiny. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

160. *Adarand*, 515 U.S. at 235. Depending on the type of classification or whether a fundamental right is involved, the court will apply one of three levels of equal protection scrutiny, listed here in descending order of stringency: strict scrutiny, intermediate scrutiny, or rational basis review. Racial classifications receive strict scrutiny. *See id.* Gender classifications receive intermediate scrutiny. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (applying intermediate scrutiny to gender classifications). All other classifications, including those that implicate age, socioeconomic status, disability, or sexual orientation, receive rational basis review. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (applying rational basis review to disability status).

161. Fullilove v. Klutznick, 448 U.S. 448, 507 (1980).

162. *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2214 (2016) (upholding affirmative action in higher education); Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (same).

163. 551 U.S. 701, 728 (2007).

164. *Id.* at 748.

challenging affirmative action or other remedial measures designed to *help* Blacks by addressing structural inequities, not impair Whites, almost always succeed.[165]

This may be due to the fact that race law encompasses a white normative baseline. The Supreme Court's affirmative action jurisprudence, for example, assumes a certain ahistorical conception of harm. Because the baseline for determining harm begins at the present time, affirmative action jurisprudence imagines that Whites are not benefitting from current social arrangements resulting from the prior, often state-sanctioned exploitation and discriminatory treatment of Blacks and members of other racial minority groups.[166] In this way, race law works to protect white people from any race-based disadvantage but covers racial minorities only for disadvantage caused by individuals motivated by racial animus. Consequently, the goal of racial equality that originally animated race law and doctrine has been undermined by the very tools that were created to prohibit discrimination.

II. AN ALTERNATIVE FRAMEWORK: DISABILITY LAW

The formidable limitations of race law force us to look to other legal provisions that more effectively combat the causes and consequences of racial inequality and enable the formulation of appropriate remedies that include structural reform. In sharp contrast to race-based antidiscrimination law and doctrine, disability law rarely requires a search for malicious motive before liability can be found—a showing of disparate impact is almost always enough. Furthermore, unlike colorblind race doctrine, these provisions expressly require that disabling conditions be considered when devising a remedy; they are disability conscious. This Part identifies the dominant disability antidiscrimination statutes and discusses the aims and conceptions of equality that prompted their enactment, as well as disability law's acceptance of the notion that disability can be socially produced.

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165. *See* Haney-López, *supra* note 122, at 1784. As noted by legal scholar, Haney-López, "colorblindness applies to affirmative action; intent doctrine sweeps up allegations of discriminatory treatment against non-Whites. Colorblindness denies that the state's purposes can be discerned; intent doctrine demands proof of malicious purpose. Colorblindness consistently imposes the most stringent form of scrutiny; intent cases always default to the most lenient form of constitutional review. Plaintiffs challenging affirmative action under colorblindness always win; parties challenging discrimination under intent doctrine almost invariably lose." *Id*.

166. *See* Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 299, 301 (2015) (noting that traditional standing doctrine requires plaintiffs to demonstrate that the policy or practice at issue causes a concrete, personal harm; however, courts in affirmative action cases ignore this requirement and instead assume harm to Whites—a phenomena Boddie calls the "innocence paradigm").

A. DISABILITY AND EXCLUSION

Persons with disabilities have faced discrimination much like that experienced by black people, including disenfranchisement,[167] restrictions on their ability to marry,[168] and outright segregation.[169] Congress thus recognized individuals with disabilities as being members of a group that has been faced with restrictions and limitations, subject[] to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society.[170]

In short, individuals with disabilities, like black people, have struggled against social practices that create a shared experience of discrimination and exclusion based on explicit and implicit bias, stereotyping, and structural inequality.[171]

The ADA's legislative history, for example, identifies among Congress's primary concerns the subordination of persons with disabilities through animus-based prejudice.[172] The ADA committee report includes testimony from individuals denied access and opportunities due to such prejudice, including the case of a wheelchair user who was unwelcome at an auction house because she was deemed "disgusting to look at," children with Down Syndrome who were refused entry to a zoo out of an alleged fear that they would upset the primates, and a man with dyslexia who was denied a job operating heavy equipment because he was unable to pass a written examination and was not permitted to

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167. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., THE AMERICANS WITH DISABILITIES ACT AND OTHER FEDERAL LAWS PROTECTING THE RIGHT OF VOTERS WITH DISABILITIES (2014), https://www.ada.gov/ada_voting/ada_voting_ta.htm [https://perma.cc/GFU4-9RKN] (describing the policies and practices that exclude people with disabilities from voting).

168. *See* Tennessee v. Lane, 541 U.S. 509, 524 (2004) (observing that people with disabilities have experienced "systematic deprivations of fundamental rights" including marriage).

169. Olmstead v. L.C., 527 U.S. 581, 600 (1999) (plurality opinion) (outlining the ADA's desegregation mandate and noting that Congress identified the unjustified segregation of people with disabilities as discrimination).

170. ADA, 42 U.S.C. § 12101(a)(7) (2012). This language was removed from the ADA after the law was amended in 2008. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553; *see also* 42 U.S.C. § 12101(a)(6) (2012) (noting stigma and severe disadvantages faced by those with disabilities); *id.* § 12101(b)(1) (stating the goal of eradicating discrimination against people with disabilities).

171. *See id.* § 12101(a)(2) ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . ."); *id.* § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional *exclusion*, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . . ." (emphasis added)); *see also* Bagenstos, *supra* note 29, at 422 (observing that Congress identified among its primary concerns the subordination of persons with disabilities through prejudice, stereotyping, and neglect).

172. *See* Bagenstos, *supra* note 29, at 422–23.

take the test orally.[173] Relying on statistical and anecdotal evidence of the prevalence and severity of such sentiments and behavior, Congress made clear that the ADA must target explicitly "unfair . . . prejudice" stemming from animus against individuals with disabilities, which contributes to discrimination.[174]

Congress also identified stereotyping, the formation of unfounded assumptions about an individual's ability to participate and contribute to society, as a significant concern.[175] Those with disabilities typically suffer the effects of stereotyping manifested as the belief that they are impaired in ways that extend beyond their specific disability.[176] Research shows this phenomenon to be particularly striking in the education setting "where educators not uncommonly assume that *any* child with a disability (even a child who has nothing more than a mobility impairment) also has difficulty learning."[177] According to David Engle, the assumption of many teachers with respect to children with disabilities is that "a child can be *either* intelligent *or* 'handicapped' but is rarely—if ever—both."[178]

Finally, Congress understood the scourge of disability discrimination to often be the result "of thoughtlessness and indifference—of benign neglect."[179] This neglect has contributed to the construction and perpetuation of structural inequities that act as barriers to equality, access, and opportunity.[180] Pervasive conscious and unconscious biases have contributed to the creation of a social and physical environment that excludes persons with disabilities, including "architectural, transportation, and communication barriers,"[181] and inaccessible health and educational services.[182] Congress recognized that these structural inequities are often exacerbated by facially neutral policies that have a disparate impact on this population.[183]

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173. *See* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R-C.L. L. REV. 413, 418–20 (1991) (providing examples of animus based actions against persons with disabilities from the Act's legislative history).

174. ADA § 12101(a)(8); *see also* Burgdorf, *supra* note 173.

175. ADA § 12101(a)(7) (2006).

176. Bagenstos, *supra* note 29, at 423 (describing this phenomenon and labeling it the "spread effect").

177. *Id.* at 424; *see also* Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 57 n.201 (1995) (addressing the prevalence of the belief in educational settings that children with disabilities are "retarded or stupid").

178. David M. Engel, Essay, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 185.

179. Alexander v. Choate, 469 U.S. 287, 295 (1985).

180. *Id.* at 295–96.

181. ADA, 42 U.S.C. § 12101(a)(7) (2012).

182. *Choate*, 469 U.S. at 297 (discussing access to special education and rehabilitation services among the handicapped); *see also* Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004) (holding that the ADA prohibited a county from eliminating healthcare services for disabled by closing hospital).

183. *Id.* at 295–97 (observing that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent").

B. DISABILITY ANTIDISCRIMINATION LAWS

Invoking the civil rights movement and adopting its rhetoric and tactics, disability rights activists and advocates ultimately succeeded in securing passage of laws intended to ensure "equality of opportunity, full participation, independent living, and economic self-sufficiency"[184] to the estimated fifty-four million individuals in the United States with one or more physical or mental disabilities.[185] Chief among these laws are the ADA and its statutory companion, the Rehabilitation Act.

A descendant of the Civil Rights Act of 1964 (CRA),[186] the Rehabilitation Act of 1973 (Rehabilitation Act) was the nation's first significant antidiscrimination law that focused on disability status.[187] The Rehabilitation Act's unprecedented and widely celebrated Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[188]

The ADA was passed in 1990 by significant bipartisan majorities in both chambers of Congress after "decades of deliberation and investigation."[189] It "provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[190] The ADA applies Section 504's prohibition on discrimination against people with disabilities to state and local governments.[191] The ADA's three primary titles address the dominant

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184. ADA § 12101(a)(7); *see also* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 106–41 (1993) (documenting the work of the disability rights movement).

185. *See* Press Release, U.S. Census Bureau, 20th Anniversary of Americans with Disabilities Act: July 26 (May 26, 2010), http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff13.html [https://perma.cc/U59L-82HV].

186. Civil Rights Act (CRA) of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1983–2000 (2012)). The various titles of the CRA proscribe racial segregation in education, employment, and public accommodations. *See* CRA §§ 2000a, 2000d, 2000e-2.

187. *See* Rehabilitation Act (RA) of 1973, Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (2012)).

188. RA § 794(a). Section 504 also covers all federal entities, including the United States executive agencies and the Postal Service, and it delegates the authority to promulgate regulations to each administrative agency. *See id.* Section 504 regulations bar denying qualified individuals the opportunity to participate in or benefit from an aid, benefit, or services; denying an opportunity to participate or benefit that is not equal to that afforded others; providing any aid, benefit, service, or training that is not as effective as that provided others; providing different aids, benefits, services, or trainings unless necessary to be effective; or limiting a qualified individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others. 28 C.F.R. § 41.51(b)(1)(i)–(vii) (2015).

189. Tennessee v. Lane, 541 U.S. 509, 516 (2004); *see also* SHAPIRO, *supra* note 184, at 322–23 (documenting the politics behind the bipartisan support for the ADA). The Act passed the Senate by a 76 to 8 vote, and the House by a 403 to 20 vote, before being signed into law by then President George H. W. Bush. 135 CONG. REC. 19,903 (1989) (Senate vote); 136 CONG. REC. 11,466–67 (1990) (House vote).

190. ADA, 42 U.S.C. § 12101(b)(1) (2012).

191. *Id.* §§ 12111–12117. The ADA prohibits all state and local government entities from excluding qualified individuals with disabilities from participation in the entities services, programs, and activi-

areas of discrimination: Title I covers employment; Title II governs all state and local services, programs, and activities; and Title III regulates public accommodations.[192]

C. SALIENT FEATURES OF DISABILITY LAW

Section 504 bars all entities that receive federal financial assistance from discriminating on the basis of disability. Title II of the ADA extends this requirement to all state and local government activities.[193] Together, their reach is broad—these laws forbid discrimination against persons with disabilities by many private actors and in the provision or operation of public services, programs, or activities.[194] Their remedial mandates include the provision of reasonable modifications, balancing of harms, acknowledgement of unintentional bias, prohibition of so-called "reverse discrimination" claims, and integration.

1. Disparate Impact Trumps Intent

Section 504 and Title II prohibit the exclusion of qualified individuals from participating in an entity's services, programs, and activities.[195] The ADA's ban on discrimination against qualified individuals with disabilities is mirrored by the Attorney General's Title II regulations, which also make it illegal to offer different or separate aids, benefits, or services except for when necessary to make such services as effective as those provided to others.[196]

Although Section 504 and Title II reach intentionally discriminatory behaviors, they also reach actions that have a disparate impact or discriminatory effect.[197] In *Alexander v. Choate*, the Supreme Court made clear that Congress

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ties; from denying qualified individuals with disabilities the benefits of the entity's services, programs, or activities; and from subjecting qualified individuals to discrimination based on their disability. *Id.* § 12132. Section 504 bars federal grantees from engaging in the discriminatory behavior prohibited by Title II, however, although Section 504 includes the words "solely by reason of his or her disability," the word "solely" is excluded from the ADA's definition of discrimination. Section 504's definitions section includes the ADA's definition of disability and person with a disability. RA § 705(9)(B).

192. ADA §§ 12101–12102. Title I's reach extends to private employers with fifteen or more employees, labor unions, agents of the employer, joint management labor committees, and employment agencies. *See id.* § 1211(2), 12111(5)(a).

193. *See supra* note 191.

194. *See supra* Section II.B.

195. *See* RA, 29 U.S.C. § 794(a) (2012); ADA § 12132.

196. 28 C.F.R. § 35.130(a) (2015). The regulations make it illegal to (1) exclude persons with disabilities from the opportunity to participate in or benefit from a government aid, benefit or service; (2) afford them an opportunity to participate or benefit that is not equal to that afforded others; and (3) provide them an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement as that provided others. *Id.* § 35.130(b)(1)(iii). They also prohibit limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others. *See id.* § 35.130(b)(1)(iv)–(vii).

197. *Id.* § 35.130(b)(3). Title II precludes "utiliz[ing] criteria or methods of administration . . . that have the *effect* of subjecting qualified individuals with disabilities to discrimination on the basis of

identified disparate impact discrimination against persons with disabilities to be among the most pressing problems it sought to address.[198] According to the Court, Congress explicitly forbade disparate impact discrimination under disability law because much of the conduct it "sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[199] As disability law scholar Mark Weber has observed, aside from one narrow exception,[200] *Choate* provides "that in other kinds of cases, disparate impact—the far extreme from intent—will suffice to establish a claim" under the ADA.[201] Thus, in most cases, Section 504 and Title II do not require courts to inquire into the perpetrator's mental state when determining liability, and they allow recovery for unintentional discrimination.

This understanding of discrimination stands in contrast to Title VI of the CRA—Section 504's analogue in race law—which accepts as "permissible" disparate impact discrimination against members of racial minority groups.[202] Moreover, unlike race law's statutory provisions that allow for disparate impact claims, plaintiffs suing under disability law need not amass statistical evidence to show that the defendant's seemingly neutral policy or practice disadvantaged one group relative to another. Rather, the plaintiff need only show that the defendant's policy or practice disadvantaged a qualified individual with a disability.[203] Thus, disability law takes seriously an individual's experience with

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disability" or "have the purpose or *effect* of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." *Id.* (emphasis added). In addition, the regulations prohibit the imposition of eligibility criteria that are likely to screen out "an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." *Id.* § 35.130(b)(8); *see also* H.R. REP. NO. 101-485, pt. 2 at 84 (1990), *reprinted* in 1990 U.S.C.C.A.N. 267, 367 ("[I]t is . . . the Committee's intent that section 202 [ADA Title II] . . . be interpreted consistent with *Alexander v. Choate*."); 28 C.F.R § 41.51(b)(3) (2015) (describing Section 504's regulations addressing disparate impact discrimination).

198. 469 U.S. 287, 295–97 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." (footnotes omitted)).

199. *Id.*

200. The Choate Court required a finding of intent where plaintiffs sought to bring a broad challenge to a state government's decision regarding the allocation of resources in a public welfare program. *See id.* at 299.

201. Mark C. Weber, *Accidentally On Purpose: Intent in Disability Law*, 56 B.C. L. REV. 1417, 1464 (2015) ("[T]he imposition of intent requirements in section 504 and ADA Title II cases, particularly those requesting monetary relief, is the consequence of insufficient attention to [case law], statutory text and legislative history, and the policy consideration that ought to determine the scope of liability and relief").

202. Alexander v. Sandoval, 532 U.S. 275, 285 (2001) (holding that no private right of action exists to assert a disparate impact claim under Title VI or its regulations because it covers only intentional discrimination, and no private right of action exists to enforce Title VI regulations that may bar disparate impact discrimination).

203. *See* Weber, *supra* note 42, at 1434 ("The courts that have read the law carefully have not found an intent requirement in Title II reasonable modification cases.").

structural inequality and mandates remedial action. Finally, a broad array of remedies unavailable under Title VI of the CRA, including compensatory damages, are available for successful disparate impact claims brought under the ADA and Section 504.[204]

2. "Reasonable Modification" and the Balance of Harms

Disability law is distinct in its recognition that covered entities need not treat individuals with disabilities as they would those without disabilities. This legislative command that covered entities take affirmative steps to alter their policies and practices to accommodate the special needs of those with disabilities signals a nuanced understanding of equal opportunity that is absent from current race law.

Indeed, Title II and Section 504 are unique among antidiscrimination laws in that they require state and local government entities and federal grantees, which include many private actors, to reasonably modify any policies, practices, or procedures for any known disabilities of qualified individuals.[205] This modification requirement of Title II, comparable to the "reasonable accommodation" mandate under the ADA's employment provision, is not dependent upon a showing of discriminatory intent by the respondent: the liability is strict.[206]

In contrast to colorblindness in the race context, the modification requirement constitutes mandated remedial action and is the primary means through which disability law makes real its antidiscrimination command. No appellate court has ever required particularized discriminatory intent to find a violation of the reasonable modification mandate, and failure to modify is itself a form of discrimination under Title II and Section 504.[207]

Although Section 504 and Title II do not require states or federal grantees to employ any and all means to make services accessible or to compromise essential eligibility criteria for public programs, they do require all reasonable modifications that would not fundamentally alter the nature of the service, program, or activity provided.[208] And this requirement applies only when the

204. *See id.* at 1449 (noting that "broad remedies, consistent with concepts of reasonable expectation of loss, and including compensatory damages and other monetary relief, are available for violations of [S]ection 504 and the ADA's reasonable accommodations and disparate impact discrimination provisions").

205. 28 C.F.R. § 35.130(b)(7) (2015) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."); *see also* 28 C.F.R. § 41.51(d) (2015) (regulations containing Section 504's reasonable modifications mandate).

206. *See* Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 206–07 (E.D.N.Y. 2000) (deciding that the government's motive was immaterial), *aff'd sub nom.* Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003).

207. *See* Weber, *supra* note 42, at 1433–34 (demonstrating that Section 504 and Title II do not impose an intent requirement for a finding of liability in reasonable modification and accommodations).

208. 28 C.F.R. § 35.130(b)(7). This "fundamental alteration" defense is analogous to the "undue hardship" defense under Title I, the ADA's employment provision.

individual seeking modification is otherwise eligible for the service with or without modification.[209] This balancing of the equal opportunity interests of individuals with disabilities against the interests of covered entities is a signature feature of disability law. Where liability for a violation of the modification mandate is found, injunctive, declaratory, and compensatory relief are available.[210]

3. "Most Integrated Setting Appropriate"

Disability antidiscrimination law has its own desegregation mandate. *Olmstead v. L.C.*, widely regarded as one of the most significant civil rights decisions for persons with disabilities and commonly referred to as the disability movement's *Brown v. Board of Education*,[211] held that states should endeavor to provide services for these individuals in a community setting, rather than segregating these individuals in institutions.[212] In reaching this decision, the Court cited the ADA, which requires state and local government services be made available in the most integrated setting appropriate.[213] Section 504's regulations also include this language,[214] and this desegregation mandate does not necessitate a showing of intent under either the ADA or Section 504.[215]

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209. *See* ADA § 12131(2) (A qualified individual with a disability under the ADA is one "who with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.").

210. Referring to cases where damages were awarded to claimants in Section 504 cases against the government, the ADA's House Committee Report notes that Congress sought to make available in Title II modification cases, the "full panoply of [Section 504] remedies." H.R. REP. NO. 101-485, pt. 3, at 52 & n.62 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 475 n.62 (citing Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982) (holding that under Section 504 an implied private right of action for damages and injunctive relief was available when officials were sued in their official capacities)); *see also Henrietta D.*, 331 F.3d at 289 n.18 (citing the House Report).

211. *See, e.g.*, Mary C. Cerreto, Olmstead*: The* Brown v. Board of Education *for Disability Rights—Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47 (2001); Don Schanche, Jr., *Georgia Lags in Responding to* Olmstead *Decision*, MACON TEL., Mar. 30, 2003, at A10 ("The Olmstead Decision has become as significant for people with disabilities as 'Brown v. Board of Education' was for the civil rights movement.").

212. 527 U.S. 581, 587 (1999) (maintaining that persons with disabilities have the right to receive necessary treatment in an integrated setting if they wish, if their physician agrees, and if it would not fundamentally alter the way the state administers services to persons with disabilities).

213. *See Olmstead*, 527 U.S. at 602 (citing 28 C.F.R. § 35.130(d) (2015)) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."); *id.* § 41.51(b)(4)(d) (including Section 504's regulations requiring that services be provided in the most integrated setting).

214. 28 C.F.R. § 41.51(b)(4)(d) (2015).

215. The court in *Helen L. v. DiDario*, a direct precursor to *Olmstead*, noted:

> [b]ecause the ADA evolved from an attempt to remedy the effects of "benign neglect" resulting from the "invisibility" of the disabled, Congress could not have intended to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination. Such discrimination arises from "affirmative animus" which was not the focus of the ADA or section 504.

46 F.3d 325, 335 (3d Cir. 1995), *cert. denied sub nom.* Pennsylvania Sec'y of Pub. Welfare v. Idell S., 516 U.S. 813 (1995).

4. Structural Inequality and the "Social Model" of Disability

Disability antidiscrimination laws cover medical impairments as well as and distinct from disabilities. To determine whether an individual is covered by the statute, the ADA first asks whether the person has:

> (a) a physical or mental impairment that substantially limits one or more major life activities [actual disability];
> (b) a record of such an impairment; or
> (c) an actual or perceived impairment that is not both transitory and minor [regarded as disabled].[216]

The ADA defines physical impairment as encompassing any physiological condition affecting one or more body systems, including skin.[217] When we think about this definition, we may understand it to include only maladies or medical conditions. However, this would be a misunderstanding of the statute. Disability law recognizes that many conditions understood as disabling do not necessarily arise from a medical condition, but are instead traits that create disadvantage when combined with an inhospitable social or physical environment.[218] For example, someone with dysgraphia is not disabled until they are called upon to write. Similarly, although blackness is, in large part, a physiological condition,[219] it is not, by itself, an impairment. Blackness becomes disabling once situated within particular social contexts.

Disability law captures this nuanced understanding of disability through its embrace of two conceptions of "actual disability": the "medical model" and the "social model."[220] The medical model looks at disability in a narrow sense as a person's condition or trait that is primarily medical in nature and situated within the corporeal being.[221] The social model of disability considers disability in a broader sense, moving beyond medical impairment to understanding disability as an impairment that arises from the relationship between the person and the social and physical environment.[222] Thus, using a wheelchair is not inherently

216. ADA, 42 U.S.C. § 12102(1)(A)–(C) (2012), *amended by* ADAAA; 28 C.F.R. § 35.108(a) (2016). Although the ADA as amended does not use the precise terms "actually disabled" or "regarded-as" disabled, both concepts are encompassed within the definition of "disability." *See* 28 C.F.R. § 35.108(a)(2)(ii) (2016).

217. 28 C.F.R. § 35.108(b)(1) (2016).

218. *See* Bagenstos, *supra* note 29, at 430.

219. Blackness is defined largely by skin color but it is also the manifestation of particular physical, cultural, and linguistic features that Americans have been socialized to recognize and correlate with people racially designated in the United States as black.

220. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649 (1999).

221. *Id.* at 649–53.

222. *See* MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 33 (1996) (distinguishing impairment from disability).

disabling but becomes so when the person in the wheelchair confronts stairs instead of an elevator. In this situation, it is not the individual's mobility impairment that disables her, but rather the contingent social choices and arrangements that have led to the creation of an inaccessible environment. Indeed, as author Simi Linton has observed with respect to her status as a wheelchair user, "If I want to go to vote or use the library, and these places are inaccessible, do I need a doctor or a lawyer?"[223]

This social model of disability was advanced by disability rights activists during the 1970s in response to the then-prevailing notion of disability as a pathology or deficit intrinsic to the person.[224] These activists rejected this understanding as flawed because it treated disability as "an inherent personal characteristic that should ideally be fixed, rather than a characteristic that draws its meaning from social context."[225] According to disability law scholar Samuel Bagenstos, the disability rights movement's claim was that disability is often a consequence of an interaction between biological conditions and the "physical and social environment—and that the greater part of the disadvantage attached to 'disability' is best addressed through attempts to change the environment."[226]

The use of a social understanding of disability to remedy disability-based disadvantage is exemplified by a community on Martha's Vineyard during the eighteenth and nineteenth centuries. As Nora Groce has documented, this community had a significant number of deaf residents and everyone, regardless of whether they were themselves deaf or were related to a deaf person, was able to communicate through sign language.[227] As a result, deaf individuals were able to express themselves freely and enjoy the benefits of full social, civic, and economic participation and inclusion.[228] For those deaf individuals, a hearing impairment was not a disability.[229] A modern counterpart can be found at Gallaudet University: a historically deaf university where the faculty, administrators, and students are able to communicate through sign language or other modes of communication for the deaf.[230]

In addition to its important insights regarding the relationship between disability and the social and physical environment, the social model also offers a critical lens into the meaning, production, and cultural relativity of disability.

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223. SIMI LINTON, MY BODY POLITIC: A MEMOIR 120 (2006).

224. CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS 11 (1988).

225. Bagenstos, *supra* note 29, at 427. In this way, disability activists conceptualized disability in a way consistent with what Martha Minow has labeled the "social-relationship approach," that is, as a way to understand differences leading to disabilities as created by, and given meaning within, social relationships. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 110–14 (1990).

226. Bagenstos, *supra* note 29, at 431.

227. NORA ELLEN GROCE, EVERYONE HERE SPOKE SIGN LANGUAGE: HEREDITARY DEAFNESS ON MARTHA'S VINEYARD 3–4 (1985).

228. *See id.* at 75–94.

229. *See id.*

230. *See Who We Are*, GALLAUDET UNIV., http://www.gallaudet.edu/about/who-we-are [https://perma.cc/U9QE-HLYZ].

For instance, it allows us to see how some disabilities are manifestations of socio-cultural forces, such as with anorexia nervosa.[231] The condition has been described as emerging from a confluence of factors, including "heightened cultural pressure to exercise and be thin, women's personal freedom, desocialized eating environments, a lack of adolescent supervision, and the ubiquity of food for purchase."[232]

A social understanding of disability also illuminates the temporality of some conditions or traits understood as disabilities. For example, as noted by Bradley Areheart, a child now diagnosed with attention deficit disorder would have been characterized as hyperactive or unfocused a century ago.[233] Similarly, a young person with a diagnosis of dyscalculia (a condition that involves difficulty with math) at one time would have been considered simply a poor student.[234] The social model also makes clear that whether a trait operates as a disability may depend on one's objectives. For instance, if one's aim is to excel at reading, then dyslexia functions as a disability. Yet if one's goal is to excel at causal perception, an ability necessary for success in many professions, then having dyslexia may be beneficial and may explain how some individuals with dyslexia, such as Carole Greider and Baruj Benacerraf, were nevertheless able to produce Nobel Prize winning scientific research.[235]

The social model also explains how the determination of what constitutes a disability does not necessarily emerge from objective empirical methods and, as such, is often contested. Consider the battles over the designation of certain conditions in the Diagnostic and Statistical Manual of Mental Disorders (DSM), which provides a standard criteria for the categorization of mental disorders. The designation of post-traumatic stress disorder, the replacement of transsexualism with gender identity disorder, and the removal of homosexuality were all hotly contested.[236] This suggests that the line between normal and abnormal can be deeply socially contextual. Rather than being binary concepts, "disabled" and "abled" move along a continuum, and determinations of what falls outside the norm are often based upon culturally specific and historically contingent normative judgments rather than science or empirics.[237] As such, these determi-

231. Areheart, *supra* note 30, at 368.
232. *Id.*
233. *Id.* at 364.
234. *Id.* at 368.
235. *See* Schneps, *supra* note 32. Schneps offers an instructive example of this phenomenon:

> [I]magine you're looking to hire a talented security guard. This person's job will be to spot things that look odd and out of place, and call the police when something suspicious—say, an unexpected footprint in a flowerbed—is spotted. If this is the person's task, would you rather hire a person who is an excellent reader, who has the ability to focus deeply and get lost in the text, or would you rather hire a person who is sensitive to changes in their visual environment, who is less apt to focus and block out the world?

Id.
236. Areheart, *supra* note 30, at 364–65.
237. *See* Crossley, *supra* note 220, at 656.

nations are prone to change over time and in different socio-cultural contexts.[238]

The social model of disability does not contest the idea that some disabilities are profoundly limiting, real, and meaningful consequences of biology, such as severe neurodevelopmental disorders, degenerative medical conditions, or catastrophic brain injuries. Rather, the central and paradigm-shifting contention of this model, which was ultimately embraced by disability law, is that society is not neutral and that biases are built into its very structures, norms, and practices, which can then produce disability. Indeed, some conditions that we consider disabling are not inherent impairments, but are instead just traits that, when coupled with an unwelcoming social setting, can create disadvantage. Disability laws are not concerned about whether this process occurred intentionally or consciously, only that it disables certain individuals and precludes their access, opportunity, and meaningful inclusion in society.

III. RACIAL INEQUALITY AND THE PROMISE OF DISABILITY ANTIDISCRIMINATION LAW

This Part explores how we might think about race in relation to disability laws' statutory provisions and employs a novel approach that uses the doctrinal framework and normative commitments of disability law as a model for attending to modern race discrimination. This Part begins by briefly chronicling the creation of racial categories in the United States and then demonstrates how a disability law lens allows us to understand the meaning of race in our society, how race functions, and the limits of current race law. This Part concludes by exploring why legislators were able to enact disability laws with a broad remedial mandate, but were unwilling or unable to do so with respect to race.

A. BLACKNESS: DISABLING BY DESIGN

Although both disability law and traditional race law bar discrimination, their approaches differ in critically important ways. Race law provides protection from discrimination on the basis of race. Under the logic of race law, because each person is ascribed a race, the law should intervene on behalf of individuals instead of groups, and anyone, regardless of their race, can bring a claim of

238. *See id.* at 656–57. According to Crossley,

> the concept of "normal" entered the English language only in the mid-nineteenth century in relation to the developing science of statistics, which focused on identifying a norm and deviations from that norm. But the concept of "normal" grew from being simply descriptive of a statistical finding to carrying with it a prescriptive force, implying that normality was to be desired and deviance from the norm was to be avoided. Yet the perimeter of human normality has been rearranged over time and among different cultures, and as the construction of normality has changed, so has the construction of that form of deviance from the norm known as disability.

Id.; *see also* LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 11 (1995) (describing the history of the concept of normal).

racial discrimination.[239] This individual rights perspective is akin to the "anti-classification" approach in equal protection jurisprudence,[240] which prohibits state actors from grouping individuals based on race. Thus, it eschews claims for enhanced protection based on a group trait or racial identity.[241] Indeed, state actions that invoke a racial classification are subject to strict scrutiny, the highest level of judicial review.[242] Under strict scrutiny, laws that have an asymmetrical racial impact are often struck down.[243] This framework, which has become the dominant approach to race law and doctrine, rejects appeals to context and history.[244]

In contrast, disability law intervenes on behalf of a specific group in the population that has been denied full citizenship and subjected to structural subordination.[245] The theory behind disability law is that groups that have experienced a history of systematic disadvantage should receive heightened protection.[246] This is similar to what has been dubbed the "anti-subordination" approach in equal protection jurisprudence.[247] Although discrimination against persons with disabilities is not entitled to increased constitutional scrutiny under equal protection doctrine, the antidiscrimination laws that govern disability are

239. As I will explain in this section, race is a social construct that often operates outside of individual choice.

240. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004) (describing the anti-classification approach); *see also* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1058 (1986) ("That principle creates the presumption that *all* race- and sex-*specific* policies are discriminatory, and that *no* race- and sex-*neutral* policies are discriminatory unless accompanied by race- or sex-specific motivation.").

241. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 129 (1976) ("The antidiscrimination principle does not formally acknowledge social groups, such as blacks; nor does it offer any special dispensation for conduct that benefits a disadvantaged group.").

242. Under the strict scrutiny standard, the government must prove that its action or law serves a compelling governmental interest and is essential to achieving that interest (that is, the least restrictive means of realizing that interest). *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 216 (1995) (quoting McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964)).

243. *See* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (noting that the application of strict scrutiny is often "strict in theory, but fatal in fact").

244. *See* Colker, *supra* note 240, at 1005 (positing that the anticlassification approach "focuses on the motivation of the individual institution that has allegedly discriminated, without attention to the larger societal context in which the institution operates").

245. *See* ADA, 42 U.S.C. § 12101(a)(7) (2012) (finding that "individuals with disabilities are a discrete and insular minority"). The ADAAA removes this language, but keeps the basic test for protected class membership. *See* ADAAA, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555 (2008).

246. Yale Law School professor Owen Fiss has been credited with identifying the anti-subordination strain of analysis in equal protection jurisprudence. *See* Colker, *supra* note 240, at 1008 n.15 (contending that Fiss was "among the first to articulate the anti-subordination principle within equal protection doctrine").

247. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 MIAMI U. L. REV. 9, 10 (2003); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004).

significantly more equality enhancing than those governing race.[248] Indeed, disability law is designed to provide robust protection while alleviating social stratification and prohibiting actions that reinforce disadvantage and the effects of past state-sanctioned discrimination.

The existence of these two approaches to addressing inequality forces us to question why blackness is deemed appropriately governed through one approach and not the other. Are there any intrinsic or inherent characteristics of blackness that justify its regulation through a paradigm that protects everyone equally regardless of race and eschews group distinctions versus a model that conceptualizes certain group-based distinctions as important and meaningful and therefore entitled to increased protection? Both approaches aim to enforce the Fourteenth Amendment's command that "all persons similarly situated be treated alike,"[249] but this raises the question of whether white people and black people are similarly situated. To answer this question, we must investigate the meaning of race and query what aspects of racial distinctions matter. This question also requires us to acknowledge the role of race. Why do we have racial distinctions? What purpose, if any, does race serve?

Embracing a race law approach to race-based discrimination makes sense if we think of race as a neutral, universal, biological fact. Within this paradigm, the notion that each person has a "race," so the law should treat everyone equally, seems eminently reasonable. This sentiment, however, misapprehends the nature of race, which is neither innate nor natural, but rather a socially constructed identity marker.[250] Historically defined by skin color, culture, language, national origin, social or socioeconomic class, or an amalgam of all these traits,[251] race in the United States is fundamentally a mutable, malleable product of social choices.[252] This means that "racial categories, the meaning we attach

248. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441–42 (1985) (holding that disability status is not a suspect or quasi-suspect classification and is therefore not entitled to heightened constitutional scrutiny, but rather rational basis review, under equal protection analysis).

249. *Id.* at 439.

250. *See, e.g.*, Guang Guo et al., *Recognizing a Small Amount of Superficial Genetic Differences Across African, European and Asian Americans Helps Understand Social Construction of Race*, 3 J. PERS. SOC. PSYCHOL. 492 (2014) (responding to criticism of an earlier study examining racial classifications in U.S. social surveys).

251. Kimani Paul-Emile, *The Regulation of Race in Science*, 80 GEO. WASH. L. REV. 1115, 1131 (2012); *see also* Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1144 (2010) ("First, the racial categories change over time and as a function of politics—just consider how the Census has counted 'race' differently over the centuries. Second, the mapping rules are also dynamic—consider how and why, in 1854, the California Supreme Court classified the Chinese as racially Indian or black in order to prevent them from testifying in court. Third, consider how the racial meanings associated with a particular category can rapidly change—e.g., for Asian-Americans, debased laborers working on the railroads (mid-1800s) to yellow peril (1940s) to model minority (late 1960s).") (footnotes omitted).

252. Paul-Emile, *supra* note 251, at 1131. Changes to the U.S. Census over the years illustrate the malleability of racial categories. For example, in 1997, the federal government increased the number of recognized racial categories from four (American Indian or Alaskan Native, Asian or Pacific Islander, black, and white) to five (American Indian or Alaskan Native, Asian, black or African American, Native

to these categories, and the way we determine which individuals will be assigned to these categories, are all driven by social, cultural, and historical practices, and are not determined *a priori* by biology or genetics."[253]

The origin of "race" can be traced to at least the seventeenth and eighteenth centuries when Western European researchers in the fields of anatomy, biology, and physiology began creating taxonomies of humanity. In 1735, for example, the Swedish biologist Carolus Linnaeus created a classification system that organized humans into four categories defined by skin color, geographic ancestry, and personality traits: Africanus (black skin, lazy, careless, carefree), Americanus (red skin, obstinate, ill-tempered), Asiaticus (yellow skin, greedy, distractible), and Europeaus (white skin, innovative, intelligent).[254] Similarly, in 1781, the physiologist and founder of modern anthropology, Johann Friedrich Blumenbach, extended Linnaeus' system to demonstrate "objectively" that Africans were biologically, psychologically, and morally inferior to Europeans.[255]

These stigmatizing ideas regarding non-Whites were used to justify the genocidal project of removing indigenous Americans from their native lands[256] as well as the enslavement of captured Africans brought to the colonies to generate extraordinary wealth for the New World.[257] During the 1840s and 1850s, well-respected American scientists began refining these theories by measuring and classifying perceived differences among humans in an effort to prove that non-Whites constituted biologically distinct and inferior species as opposed to their previous designation as members of "less developed" cul-

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Hawaiian or Other Pacific Islander, and white). U.S. CENSUS BUREAU, RACIAL AND ETHNIC CLASSIFICATIONS USED IN CENSUS 2000 AND BEYOND, http://www.pacificweb.org/DOCS/PopRaceAncestry/Race/Racial%20and%20Ethnic%20Classifications %202000.pdf [https://perma.cc/7LV5-MP32].

253. Paul-Emile, *supra* note 251, at 1131–32; *see also* Gail Dutton, *Correlating Genomics, Race, and Medicine: Researchers Strive to Quantify Racial Rule in Disease Risk and Treatment*, 26 GENETIC ENGINEERING NEWS, Jan. 1, 2006, at 1 ("The idea of race persists in cultures, but it's not a genetic definition and it gets confused with cultural relationships." (quoting Michael Liebman, Executive Director of the Windber Research Institute)); Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. SOC. SCI. 487, 490–91 (2010) ("This view of race as socially constructed emphasizes power relations (subordination) and inequality (stratification), drawing heavily on the historical roots of racial exclusion, rather than, for example, racial identity."); Jennifer McAndrew, *Deep Roots?: New DNA Tests May Reveal Your Ancestry, But Researchers Urge Caution When Interpreting Results*, LIFE & LETTERS (Sept. 10, 2008), http://lifeandletters.la.utexas.edu/2008/09/deep-roots [https://perma.cc/8SHE-AP3S] ("[T]here's no clear-cut connection between racial identity and your genetic makeup.").

254. Paul-Emile, *supra* note 251, at 1123 (citing WILLIAM STANTON, THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815–59 (1960)); WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH 9 (1994); Christian B. Sundquist, *The Meaning of Race in the DNA Era: Science, History, and the Law*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 231, 234–35 (2008)).

255. TUCKER, *supra* note 254, at 9. Blumenbach also coined the term "Caucasian," which he deemed to be the ultimate race. *Id.*

256. *See* Maria Yellow Horse Brave Heart & Lemyra DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & AK. NATIVE MENTAL HEALTH RES. 56, 60–61 (1998).

257. *See* TUCKER, *supra* note 254, at 12–15.

tures.[258] Among the most highly regarded of these scientists was the renowned phrenologist, Dr. Samuel George Morton, who measured the cranial capacity of over eight hundred skulls found throughout the world to produce evidence of the inferiority of people not deemed white.[259]

History shows that the research of these "race scientists" was shaped by their own prejudices and then-popular pejorative perceptions of non-white peoples.[260] Nevertheless, their presumed "objective" research was widely celebrated and readily accepted by many, including jurists.[261] Their research findings were invoked in the case law of the time. In *Plessy v. Ferguson*, the Supreme Court upheld the doctrine of "separate but equal."[262] And in the infamous Dred Scott decision, the Supreme Court declared that black people were not entitled to the rights and privileges of citizenship or full protection under the Constitution because they were "considered . . . a subordinate and inferior class of beings, who . . . had no rights or privileges."[263]

These "scientific" conclusions regarding the "natural" inferiority of Blacks were also championed by those who sought to maintain the prosperity and political power of southern states. Indeed, this research offered empirical support for their contention that as a subhuman species, Africans and their descendants were exempt from the Declaration of Independence's "self-evident" truth "that all men are created equal."[264] After the Thirteenth Amendment outlawed slavery, these same southern states instituted the "Black Codes," which invited

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258. *See id.* at 17–21.

259. *See id.* According to Morton's findings, the most highly ranked peoples were the "Caucasians," who had the largest skulls and therefore the "highest intellectual endowments." *See id.* at 18–19 (citing Samuel George Morton, CRANIA AMERICANA 5–7, 54, 65, 93 (1839)). Much lower down the scale were American Indians, who were "averse to cultivation," and, at the bottom, were "Ethiopians," as blacks were known at the time, whom he deemed "the lowest grade of humanity." *See id.* Another of these scientists was the internationally acclaimed Harvard professor Louis Agassiz, who maintained that the races emerged from distinct origins and were inherently unequal. *Id.* at 17–21.

260. Paul-Emile, *supra* note 251, at 1124 n.28. Scientist Stephen J. Gould attempted to recreate Morton's research on human skulls and found them to be "a patchwork of fudging and finagling in the clear interest of controlling a priori convictions." STEPHEN JAY GOULD, THE MISMEASURE OF MAN 54 (1981). Moreover, historians suggest that most of the "Caucasian" skulls that Morton studied belonged to executed felons; therefore, a large skull could have represented criminality. *See* THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 74 (1963). Likewise, Louis Agassiz claimed that his work on racial difference was disinterested and nonpolitical; however, in his first significant article on race he justified his efforts by announcing that "the submissive, obsequious, imitative negro" exhibited a "peculiar indifference to the advantages afforded by civilized society," and concluded that:

> human affairs with reference to the colored races would be far more judiciously conducted, if, in our intercourse with them, we were guided by a full consciousness of the real differences existing between us and them, and a desire to foster those dispositions that are eminently marked in them, rather than by treating them on terms of equality.

TUCKER, *supra* note 254, at 17–18.

261. *See* TUCKER, *supra* note 254, at 17.

262. *Cf.* 163 U.S. 537 (1896).

263. *Cf.* Scott v. Sandford, 60 U.S. 393, 404–05, 454 (1856).

264. Paul-Emile, *supra* note 251, at 1124 n.29 (citing *Plessy*, 163 U.S. at 551–52; *Scott*, 60 U.S. at 410–11).

the arrest and incarceration of Blacks without cause.[265] The resulting prison labor force was made to work in the agribusiness, mining, and steel industries. Dubbed "slavery by another name," this system enabled the explosive industrial development of the late nineteenth century.[266]

The project of attaching meaning to the emerging racial categories and determining which individuals would be assigned to each category continued to develop through the nineteenth and twentieth centuries because biologists applied Charles Darwin's notion of natural selection to humanity.[267] This led to what became known as "Social Darwinism."[268] This social theory used Darwin's hypotheses to justify its "survival of the fittest" approach to race and class distinctions and maintained that social programs aimed at elevating the status of the poor and racial minorities—including Irish Catholic immigrants, who were then widely seen as racially distinct from Anglo-Saxons[269]—undermined the natural balance of the races.[270] Social Darwinist philosophies would ultimately lead to the advent of the eugenics movement, and was largely responsible for the passage of anti-miscegenation laws, Jim Crow segregation policies, immigration restrictions, and the forced sterilization of an estimated 45,000 people of "inferior stock" in the United States alone.[271]

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265. Hollis R. Lynch, *The Black Codes*, INT'L WORLD HISTORY PROJECT (Feb. 26, 2016), http://historyworld.org/black_codes.htm [perma.cc/22YJ-Z32K]; Michael Zuckert, *Natural Rights and the Post-Civil War Amendments*, NATURAL LAW, NATURAL RIGHTS, & AMERICAN CONSTITUTIONALISM (2011), http://www.nlnrac.org/american/civil-war-amendments [https://perma.cc/CS8C-GFSV].

266. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008); Devon Douglas-Bowers, *Slavery by a Different Name: The Convict Lease System*, GLOBAL RESEARCH CTR. FOR RESEARCH ON GLOBALIZATION (June 1, 2012), https://www.globalresearch.ca/slavery-by-a-different-name-the-convict-lease-system/31176 [perma.cc/34AF-A56H].

267. *See* CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (J. Carroll ed., Broadview Press 2003) (1859). Darwin maintained that all humans belonged to one species and cautioned that his work should not be used to create hierarchies of human beings. According to Darwin:

> [a]lthough the existing races of man differ in many respects as in color, hair, shape of skull, proportions of the body, etc., yet if their whole structure be taken into consideration they are found to resemble each other closely in a multitude of points. Many of these points are of so unimportant or of so singular a nature that it is extremely improbable that they should have been independently acquired by aboriginally distinct species or races.

CHARLES DARWIN, THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX 203 (reprinted from 2d Eng. ed., rev. and augmented 1874).

268. Paul-Emile, *supra* note 251, at 1125 (citing Troy Duster, *Lessons from History: Why Race and Ethnicity Have Played a Major Role in Biomedical Research*, 34 J. L. MED. & ETHICS 487, 490–91 (2006)).

269. NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 130, 132–33, 150 (2010).

270. Paul-Emile, *supra* note 251, at 1125 (citing Sundquist, *supra* note 254, at 243). According to Professor Troy Duster, the term "survival of the fittest" was devised by Social Darwinist Herbert Spencer, who "dominated the social thought of his age as few have ever done." Duster, *supra* note 268, at 490–91.

271. Paul-Emile, *supra* note 251, at 1125 (citing Sundquist, *supra* note 254, at 242–46).

Today, although the mapping of the human genome demonstrated that all humans are 99.9% identical genetically,[272] and revealed that there is no genetic variation responsible for the combination of characteristics and features typically ascribed to race,[273] the idea of racial difference remains a powerful force in twenty-first century America.[274] The broad consensus among scientists is that "[o]ne definite and obvious consequence of the complexity of human demographic history is that races in any meaningful sense of the term do not exist in the human species."[275] Thus, scholars overwhelmingly agree that "among modern humans, there's no such thing as race."[276] Nevertheless, the stigmatized meaning inscribed over hundreds of years onto this socially constructed identity marker continues to privilege some while disabling others as racial inequality and race discrimination remain startlingly commonplace.[277]

Disability law—especially the social model of disability—offers a framework for understanding the meaning and function of race in the United States because it serves a de-naturalizing role by making race seem less neutral and innate. Disability law's appreciation of the constructed nature of some disabilities and its focus on groups that have long experienced subordination enables it to capture the historical meaning and contingencies of race in ways that race law does not allow. Disability law centers our attention on what aspects of blackness really matter, revealing its purpose to disable. Race law's intent doctrine and colorblindness, on the other hand, erase this history. By failing to acknowledge that racial classifications were designed to function as a caste system, the intent doctrine and colorblindness flatten racial difference, giving all distinctions a false equivalence.[278] This makes racial categories appear innocuous and natural,

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272. *See* Dutton, *supra* note 253, at 2.

273. *See id.* at 1.

274. Paul-Emile, *supra* note 251, at 1131.

275. *Id.* (citing David B. Goldstein & Lounès Chikhi, *Human Migrations and Population Structure: What We Know and Why It Matters*, 3 ANN. REV. GENOMICS & HUM. GENETICS 129, 137–38 (2002); *see also* JONATHAN MARKS, HUMAN BIODIVERSITY: GENES, RACE, AND HISTORY 162 (1995); Jonathan M. Marks, *Scientific and Folk Ideas About Heredity*, *in* THE HUMAN GENOME PROJECT AND MINORITY COMMUNITIES: ETHICAL, SOCIAL, AND POLITICAL DILEMMAS 53, 61 (Raymond A. Zilinskas & Peter J. Balint eds., 2001)); Henry T. Greely, *Human Genome Diversity: What About the Other Human Genome Project?*, 2 NATURE REV. GENETICS 222, 225 (2001); Margaret Lock, *Genetic Diversity and the Politics of Difference*, 75 CHI.-KENT L. REV. 83, 87 (1999).

276. *See* Dutton, *supra* note 253, at 1 (quoting Joseph L. Graves, Jr., Dean of University Studies and Professor of Biological Sciences, North Carolina Agricultural & Technical State University); *see also* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xiii–xiv (1996); Catarina I. Kiefe, Editorial, *Race/Ethnicity and Cancer Survival: The Elusive Target of Biological Differences*, 287 J. AM. MED. ASS'N 2138, 2138 (2002) ([O]ver the past several decades, race as a biological construct became largely discredited among scientists . . . ."); Ritchie Witzig, *The Medicalization of Race: Scientific Legitimization of a Flawed Social Construct*, 125 ANNALS INTERNAL MED. 675, 676 (1996) ("Race is . . . an unscientific social construct . . . .").

277. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 805 (2004) ("[T]he American caste system whose brutality and forced separation of the races effectuated the economic, political, and social exploitation and subordination of generations of African Americans and *other racial minorities*." (emphasis added)).

278. *See supra* Section II.A.

instead of socially constructed and often fraught. Once race is stripped of all meaning and context, the focus on intent and colorblindness seems to make sense.

A disability law lens forces us to recognize how social practices, attitudes, and choices produced a social environment that is disabling for black people. Here the social mode of disability is instructive because it provides a mechanism for identifying the ways in which social institutions, policies, and norms have been shaped—consciously or unconsciously—in a way that benefits one racial group at the expense of another. In the same way that society was developed by and for the non-disabled, so too has it been structured in a way that privileges Whites, who have a competitive advantage in an unequal playing field on which Blacks struggle to compete.

Blackness, to be sure, is neither a medical impairment nor operational deficiency, but within many contexts it serves as a functional impediment.[279] Race law occludes this aspect of racial inequality. By not meaningfully addressing structural racism, it reinforces the inequities that it claims to combat and legitimizes the very social conditions that harm black people. Moreover, by focusing so heavily on intentional behaviors, race law transforms the residual effect of the United States' legacy of state-sanctioned race discrimination and ongoing systemic inequality into an innately personal concern, rather than a social or collective issue. This dynamic shifts responsibility for alleviating the disabling aspects of blackness onto black people themselves and away from the collective, thus further disabling black people.

The social mode of disability, on the other hand, illuminates how social and juridical practices can attach stigmatized meanings—such as biases, stereotypes, and attitudes—to certain people with shared characteristics in ways that make these stigmatized meanings seem essential and intrinsic to the group. This influences subsequent social, legal, and economic choices in a feedback loop and informs how the group is treated and perceived going forward, adversely influencing the development of the social environment they must navigate. A disability law lens—as opposed to a race law approach—therefore suggests a means for recognizing how the meanings and values that came to be associated with racial difference were produced and how they ultimately rendered blackness disabling.[280] This is how a myth becomes reality—how contingent social choices and practices can create the disabled subject.

B. IS BLACKNESS AN "ACTUAL DISABILITY"?

How might we think about race in relation to disability law's statutory provisions? To determine whether a person has an "actual disability"—as

279. *See supra* Section I.A.

280. *See* OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND (2014) (describing how social practices produce racial meaning through a study of how blind people learn to "see" race).

opposed to being "regarded as disabled"—disability law asks whether the individual has a "physiological condition"[281] that "substantially limits" one's ability to perform a "major life activity."[282] This definition was expanded by the ADA Amendments Act of 2008 (ADAAA), which sought to counter courts' restrictive interpretations of the ADA, including the imposition of a "demanding standard" for determining disability.[283] The ADAAA extends the scope of the ADA by defining disability "broadly in favor of expansive coverage."[284]

Some may object to characterizing blackness as an "actual disability," contending that the discrimination black people experience would be more appropriately characterized under the "regarded as" prong of the ADA's definition of disability. This provision allows plaintiffs to allege that they experienced discrimination based on the perception that they are disabled, even though they are not "actually disabled."[285] Notably, reasonable modifications or accommodations are unavailable for these claims.[286]

Legal scholars Angela Onwuachi-Willig and Mario Barnes have advanced this precise argument, suggesting that the "regarded as" provision be used as a model for recognizing employment discrimination claims based on the use of proxies for race, such as discrimination based on black sounding names, voices, or accents.[287] These scholars maintain that "it is not physical race but the presumption[] of 'disability,'" based on "socially significant racial meanings"

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281. 28 C.F.R. § 35.108(b)(1) (2016).

282. ADA, 42 U.S.C. § 12102(1) (2012), *amended by* ADAAA. According to DOJ's ADA regulations, "[a]n impairment is a disability if it "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 28 C.F.R. § 35.108(d)(1)(v) (2016).

283. *See* Amy L. Albright, *2009 Employment Decisions Under the ADA Title I—Survey Update*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 340 (2010) (documenting that plaintiffs were losing 97% of their discrimination cases under the ADA).

284. ADAAA, Pub. L. No. 110-325, § 5(a), 122 Stat. 3553, 3557 (2008) (codified as amended at ADA, 42 U.S.C. § 12112 (Supp. II 2008)). The primary purpose of the ADAAA:

> is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the [ADAA's] purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

28 C.F.R. § 35.101(b) (2016).

285. ADA § 12102(2)(C), *amended by* ADAAA; 28 C.F.R. § 35.108(a)(2)(ii) (2016); *see supra* note 148 (describing the provision).

286. The ADAAA removed from the ADA the accommodation–modification remedy for those "regarded as" disabled, stripping these individuals of any statutory right to accommodation–modification. *See* 76 Fed. Reg. 16,980 (Mar. 25, 2011) ("The terminology selected is for ease of reference and is not intended to suggest that individuals with a disability under the first prong otherwise have any greater rights under the ADA than individuals whose impairments are covered under the 'record of' or the 'regarded as' prongs, other than the restriction created by the Amendments Act that individuals covered only under the 'regarded as' prong are not entitled to reasonable accommodations.").

287. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being 'Regarded As' Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1289 (2005).

and stereotypical assumptions about people from certain disadvantaged groups, that inspires "both conscious and unconscious forms of discrimination."[288]

Although, as I have explained, race is a powerful social construct, I submit that the combination of physical characteristics historically ascribed to black people in the United States operate as a physiological condition[289] that "substantially limits one or more . . . major life activities."[290] Indeed, although one's race is not always obvious, unambiguous, or transparent, in many instances it is one's perceived blackness itself that is actually disabling in American society. This is best exemplified by racial profiling in policing, which substantially limits many of the most fundamental life activities, including the basic act of navigating public spaces.[291]

Proven to be quite widespread throughout the United States, racial profiling practices place black individuals at heightened risk of violence and abuse based primarily on their phenotypic characteristics. This practice often occurs through *Terry* stops, known colloquially as "stop and frisk," which involve law enforcement officers stopping, detaining, questioning, and frisking or searching individuals suspected of engaging, having engaged, or attempting to engage in criminal activity.[292] A 2016 U.S. Department of Justice (DOJ) report, for example, found that the Baltimore, Maryland police department had systematically and unconstitutionally stopped, searched, harassed, and arrested black residents for years without cause or legitimate suspicion.[293] Although Baltimore is 63% black, these residents constituted "84[%] of police stops—and 95[%] of 410 individuals found to have been unjustifiably stopped at least 10 times in a five-and-a-half-year period."[294] Moreover, charges were not filed in twenty-six of every twenty-

288. *Id.*

289. 28 C.F.R. § 35.108(b)(1) (2016).

290. ADA § 12102(2)(A), *amended by* ADAAA; 28 C.F.R. § 35.108(a)(1)(i) (2016).

291. *See* CIV. RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4, 62 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/F8WP-EJK4] [hereinafter FERGUSON REPORT] (documenting the arrest of black individuals without justification).

292. *See* Terry v. Ohio, 392 U.S. 1, 33 (1968); *see also* N.Y. C.L. UNION, *Stop-And-Frisk 2011: NYCLU Briefing* 2 (2012), http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf [https://perma.cc/V96C-7B4B].

293. Editorial, *A Policing Culture Built on Racism in Baltimore*, N.Y. TIMES (Aug. 10, 2016), https://www.nytimes.com/2016/08/11/opinion/a-policing-culture-built-on-racism-in-baltimore.html [https://nyti.ms/2kq5K4I]; Sheryl Gay Stolberg, *Findings of Police Bias in Baltimore Validate What Many Have Long Felt*, N.Y. TIMES (Aug. 10, 2016), https://www.nytimes.com/2016/08/11/us/baltimore-police-bias-report.html [https://nyti.ms/2jS2XEC].

294. Editorial, *supra* note 293. The report also notes that during this same five-and-a-half-year period, "officers stopped 34 black residents at least 20 times each, and seven 30 times or more. No individuals of any other race were stopped more than 12 times each." *Id.* Moreover, black individuals comprise 37.8% of the federal prison population but only 13.3% of the general population, making the total number of police stops disproportionate even when compared to the black criminal population. *See* Janice Williams, *White Men vs. Black Men Prison Statistics 2016: Why Are More African American Males Incarcerated?*, INT'L BUS. TIMES (Oct. 5, 2016, 11:41 AM), http://www.ibtimes.com/white-men-vs-black-men-prison-statistics-2016-why-are-more-african-american-males-2426793 [https://perma.cc/HG2N-8R6U].

seven pedestrian stops, and the report noted that residents could be arrested unlawfully simply because officers "did not like what those individuals said."[295]

In New York City in 2011, the police stopped, questioned, or searched 684,330 people, approximately 87% of whom were black or Latino, and 9% of whom were white.[296] Nearly 90% of those stopped had engaged in no wrongdoing.[297] In 2013, a New York federal court held the New York City Police Department ("NYPD") liable for a pattern and practice of racial profiling and unconstitutional stop-and-frisks after finding that the NYPD had systematically stopped innocent black and Latino individuals for years without any objective reason to suspect them of doing anything wrong.[298]

Similarly, in San Francisco, Blacks constitute 6% of the population but 45% of those cited and 40% of those shot by police from January 2010 through July 2015.[299] In Chicago, which has the nation's second largest municipal police force after New York City, a 2016 report issued by a mayoral task force found that although Blacks account for one-third of the city's populace, they represented "74[%] of the 404 people shot by the Chicago police between 2008 and 2015," 75% of the people Tasered by the police, 46% of drivers stopped by the police in 2013, and "72[%] of the thousands of investigative street stops that did not lead to arrests during the summer of 2014."[300] The report emphasized that many of these people were "[s]topped without justification, verbally and physically abused, and in some instances arrested, and then detained without counsel."[301] The report concluded that "the police have no regard for the sanctity of life when it comes to people of color."[302] DOJ was also investigating nearly a dozen cities for reported widespread, unconstitutional policing.[303]

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295. Editorial, *supra* note 293. The report noted that when one officer protested, the supervisor suggested that the officer "[m]ake something up." *Id*.

296. Kate Taylor, *Record Number of Street Stops Prompts a Protest*, N.Y. TIMES CITY ROOM BLOG (Feb. 14, 2012, 5:05 PM), https://cityroom.blogs.nytimes.com/2012/02/14/record-number-of-street-stops-prompts-a-protest/ [https://nyti.ms/2zwunUO].

297. *See, e.g.*, Editorial, *Stop and Frisk, Continued*, N.Y. TIMES (Apr. 2, 2012), http://www.nytimes.com/2012/04/03/opinion/stop-and-frisk-continued.html [https://nyti.ms/2wheZNz] (describing a federal lawsuit against the NYPD for stopping and arresting individuals who had engaged in no wrongdoing).

298. Floyd v. City of New York, 939 F. Supp. 2d 668, 671 (S.D.N.Y 2013); *cf.* Jim Dwyer, *Police Stops are Down; So is Murder*, N.Y. TIMES (Feb. 5, 2013), http://www.nytimes.com/2013/02/ 06/nyregion/police-stops-are-down-in-new-york-so-is-murder.html [https://nyti.ms/Wt406H] (noting a decrease in murder rates with fewer officers on the street and fewer stop-and-frisks).

299. Thomas Fuller, *The Loneliness of Being Black in San Francisco*, N.Y. TIMES (July 20, 2016), http://www.nytimes.com/2016/07/21/us/black-exodus-from-san-francisco.html [perma.cc/ZQ5E-2ZN3]; Emily Green, *African Americans Cited for Resisting Arrest at High Rate in S.F.*, S.F. GATE (Apr. 29, 2015, 5:25 AM), http://www.sfgate.com/bayarea/article/African-Americans-cited-for-resisting-arrest-at-6229946.php [https://perma.cc/Q863-BA5W].

300. Monica Davey & Mitch Smith, *Chicago Police Dept. Plagued by Systemic Racism, Task Force Finds*, N.Y. TIMES (Apr. 13, 2016), http://www.nytimes.com/2016/04/14/us/chicago-police-dept-plagued-by-systemic-racism-task-force-finds.html [https://nyti.ms/2kdum0k]; *see* Williams, *supra* note 294.

301. *See* Davey & Smith, *supra* note 300.

302. *Id.*

303. Editorial, *supra* note 293.

Terry stops have become an integral part of popular police control and surveillance strategies that disproportionately target black populations, such as the "war on drugs"[304] and "broken windows"[305] policing. Implicit bias undoubtedly plays a role in police officers' racially discriminatory use of these law enforcement tactics,[306] but incidents of conscious and explicit racial profiling and police bias remain alarmingly common. The Ferguson Report documents several such incidents, including the case of a young black man named Michael who was arrested and charged with "making a false declaration" for informing police officers that his name was "Mike."[307] He was later charged with other offenses, including "not wearing a seat belt," notwithstanding that he was sitting in a parked car at the time of his police encounter after playing basketball in a nearby public park.[308] His arrest at gunpoint was precipitated by his decision to assert his constitutional right to refuse a police search of his vehicle.[309] Similarly, among the many anecdotes cited in DOJ's report on Baltimore was one that described a teenage boy who was strip-searched in public and in front of his girlfriend.[310] The officer denied searching the boy and the charges were later dropped; however, after the boy filed a complaint, he was again strip-searched by the same officer, who pulled down the boy's pants and grabbed his genitals.[311]

This problem of racial profiling by law enforcement is not confined to low-income communities. Consider the case of Harvard Professor Henry Louis "Skip" Gates, Jr., who was arrested for breaking into his own home.[312] Even on a national level, Blacks are arrested at rates disproportionate to their share of the population and their level of actual criminal activity.[313] One study found black

304. Arthur H. Garrison, *NYPD Stop and Frisk, Perceptions of Criminals, Race and the Meaning of* Terry v. Ohio*: A Content Analysis of* Floyd et al. v. City of New York, 15 RUTGERS RACE & L. REV. 65, 144 (2014).

305. *See* E.B., *What "Broken Windows" Policing Is*, ECONOMIST (Jan. 27, 2015, 11:50 PM), http://www.economist.com/blogs/economist-explains/2015/01/economist-explains-18 [perma.cc/HR33-HQ87]; Jeffrey Fagan et al., *An Analysis of the NYPD's Stop-and-Frisk Policy in the Context of Claims of Racial Bias* 11, 17 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 05-95, 2006), http://ssrn.com/abstract=846365 [https://perma.cc/CG47-BXL7].

306. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876,878 (2004) (finding that the cognitive correlation between black people and violent crime is so strong that "the more stereotypically Black [a person's] face appears, the more the likely officers are to report the face looks criminal").

307. *See* FERGUSON REPORT, *supra* note 291, at 3.

308. *Id.*

309. *Id.*

310. CIV. RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 33 (2016), https://www.justice.gov/crt/file/883296/download [https://perma.cc/KQ8J-DXE8].

311. *Id.*; *see also* Stolberg, *supra* note 293.

312. *See* Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias*, N.Y. TIMES (July 20, 2009), http://www.nytimes.com/2009/07/21/us/21gates.html [https://nyti.ms/2jLU5QG].

313. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: 2015, tbl.43A (2015), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43 [https://perma.cc/Z635-JCAP] (reporting arrests by race and ethnicity and finding 26.6% of total arrestees were black or African American); *see also* Jamiles Lartey & Naomi Stewart, *'Excessive Arrest' of Minorities—Not Police Violence—Explain Deaths: Study*, GUARDIAN (July 26, 2016, 9:57 AM), https://www.

Americans in Minneapolis are up to six times more likely than white Americans to be arrested or cited for low-level offenses.[314]

With respect to drug offenses, Blacks are more likely than Whites to be arrested, convicted, or sentenced despite studies consistently showing their rate of drug use is comparable to that of Whites.[315] Law enforcement data from all fifty states and the District of Columbia show that Blacks are almost four times as likely to be arrested for marijuana possession as Whites.[316] In some states—including Illinois, Iowa, and Minnesota—they are eight times as likely to be arrested and, in some counties, black people are ten or even thirty times as likely to be arrested.[317]

Law enforcement's reliance on phenotypic race to target black people has led to their overrepresentation in the corrections system[318] as Blacks are incarcerated at rates greater than their proportion of the general population.[319] Blacks

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theguardian.com/us-news/2016/jul/26/black-men-minorities-killed-police-encounters-study [https://perma.cc/4G5X-WT9J]; Williams, *supra* note 294, at 2; CIV. RIGHTS DIV., *supra* note 310, at 8–9.

314. AM. C.L. UNION, PICKING UP THE PIECES: A MINNEAPOLIS CASE STUDY 22 (2015), https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces [https://perma.cc/R6ER-SGFR] (finding "Black youth in Minneapolis are 5.8 times more likely to be arrest for a low-level offense than a White youth"); *see also* Victoria Bekiempis, *Why Do NYC's Minorities Still Face So Many Misdemeanor Arrests?*, NEWSWEEK (Feb. 28, 2015, 12:11 PM), http://www.newsweek.com/nypd-race-arrest-numbers-309686 [https://perma.cc/2NF4-5ZKK] (reporting in 2014, the New York City Police Department made 221,851 misdemeanor arrests, of which 80% were black or Hispanic arrestees).

315. U.S. DEP'T OF HEALTH & HUMAN SERVICES, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26 (2014) (reporting rates of illicit drug use in the United States in 2013 among persons aged twelve and older were 10.5% for African Americans and 9.5% for Whites). However, black adults in 2014 constituted "close to a third of those arrested for drug possession [and] . . . were more than four times as likely to be arrested for marijuana possession than white adults." HUMAN RIGHTS WATCH & AM. C.L. UNION, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES 6 (2016), https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states [https://perma.cc/Q5WL-L6RX].

316. *See* AM. C.L. UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 9 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [https://perma.cc/4UDR-8KQF].

317. *See id.* at 48, 58.

318. In a recently released analysis of data on disproportionate minority contact in arrests, court processing and sentencing, new admissions, ongoing populations in prison and jails, probation and parole, capital punishment, and recidivism, the National Council on Crime and Delinquency found that "[a]t each of these stages, persons of color, particularly African Americans, are more likely to receive less favorable results than their White counterparts." Christopher Hartney & Linh Vuong, NAT'L COUNCIL ON CRIME & DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 2 (2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf [https://perma.cc/DH4P-JLKT]; *see also* David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 376–77 (2012) (finding consistent evidence of differential judicial treatment among African American defendants).

319. AM. C.L. UNION, COMBATING MASS INCARCERATION—THE FACTS (2011), https://www.aclu.org/infographic-combating-mass-incarceration-facts [https://perma.cc/CX37-QDTN] (finding one in every fifteen black males aged eighteen and older were incarcerated, compared to one in every thirty-six Hispanic males and one in every one hundred six white males). Incarceration rates are even higher for twenty- to thirty-four-year-old men without a high school diploma or GED. PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 8 (2010). Approximately one in

represent 38% of prison and jail inmates,[320] even though they account for approximately 13% of the general population.[321] Assuming current incarceration rates remain constant, black males will have a 32% chance of serving time in prison during their lifetime, whereas white males will have only a 6% chance.[322]

1. Blackness as a Stigmatized Condition

The ADAAA places special emphasis on protecting individuals with particularly stigmatized conditions from discrimination[323] and stipulates that the central inquiry should be whether discrimination occurred, not whether the actual disability was sufficiently severe.[324] Indeed, according to the ADAAA's legislative history, Congress was concerned that the ADA failed to adequately protect individuals with highly stigmatized disabilities, such as depression and epilepsy, which courts generally considered insufficiently debilitating to warrant protection.[325] So, too, is blackness stigmatizing, and it has an independent stigmatizing effect across a spectrum of areas in an individual's life that is distinct from the effects of demographics and socioeconomic class.

For example, field experiments designed to gauge the degree to which race affects access to opportunities by sending correspondences ascribed to fictitious individuals who differ only by race or ethnicity reveal that when sent resumes with names suggestive of black ancestry and others suggestive of white ancestry, the resumes assumed to be from Whites received 50% more interview offers irrespective of occupation or industry.[326] Furthermore, when sent identical emails requesting opportunities to discuss research, more than 6,500 professors across disciplines at the top 260 universities were more likely to respond to the

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eight white men in this demographic is incarcerated, relative to one in fourteen Hispanic men and one in three black men. *See id.*

320. *Inmate Race*, FED. BUREAU OF PRISONS (Sept. 23, 2017), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/NE27-CAUD].

321. *QuickFacts United States Population*, U.S. CENSUS BUREAU (2015), https://www.census.gov/quickfacts/table/PST045215/00 [https://perma.cc/5HNQ-PYZF] (showing that, in 2015, 13% of all people in the United States identified as black, either alone, or in combination with one or more other races).

322. Tanisha Wilburn, Acting Assistant Legal Counsel in the Office of Legal Counsel, Written Testimony on Arrests and Convictions to the U.S. Equal Employment Opportunity Commission (July 16, 2011), http://www.eeoc.gov//eeoc/meetings/4-25-12/olc_testimony.cfm [https://perma.cc/2CQA-VHJZ].

323. Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 455 n.92 (2010).

324. ADAAA, Pub. L. No. 110-325, § 5(a), 122 Stat. 3553 (2008) (amending ADA, 42 U.S.C. § 12112 (2012), to prevent covered entities from "discriminat[ing] against a qualified individual on the basis of disability.").

325. Cox, *supra* note 323, at 455 n.92; *see also* S. REP. NO. 93-1297, at 37–38, 50–51 (1974) [hereinafter S. Rep 93-1297], *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388–91, 6413–14.

326. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 10 (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), http://www.nber.org/papers/w9873 [https://perma.cc/GNW4-Z27B].

emails sent by students with stereotypically white names than students with stereotypically black, Latino, or Asian names.[327] When sent identical constituent emails, white legislators from both major political parties were less likely to respond to emails with black-sounding names.[328]

In another study, law firm partners were told to review a memo containing several grammatical and substantive errors. One group of partners was told that the writer was a black man, whereas the other group was informed that the writer was a white man—both men were named Thomas Meyer. According to the study, the reviewers gave the memo ostensibly written by a white man a 4.1 out of 5 rating, whereas they gave the same memo supposedly written by a black man a 3.2 out of 5 rating and identified almost twice as many spelling and grammatical errors. The white Thomas Meyer was commended for his "potential" and for being a "generally good writer," whereas the black Thomas Meyer was criticized as "average at best" and in need of remedial assistance.[329]

In the medical context, studies show that physicians in hospital emergency departments prescribe fewer analgesics to black and Latino patients, despite similar estimates of pain among the groups.[330] Further, when physicians were shown identical medical histories and asked to make judgments about heart disease, they were less likely to recommend cardiac catheterization to black patients.[331]

Race even influences everyday commercial transactions. For example, when researchers varied the skin color of a hand holding an iPod in eBay auctions, the white hand received 23% more offers than the black hand.[332] Likewise, when negotiating for used cars, Blacks were given significantly fewer concessions and were offered an initial price that was an average of $700 higher than that given to Whites.[333] And a Harvard Business School study found that among Airbnb users, those with stereotypically black names were 16% "less likely to be accepted as guests" than those with stereotypically white names.[334]

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327. *See* Katherine L. Milkman et al., *Temporal Distance and Discrimination: An Audit Study in Academia*, 23 PSYCHOL. SCI. 710, 714 (2012).

328. Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463, 471–72 (2011).

329. Debra Cassens Weiss, *Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn't White*, ABA J. (Apr. 21, 2014, 12:09 PM), http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases [https://perma.cc/BCB9-NBGX].

330. Claudia M. Campbell & Robert R. Edwards, *Ethnic Differences in Pain and Pain Management*, 2 PAIN MGMT. 219 (2012); *see also* Bonham, *supra* note 97, at 52; Monika K. Goyal et al., *Racial Disparities in Pain Management of Children with Appendicitis in Emergency Departments*, 169 J. AM. MED. ASS'N PEDIATRICS 996, 996 (finding among children with appendicitis in emergency departments, black patients were half as likely as white patients to receive appropriate pain relief).

331. *See* Schulman et al., *supra* note 98, at 624–25.

332. Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 ECON. J. F469, F488 (2013).

333. Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 319 (1995).

334. Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (June 21, 2016), http://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html [https://nyti.ms/2kgjpev].

Evidence of racial bias also negatively influences perceptions of violence and criminality. In death penalty litigation, "the perceived blackness of a defendant is related to sentencing: the more black the more deathworthy."[335] Juries comprised entirely of white individuals have a roughly 16% higher conviction rate for black defendants than for white ones; however, convictions occur at the same rate for both groups if just one black person is added to the jury.[336] Moreover, despite comprising only 13% of the population, black individuals "make up 42[%] of death row and 35[%] of those executed . . . [and] many studies have found the race of the victim to affect who receives the death penalty, with homicides of white victims more likely to result in the death penalty."[337] Lastly, in a study that asked subjects in a video game simulation to shoot at people holding a gun, Blacks were shot at a higher rate, including those who were not holding a gun.[338]

2. Does Blackness "Substantially Limit a Major Life Activity"?

With respect to the "substantially limits" prong of the "actual disability" analysis, DOJ's ADA regulations provide rules of construction to help discern whether an individual is substantially limited in performing a major life activity.[339] They make clear that Congress did not expect this determination to "demand extensive analysis,"[340] but rather intended for broad interpretation so as to ensure "expansive coverage."[341] An individual need only be limited in one major life activity,[342] and the activity need not be of central importance to daily life.[343] Moreover, the law does not mandate that the impairment *prevent* or *severely* limit a major activity.[344]

In keeping with this definition, it is clear that being a black person in the United States substantially limits many major life activities in myriad ways, including working and pursuing an education. It also substantially limits one's health and life chances. According to the Centers for Disease Control and Prevention, the infant mortality rate for Blacks is nearly three times higher than

335. Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006).

336. Shamena Anwar et. al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1017 (2012).

337. *NAACP Death Penalty Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (Jan. 17, 2017), http://www.naacp.org/latest/naacp-death-penalty-fact-sheet/ [https://perma.cc/6LCV-KCTQ].

338. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1007 (2007).

339. 28 C.F.R. § 35.108(a)(2) (2016).

340. *Id.* § 35.108(d)(1)(ii).

341. *Id.* § 35.108(d)(1)(i).

342. *Id.* § 35.108(d)(1)(v).

343. *Id.* § 35.108(c)(2)(ii).

344. *Id.* § 35.108(d)(1)(i).

that of other races;[345] Blacks die of heart disease much more often than Whites and die younger;[346] Blacks, whether straight or gay, have higher rates of HIV infection than Whites;[347] life expectancy for Blacks lags behind that of Whites by 4.5 years;[348] the age-adjusted death rate for the black population exceeds that for the white population by 41% for stroke (cerebrovascular disease), 24% for heart disease, 15% for cancer (malignant neoplasms), 93% for diabetes, and 655% for HIV disease;[349] and diabetes is more prevalent among Blacks than other groups.[350]

Research has long demonstrated that the experience of institutional racism and race discrimination can cause race-related stress, which negatively impacts health, including the onset, progression, and severity of illness or disease.[351] Studies show that even after controlling for socioeconomic factors, members of racial minority groups experience higher levels of race-related stress than Whites, and Blacks experience the most elevated stress rates.[352] The effects of

345. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVS., HEALTH, UNITED STATES, 2015, at 23 (2016), http://www.cdc.gov/nchs/data/hus/hus15.pdf [https://perma.cc/UU6T-6XF2].

346. *Id.* at 100.

347. *Id.*

348. *Id.* at 22.

349. *Id.* at 100.

350. *See id*. at 170.

351. *See* Gilbert C. Gee et al., *A Nationwide Study of Discrimination and Chronic Health Conditions Among Asian Americans*, 97 AM. J. PUB. HEALTH 1275, 1275 (2007) (describing how institutional racism correlates with poor health outcomes, including cardiovascular disease, depression, high blood pressure, and pulmonary disease); Tené T. Lewis et al., *Self-Reported Experiences of Everyday Discrimination are Associated with Elevated C-Reactive Protein Levels in Older African-American Adults*, 24 BRAIN, BEHAV. & IMMUNITY 438, 441 (2010) (describing how among African Americans, perceptions of discrimination have an independent association with cardiovascular disease and other health outcomes, and precursors to cardiovascular disease); *see also* Elizabeth Brondolo et al., *Race, Racism and Health: Disparities, Mechanisms, and Interventions*, 32 J. BEHAV. MED. 1, 2 (2009); Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 COUNSELING PSYCHOLOGIST 13, 14 (2007); Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2324 (2014) (showing how police stops that black men experience disproportionately cause anxiety and post-traumatic stress); Yin Paradies, *A Systematic Review of Empirical Research on Self-Reported Racism and Health*, 35 INT'L J. EPIDEMIOLOGY 888, 891–92 (2006) (finding consistent association between self-reported racism and negative mental health outcomes); David R. Williams & Selina A. Mohammed, *Discrimination and Racial Disparities in Health: Evidence and Needed Research*, 32 J. BEHAV. MED. 20, 27 (2009) (finding positive association between racial discrimination and the incidence of diseases, including uterine myomas and breast cancer); Erlanger A. Turner & Jasmine Richardson, *Racial Trauma is Real: The Impact of Police Shootings on African Americans*, PSYCHOL. BENEFITS SOC. (July 14, 2016), https://psychologybenefits.org/2016/07/14/racial-trauma-police-shootings-on-african-americans/ [https://perma.cc/2XQ3-S8CV] (describing the impacts of racial trauma on blacks); Douglas Jacobs, *We're Sick of Racism, Literally*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/opinion/sunday/sick-of-racism-literally.html [https://nyti.ms/2hsFH11] (describing the negative health effects of race related stress); Jenna Wortham, *Racism's Psychological Toll*, N.Y. TIMES (June 24, 2015), http://www.nytimes.com/ 2015/06/24/magazine/racisms-psychological-toll.html [https://nyti.ms/2k96gE8] (describing black people's experience and race related stress).

352. *See* Dutton, *supra* note 253, at 3; Deidre Franklin-Jackson & Robert T. Carter, *The Relationships Between Race-Related Stress, Racial Identity, and Mental Health for Black Americans*, 33 J.

racial discrimination and race-based stress have been associated with the development of various cancers and health problems manifesting in the neuroendocrine, cardiovascular, and immune systems.[353] The experience of racial discrimination and race-related stress has also been found to affect chronic pain, low birth weight, and BMI and obesity.[354] In addition, studies find that Blacks living in states with high levels of structural discrimination are "more likely to have heart attacks than Blacks in low-discrimination states, and black women are more likely to give birth to babies too small for their gestational age."[355]

All of this goes to show the ways in which the aggregate impact of a life's worth of racially informed experiences may result in particular physiological responses—including differences in overall health status and incidence and prevalence of disease, morbidity, and mortality—that are not determined by assumed genetic differences among groups and are irreducible to other demographic factors or variables.[356]

C. INTEREST CONVERGENCE AND DISABILITY LAW'S BROAD REMEDIAL MANDATE

When we consider the laws that have been enacted to address race and disability discrimination, one might query the incongruity with respect to their remedial mandates. Why might Congress have decided that meaningful equality requires differential treatment, not same treatment, in the disability context, but

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BLACK PSYCHOL. 5, 6 (2007); *see also* Hope Landrine et al., *Conceptualizing and Measuring Ethnic Discrimination in Health Research*, 29 J. BEHAV. MED. 79, 79, 88 (2006); Shawn O. Utsey et al., *Effect of Ethnic Group Membership on Ethnic Identity, Race-Related Stress, and Quality of Life*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 366, 368 (2002); Wortham, *supra* note 351.

353. *See* Teletia R. Taylor et al., *Racial Discrimination and Breast Cancer Incidence in U.S. Black Women: The Black Women's Health Survey*, 166 AM. J. EPIDEMIOLOGY 46, 46 (2007) (noting that research suggests discriminatory treatment contributes to psychological stress and somatic disease, including a higher incidence of breast cancer in black women); Utsey, *supra* note 352, at 368; Elizabeth Brondolo et al., *Racism and Ambulatory Blood Pressure in a Community Sample*, 70 PSYCHOSOM MED. 49 (2008) (observing that perceived racism leads to increased blood pressure among blacks and Latinos); E.K. Adam, *Developmental Histories of Perceived Racial Discrimination and Diurnal Cortisol Profiles in Adulthood: A 20 Year Prospective Study*, 62 PSYCHONEUROENDOCRINOLOGY 279 (2015) (finding that perceived discrimination predicted slower declines in cortisol levels, which have been associated with obesity, depressions, decreased immune function, cancer and death); *see also* Jason Silverstein, *How Racism Is Bad for Our Bodies*, ATLANTIC, (Mar. 12, 2013), https://www.theatlantic.com/health/archive/2013/03/how-racism-is-bad-for-our-bodies/273911/ [https://perma.cc/5HGK-Z4AN].

354. SHANDANETTE MOLNAR, RACIAL DISPARITIES IN BIRTH OUTCOMES AND RACIAL DISCRIMINATION AS AN INDEPENDENT RISK FACTOR AFFECTING MATERNAL, INFANT, AND CHILD HEALTH (2015) (noting effects on low birth weight); Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, 10 PLOS ONE, Sept. 23, 2015, at 1, 14 (noting effects on BMI/obesity and chronic pain); *see* Brondolo, *supra* note 351, at 2; Williams & Mohammed, *supra* note 351, at 27.

355. Dhruv Khullar, *How Prejudice Can Harm Your Health*, N.Y. Times (June 8, 2017), https://www.nytimes.com/2017/06/08/upshot/how-prejudice-can-harm-your-health.html [https://nyti.ms/2rYNTJa].

356. *See, e.g.*, Pilar Ossorio & Troy Duster, *Race and Genetics: Controversies in Biomedical, Behavioral, and Forensic Sciences*, 60 AM. PSYCHOLOGIST 115, 119 (2005); NAT'L INSTS. OF HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NIH HEALTH DISPARITIES STRATEGIC PLAN AND BUDGET: FISCAL YEARS 2009–2013, at 16, https://www.nimhd.nih.gov/docs/2009-2013nih_health_disparities_strategic_plan_and_budget.pdf [https://perma.cc/U4FJ-GFFV].

not in the case of race? And why might legislators and jurists have been less concerned about disparate impact discrimination in the context of race discrimination but not in the case of disability?

The principle that equality sometimes necessitates treating people differently has generated much rancor in the context of affirmative action.[357] A common perception among some Americans is that affirmative action policies confer "special rights."[358] Thus, such race-based remedial efforts are typically cast as unfair, unmeritocratic, and inherently unequal: a zero-sum game in which Blacks gain at the expense of others.[359] In the case of disability legislation, not only is the idea of modification generally accepted, but the concept of disability was recently expanded to cover more people through the 2008 enactment of the ADAAA.[360] Further, Congress accomplished this during a period of retrenchment on issues of civil rights.[361]

Disability law scholar Elizabeth Emens has aptly suggested that the striking bipartisan support for the most recent broadening of disability laws can be attributed to a combination of a commitment to civil rights on the part of some legislators, a sense of pity on the part of others, and a desire to reduce welfare and tax rolls on the part of still other legislators.[362] Emens also notes that so-called reverse discrimination claims and other attacks on the idea of modification have not materialized because of both the "highly negative social status of disability"[363] and the "third party benefits" enjoyed by the nondisabled through modifications such as curb cuts, elevators, and closed captioning.[364]

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357. *See, e.g.*, Charles T. Canady, *The Meaning of American Equality*, *in* THE AFFIRMATIVE ACTION DEBATE 277, 280 (George Curry ed., 1996) (noting Justice Thomas statements that "[p]referential treatment and genuine equal opportunity are fundamentally incompatible"); *id*. at 277–78 (explaining that the Clinton administration's emphasis on their understanding of objections to affirmative action, but strongly endorsing the policies and their necessity).

358. *See* John Blake, *It's Time to Talk About 'Black Privilege,'* CNN (Mar. 31, 2016, 11:28 AM), http://www.cnn.com/2016/03/30/us/black-privilege/index.html [https://perma.cc/EBH3-3LRZ]; Jeffrey R. Dudas, *In the Name of Equal Rights: "Special" Rights and the Politics of Resentment in Post-Civil Rights America*, 39 LAW & SOC'Y REV. 723, 725 (2005).

359. *See, e.g.*, Heather Horn, *When Is Affirmative Action Unfair?*, ATLANTIC (July 24, 2010), https://www.theatlantic.com/national/archive/2010/07/when-is-affirmative-action-unfair/344759/ [https://perma.cc/2TH2-8R88].

360. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a), 122 Stat. 3553, 3557 (2008) (codified as amended at 42 U.S.C. § 12112 (Supp. II 2008)).

361. *See* Emens, *supra* note 37, at 206.

362. *See id.*; *see also* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 926–27 (2003) ("[S]upporters of the proposed ADA argued . . . that a regime of 'reasonable accommodations' could move people with disabilities off of the public assistance rolls and into the workforce in a way that would ultimately save the nation money."); Burgdorf, *supra* note 173, at 425–26 (noting that legislators were concerned about the "tremendous sums in support expenditures" to address the economic dependence of individuals with disabilities).

363. *See* Emens, *supra* note 37, at 227. Emens attributes this to three factors. First, unlike race and gender, disability remains a largely "unmarked status;" second "disability is still so widely regarded as an inferior status that giving something to this group that no one else gets can go largely unchallenged;" and third "the degree of inferiority society assigns to disability allows the category to escape the anxieties about a world upside down that animate racial discourse." *Id.* at 227–28.

364. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 841 (2008).

These justifications are quite likely correct, but there may be other factors at work. The relative capaciousness of disability law relative to race law may also represent an example of "interest convergence" on the part of legislators. Interest convergence theory holds that white elites have historically supported efforts to elevate the status of subordinated groups only when such efforts benefit them.[365] As a result, progress in achieving equality and opportunity for marginalized populations has been limited to moments when the interests of white elites "converge" with those of disadvantaged communities.[366]

In this case, congressional legislators likely understood race to be immutable, natural, and fixed, but thought of disability as being mutable, variable, and shifting. Legislators were probably well aware that any able-bodied person, themselves included, could at any time become physically or mentally disabled due to chance, age, illness, or accident. But these same legislators were likely quite certain that they would not become black if they were not so already. Thus, many legislators' interests converged with the interests of individuals with disabilities to the extent that these legislators likely understood that they may have to seek the protections of disability laws one day. This was probably not how they understood themselves in relation to race laws. As a result, it is conceivable that legislators designed disability laws to function as a sort of insurance policy.[367]

This interest convergence may also reflect a form of homophily, an affinity for individuals similar to oneself. It is not unreasonable to believe that at least some legislators had a family member, friend, or acquaintance with a disability because disability as a legal concept encompasses many physical and mental conditions, from cancer and quadriplegia to attention deficit disorder. Indeed, former U.S. Senator Tom Harkin, who was the primary author of the ADA as well as its chief sponsor in the Senate, maintains that witnessing his older, deaf brother experience discrimination and inequality inspired his efforts to champion the legislation.[368] Because it is likely that legislators knew well at least one person with a disability, it is also quite probable that legislators, like most Americans, have few, if any, family or close friends from a racial group other

365. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–23 (1980).

366. *Id.* at 523.

367. This theory is a modified version of John Rawls' "veil of ignorance," which hypothesizes that policymakers whose characteristics (i.e. race, gender, religion, etc.) were unknown to themselves would craft policies ensuring access to basic liberties for everyone. JOHN RAWLS, A THEORY OF JUSTICE 118–23 (Harv. Univ. Press 1999) (1971). Here, policymakers are behind this veil of ignorance in regards to disability status because they could conceive of their future selves becoming disabled. *See id.*

368. Andrew J. Nelson, *Tom Harkin's Brother Fueled his ADA Determination*, OMAHA WORLD-HERALD (July 21, 2013), http://www.omaha.com/news/tom-harkin-s-brother-fueled-his-ada-determination/article_87ac69b0-d54c-5a71-ae61-6a7434fac397.html [https://perma.cc/4JTX-L8UH]; *The Take Away: The Fight Goes on For American with Disabilities*, NEW YORK PUBLIC RADIO (Dec. 9, 2016) (downloaded from http://www.wnyc.org/story/assessing-state-disability-rights/) (interviewing Tom Harkin).

than their own.[369] Therefore, members of Congress may have been unable (or unwilling) to grasp the realities of the day-to-day hardships endured by many black people. However, because these same legislators were able to appreciate the struggles experienced by individuals with disabilities, they created a regulatory framework addressing the needs of this community.

In many ways, the design of disability law, as compared to race laws, resembles the Rawlsian world in which a society must be created from behind a "veil of ignorance," with the creators in the "original position" unaware of what their place or status will be in the new society that they are devising.[370] While considering the allocation of rights, goods, and resources in this new society, they are unaware of whether they will figure among the most or least privileged.[371] Under these circumstances the creators are more likely to make fair and just decisions and are less likely to act out of naked group or self-interest.[372] In this way, legislators may have drafted disability laws with a broader remedial mandate than race laws because, to the extent that disability laws' protections could be called upon by themselves, a friend, or loved one, these laws represented the world in which everyone's interests converge.

IV. OPERATIONALIZING THE BLACKNESS-AS-DISABILITY FRAMEWORK

This Part suggests how the blackness-as-disability framework would operate by applying it to race discrimination and inequality in education and policing. In so doing, this Part focuses on disability law's acknowledgement of unconscious bias when determining liability and its requirement that we think about disabilities when devising appropriate remedies. This Part then shows how this framework enables us to attend to modern race discrimination while simultaneously providing for a serious evaluation of structural inequalities and the possibility of systemic reform. In conclusion, this Part turns to the challenges attendant to the applied blackness-as-disability framework. It identifies and addresses the practical implications of the framework with the aim of informing the way we think about enacting meaningful legal change in the context of race discrimination.

A. BLACKNESS-AS-DISABILITY FRAMEWORK APPLIED

For an examination of how the blackness-as-disability framework would change our practical approach to race discrimination and racial inequality, this

369. Xavier de Souza Briggs, *"Some of my Best Friends Are . . .": Interracial Friendships, Class, and Segregation in America*, 6 CITY & COMMUNITY 263, 267 (2007); Peter V. Marsden, *Homogeneity in Confiding Relations*, 10 SOC. NETWORKS 57, 65 (1988).

370. *See* Sharona Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. DAVIS L. REV. 1491, 1511–12 (2009).

371. RAWLS, *supra* note 367, at 118 (in Rawls' original position, "no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like").

372. *Id.*

section considers two notable flashpoints where race law is failing, but disability law offers new promise: race discrimination in elementary and secondary school education, and racial profiling and abuse by law enforcement.

1. Elementary and Secondary School Education

Race in elementary and secondary school education is an area in which both structural disadvantage and race discrimination are endemic. A tragic consequence of FHA redlining policies and other state-sanctioned discriminatory housing practices is that they led to the creation of racially segregated schools that are funded through local taxes, with black segregated schools often chronically underfunded.[373]

Despite decades of fierce and often violent struggles over federal government efforts to desegregate the nation's public schools, the percentage of schools with large numbers of indigent black students increased between 2000 and 2014.[374] In the northeastern United States alone, 51.4% of black students attend schools where 90% to 100% of their classmates are racial minorities, an increase from 42.7% in 1968.[375] This is so notwithstanding that, according to data, students irrespective of race feel safer, less victimized, and less lonely in more diverse schools.[376] Researchers have also found that:

> Diverse classrooms reduce racial bias and promote complex reasoning, problem solving and creativity for all students. Five decades of research confirm that students in socioeconomically and racially diverse schools have higher test scores, are more likely to enroll in college, and are less likely to drop out, on average, than peers in schools with concentrated poverty.[377]

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373. *See, e.g.*, David Mosenkis, *Racial Bias in Pennsylvania's Funding of Public Schools*, PHILADELPHIANS ORGANIZED TO WITNESS, EMPOWER & REBUILD (POWER) (Nov. 15, 2014), http://powerinterfaith.org/racial-bias-in-pennsylvanias-funding-of-public-schools/ [https://perma.cc/8TUQ-Y732] (showing that schools with more minority students receive less funding); *see also*, Nicholas Kristof, Opinion, *A History of White Delusion*, N.Y. TIMES (July 14, 2016), https://www.nytimes.com/2016/07/14/opinion/a-history-of-white-delusion.html [https://nyti.ms/2kCHfFr] (observing that the U.S. has an "education system that routinely sends the neediest black students to underfunded, third-rate schools, while directing bountiful resources to affluent white schools.").

374. *See* Richard Fausset, *In Mississippi Town, Some Fear School Desegregation Ruling May Backfire*, N.Y. TIMES (June 6, 2016), http://www.nytimes.com/2016/06/07/us/in-mississippi-town-some-fear-school-desegregation-ruling-may-backfire.html [https://nyti.ms/2k4FBbG] (citing an April 2016 report of the Government Accountability Office).

375. GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT, UCLA, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE 18 (2014).

376. Jaana Juvonen et al., *When and How Do Students Benefit from Ethnic Diversity in Middle School?* CHILD DEV. 1 (2017)

377. Halley Potter & Kimberly Quick, Opinion, *The Secret to School Integration*, N.Y. TIMES (Feb. 23, 2016), http://www.nytimes.com/2016/02/23/opinion/the-secret-to-school-integration.html [https://nyti.ms/20Sewq8]; *see also* David L. Kirp, Opinion, *Making Schools Work*, N.Y. TIMES (May 19, 2012), http://www.nytimes.com/2012/05/20/opinion/sunday/integration-worked-why-have-we-rejected-it.html [https://nyti.ms/JaDM4J] (noting that "African-American students who attended integrated schools fared better academically than those left behind in segregated schools" and were "more likely to

Moreover, black students subject to court-ordered desegregation plans earned 25% more in annual family income as adults than students who remained in segregated schools.[378] Researchers note that it is not the race-mixing that led to the improvements, but that "the fate of black and white students became intertwined" as "[s]chool systems that had spent a pittance on all-black schools were now obliged to invest considerably more on African-American students' education after the schools became integrated."[379]

Compounding the inequities caused by segregated classrooms is the reality that black students are half as likely as white students to have resource-rich, academically rigorous, gifted programs available to them or to be placed in such gifted programs.[380] These programs are geared toward high-achieving students and offer significant benefits, such as "more challenging coursework, smaller class sizes, and individualized attention."[381] At many schools throughout the country, placement in gifted programs involves a three-step process that includes identifying "gifted" students, testing them, and then referring these students for placement in available gifted programs.[382] Teachers play a significant role in each step of this process, often determining which students to recommend for the programs. However, when school districts evaluate all of their students for eligibility for gifted programs instead of relying on teacher referrals, the number of disadvantaged students who qualify increases by 180%.[383] Researchers note that conscious or unconscious bias among teachers, and stereotyping about the capabilities of black children, likely plays a significant role in the referral process, contributing to black students being passed over for the coveted spots in gifted classes.[384]

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graduate from high school and attend and graduate from college; and, the longer they spent attending integrated schools, the better they did").

378. Rucker C. Johnson, *Long-Run Impacts of Desegregation and School Quality on Adult Attainments* 21 (Nat'l Bureau of Econ. Research, Working Paper No. 16,664 2011, *revised* 2015), http://socrates.berkeley.edu/ruckerj/johnson_schooldesegregation_NBERw16664.pdf [https://perma.cc/TC6G-8].

379. Kirp, *supra* note 377.

380. Candice Norwood, *Most Teachers are Overlooking Huge Numbers of Gifted Black Students*, Vox (Feb. 3, 2016) http://www.vox.com/2016/2/3/10905466/gifted-black-students [https://perma.cc/3EQ9-Y7A3] (citing a 2016 study conducted by researcher at Vanderbilt University).

381. *Id.*

382. Anya Kamenetz, *Who are the 'Gifted and Talented" and What Do they Need?*, NPR (Sept. 28, 2015), http://www.npr.org/sections/ed/2015/09/28/443193523/who-are-the-gifted-and-talented-and-what-do-they-need [https://perma.cc/L2DX-KJ4N].

383. Norwood, *supra* note 380 (citing a 2015 research paper by the National Bureau of Economic Research).

384. *Id.*; *see also* Laura Isensee, *In Houston's Gifted Program, Critics Say Blacks and Latinos are Overlooked*, NPR (Sept. 30, 2015), http://www.npr.org/sections/ed/2015/09/30/441409122/in-houstons-gifted-program-blacks-and-latinos-are-underrepresented. http://www.npr.org/sections/ed/2015/09/30/441409122/in-houstons-gifted-program-blacks-and-latinos-are-underrepresented [https://perma.cc/NS5W-X9R7] (Houston's enrollment statistics indicate that black students would more likely be identified as gifted if they were white or Asian).

Race law offers no meaningful mechanisms for addressing structural inequities caused by racial segregation or the problem of racial discrimination, bias, and stereotyping in education. Searching for clear evidence of invidious intent among teachers and lawmakers to harm black students because of their race would prove challenging, if not impossible. Similarly, devising a district-wide integration plan for schools to afford all children the opportunity to participate in gifted programs would certainly fail because the Supreme Court has already found most district-wide remedies to be barred under its colorblindness doctrine.[385] Indeed, in the aforementioned *Parents Involved* case, the Court held that school districts' use of racial classifications in school assignment plans for students violated equal protection.[386] A majority of justices found that a government interest in addressing racial imbalance is a compelling interest for equal protection purposes; however, the state must rely not solely on race, but on "all factors that may contribute to student body diversity."[387]

This "diversity theory" of antidiscrimination law—which serves to keep colorblindness from completely eviscerating equal protection jurisprudence—exemplifies the extent to which race frameworks stand on weak legs. The use of "diversity" fails as a mechanism for achieving equality because conceptually diversity can include almost anything and any proposed "diversity" factors will be given as much weight as race in the remedial calculus.[388] Thus, the diversity model protects everyone and no one.

In contrast to diversity, disability law's aim of protecting the rights of historically subordinated groups and its emphasis on inclusion through reasonable modification rests on a much firmer foundation and is bound to yield more equality enhancing outcomes.[389] Indeed, contrary to Chief Justice Roberts's declaration of colorblindness that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[390] is Justice Ginsburg's pronouncement that inclusion under the ADA "would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation."[391]

Under the blackness-as-disability model, excluding black children from participating in gifted programs or denying them the benefits of such programs would

385. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 862 (2007)

386. *Id.* at 710–11.

387. *Id.* at 722 (citing Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

388. *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2206 (2016); *Grutter*, 539 U.S. at 325 (upholding diversity as a compelling interest in public higher education).

389. *See* ADA, 42 U.S.C. § 12101(a)(7)–(8) (2012) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, *full participation*, independent living, and economic self-sufficiency for such individuals . . . ." (emphasis added)); *supra* Part II.

390. *Parents Involved*, 551 U.S. at 748.

391. Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

likely run afoul of Title II.[392] This practice also contravenes disability law's goal of promoting inclusion through modification, which requires state and local government services and programs to be available in the "most integrated setting" appropriate,[393] regardless of whether malicious intent or animus are found on the part of the respondent.[394] Violations of these provisions could amount to a denial of the ADA's requirement of equal participation in education for children with disabilities.[395] Thus, schools or school districts could be required to provide reasonable modifications to avoid such discrimination.[396] The student need only demonstrate that she is being denied a specific benefit available to nondisabled students, identify a specific modification that would remedy the inequity, and rebut any claim by the school that providing the requested modification would be so onerous as to "fundamentally alter the nature of" its activities.[397] Thus, in keeping with the broad understanding of modification envisioned by the ADA, schools or school districts could be asked to modify policies that disadvantage black students, including devising a district-

392. 28 C.F.R. § 35.130(a) (2015) (requiring that "[n]o qualified individual with a disability shall, on the basis of 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 public entity").

393. *Id.* § 35.130(d) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

394. *See* Olmstead v. L.C., 527 U.S. 581, 607 (1999) (plurality opinion) (holding ADA does not require proof of discriminatory intent); *see also* Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995), *cert. denied sub nom.*, Pennsylvania Sec'y of Pub. Welfare v. Idell S., 516 U.S. 813 (1995) (holding that altering the conduct Congress intended to change through the ADA would be impossible if only discriminatory intent was considered).

395. 28 C.F.R. § 35.130(b)(7) (2015) (mandating that state and local government entities, including schools, cannot discriminate against individuals with disabilities, and are required to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity"); *see also* Samuel R. Bagenstos, *Educational Equality for Children with Disabilities: The 2016 Term Cases*, ACS SUP. CT. REV. (forthcoming 2017) (manuscript at 1, 5), https://ssrn.com/abstract=3015033 [https://perma.cc/M6D3-3SCT] (noting that the Supreme Court's 2017 cases addressing discrimination against children with disabilities in education, *Fry v. Napoleon Comm. Schools*, 137 S. Ct. 743 (2017), and *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017), together "establish that children with disabilities do have federal rights to equal opportunity in education—but that the ADA, not the IDEA, is the key vehicle for enforcing those rights" (emphasis omitted)).

396. 28 C.F.R. § 35.130(b)(7) (2015).

397. *See* Bagenstos, *supra* note 395, at 31. The ADA requires federally-funded school districts to ensure the provision of a "free appropriate public education" (FAPE) and in this regard is coterminous with the Individuals with Disabilities in Education Act (IDEA), which includes the same requirement for all states accepting federal funds for special education. *See* IDEA, 20 U.S.C. § 1412(a)(1)(A) (2012). Disabled children seeking to enforce their right to a FAPE under the ADA must first exhaust administrative proceedings under the IDEA. 20 U.S.C. § 1415(l) (2012). However, these children may proceed with an action under the ADA without raising an IDEA claim or exhausting administrative procedures under the IDEA so long as they are alleging a genuine ADA violation and are not claiming a denial of a FAPE. *See* Fry v. Napoleon Community Schools, 137 S. Ct. 743, 748 (2017). The test is whether the "gravamen of the plaintiff's suit" under the ADA or other statute "is something other than the denial of the IDEA's core guarantee" of FAPE. *Id*.

wide integration plan, or deemphasizing or prohibiting the reliance on teacher referrals for placement in gifted programs.

Through its mandate that the eligibility requirements of public services and programs are not compromised,[398] the ADA seeks to balance the interests of covered entities with individuals' interests in equal opportunity.[399] In this case, neither the essential eligibility criteria for gifted programs nor the gifted programs themselves would be compromised because studies show that qualified black students are often excluded due to facially neutral policies and rules that have a disparate racial impact, and by stereotyping and implicit bias.[400]

Because the ADA prioritizes combating discrimination, the central focus would not be on identifying an evil perpetrator or appointing blame,[401] but on remediating structures that perpetuate inequality. This focus is particularly useful in cases of race discrimination because subjective proof of intentional racial bias is often difficult to obtain. Further, as noted earlier, even well-meaning individuals may unwittingly behave in ways that disable black people. In these circumstances, instead of engaging in public shaming, the aim should be to remedy the wrong committed. If addressing racial inequality is the central concern, then discrimination must be understood in terms of consequences and not intent.

Moreover, were affected white students to challenge these modifications, they would be precluded from bringing so-called "reverse discrimination" lawsuits, which have become all too common under race law to challenge affirmative action policies.[402] This is because the ADAAA includes an express statement barring such claims under the ADA and Section 504 and admonishes that "[n]othing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability."[403] When blackness is understood as a

398. *See* ADA, 42 U.S.C. § 12131(2) (2012) (A qualified individual with a disability under the ADA is one "who with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or provision of auxiliary aids or services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.").

399. 28 C.F.R. § 35.130(b)(7) (2015).

400. *See* Isensee, *supra* note 384.

401. Alexander v. Choate, 469 U.S. 287, 295–97 (1985) (noting that the ADA's reach is not limited to conduct "fueled by discriminatory intent").

402. *See, e.g.*, Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2207 (2016); Gratz v. Bollinger, 539 U.S. 244, 251 (2003); Grutter v. Bollinger, 539 U.S. 306, 316 (2003); Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 701 (9th Cir. 1997); Students for Fair Admissions Inc. v. Univ. of N.C., 319 F.R.D. 490, 492 (M.D.N.C. 2017); S. Motors Chevrolet, Inc. v. Gen. Motors, LLC, No. CV414-152, 2014 WL 5644089, at *2 (S.D. Ga. Nov. 4, 2014); Finch v. City of Indianapolis, 886 F. Supp. 2d 945, 952 (S.D. Ind. 2012).

403. ADAAA, Pub. L. No. 110-325, § 6(g), 122 Stat. 3553, 3557–58 (2008) (codified as amended at ADA, 42 U.S.C. § 12201(g) (2012)). This provision was added to avoid inviting reverse discrimination claims that might be brought as a result of slight changes in the definition of "discrimination" in § 12112(a), which went from forbidding "discrimination 'against a qualified individual with a disability because of the disability of such individual'" to forbidding "discrimination 'against a qualified individual on the basis of disability.'" *See* 76 Fed. Reg. 17,016 (Mar. 25, 2011).

disability, affirmative action plans and other policies designed to remedy systemic disadvantage become an imperative, and pronouncements that these policies are unfair to Whites lose much of their moral and persuasive force.

2. Racial Profiling and Police Abuse

Another area in which the blackness-as-disability framework bears fruit is policing, particularly in combating racial profiling by law enforcement. As discussed above, black people are disproportionately stopped and questioned by the police, and for this population, even routine police encounters can end in arrest, injury, abuse, anxiety, post-traumatic stress, and death.[404]

Racial profiling and systemic abuses by the police would appear to violate black people's Fourth Amendment rights against unreasonable searches and seizures. Legal scholars, however, have argued persuasively that the Supreme Court's Fourth Amendment jurisprudence allows for, if not encourages, racial profiling. In a recent article, Paul Butler reveals the ways in which racial profiling and police abuse are "not only legal, but how . . . the police are supposed to do their jobs."[405] According to Devon Carbado, "the Supreme Court has interpreted the Fourth Amendment to enable and sometimes expressly legalize racial profiling." [406] Carbado further maintains that

> the Court's legalization of racial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact but to the violence of serious bodily injury and death. Put another way, the legalization of racial profiling facilitates the precarious line between stopping black people and killing black people.[407]

These scholars and others have argued that the system needs more than reform and, indeed, requires complete transformation. Application of disability law enables this necessary change.

When we view these cases through the lens of race, we are hamstrung by the Court's approach to racial profiling in its Fourth Amendment jurisprudence and the unassailability of its approach to intent. However, if we consider these cases through a blackness-as-disability frame, we can see the ways in which everyday

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404. *See also* Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 57–58 (2014) (comparing the psychological effect of police stops to that of lynching); Geller et al., *supra* note 351, at 2324 (showing how the police stops that black men are disproportionately subject to often cause anxiety and post-traumatic stress); Freddie Allen, *Police Killings Underscore Need for Reform*, DALLAS WEEKLY (Feb. 9, 2015), http://www.dallasweekly.com/news/national/article_2fb1c6e0-b086-11e4-9fc6-3f2cc2be6f90.html [https://perma.cc/48JJ-LDGH].

405. Paul D. Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1426 (2016); *see also* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

406. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017).

407. *Id.*

police practices do not just discriminate on the basis of race, but also actually create race as disability. This disabling conduct goes to the heart of Title II's protections.

Title II forbids state and local public entities, including state and municipal law enforcement, from discriminating against persons with disabilities in the provision or operation of public services and from excluding them from participating in the entity's services, programs, and activities.[408] Title II "seeks to enforce the Fourteenth Amendment's prohibition on irrational disability discrimination" and, as the Supreme Court reminds us, "a variety of other basic constitutional guarantees."[409] For example, the petitioner in *Tennessee v. Lane* challenged Congress's power under Section Five of the Fourteenth Amendment to use Title II to enforce the Sixth Amendment "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."[410] The Court found Title II "unquestionably" valid and noted its breadth of scope.[411]

In the context of racial profiling against black people, Title II should be used to enforce the Fourth Amendment's guarantees against unreasonable search and seizure. The Supreme Court has made clear that "Congress enacted Title II against a backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights."[412] In invoking Title II's guarantees, the Supreme Court advised that "[d]ifficult and intractable problems often require powerful remedies,"[413] and the determination of whether Title II validly enforces the constitutional rights in question "must be judged with reference to the historical experience which it reflects."[414]

Black people have long experienced racial profiling by law enforcement, and these practices not only discriminate against black people, but also harm them by instantiating their status as disabled. Moreover, data show that popular perceptions of racial minority groups are influenced by law enforcement treat-

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408. *See* ADA, 42 U.S.C. § 12132 (2012). While the ADA applies to policing, there is some disagreement among the circuits on whether the ADA applies to arrests, with the majority of circuits to have addressed the question finding that it does. *See* Sheehan v. City & Cty. of San Francisco, 743 F.3d 1211, 1231 (9th Cir. 2014); Bircoll v. Miami-Dade Cty., 480 F.3d 1072 (11th Cir. 2007); Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law."). *But see* Hainez v. Richards, 297 F.3d 795, 801 (5th Cir. 2000) ("Title II does not apply to officer's on-the-street responses to reported disturbances or other similar incidents . . . prior to the officer's securing the scene and ensuring that there is no threat to human life."); City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (declining to consider the issue of whether the ADA applies to arrests).

409. Tennessee v. Lane, 541 U.S. 509, 510 (2004) (citing Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001)) (holding that "Title II validly enforced the Sixth Amendment right to access to judicial services").

410. *Id.* at 523 (quoting Faretta v. California, 422 U.S. 806, 819, n.15 (1975)).

411. *Id.* at 531.

412. *Id.* at 510.

413. *Id.* at 524 (quoting Kimel v. Fl. Bd. of Regents, 528 U.S. 62, 88 (2000)).

414. *Id.* at 523 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

ment of individuals within the group, with public regard diminishing for those groups subject to police surveillance and intervention.[415] Further, current police practices also effectively exclude certain racial minority populations from enjoying the benefits of police services to the extent that members of these groups may refrain from partaking of police services out of a well-founded fear of being subject to police violence.[416] Under the blackness-as-disability framework, modifications would be in order.

What would modification look like in this context? Although modifications cannot "fundamentally alter the nature of the service provided," Title II's implementing regulations stipulate that modification can be accomplished in several ways.[417] To ensure that black people are not disabled by police profiling practices and abuse, municipalities could, for example, be required to modify the policing policies that have been proven to encourage racial profiling, such as "broken windows policing" and "stop and frisk" tactics.[418] Were such a case brought, the government's motive or intent would be irrelevant to a finding of liability for the violation of black individuals' rights.[419] Moreover, in light of the recent use of video technology to powerfully document incidents of police brutality that previously would likely have gone unnoticed by the public and unacknowledged by state actors,[420] Blacks could demand that police procedures be modified to require law enforcement officers to wear body cameras or use other technologies that document police interactions with the public. Such modifications are eminently appropriate considering the clear harm to black persons posed by current police policies and practices and the significance of the constitutional right at stake.

Moreover, unlike Title VI of the CRA, which precludes private enforcement and requires proof of discriminatory intent for compensatory relief to be

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415. *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 31–32 (2012).

416. *See* FERGUSON REPORT, *supra* note 291, at 79 ("An African–American minister of a church in a nearby community told us that he doesn't allow his two sons to drive through Ferguson out of 'fear that they will be targeted for arrest.'").

417. 28 C.F.R § 25.130(b)(7) (2015); *see also* Tennessee v. Lane, 541 U.S. 509, 532 (2004).

418. *Cf.* Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 209 (E.D.N.Y. 2000), *aff'd sub nom.*, Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003) (plaintiffs sued New York City for its failure to modify rules ensuring access to public benefits and services for HIV positive individuals).

419. *See id*. at 206.

420. *See, e.g.*, Ryan Boetel, *APD Releases Documents, Videos in James Boyd's Death Investigation*, ALBUQUERQUE J. (Oct. 17, 2014), http://www.abqjournal.com/481710/apds-releases-documents-of-james-boyds-death-investigation.html [https://perma.cc/B7PS-9H6T]; *Caught on Body Camera: The Chilling Moment Cops Shot Dead Mentally Disabled Man Wielding a Screwdriver*, DAILY MAIL (Mar. 17, 2015), http://www.dailymail.co.uk/news/article-2999731/Chilling-moment-cops-shot-dead-mentally-disabled-man-wielding-screwdriver-caught-body-camera.html [https://perma.cc/8AAC-G8JP]; Samantha Masunaga, *Dash Cam Shows Emotional Montana Officer After he Shoots Unarmed Man*, L.A. TIMES (Jan. 13, 2015), http://www.latimes.com/nation/la-na-montana-officer-dashcam-20150113-story.html [https://perma.cc/GX9Q-X45D].

ordered,[421] Title II and Section 504 allow for a private right of action to enforce their antidiscrimination provisions regardless of whether intent is shown. Both sections also provide for compensatory and other monetary damages as well as injunctive relief for disparate impact discrimination and for failure to make reasonable modifications.[422] Indeed, the Supreme Court in *Barnes v. Gorman* found that a police department's failure to reasonably modify its standard procedures that posed a threat of harm to persons with disabilities violated the ADA and Section 504 by discriminating against the respondent on the basis of his disability.[423] The Court observed that the ADA incorporates Section 504 remedies, which are based on the remedies in Title VI, a Spending Clause statute, that is "much in the nature of a *contract:* in return for federal funds, the [recipients] agree to comply with federally imposed conditions."[424] Federal grantees should therefore expect to be governed by contract law, which provides for compensatory and injunctive relief.[425] The breadth of disability law's remedial powers, perhaps more than anything else, may succeed where race laws have failed in prompting necessary change to racially discriminatory policing practices.

B. OPERATIONAL CHALLENGES POSED BY THE FRAMEWORK

The blackness-as-disability framework raises several practical considerations that must be addressed. First, disability laws have improved the lives of millions of people in the United States with one or more physical or mental disabilities; however, these laws have not eliminated all barriers to equality and are therefore by no means a silver bullet.[426] For example, the ADA includes many

421. *See* Guardians Ass'n v. Civil Serv. Comm'n of the City of N.Y., 463 U.S. 582, 584 (1983) (holding that Title VI of the CRA requires proof of discriminatory intent and in the absence of intent, injunctive and declaratory relief are the only available private remedies).

422. *See* Barnes v. Gorman, 536 U.S. 181, 187 (2002) (holding that compensatory damages and injunctive relief, and not punitive damages, are available remedies for failure to provide reasonable accommodations).

423. *Id.* at 183 (finding that a police department's decision to transport a man with a mobility impairment in a van not equipped to accommodate a wheelchair discriminated against the individual on the basis of his disability).

424. *Id.* at 186 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

425. *Id.*

426. *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 23 (2004) (noting the "deep rooted structural barriers" including lack of personal assistance services, assistive technology, and accessible transportation that keep individuals with disabilities out of the work force); *see also* Jessica L. Roberts, *Health Law as Disability Rights Law*, 97 MINN. L. REV. 1963, 1965–66 (2013) (noting how portions of the Affordable Care Act function as disability law in areas where disability antidiscrimination laws fall short); Jasmine E. Harris, *Processing Disability*, 64 AM. UNIV. L. REV. 457, 466 (observing that "the ADA has not lived up to its initial hype); Satz, *supra* note 39, at 513 (noting how an antidiscrimination approach fails to adequately protect individuals with disabilities "because it views disability as a narrow identity category and fragments disability protection" by conceptualizing disability protection as only arising in "discrete environments such as the workplace and particular places of public accommodation"). Most critiques of disability laws, however, refer to their employment provisions and not the provisions that extend equality, access, and opportunity to public accommodation and by government grantees. *See* Les Picker, *Consequences of the Americans with Disabilities*

opt-outs for accommodations, which have been exploited by those seeking to avoid the perceived burden of making their businesses, structures, or programs accessible.[427] Still, not only have these laws allowed for increased access and opportunity in many areas of public and private life for persons with disabilities, they have also served an important expressive function, inspiring a positive change in social norms and attitudes toward these individuals.[428] Indeed, the broad culture of compliance generated by disability law has had a positive impact on access to education, architecture, public transportation, commercial spaces, and public programs.[429]

In the disability context, although people may associate modifications with more costs than gains, they do not believe that the gains come at their expense.[430] If history is to be our guide, this would probably not be the case if a disability framework was applied to members of disadvantaged racial minority groups.[431] This raises challenges for implementation. The framework I advance would probably require legal change, and in the current political climate, Congress is unlikely to willingly extend or amend disability laws to explicitly protect black people.[432] Nevertheless, to the extent that Congress recently amended the ADA to expand the definition of disability to cover all persons with a physical or mental impairment[433] and put special emphasis on covering

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Act, NAT'L BUREAU ECON. RESEARCH, http://www.nber.org/digest/dec98/w6670.html [https://perma.cc/9HRK-Z9ZU].

427. Religious institutions were also granted exemptions from making their buildings accessible to persons with disabilities. *See* ADA, 42 U.S.C. § 12187 (2012).

428. Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1184–87 (2004) (reviewing DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003)).

429. *See* Eileen G. Fowler, *Disability Rights: Accomplishments and New Frontiers*, 57 DEV. MED. & CHILD NEUROLOGY 888, 888 (2015).

430. *See* Emens, *supra* note 364, at 879–80.

431. In the education context, for instance, plaintiffs do not focus on societal gains stemming from affirmative action. Rather, plaintiffs focus on the "harm" of being denied admission as a result of the school's affirmative action program. *See, e.g.*, Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2232 (2016) (Alito, J., dissenting) (discussing affirmative action's alleged negative impact on Caucasians seeking university admission); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 277–78 (1978); United States v. Brennan, 650 F.3d 65, 70 (2d Cir. 2011); Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827, 834 (9th Cir. 2006); *see also* Horan v. City of Chicago, No. 98-C-2850, 2003 U.S. Dist. LEXIS 17173, at *2–3 (N.D. Ill. Sep. 30, 2003); Baker v. City of Detroit, 483 F. Supp. 930, 936 (E.D. Mich. 1979).

432. *See* Juliet Eilperin et al., *Trump Administration Plans to Minimize Civil Rights Efforts in Agencies*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-ddbb23c75d82_story.html [https://perma.cc/X9YT-UUMY]; Cedric Richmond, *Resisting the Rollback: CBC Congressional Priorities in the Trump Era*, STATE OF BLACK AMERICA, https://soba.iamempowered.com/node/267 [https://perma.cc/Z2J9-745T]; *cf.* Mark Joseph Stern, *Obama's Civil Rights Legacy is Crumbling*, SLATE (May 30, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/05/the_trump_administration_is_dismantling_obama_s_civil_rights_legacy.html [https://perma.cc/A6WU-494S].

433. ADAAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3557 (2008) (codified as amended at ADA, 42 U.S.C. § 12102 (2012)).

particularly stigmatized conditions,[434] then perhaps it should be interpreted to cover black people and members of other racial groups whose racial designation is disabling.

Using disability law to attend to discrimination against black people certainly pushes the boundaries of the dominant approaches to statutory interpretation; however, it is not without support in Supreme Court doctrine and administrative law. For example, the Supreme Court has long recognized the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."[435] Moreover, as stated previously, Congress expanded the definition of disability with passage of the ADAAA in a move specifically intended to counter courts' imposition of a "demanding standard" for determining disability.[436] Thus, disability law covers *all* persons with any "physiological condition"[437] that "substantially limits" one's ability to perform a "major life activity."[438] And although an understanding of blackness as disability may not have been what Congress envisioned when enacting the ADAAA, the Supreme Court has made abundantly clear that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[439] Thus, "that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books."[440]

Furthermore, Congress has delegated to both DOJ and the EEOC broad authority to interpret the ADA and Rehabilitation Act, with DOJ administering Title II and Section 504.[441] Congress empowered these agencies to engage in

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434. *See* Cox, *supra* note 323, at 455 n.92 (noting that the legislative history of the ADAAA indicates that Congress was concerned that the ADA failed to adequately protect individuals with highly stigmatized disabilities, such as psychiatric conditions, which courts generally considered insufficiently debilitating to warrant protection). The legislative history of the ADA also indicates an intent to address the stigma attached to disability status. *See* S. REP. NO. 93-1297, *supra* note 325, at 37–38.

435. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

436. *See* Albright, *supra* note 283, at 340 (documenting that plaintiffs were losing 97% of their discrimination cases under the ADA).

437. 28 C.F.R. § 35.108(b)(1) (2016).

438. ADA, 42 U.S.C. § 12102(1) (2012), *amended by* ADAAA. According to DOJ's ADA regulations, "[a]n impairment is a disability if it "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 28 C.F.R. § 35.108(d)(1)(v) (2016).

439. Oncale v. Sundowner Offshore Servs, Inc. 523 U.S. 75, 79 (1998) (holding that Title VII's prohibition against sex discrimination reaches same-sex sexual harassment).

440. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (6th Cir. 2017) (holding that employment discrimination on basis of sexual orientation constitutes sex discrimination under Title VII).

441. *See* Beth Collins, *Americans with Disabilities Act: Rehabilitating Congressional Intent*, 28 J. LEGIS. 213, 216 (2002) ("Department of Justice . . . controls discrimination claims in public services for Section 504 and Title II.").

legislative rulemaking "to carry out" the ADA's provisions.[442] The Supreme Court has read this to mean that these agencies' construction of the statute deserves deference from the judiciary.[443] Interestingly, this has not been the case under race law.[444] With the extensive interpretive powers delegated to it by Congress with respect to disability law, under a progressive executive branch DOJ could construe the law to cover black people. Although this scenario may not seem probable at the current moment, we are at a time that calls for new approaches to the seemingly intractable problem of racial inequality.

Regardless of whether the blackness-as-disability framework could be operationalized in the near future, this conceptual lens, more so than current race law, allows us to forge a more thoughtful, integrated mechanism for rethinking how we attend to race discrimination and efforts to achieve racial equality.

CONCLUSION

From the widespread police abuses chronicled in DOJ's reports on several cities to the environmental racism evidenced in the stunning levels of lead found in many black communities, recent high-profile examples of race discrimination and structural inequities make clear the immediate need to rethink contemporary approaches to racial inequality and injustice.[445] The blackness-as-disability framework proposed by this Article takes on this challenge and offers a more nuanced and effective means of confronting modern race discrimination, including unacknowledged bias and stereotyping, than is available through current race law.

Through its robust commitment to equality through "inclusion," rather than race law's anemic version of equality through "diversity," disability law provides a means for appreciating that blackness as a racial category was manufac-

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442. *Cf.* Mourning v. Fam. Publ'ns. Serv., Inc., 411 U.S. 356, 369 (1973) (reversing a previous holding that the Federal Reserve Board exceeded its authority because the regulation was a reasonable approach to carry out congressional intent).

443. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court . . . .'") (citation omitted) (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).

444. Congress delegated to the EEOC broad power to interpret the ADA's employment provision, Title I. Conversely, Congress did not grant the EEOC the power to interpret the Civil Rights Act's employment provision, Title VII. Indeed, the agency was explicitly denied such deference by the Supreme Court because Congress did not grant the EEOC rulemaking authority. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1975) ("[I]n enacting Title VII, [Congress] did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title . . . [which] mean[s] that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law . . . .").

445. *See* Editorial, *The Racism at the Heart of Flint's Crisis*, N.Y. TIMES (Mar. 25, 2016), https://www.nytimes.com/2016/03/25/opinion/the-racism-at-the-heart-of-flints-crisis.html [https://nyti.ms/2kpME2I]; Abby Goodnough, *Their Soil Toxic, 1,100 Indiana Residents Scramble to Find New Homes*, N.Y. TIMES (Aug. 30, 2016) https://www.nytimes.com/2016/08/31/us/lead-contamination-public-housing-east-chicago-indiana.html [https://nyti.ms/2jEChXL]; Stolberg, *supra* note 293.

tured with the singular purpose of being disabling. Current race law fails to acknowledge this history and the ways in which blackness continues to function as a disabling condition. In so doing, race law both masks and legitimizes inequities. Additionally, race law ignores how society and social institutions are structured in a way that reflects and reinforces the norm of blackness as disabling. As a result, a statutory or judicial requirement that intent be shown to make a claim of discrimination and a mandate that all remedial measures be colorblind will never address how the very structures of society disable certain individuals.

The entire conceptual, practical, normative, and doctrinal apparatus of disability law, on the other hand—from reasonable modifications, balancing of benefits and burdens, and mandated integration—provides a more muscular approach to combating racial inequality and discrimination against black people. As a normative lens, disability law better captures the nature of race law frameworks and provides a means for thinking about the historical and contemporary contingencies of race, along with the inadequacies of our current remedial approaches to race discrimination. In so doing, disability law allows us to investigate the real causes and consequences of the disabling aspects of race.

As a practical tool, disability law levels the playing field by recognizing that social institutions, practices, and norms are not neutral. In the same way that law now recognizes the ways in which social structures were built with the able-bodied in mind, so too is society structured to benefit Whites. The blackness-as-disability framework shifts responsibility for mitigating the effects of past and ongoing discrimination from the individual disabled by these effects to the collective. In this way, the blackness-as-disability framework holds tremendous promise for rethinking racial inequality across many sectors of society, from school segregation to discrimination in housing, healthcare, policing, the criminal legal system, and other public services offered by government to its citizens. Whether the blackness-as-disability framework is viewed as a call to action or thought experiment, the exercise of conceptualizing blackness in terms of disability law may be our most promising legal means of achieving the ideal of racial equality.