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"When They Enter, We All Enter": Opening the Door to Intersectional Discrimination Claims Based on Race and Disability

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"WHEN THEY ENTER, WE ALL ENTER": OPENING THE DOOR TO INTERSECTIONAL DISCRIMINATION CLAIMS BASED ON RACE AND DISABILITY

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This Article explores the intersection of race and disability in the context of employment discrimination, arguing that people of color with disabilities can and should obtain more robust relief for their harms by asserting intersectional discrimination claims. Professor Kimberlé Crenshaw first articulated the intersectionality framework by explaining that Black women can experience a form of discrimination distinct from that experienced by White women or Black men, that is, they may face discrimination as Black women due to the intersection of their race and gender. Likewise, people of color with disabilities can experience discrimination distinct from that felt by people of color without disabilities or by White people with disabilities due to the intersection of their race and disability. Yet often our legal and cultural institutions have been reluctant to acknowledge the intersectional experience, preferring instead to understand people by a singular trait like their race, gender, or disability. While courts have recognized the validity of intersectional discrimination claims, they have offered little guidance on how to articulate and prove the claims, leaving compound and complex forms of discrimination unaddressed. This Article thus offers an analysis of how courts and litigants should evaluate claims of workplace discrimination based on the intersection of race and disability, highlighting in particular the experience of Black disabled individuals. Only by fully embracing intersectionality analysis can we realize the potential of antidiscrimination law to remedy the harms of those most at risk of being denied equal opportunity.

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I. INTRODUCTION

To be intersectional is to be disruptive. The word "intersection" derives from the Latin *intersecare*, meaning to "cut asunder."[1] People who identify with an intersectional identity break apart our most basic ways of understanding the human experience and demand to be understood as

1. *Intersection*, OXFORD ENGLISH DICTIONARY ONLINE, www.oed.com/view/Entry/98300 (last visited June 21, 2018); *see Intersect*, OXFORD ENGLISH DICTIONARY ONLINE, www.oed.com/view/Entry/98296 (last visited June 21, 2018).

whole individuals whose experiences consist of more than the sum of their parts.

According to Professor Kimberelé Crenshaw's description of intersectionality, some individuals are treated unequally because they are positioned directly at the crossroads of different human experiences.[2] If you understand a Black woman only as you understand a Black person or only as you understand a woman, then you have failed to understand the Black woman. Because "[d]iscrimination, like traffic through an intersection, may flow in one direction, and it may flow in another," the person standing in the intersection may be singularly harmed by discrimination coming from one of many directions or they may be harmed precisely because they exist where these varying forms of discrimination converge.[3] Because she exists in the intersection, this forces on others the choice to stop and confront her reality and experience head-on or to instead barrel through or around her. Crenshaw's intersectionality analysis calls for the former, arguing that realizing the promise of antidiscrimination law requires the "inclusion of marginalized groups for whom it can be said: '[w]hen they enter, we all enter.' "[4]

In the nearly three decades since Crenshaw first presented an intersectionality framework highlighting the intersection of race and sex, there has been an increasing—though still limited—recognition in our public discourse of other important intersections at which people may experience discrimination, including the intersection of race and disability.[5] From discussions on the identification of students of color within the context of special education to the interactions of police officers with people of color who have mental health disabilities, public awareness of the intersection of race and disability has matured over time.[6] We now better appreciate that people of color with disabilities can experience

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2. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

3. *Id*. at 149.

4. *Id*. at 167.

5. *See generally* Rabia Belt, *"And Then Comes Life": The Intersection of Race, Poverty, and Disability in HBO's The Wire*, 13 RUTGERS RACE & L. REV. 1 (2012); Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 209 (2010); Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425 (2001).

6. *See generally* Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 FORDHAM URB. L.J. 615 (2016); Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1 (2010); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407 (2001).

complex forms of discrimination distinct from those experienced by either people of color or people with disabilities more broadly. Furthermore, the work of Crenshaw and others prompted extensive legal scholarship evaluating the complexities of intersectional discrimination claims.[7] However, while courts recognize the validity of intersectional discrimination claims, they have been slow to embrace intersectionality analysis.[8] The case law has yet to clearly articulate how a plaintiff experiencing discrimination due to their race and disability together can redress the harms that come from standing in this specific intersection. This lack of guidance leaves such plaintiffs with an uncharted path forward, as they potentially face two different legal causation standards—the "motivating factor" standard, which applies to racial discrimination claims, and the "but-for" standard, which many courts apply to disability discrimination claims.[9]

To help fill this gap in intersectionality analysis, this Article articulates how people of color with disabilities can remedy the intersectional discrimination they experience, focusing on the context of employment discrimination. Part Two of the Article highlights the importance of acknowledging intersectional discrimination based on race and disability by examining the position of the Black body, disabled body, and Black disabled body in our laws and our society. Part Three analyzes how intersectional plaintiffs may navigate the applicable legal standards and prove their employment discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII) and Title I of the Americans with Disabilities Act (ADA). Part Three further offers examples of claims that such plaintiffs might bring and the remedies potentially available to them.

By focusing on the under-acknowledged legal position of people of color with disabilities, this Article endeavors to further the ever-critical goal of "recenter[ing] discrimination discourse at the intersection."[10] The promise of the intersectionality framework is two-fold. First, courts cannot remedy forms of discrimination that they do not know exist, and intersectional discrimination analysis usefully draws attention to distinct and complex forms of discrimination that would otherwise be erased.[11] Indeed, part of the harm that people at the intersection of socially marginal-

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7. *See* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 730 (2015).

8. *See id*. ("[L]egal theory and scholarship on intersectionality continue to vastly outpace actual Title VII doctrine. To this day, there is no robust canon of intersectionality case law.").

9. *See infra* Section III.A.1.

10. Crenshaw, *supra* note 2, at 167.

11. *See* Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS 785, 790-91 (2013); Ribet, *supra* note 5, at 232-33.

ized identities face is having their specific lived experience be unrecognized or dismissed as unimportant.[12] Advancing the analysis of intersectional discrimination claims will serve the plaintiffs asserting these claims by affirming that their experience of discrimination matters and is worthy of redress and by allowing for remedies that are as nuanced as the various harms these plaintiffs have experienced.

But this effort will also serve a second, broader purpose, because when those who have borne the brunt of the most complex forms of discrimination due to their intersectional position can access an equal opportunity, then we will have cleared the path for countless others. For example, a Black plaintiff with a disability might succeed in proving that she was discriminated against based on her race under Title VII and in proving that she was discriminated against based on her disability under the ADA without necessarily proving that she was discriminated against based on her status *as a Black person with a disability*.[13] But if the plaintiff can show that she was discriminated against specifically as a Black person with a disability, I contend that her success in proving the intersectional claim will also expose any discrimination based on the underlying protected traits.[14] Shedding light on those intersectional experiences that are most at risk of remaining unseen therefore leaves little room for any form of discrimination to hide. The intersectionality framework thus carries the potential to truly serve the purpose of antidiscrimination laws by opening the door to equal opportunity wide enough for all.

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12. *See id*. *See also* Lecture by Kimberlé Crenshaw, Women & Power: Women, Power, and Peace (2007), https://www.eomega.org/videos/intersectional-erasure (explaining the concept of "intersectional erasure").

13. Despite the dearth of case law expressly analyzing intersectional discrimination claims based on race and disability, the analogous case law concerning race-and-gender discrimination holds that such an intersectional claim is not automatically proven by evidence of discrimination based singularly on race or gender. *See* Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) ("[W]hen a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.").

14. This Article offers several examples of potential employment discrimination claims based on the intersection of race and disability, including one in which a restaurant refuses to hire Black jobseekers based on an assumption that they are more likely to be HIV-positive and thus pose a risk to others. *See infra* Section III.C. If such a prospective employee in this hypothetical example succeeds in proving that they were discriminated against as a Black person with an actual or perceived disability, the analysis necessary for a court to find intersectional discrimination will arguably also uncover evidence that would support distinct race and disability discrimination claims. *See id*.

II. ACKNOWLEDGING AND UNDERSTANDING THE INTERSECTION OF RACE AND DISABILITY

In her pioneering work considering the intersection of race and sex in antidiscrimination law, Kimberelé Crenshaw explained that:

> Black women can experience discrimination in ways that are both similar to and different from those experienced by [W]hite women and Black men . . . . Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. *And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.*[15]

This last form of discrimination—that is, discrimination unique to Black women *because* they are Black women—was first meaningfully considered by federal courts in *Jefferies v. Harris County Community Action Ass'n*, an employment discrimination case in the Fifth Circuit holding that "discrimination against [B]lack females can exist even in the absence of discrimination against [B]lack men or [W]hite women."[16] Refusing to "condone a result which leaves [B]lack women without a viable Title VII remedy," the court explained that "[r]ecognition of [B]lack females as a distinct protected subgroup . . . is the only way to identify and remedy discrimination directed toward [B]lack females."[17] As later courts have explained, "[r]ather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences."[18]

Likewise, discrimination against people of color with disabilities can exist irrespective of discrimination against people of color without disabilities or against White people with disabilities.[19] People who exist at the intersection of race and disability experience a multi-dimensional form of discrimination that is continually at risk of being flattened to a single di-

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15. Crenshaw, *supra* note 2, at 149 (emphasis added).

16. Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980).

17. *Id*. at 1032, 1034.

18. Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994).

19. *See* Craig v. Yale Univ. Sch. of Med., 838 F. Supp. 2d 4, 8-9 (D. Conn. 2011) (holding that the plaintiff did not sufficiently state a "pure gender discrimination claim" but did plead "sufficient facts to make out a cognizable 'intersectional claim,' or a 'race plus' claim of discrimination against black males."); Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003) (holding that the plaintiff "failed to establish a *prima facie* case of pure gender discrimination" but had established "a *prima facie* case of composite, race-and-gender discrimination.").

mension—*either* race *or* disability—due to the limitations of our collective understanding of intersectionality.[20] Understanding race and understanding disability are both difficult enough, so we often reduce the experiences of disabled persons of color to being defined either by disability or race.[21] Importantly, acknowledging the reality of intersectional discrimination does not require weighing the discrimination experienced by people of color with disabilities against the discrimination experienced by others. Rather, embracing intersectionality analysis helps guard against the erasure of an individual's particular experience of discrimination when that erasure may occur simply because the discrimination happens at the intersection of two comparatively better-understood identities.[22]

In order to apply Crenshaw's intersectionality framework to workplace discrimination claims based on race and disability, we must first understand the forms of discrimination present at this intersection. Accordingly, the first part of this Article examines how our legal system and society have historically treated Black bodies, disabled bodies, and Black disabled bodies.[23]

A. *Understanding the Position of Black Bodies in our Law and Society*

Whether through physical force, the pressures of poverty, or a lack of equal opportunity, the Black body in America has long been subject to a profound level of control by public and private actors.[24] Writer Ta-Nehisi Coates tackles this issue in *Between the World and Me*, in which he sets out to share with his son his own journey of answering "the question

20. *See* Cho et al., *supra* note 11, at 790-91.

21. *See* Ribet, *supra* note 5, at 236-37 (explaining that the "intersectional pressure" to be "better, stronger, smarter, more effective, flawlessly capable, and apparently unharmed or immune to the strain of hyper-functioning" that people of color with disabilities experience "is often not fully acknowledged either in disability communities or Communities of Color").

22. *See id*.

23. The body is a useful lens through which to understand intersectional discrimination—even though some people experience a body at odds with how they personally identify—because it is how we most readily understand people. This Article focuses on the Black body in particular because the Black body's unique role in how America has developed and enforced its laws, including the Constitution, offers perhaps the clearest evidence that the law must recognize and endorse intersectional discrimination claims. *See infra* Section II.A. I hope that others reading this article will take up the mantle of articulating and expanding this analysis for other persons of color.

24. *See* TA-NEHISI COATES, BETWEEN THE WORLD AND ME 103 (2015) ("[T]he power of the American state and the weight of an American legacy . . . necessitate that of the bodies destroyed every year, some wild and disproportionate number of them will be [B]lack. Here is what I would like for you to know: In America, it is traditional to destroy the [B]lack body—*it is heritage*.").

of how one should live within a [B]lack body."[25] Building upon the work of others, Coates describes Black Americans' experience with racism as a physical assault on the body that "dislodges brains, blocks airways, rips muscle, extracts organs, cracks bones, [and] breaks teeth."[26] Coates concludes that the question of how to live in a Black body is ultimately unanswerable, but advises his son that "the [B]lack body is the clearest evidence that America is the work of men."[27] Comprehensively cataloguing the various ways in which our legal and cultural institutions have exercised authority over Black bodies would be an impossible endeavor in the space of this Article; thus the following section highlights only a few such examples.

The exercise of control over the Black body in America began as early as the then-lawful use of African slave labor in the colonial period, and it played a fundamental role in the development of young America's economic, political, and legal systems.[28] Indeed, the development of our nation's system of government depended in part on the political compromise that resulted in the U.S. Constitution weighing Black bodies as worth three-fifths the value of other humans.[29] Furthermore, in order to sustain an economic system reliant on forced Black labor, states passed laws both before and after the Civil War regulating virtually every aspect of Black lives. Prior to the Civil War, several states enacted "Slave Codes" designed to curtail the liberties and opportunities of slaves. For instance, these Codes authorized deadly violence against slaves who resisted and prohibited the act of teaching slaves how to read and write.[30] After the Civil War, the former slaveholding states passed "Black Codes" that similarly restricted the civil liberties of former slaves through several means, including limiting their ability to testify in legal matters.[31] "[T]he

25. *Id*. at 12.

26. *Id*. at 10.

27. *Id*. at 12.

28. *See generally* A. LEON HIGGINBOTHAM JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978).

29. *See* Thurgood J. Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

30. *See, e.g.*, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 459 (William Waller Hening ed., 1823), https://www.encyclopediavirginia.org/_An_act_concerning_Servants_and_Slaves_1705; Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803-1865*, 24 S.U. L. REV. 145, 151, 164-65 (1997).

31. *See e.g.*, Ala. Code §§ 2680, 4231 (1867) (Alabama law allowing free Blacks and mixed-race persons to testify only in open court and in cases in which they or other free Black and mixed-raced persons were parties or had suffered an injury); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 368 (reprt. 1981) ("With the adoption of the Black Codes, the place of the ex-slave in postwar

key provisions were those which defined [the freedman] as an agricultural laborer, barred or circumscribed any alternative occupations, and compelled him to work."[32] "Several of the codes also set down the hours of labor (from sunrise to sunset), the duties, and the behavior expected of [B]lack agricultural workers."[33] For example, in a model that inspired other towns, the city of Opelousas, Louisiana adopted an ordinance that policed whether and how freed Black Americans could enter and live in the town, limited their ability to freely assemble and worship, and prohibited them from possessing weapons or selling merchandise without a special permit.[34] As these laws illustrate, the legal subjugation of the Black body began at the very infancy of the United States and played a critical role in answering early legal questions, like who counted as a full legal person and what rights were available to those excluded from that personhood.

Many efforts by public and private actors to control those Black bodies perceived as threats to the social order have been specifically aimed at Black women. For example, as legal scholar Dorothy Roberts explains, "[t]he systematic, institutionalized denial of reproductive freedom has uniquely marked Black women's history in America."[35] "Black women's earliest experience in America was one of brutal denial of autonomy over reproduction."[36] Not only was the rape of a female slave not a criminal offense,[37] but slave masters held an "economic stake in bonded women's fertility," as Black women were expected to birth future slaves.[38] Black women were made to withstand the grueling physical demands of slavery even during their pregnancies.[39] In order to whip pregnant slaves without harming the children who would later be born as property, Southern slaveholders "forced women to lie face down in a depression in the ground while they were whipped."[40]

However, when these slaveholders no longer stood to gain financially from Black fertility in the aftermath of Emancipation, the potential

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southern society had been fixed in law, his mobility checked, his bargaining power sharply reduced, and his rights of appeal hedged with difficulties."). *See also* David Martin, *The Birth of Jim Crow in Alabama 1865-1896*, 13 NAT'L BLACK L.J. 184, 190 (1993).

32. LITWACK, *supra* note 31, at 366.

33. *Id*. at 367.

34. *Id*. at 368.

35. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 4 (1997).

36. *Id*. at 6.

37. *Id*. at 29. *See id*. at 29-33.

38. *Id*. at 4. *See also id*. at 22-55.

39. *Id*. at 46 ("[M]ost expectant mothers received little or no respite from their grueling work load until the final months of pregnancy.").

40. *Id*. at 39.

of Black women to create more Black bodies became a threat rather than an asset.[41] In the first half of the twentieth century, "[t]he demise of Jim Crow had ironically opened the doors of state institutions to Blacks, who took the place of poor [W]hites as the main target of the eugenicist's scalpel."[42] Though institutionalized Black women and men were both subject to involuntary sterilization laws continuing through the 1940s, "[a]s mandatory sterilization laws were repealed across the country, Black women fell victim to widespread sterilization abuse at the hands of government-paid doctors."[43] Sterilization became a common form of birth control by the 1960s and 1970s, and medical providers paid by the government to provide reproductive care routinely gave Black women unnecessary hysterectomies without their knowledge or informed consent, in part so that medical residents could practice their skills.[44] Some "government-sponsored family planning programs not only encouraged Black women to use birth control but coerced them into being sterilized" by threatening to take away their access to medical care or welfare benefits.[45] These practices were sustained by stereotypes painting Black mothers as, among other things, immoral, sexually deviant, negligent, ignorant, domineering, lazy, and parasitic.[46] These efforts to control the reproduction of Black women's bodies thus persisted following slavery, at least in part due to a cultural imagining of Black women as "responsible for the menace that Blacks posed for American social order."[47]

The Black male body has also been subject to a gender-specific form of violence and control, largely due to the enduring fear that "[B]lack men would, whenever possible, rape [W]hite women."[48] This fear was based not only on beliefs that Black men were primitive and degenerate, but also on a judgment about the presumed sexual laxity of Black women. One nineteenth-century historian argued that "Black men lacked any understanding of sexual violation because their women were always eager to engage in sex."[49] Therefore, one main justification for the state anti-miscegenation laws prohibiting interracial sexual and marital re-

41. See ROBERTS, *supra* note 35, at 56 ("While slave masters forced Black women to bear children for profit, more recent policies have sought to reduce Black women's fertility.").

42. *Id*. at 89.

43. *Id*. at 89; *see id*. at 88-90.

44. *See id*. at 90-96.

45. *Id*. at 56, 92-94.

46. *See generally id*. at 8-21.

47. ROBERTS, *supra* note 35, at 12.

48. N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1324 (2004). *See also* SUSAN BURCH & HANNAH JOYNER, UNSPEAKABLE: THE STORY OF JUNIUS WILSON 31 (2007).

49. ROBERTS, *supra* note 35, at 11.

lationships—laws that were more vigorously enforced against Black men than others—was to guard against the rape of White women by Black men.[50]

The state's reaction to this presumed threat is sharply illustrated by the infamous 1931 *Scottsboro* case, in which nine Black boys were accused of raping two White women on an Alabama train, and all but one were sentenced to die.[51] The local deputy sheriff effected arrest of the "Scottsboro boys" by deputizing a "posse comitatus,"[52] calling together a group of "fifty men, armed with shotguns, rifles, and pistols" with the mission to "capture every Negro on the train."[53] In essence, when the state alone lacked the resources to respond to the alleged rape of White women by Black boys, it conjured an armed group of citizens to help control these young Black bodies. Nearly sixty years later, when five Black and Latino boys were convicted of raping a White female jogger in Central Park after being pressured by the police to confess, the state no longer needed to rely on posses of armed citizens to carry out its work.[54] It was instead able to secure the conviction of all five boys—each of which was later vacated when DNA testing identified another person as the rapist—with the approval of another kind of posse, as media reports and public opinion likened the boys to wild animals compelled to savagely hunt White women.[55] As with the examples concerning Black women, these cases reveal the comprehensive efforts of legal and societal institutions to control those Black bodies considered threatening.

Arguably the most impactful form of state control over Black bodies in modern America has been in the area of mass incarceration. Black Americans' experience with mass incarceration informs Coates' warning

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50. *See* BURCH & JOYNER, *supra* note 48, at 31 (explaining that the film THE BIRTH OF A NATION argued that "[m]iscegenation . . . was the ultimate goal of the [B]lack legislators. And when miscegenation could not be carried out by legal means, violence and rape could accomplish that same end."); Kenneth Lay, *Sexual Racism: A Legacy of Slavery*, 13 NAT'L. BLACK L.J. 165, 166 (1993) ("All were phrased so that intermarriage between a White person and a member of the other designated groups was prohibited; the statutes generally did not restrict intermarriage between members of races other than Whites."); Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*, 20 L. & HIST. REV. 225, 231 (2002) ("Interracial sex was not prohibited per se, as this could have posed problems for [W]hite men, but the state made clear its horror at the thought that [B]lack men might partake of forcible sex with [W]hite women.").

51. *See generally* Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379 (2009).

52. *See* Patterson v. State, 224 Ala. 531, 536 (1932); Klarman, *supra* note 51, at 380; *Posse Comitatus*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations.").

53. Douglas O. Linder, *Without Fear or Favor: Judge James Edwin Horton and the Trial of the "Scottsboro Boys,"* 68 UMKC L. REV. 549, 550 (2000).

54. *See* Duru, *supra* note 48, at 1316-17.

55. *See id.* at 1347-49.

to his son that "the police departments of your country have been endowed with the authority to destroy your body."[56] Irrespective of the race of any particular police officer, Coates advises that "what matters is the system that makes your body breakable."[57] This can be seen in the shift in the enforcement of drug laws that caused the U.S. prison population to explode in the 1980s and 1990s, with especially stark consequences for the communities of color who were policed and prosecuted most vigorously.[58] The percentage of Black women behind bars for drug offenses increased by a staggering 828 percent between 1986 and 1991.[59] A 2003 report by the Bureau of Justice Statistics found that Black men were more than twice as likely as Hispanic men and more than six times as likely as White men to go to prison during their lifetimes.[60] The report warned that, if incarceration rates remained unchanged, about one in three Black men were expected to go to prison in their lifetime, as compared to one in six Hispanic men and one in seventeen White men.[61] Despite this warning, these troubling statistics are our current reality.[62] While Black Americans constitute roughly 13 percent of the U.S. population,[63] they make up roughly 38 percent of the federal prison population.[64] Black children are now six times more likely than White children to have or have had an incarcerated parent.[65] Moreover, the criminal legal

56. COATES, *supra* note 25, at 9.

57. *Id*. at 18.

58. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 96-103 (2012). ("Although the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been [B]lack or Latino.").

59. Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1480 (2012).

60. Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, NCJ 197976, at 1 (2003), https://www.bjs.gov/content/pub/pdf/piusp01.pdf.

61. *Id*.

62. *See* FACT SHEET: TRENDS IN U.S. CORRECTIONS 5, THE SENTENCING PROJECT (2017), http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

63. *Quick Facts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045217 (last visited June 21, 2018).

64. *Inmate Race*, U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited June 21, 2018).

65. LEILA MORSY & RICHARD ROTHSTEIN, ECON. POL'Y INST., MASS INCARCERATION AND CHILDREN'S OUTCOMES 1 (2016), http://www.epi.org/files/pdf/118615.pdf; Valerie Strauss, *Mass Incarceration of African Americans Affects the Racial Achievement Gap-Report*, WASH. POST (Mar. 15, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/03/15/mass-incarceration-of-african-americans-affects-the-racial-achievement-gap-report/?utm_term=.d61c11df58a7.

system's control over Black bodies is not confined to the accused and the incarcerated. Attorney and activist Bryan Stevenson describes in his memoir the experience of being strip-searched on his way to visit a client condemned to death simply because the prison guard refused to accept that Stevenson, a Black male, was indeed an attorney.[66] This account exemplifies the kind of racialized intrusion on bodily integrity that can assault one's dignity even without the physical violence that Coates describes.

In contrast with the legal diminution of the importance of the Black body, our cultural understanding of the Black body has generally consisted of an exaggerated image of the Black body as larger-than-life, stronger-than-human, and preternaturally dangerous.[67] This is reflected in the description of teenager Michael Brown by the officer who killed him as having nearly superhuman size and strength.[68] It is reflected in the research indicating that Black boys and girls are seen as less innocent than other children and are perceived as being older than they are.[69] It is reflected in the research indicating that White medical providers underestimate the pain experienced by Black patients, and thus under-prescribe and under-diagnose medical conditions, because they perceive Black patients as less sensitive to pain than White patients.[70] The common thread

66. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 194-95 (2014).

67. *See generally* Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640 (2003); Jenessa R. Shapiro et al., *Following in the Wake of Anger: When Not Discriminating is Discriminating*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 1356 (2009) (comparing the perceptions of Black or White individuals as either friendly or threatening based on their facial expressions); Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59-80, 74 (2017) ("Non-Black perceivers overestimated young Black men as taller, heavier, stronger, more muscular, and more capable of causing physical harm than young White men.").

68. *See* Emily Wax-Thibodeaux, *Wilson Said the Unarmed Teen Looked Like a 'Demon.' Experts Say His Testimony Was Dehumanizing and 'Super-Humanizing*,' WASH. POST (Nov. 25, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/11/25/wilson-said-the-unarmed-teen-looked-like-a-demon-experts-say-his-testimony-was-dehumanizing-and-super-humanizing/?utm_term=.0c900bfa0c64 (discussing Officer Darren Wilson's grand jury testimony that Michael Brown looked like a "demon" and that Wilson "felt like a 5-year-old holding onto Hulk Hogan" when he grabbed Brown).

69. REBECCA EPSTEIN ET AL., GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 8 (2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf; Philip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 536 (2014).

70. *See generally* Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PNAS 4296 (2016) (finding that individuals with some medical training "hold and may

in these observations is that the American imagination instinctively considers Black bodies as more likely to hurt and less likely to be hurt than other bodies.

In response to this instinct, several television and film portrayals have sought to present the Black body's perceived superhuman strength and imperviousness to physical pain as signaling more dignity than danger. Netflix's retelling of the story of bulletproof comic book figure Luke Cage is a prime example—his formerly incarcerated Black body is dispatched for the public good and is literally unbreakable.[71] And in the horror/thriller film *Get Out*, the Black male protagonist is the subject of an effort by his White girlfriend's family to auction off and inhabit his healthy Black body for the purpose of achieving a form of disability-free immortality; the family ultimately sells access to his body to a friend seeking to overcome blindness.[72] The protagonist survives by killing the family, and the film concludes with a police car slowly driving towards him while he leans over his girlfriend's body.[73] Primed to expect the Black body as a suspect in the eyes of state authority, the audience is instead offered a scene of resilience in the face of racial terror, as the driver of the police car is a friend who believes the protagonist's account—this *particular* Black body is a survivor of what Coates describes as "the sheer terror of disembodiment."[74]

This context of how Black bodies have been and continue to be understood in the American legal system and culture is fundamental to a robust understanding of what lies at the intersection of Blackness and disability. As the above examination of the Black body reveals, the historical and ongoing efforts to control Black bodies reflect pervasive and longstanding fears surrounding the Black body, from the feared loss of the Black body as a source of forced labor to the presumption of Black dangerousness. In order to better understand the discrimination that an individual may face at the intersection of race and disability, this Article turns next to an examination of the disabled body.

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use false beliefs about biological differences" in Black and White patients to inform medical judgments); Astha Singhal et al., *Racial-Ethnic Disparities in Opioid Prescriptions at Emergency Department Visits for Conditions Commonly Associated with Prescription Drug Abuse*, 11 PLOS ONE, Aug. 8, 2016, at 1 (finding significant racial-ethnic disparities in opioid prescriptions for certain medical diagnoses); Sophie Trawalter et al., *Racial Bias in Perceptions of Others' Pain*, 7 PLOS ONE, Nov. 2012, at 1 (finding that "people assume *a priori* that Blacks feel less pain than do Whites).

71. *See* Lawrence Ware, *Luke Cage: A Bulletproof Black Man in the Black Lives Matter Era*, THE ROOT (Sept. 30, 2016), http://www.theroot.com/luke-cage-a-bulletproof-black-man-in-the-black-lives-m-1790857029.

72. GET OUT (Universal Pictures 2017).

73. *Id*.

74. COATES, *supra* note 25; *see* GET OUT, *supra* note 72.

B. *Understanding the Position of Disabled Bodies in our Law and Society*

As explained in this Section, the exercise of control over disabled bodies by American legal and cultural institutions stems from a similarly complex set of public and private attitudes.[75] These attitudes—ranging from fear, disdain, paternalism, indifference, pity, and disgust—continually shift over time, sometimes amplifying and sometimes mitigating one another.[76] The use of public authority and public institutions to control disabled bodies, however, remains constant.[77]

Justice Marshall outlined the shifting attitudes towards disabled bodies in America in his partial concurrence in *City of Cleburne, Texas v. Cleburne Living Center*.[78] While the majority holds that equal protection claims asserting discrimination based on disability are subject only to rational basis review,[79] Justice Marshall writes separately in defense of heightened scrutiny, in the process describing the "lengthy and tragic history . . . of segregation and discrimination" that individuals with intellectual disabilities have faced in America.[80] Justice Marshall first describes a period of ambivalence during much of the nineteenth century in which "mental retardation was viewed as neither curable nor dangerous and the retarded[81] were largely left to their own devices."[82] However, by the end of that century and into the next, public attitudes shifted to a disdain and fear inspired by Social Darwinism and eugenics.[83] "[L]eading medical authorities and others began to portray the 'feeble-minded' as a 'menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems.' "[84] This change in attitude ushered in a "regime of state-mandated segregation and degradation" that sought to control disabled bodies through "[m]assive custodial institutions . . . built to warehouse the retarded for life" and prevent their reproduction.[85] States ratified the effort to exclude and control intellectually disabled persons by

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75. *See infra* Sections II.B. and II.C.

76. *See, e.g.*, *infra* notes 80, 82-86 and accompanying text.

77. *See, e.g.*, *infra* pp. 34-36.

78. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 455-78 (1985) (Marshall, J.) (dissenting in part, concurring in part).

79. *Id.* at 446 (White, J.) (plurality opinion).

80. *Id.* at 461 (Marshall, J., dissenting) (citation omitted).

81. Over time, the pejorative nature of the word "retarded" has become more widely understood and acknowledged. Outside of direct quotes, this Article therefore uses the terms "intellectual disability" or "cognitive disability."

82. *Cleburne*, 473 U.S. at 461 (Marshall, J., dissenting).

83. *See id.* at 461-62.

84. *Id.* at 462 (internal citations omitted).

85. *Id.*

passing laws voiding and criminalizing their marriages, forcing their sterilizations, denying their citizenship status, and excluding them from public spaces like the voting booth and the schoolhouse.[86] Although these laws generally treated individuals with intellectual disabilities as threatening because of their perceived weaknesses rather than because of perceived superhuman strengths as with Black Americans, the effect and purpose of the laws was the same—to exert state control over otherwise uncontrollable bodies.

As scholar Douglas Baynton points out, disability was treated with such disdain at the turn of the twentieth century that the very concept of disability was considered justification for denying full citizenship to those distinguished as "other," regardless of whether they indeed had a disability.[87] Baynton argues that disability played a key role during "the three great citizenship debates of the nineteenth and early twentieth centuries: women's suffrage, African American freedom and civil rights, and the restriction of immigration," in that "disability was called on to clarify and define who deserved, and who was deservedly excluded from, citizenship."[88] For example, "one of the rhetorical tactics of suffrage opponents was to point to the physical, intellectual, and psychological flaws of women, their frailty, irrationality, and emotional excesses."[89] Anti-suffragists argued both that "women had disabilities that made them incapable of using the franchise responsibly, and that because of their frailty women would become disabled if exposed to the rigors of political participation."[90]

Similarly, "[t]he most common disability argument for slavery was simply that African Americans lacked sufficient intelligence to participate or compete on an equal basis in society with [W]hite Americans."[91] Proponents of slavery further argued that "African Americans, because of their inherent physical and mental weaknesses, were prone to become disabled under conditions of freedom and equality."[92] Medical providers at the time even asserted that African slaves and their descendants were vulnerable to purported mental illnesses like drapetomania, "a condition that caused slaves to run away," and dysaesthesia aethiopis, a condition

86. *See id*. at 463-64.

87. *See* Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, *in* THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 33, 33 (Paul K. Longmore & Lauri Umansky eds., 2001).

88. *Id*.

89. *Id*. at 41.

90. *Id*. at 41-42.

91. *Id*. at 37.

92. *Id*.

which "resulted in a desire to avoid work and generally to cause mischief."[93]

Furthermore, the exclusion of people with disabilities was so fundamental to national immigration laws at the end of the nineteenth century through the beginning of the twentieth century that "[t]he detection of physical disabilities was a major aspect of the immigration inspector's work."[94] Not only did "people with disabilities constitute a distinct category of persons unwelcome in the United States," but also "the charge that certain ethnic groups were mentally and physically deficient was instrumental in arguing for their exclusion."[95] This historical use of disability to justify the legal exclusion and marginalization of individuals with and without disabilities reveals a substantial level of derision towards even the concept of disability.

One of the most sweeping efforts at state control over disabled bodies arose from the eugenics movement of the twentieth century, which sought to prevent people with disabilities from procreating based on the paternalistic belief that they could not be trusted to adequately care for their children, and that society would be better off if there were fewer disabled bodies to care for.[96] As part of this movement, more than thirty states passed laws authorizing the involuntary sterilization of individuals with disabilities.[97] A 2012 report by the National Council on Disability reveals that the legacy of this attitude towards individuals with disabilities lives on in family law. Even now, "[p]arents with disabilities and their children are overly, and often inappropriately, referred to child welfare services and, once involved, are permanently separated at disproportionately high rates."[98] Accordingly, removal rates in child welfare cases where one parent has a psychiatric disability range from seventy to eighty percent.[99] Furthermore, "two-thirds of dependency statutes allow the court to reach the determination that a parent is unfit (a determination necessary to terminate parental rights) on the basis of the parent's disability."[100] Individuals with disabilities face further barriers to growing their

93. Baynton, *supra* note 87, at 38.

94. *Id*. at 46.

95. *Id*. at 47 (emphasis omitted).

96. *See* Buck v. Bell, 274 U.S. 200, 207 (1927). *See also* Ora Prilleltensky, *A Ramp to Motherhood: The Experiences of Mothers with Physical Disabilities*, 21 SEXUALITY & DISABILITY 21, 22–23 (2003).

97. NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 43 (2012).

98. *Id*. at 18.

99. *Id*. at 14.

100. *Id*.

families through adoption or assisted reproductive technologies.[101] The profundity of state control over disabled bodies in the area of family law cannot be overstated. These laws police not only what disabled bodies are permitted to do, but whether disabled bodies are permitted to exist.[102]

America's criminal legal system further manifests an exertion of state control over disabled bodies, stemming from a combination of indifference, fear, and contempt. After decades of efforts to move people with disabilities out of institutional settings like mental hospitals and into their communities, these individuals instead have been disproportionately institutionalized in jails and prisons because many states lack adequate systems for providing community-based care.[103] Individuals in prison are thus four times as likely, and individuals in jail are six times as likely to report a cognitive disability as individuals in the general population.[104] One in five persons in prison has a serious mental illness.[105] Once jailed or incarcerated, individuals with disabilities are routinely segregated in solitary settings, subject to mistreatment or abuse, and denied necessary accommodations or modifications.[106]

The overrepresentation of individuals with disabilities, particularly mental health disabilities, in the U.S. criminal legal system reflects both an indifference about the lack of adequate supports for and the potency of stereotypes and generalizations about such individuals. Many jailed or incarcerated persons with disabilities are exposed to the criminal legal system not because they have committed serious crimes, but because they are arrested for "crimes of survival" that reflect inadequate community-based services and the criminalization of the symptoms of their disabilities.[107] For individuals with a mental health disability, this criminalization is bolstered by stereotypes that they are dangerous, "responsible for their

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101. *See generally id*. at 179-227 (overview of access to adoption system and assisted reproductive technologies).

102. *See generally* Rosemarie Garland-Thomson, ABC RELIGION & ETHICS, *A Habitable World: Eugenics and Why We Should Conserve Disability* (Mar. 22, 2018), http://www.abc.net.au/religion/articles/2017/03/21/4639875.htm (addressing the question of "why disabled people should be in the world").

103. *See* REBECCA VALLAS, CTR. FOR AM. PROGRESS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS (2016).

104. *Id*. at 2.

105. *Id*.

106. *See generally*, RACHAEL SEEVERS, AVID PRISON PROJECT MAKING HARD TIME HARDER: PROGRAMMATIC ACCOMMODATIONS FOR INMATES WITH DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT (June 22, 2016); *see* VALLAS, *supra* note 103, at 11.

107. *See* Matt Ford, *America's Largest Mental Hospital is a Jail*, THE ATLANTIC (June 8, 2015), https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/.

illness or otherwise blameworthy," and "faking or exaggerating their condition."[108] American society persists in this imagining of individuals with mental health disabilities as atypically violent even though research shows that "the vast majority of people with mental disorders do not engage in violence" and that they are "much more likely to be *victims* of violent crime than the general population."[109]

The above mix of indifference and disdain is not confined to individuals with mental health disabilities. For example, in his dissent in *Atkins v. Virginia*, in which the majority held that capital punishment for the intellectually disabled is unconstitutional, Justice Scalia argued that intellectual disability "can readily be feigned" by defendants seeking to "turn the process of capital trial into a game."[110] Justice Scalia further dismissed the ways in which having an intellectual disability may contribute to wrongful imprisonment or execution[111] and instead cast suspicion that those who raise the issue of their intellectual disability may be duplicitous. These attitudes help sustain the systemic segregation and institutionalization of individuals with disabilities in our nation's jails and prisons.

Even efforts to vindicate the legal rights of persons with disabilities rely in part on a perception of disabled bodies as objects to be pitied for their brokenness. One prime example is in tort litigation, where often "[p]laintiffs' lawyers believe that they must arouse the jury's pity in order to succeed in the case and they think that images of plaintiffs' impairments will help them to do that."[112] "As a result, most trial lawyers develop trial themes that portray plaintiffs' bodies in negative ways," using themes such as " '[s]he is a prisoner in her own body,' " and " '[s]he used to be so beautiful. All of her friends envied her. Now they pity her.' "[113] Research by Professors Samuel Bagenstos and Margo Schlanger, among others, reveals that, in jurisdictions that allow monetary damages to compensate plaintiffs for the "loss of enjoyment of life," some courts "permit

108. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 416-17 (2006).

109. Paul S. Appelbaum, *Public Safety, Mental Disorders, and Guns*, 70 JAMA PSYCHIATRY 565, 565 (2013) (emphasis added).

110. Atkins v. Virginia, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting).

111. *Compare id.* at 320-21 (majority opinion) (explaining that intellectually disabled defendants "face a special risk of wrongful execution" due to factors like "the possibility of false confessions," a lessened ability to meaningfully assist their counsel, and a "demeanor [that] may create an unwarranted impression of lack of remorse for their crimes"), *with id.* at 352 (Scalia, J., dissenting) (arguing that "a similar 'special risk' could be said to exist for just plain stupid people, inarticulate people, even ugly people").

112. Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 724 (2011).

113. *Id.* (internal citations omitted).

a jury to presume that plaintiffs with disabilities will experience less pleasure in their life," and thus award damages on that basis.[114] Moreover, "[b]ecause plaintiffs in tort litigation frequently seek compensation for bodily injuries, the references [in tort case law] to 'making the plaintiff whole' suggest that plaintiffs' bodies are not 'whole' without the relief."[115] As a result of this framing, the assessment of tort damages to compensate for the defendant's wrongful conduct centers on the perceived wrongfulness of the plaintiff's body. And in the case of the controversial tort claims for a "wrongful birth" or a "wrongful life," the presentation of disabled bodies as "wrong" by virtue of their very existence comes from the parents of severely disabled children or from those children themselves.[116] While this perception of disabled bodies in tort litigation may help ensure that some plaintiffs are compensated, it reinforces our definitional understanding of disability as a deficiency relative to the nondisabled body. Under this view, a defendant's conduct that causes a disabling condition deserves compensation because the disability signals the absence of some meaningful aspect of human life. Yet, as autism advocate Amanda Baggs has explained, "[b]eing seen in light of the ghost of who you were expected to be is a kind of emotional violence for many disabled people."[117]

America's cultural spaces have further treated disabled bodies with a sense of bewilderment. Curiosity about how people with disabilities navigate the world has led American society to treat disabled bodies as spectacle, from staring at the person who manifests symptoms of mental illness on the street to placing individuals with physical disabilities on display as "freak show" acts.[118] Yet discomfort with the visual presentation of disa-

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114. *See generally* Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007); *see* Bloom & Miller, *supra* note 112, at 720-21.

115. Bloom & Miller, *supra* note 112, at 727.

116. *See, e.g.*, Catherine Palo, *Causes of Action for Wrongful Birth or Wrongful Life*, 23 C.O.A.2D 55 (2017). "Wrongful birth actions are brought by parents to recover for the birth of an unhealthy child. The parents' right to recover is based on the defendant's negligent deprivation of the parents' right not to conceive the child or to prevent the child's birth." *Id*. "Wrongful life actions are brought by unhealthy children to recover for having been born. The child's right to recover is based on the defendant's negligent deprivation of the right of the parents of the child not to conceive the child or to prevent the child's birth." *Id*. *See generally* Jillian T. Stein, *Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims*, 40 SETON HALL L. REV. 1117 (2010) (describing courts' resistance to recognizing wrongful birth and wrongful life actions).

117. ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN AND THE SEARCH FOR IDENTITY 238 (2012).

118. *See generally* Rosemarie Garland-Thomson, *Staring at the Other*, 25 DISABILITY STUD. Q. (2005), http://dsq-sds.org/article/view/610/787 [hereinafter Garland-

bility also led cities like San Francisco and Chicago to pass "ugly laws" in the late nineteenth and early twentieth centuries aimed at removing from public view those deemed too unsightly due to their disabilities.[119] Whether presented as spectacle or hidden away as unsightly, the perceived "burden" of disabled bodies is that they present a problem to be dealt with—an accommodation or modification that must be made or refused—and I contend that the effort to avoid this sense of obligation has historically led us to engage in practices that erase the need to accommodate disability.[120] As Professor Rosemarie Garland-Thomson has described this paradox, "the history of disabled people in the Western world is in part the history of being on display, of being visually conspicuous while being politically and socially erased."[121]

This brief examination of how individuals with disabilities have been treated by America's legal and cultural systems highlights the public's varied attitudes towards people with disabilities. Additionally, this history exposes an uncomfortable truth about individuals *without* disabilities: that we have collectively warehoused, institutionalized, obscured, and preempted the existence of disabled bodies at least in part because erasing disabled bodies can also erase discomfort—or fear, pity, contempt, disgust, or indifference—towards those who present as atypical in some way. Because this understanding of disability is further complicated by race, the following section examines Black Americans' experience with disability in particular.

Thomson, *Staring at the Other*]; PAMELA NEWKIRK, SPECTACLE: THE ASTONISHING LIFE OF OTA BENGA (2015); Jess Waggoner, *"Oh say can you ____": Race and Mental Disability in Performances of Citizenship*, 10 J. OF LITERARY & CULTURAL DISABILITY STUD. 87, 93 (2016) ("Since the mid-nineteenth century, microcephalic bodies have attracted notoriety through the traveling freak show. Entertainers were billed as an atavistic version of the modern human ('The Missing Link'), a wonder of human form ('The Pinhead'), or an unintelligible creature ('The What Is It?'). This combination of small stature, a small skull, and intellectual disability places the microcephalic performer at the intersection of discourses on physical and mental disability.").

119. *See* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC (2009). For instance, in 1881, Chicago's city code provided that, "[a]ny person who is diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object, or an improper person to be allowed in or on the streets, highways, thoroughfares, or public places in this city, shall not therein or thereon expose himself to public view, under the penalty of a fine of $1 [about $20 today] for each offense." *Id*. at 1-2 (second alteration in original).

120. *See* Ribet, *supra* note 5, at 233, 237-38, 242, 244 (discussing "the [presumed] social and economic burden or cost of letting disabled people into social institutions, and the social, personal, and economic consequences of keeping disabled people out.").

121. Garland-Thomson, *Staring at the Other*, *supra* note 1188.

C. *Understanding the Position of Black Disabled Bodies in our Law and Society*

While Black bodies and disabled bodies experience many similar forms of discrimination, acknowledging the specific discrimination that occurs due to the intersection of race and disability is critical to safeguarding the legal rights—and the lives—of people of color with disabilities. This acknowledgment requires not only examining what happens to those in the intersection, but also examining how they got there. Accordingly, this Section first discusses the "social model" of disability, which involves recognizing the role that race, poverty, and other factors play in the development of disabling conditions and in society's treatment of individuals with disabilities.[122] This Section then highlights examples of the forms of discrimination that individuals may experience once they arrive at the intersection of race and disability. These examples illustrate that Black disabled bodies, like others who experience intersectional discrimination, are continually at risk of having their complex experiences flattened to being characterized *either* race *or* disability, leaving those individuals vulnerable to discrimination based on the disregarded identity with no path for recourse.

First, the social model of understanding disability urges us to consider the wide range of factors that can cause disabling conditions and influence how society treats people with disabilities.[123] While the medical model focuses on clinical diagnoses that "characterize a physical or mental difference as a deviation from the norm,"[124] the social model "defines disability as a relationship between people with impairments and broader social and economic forces."[125] The social model thus considers the more useful understanding of disability to be one that evaluates how society *reacts* to physical or mental impairments, highlighting "the role of environment, systems, attitudes, policy, and law, in rendering members of the population disadvantaged."[126]

One key aspect of the social model is that it calls for a recognition that "race is correlated with an increased risk for ill-health and disability," such that, "*[a]t every level of income*, African Americans experience [a] shorter life expectancy and poorer health outcomes."[127] According to

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122. *See generally* Pokempner & Roberts, *supra* note 5; Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 427-32 (2000).

123. *See* Pokempner & Roberts, *supra* note 5, at 426.

124. *Id*. at 426 n.7 (internal citations omitted).

125. *Id*. (quoting Tom Shakespeare, *What Is a Disabled Person?*, *in* DISABILITY, DIVERSABILITY, AND LEGAL CHANGE 25 (Melinda Jones & Lea Ann B. Marks eds., 1999)).

126. *Id*. (quoting Shakespeare, *supra* note 125, at 29).

127. *Id*. at 435 (emphasis added).

scholars Jennifer Pokempner and Dorothy Roberts, "[t]his racial factor in disability stems partly from institutional racism that creates barriers to appropriate medical care and insurance."[128] This disparity is also attributable to "racism in the job market and housing [that] expose[s] African Americans to more health risks," and to "conscious or unconscious discrimination by doctors against [B]lack patients."[129] For example, a study of exposure to lead poisoning—which can lead to developmental, cognitive, and behavioral disorders in children—conducted in Chicago neighborhoods found that "Black and Hispanic neighborhoods exhibited extraordinarily high rates of lead toxicity compared to White neighborhoods."[130] One consequence of "the color of poverty in America" is that, starting from childhood, Black Americans are more likely to experience illness and disability than White Americans.[131] "African Americans and other ethnic minorities have higher rates of childhood diseases such as measles and chicken-pox; chronic diseases such as diabetes, heart disease, and cancer; and communicable diseases such as HIV and tuberculosis."[132] In addition, as noted earlier, Black children are more likely than other children to have had an incarcerated parent.[133] Controlling for other factors, researchers have found that children of incarcerated parents are more likely to have conditions like attention deficit hyperactivity disorder (ADHD), developmental delays, learning disabilities, and behavioral problems.[134]

Race not only plays a role in causing disabling conditions, but it also can influence whether a person with a disability will be diagnosed with and treated for their condition, and whether they will be *correctly* diagnosed and treated. Researchers have found that medical providers routinely underestimate the physical pain that Black patients experience, and thus underdiagnose and undertreat physical conditions.[135] Black patients "are less likely than Whites to receive pain medication and, when they do, they receive less."[136] Similarly, Black patients receiving Medicare are

128. *Id.*

129. Pokempner & Roberts, *supra* note 5, at 435.

130. Robert J. Sampson & Alix S. Winter, *The Racial Ecology of Lead Poisoning: Toxic Inequality in Chicago Neighborhoods, 1995-2013*, 13 DU BOIS REV. 261, 279 (2016). *See also* Terrence McCoy, *Freddie Gray's Life a Study on the Effects of Lead Paint on Poor Blacks*, WASH. POST (Apr. 29, 2015), https://www.washingtonpost.com/local/freddie-grays-life-a-study-in-the-sad-effects-of-lead-paint-on-poor-blacks/2015/04/29/0be898e6-eea8-11e4-8abc-d6aa3bad79dd_story.html?utm_campaign=pubexchange_article&utm_medium=referral&utm_source=huffingtonpost.com&utm_term=.854004910c65.

131. Pokempner & Roberts, *supra* note 5, at 434.

132. *Id.* (internal quotation marks and citations omitted).

133. *See supra* note 65 and accompanying text.

134. MORSY & ROTHSTEIN, *supra* note 65, at 10-11.

135. *See supra* note 70 and accompanying text.

136. Trawalter et al., *supra* note 70, at 1.

less likely than White Medicare patients to receive all of the sixteen most common procedures, and "[t]he only four procedures blacks are more likely to receive, such as amputation, all reflect delayed diagnosis or treatment and poorer care."[137] One study suggests that this failure to treat physical pain among Black patients stems from providers viewing Black people as less privileged and as having faced more hardship than White people, in turn associating that hardship with "physical toughness."[138]

Medical providers are not alone in underestimating Black Americans' pain and in perceiving Black people as having unusual physical strength. One study found that "[W]hite adults without medical training endorse at least some beliefs about biological differences between [B]lacks and [W]hites, many of which are false and fantastical in nature (e.g., [B]lack people's blood coagulates more quickly than [W]hite people's blood)."[139] Another study found that National Football League personnel responsible for predicting whether injured players will be able to play the week after their injury thought that Black players were more likely to play in the next game than with White players with similar injuries.[140] Finally, a police officer's dismissal of Sandra Bland's explanation that she had epilepsy after he pushed her to the ground during a traffic stop presents a real-world example of how Black Americans' physical disabilities may be underestimated or disregarded.[141]

While Black patients are underdiagnosed and undertreated with respect to physical conditions, they are overdiagnosed or misdiagnosed with certain mental conditions. For instance, Black patients are three to five times more likely than White patients to be diagnosed with schizophrenia, despite similar rates of prevalence.[142] Researchers have further found that counselors disproportionately diagnose Black patients with psychotic disorders and with childhood disorders like conduct disorder, opposition-

137. Pokempner & Roberts, *supra* note 5, at 435.

138. Trawalter et al., *supra* note 70, at 5.

139. Hoffman et al., *supra* note 70, at 4298.

140. Trawalter et al., *supra* note 70, at 1-2.

141. *See* Margaret Talbot, *Watching Sandra Bland*, NEW YORKER (July 29, 2015), http://www.newyorker.com/news/daily-comment/watching-sandra-bland (describing the arrest of Sandra Bland, an African American woman, following a traffic stop and her death in a jail cell three days later).

142. Robert C. Schwartz & David M. Blankenship, *Racial Disparities in Psychotic Disorder Diagnosis: A Review of Empirical Literature*, 4 WORLD J. OF PSYCHIATRY 133, 135 (2014); *see also* Shankar Vedantam, *Racial Disparities Found in Pinpointing Mental Illness*, WASH. POST (June 28, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062701496.html.

al defiance disorder (ODD), and ADHD.[143] These conditions "are often diagnosed and subjectively perceived as involving socially disruptive behaviors," and many of the diagnostic criteria "involve acting out in ways that interfere with or disrupt others."[144] One contributing factor proffered for the racial disparity in the diagnosis of ODD, which is characterized by "a pattern of behavior that includes angry and irritable mood, argumentative and defiant behavior, and/or vindictiveness," is that "White American clients presenting with the same disruptive behavioral symptoms as African American clients tend to be diagnosed with adjustment disorder,"[145] which is "considered a residual category, often comprising the most mild of mental disorders."[146] By contrast, one review found a consensus among researchers that mood disorders, which "usually require less invasive interventions and have better prognoses than do psychotic disorders," are "as underdiagnosed as schizophrenia is overdiagnosed" among Black patients.[147] Together, this research indicates that Black bodies, Black behaviors, and Black words are routinely pathologized as signaling serious mental illness.

Importantly, the stigma attached to many disabilities further complicates whether a person of color with a disability will receive help for their condition. Before she was shot and killed in her home by police who found her threatening, Deborah Danner wrote an essay articulating how "[s]tigma causes people to treat you differently."[148] Danner explains:

> I've lost several jobs because of stigma—jobs I was succeeding at. I've gotten to the point where I now tell any employer who asks that I am "semi-retired" to avoid explaining, endlessly, that I have schizophrenia and that no, I won't go postal and yes, I can handle more than normal stress(es) and no, I am not taking Thorazine, and no, I won't be getting bouts of de-

143. Robert C. Schwartz & Kevin P. Feisthamel, *Disproportionate Diagnosis of Mental Disorders Among African American Versus European American Clients: Implications for Counseling Theory, Research, and Practice*, 87 J. OF COUNSELING & DEV. 295, 298 (2009).

144. *Id*.

145. Marc. A Grimmett et al., *The Process and Implications of Diagnosing Oppositional Defiant Disorder in African American Males*, 6 THE PROF. COUNSELOR 147, 147-48 (2016). *See also* Kevin P. Feisthamel & Robert C. Schwartz, *Differences in Mental Health Counselors' Diagnoses Based on Client Race: An Investigation of Adjustment, Childhood, and Substance-Related Disorders*, 31 J. OF MENTAL HEALTH COUNSELING 47 (2009).

146. Feisthamel & Schwartz, *supra* note 145, at 51-52 (internal quotation marks and citations omitted).

147. Schwartz & Blankenship, *supra* note 142, at 296.

148. Deborah Danner, *Living with Schizophrenia*, N.Y. TIMES, at 5 (Oct. 19, 2016), https://www.nytimes.com/interactive/2016/10/19/nyregion/document-Living-With-Schizophrenia-by-Deborah-Danner.html.

> pression that'll make me miss work and that yes, I take medication daily to control it and that no I don't act crazy and no, I don't require special handling, thank you very much.[149]

While Danner does not expressly discuss her specific experience as a Black woman with schizophrenia in this essay, some Black Americans feel the exhausting stigma she describes due to the intersection of their race and their disability.[150] As scholar Beth Ribet explains, "it is not uncommon for People of Color to 'over-perform' . . . in order to excel in hostile structures, and in the process negate or 'disprove' racial mythologies."[151] Likewise, people with disabilities may feel compelled to "prov[e] extraordinary capacity in various ways" in response to "a set of cultural messages about transcending limits and boundaries."[152] And "the two parallel dynamics fuse for People of Color with disabilities, creating an extraordinary pressure to be better, stronger, smarter, more effective, flawlessly capable, and apparently unharmed or immune to the strain of hyper-functioning . . . ."[153] This pressure to defy expectations about both race and disability can contribute to a fear for people of color with disabilities that seeking help will signal not only failure for themselves but for their communities.[154] Accordingly, "[t]he request for disability accommodation then, or even the recognition that one is struggling without it, can feel like a kind of surrender or defeat . . . ."[155] "People of Color with disabilities then must face the untenable choice: do without a resource that is needed for success and access or seek it out through channels that in themselves signal failure."[156] As the social model reveals, race can play a pivotal role not only in whether one will experience a disability and have that disability recognized by a medical professional, but in whether one will feel accepted in seeking and receiving help.

Viewed through the lens of the social model, the above discussion of how and why one may arrive at the intersection of race and disability informs an understanding of the experience of Black disabled bodies. This

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149. *Id*.

150. *See* Tara Bahrampour, *Therapists say African Americans are Increasingly Seeking Help for Mental Illness*, WASH. POST (July 9, 2013), https://www.washingtonpost.com/local/therapists-say-african-americans-are-increasingly-seeking-help-for-mental-illness/2013/07/09/9b15cb4c-e400-11e2-a11e-c2ea876a8f30_story.html. *See also* Linda Villarosa, *America's Hidden H.I.V. Epidemic*, N.Y. TIMES (June 6, 2017), https://mobile.nytimes.com/2017/06/06/magazine/americas-hidden-hiv-epidemic.html.

151. Ribet, *supra* note 5, at 236.

152. *Id*.

153. *Id*.

154. *Id*. at 236-37.

155. *Id*. at 237.

156. *Id*.

Section next highlights examples of the discrimination that Black disabled persons may experience due to the complex intersectional space they occupy.

The experience of Black deaf students seeking equal educational opportunity in the nineteenth century offers a prime example of the ways in which our legal and cultural institutions can flatten such experiences of intersectional discrimination, characterizing them singularly by race or disability. In the mid-1800s, Gallaudet University, the nation's first institution of higher education dedicated to serving deaf students, educated both Black and White students.[157] This was especially unusual in the pre-Civil War era, when "Black people, both deaf and hearing, struggled to obtain a formal education," and "it was a criminal offense in some states to educate enslaved people."[158]

School superintendent Edward Miner Gallaudet continued to depart from the prevailing racially segregated approach to education when he accepted Black students into the Kendall School, an elementary school based on Gallaudet's campus for District of Columbia students.[159] He did so in response to "the intervention of wealthy [W]hite patrons," and typically accepted "poor, Black deaf youth" such as "orphaned Black students found abandoned in alleys, sponsored by church groups and other social agencies."[160] Because the inclusion of Black students at the Kendall School was charity-based rather than rights-based, however, Black and White students learned in the same classrooms but remained segregated in their sleeping and eating accommodations.[161] And while Black students were initially accepted at the prompting of White philanthropists, by the end of the twentieth century, "[W]hite parents had begun to object strenuously to the presence of these students," and White students began harassing their Black peers.[162]

Responding to this pressure, Gallaudet sought assistance from Congress, which passed legislation in 1905 authorizing the transfer of the Black students to a segregated school for Black deaf and mute students in Maryland.[163] In addition to being farther away from the students' family and community supports in D.C., the Maryland school was rundown physically and students were not taught using the oral method of instruc-

157. Sandra Jowers-Barber, *The Struggle to Educate Black Deaf School Children*, *in* A FAIR CHANCE IN THE RACE OF LIFE: THE ROLE OF GALLAUDET UNIVERSITY IN DEAF HISTORY 113, 114 (2008).

158. *Id*.

159. *Id*.

160. *Id*.

161. *Id*.

162. *Id*. at 115.

163. Jowers-Barber, *supra* note 157, at 115.

tion that was available in deaf schools which White children attended, then considered more advanced.[164] As a result of the legislation, the Kendall School would not see another Black student for nearly fifty years, when several Black parents successfully sued in 1952.[165] When Black students returned to the school later that year, they found themselves segregated from their White classmates in all respects.[166]

This account of how Black students were treated at the Kendall School illustrates that people of color with disabilities can experience discrimination in ways that are both similar to and different from the discrimination experienced by others who share either of these traits. Certainly, Black students with and without disabilities experienced the sting of being segregated from their White peers based on the notion that their mere presence in a shared space would demean the educational experience for White children.[167] Indeed, it was unusual at the time that the Kendall School's Black students had ever shared a classroom with White students. Yet, eugenicists like Alexander Graham Bell advocated *for* the education of deaf students alongside hearing children based partly on the belief that segregated education for deaf children contributed to a tendency of deaf people to marry one another, and threatened to create "a defective race of human beings [who] would be a great calamity to the world."[168] Paradoxically, the notion of Black inferiority was cited as a reason for segregation, but the notion of deaf inferiority presented an argument for integration.

The Black deaf students at the Kendall School experienced some aspects of these forms of discrimination, but, by virtue of existing at the intersection of race and disability, also experienced something different. Their deafness initially exempted them from a strict adherence to racial segregation in the classroom that they likely would have experienced otherwise. However, once the pity of White philanthropists eroded, their Blackness exempted them from the educational opportunities that the other deaf children enjoyed. Even within an institution where the difference of deafness was valorized, the difference of race remained vilified. This left Black deaf students in an unsteady position that only exists for

164. *Id*. at 118.

165. *Id*. at 119-24.

166. *See id*. at 124-29.

167. LITWACK, *supra* note 31, at 489.

168. ALEXANDER GRAHAM BELL, UPON THE FORMATION OF A DEAF VARIETY OF THE HUMAN RACE 41, 46 (1883). Notably, Bell advocated only partial integration of deaf and hearing students and thought "the school that would most perfectly fulfill the condition required would contain only one deaf child." *See id*. at 46-47. *See also* JACK R. GANNON, DEAF HERITAGE: A NARRATIVE HISTORY OF DEAF AMERICA 75-77 (2011).

those in the intersection—at first protected by their deafness, and then punished for their race.

Students of color with disabilities, particularly Black disabled students, continue to face forms of discrimination that are at times in tension with one another. For instance, the U.S. Department of Education's Office for Civil Rights has confirmed through its enforcement experience both the "over-identification of students of color as having disabilities" and the "under-identification of students of color who *do* have disabilities."[169] Over-identification means "the inappropriate identification of a student who does not actually have a disability and who does not need services as a student with a disability."[170] By contrast, under-identification means "the failure to appropriately identify a student who has a disability and who *does* need services as a student with a disability."[171] This over-identification suggests that students of color are *too disabled*, because academic performance or behaviors that may be a reflection of inadequate instruction or the highly subjective judgments of school staff are instead pathologized as signs of a disability.[172] Yet, under-identification suggests that disabled students of color are simultaneously *not disabled enough*, because their need for modifications is underestimated or attributed to personal or cultural failings. As the National Council on Disability has explained, "[s]chool psychologists often find students of color ineligible for special education because their behavior is believed to be willful or purposeful and not related to a disability."[173] Furthermore, these students may be *misidentified* due to implicit assumptions about their behaviors. The Department of Education has explained that "[B]lack students may be more likely to be classified as emotionally disturbed while [W]hite students with similar behavior may be more likely to be classified as having ADHD."[174] While the identification of students of color with disabilities is the subject of ongoing research and debate, these reports suggest that Black students are less likely to be found eligible for services and, when they *are* found eligible, it is in more stigmatized disability categories like "emotional disturbance."

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169. U.S. Dep't of Educ., Office for Civil Rights (OCR), Opinion Letter on Preventing Racial Discrimination in Special Education to States, Districts, and Schools 2 (Dec. 12, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf, at 2 (emphasis added) [hereinafter OCR Letter].

170. *Id.* at 2 n.5.

171. *Id.* (emphasis added).

172. *See* Losen & Welner, *supra* note 6, at 419-20, 440-41, 451.

173. NAT'L COUNCIL ON DISABILITY, BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES 48 (2015) [hereinafter NCD Report].

174. OCR Letter, *supra* note 169, at 16 n.46.

With respect to school discipline, both students of color and students with disabilities are disproportionately suspended and expelled, and this disparity is compounded for students of color with disabilities, who are disciplined more than any other group.[175] Many students are disciplined for subjective behaviors, like being threatening or disruptive, and implicit biases may lead schools to consider the same behaviors more dangerous when presented by Black bodies.[176] Paradoxically, these biases may lead schools to discipline Black students for behaviors that are manifestations of their disabilities while simultaneously denying that they are disabled and eligible for services, further reflecting the nuanced discrimination that occurs at the intersection of race and disability.

The story of Black and deaf Junius Wilson further illustrates the ways in which race and disability may amplify the other trait's discriminatory effects and additionally create a distinct form of discrimination. Accused of assault with intent to rape in 1925, Wilson was jailed, castrated, and held in a segregated mental hospital for sixty-eight years before his eventual release.[177] Wilson was not, in fact, mentally ill, and he remained hospitalized for roughly twenty of those years even after the charges had been dropped, in large part because his family could no longer be found.[178]

As a child, Wilson attended the North Carolina School for the Colored Blind and Deaf, where he was initiated into a unique Black deaf community.[179] There, he learned "Raleigh signs," a dialect of Black sign

175. *See* NCD Report, *supra* note 173, at 11 ("Twenty-seven percent of African American boys with disabilities and 19 percent of African American girls with disabilities received at least one out-of-school suspension in 2011-2012."); Amanda L. Sullivan et al., *Beyond Behavior: Multilevel Analysis of the Influence of Sociodemographics and School Characteristics on Students' Risk of Suspension*, 42 SCH. PSYCHOL. REV. 99, 107 (2013) (explaining research showing that suspension is most prevalent among Black students and students with disabilities, and that the highest risk of suspension is for Black students with disabilities).

176. *See* NCD Report, *supra* note 173, at 47-48 (citing studies showing that school administrators "dole out harsher punishment to students of color than white students for the same or similar behavior."); Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 334-35 (2002) ("Significantly different patterns of referrals suggest that black students are more likely to be referred to the office for more subjective reasons.").

177. *See* BURCH & JOYNER, *supra* note 48, at 1, 163. *See also* Nirmala Erevelles & Andrea Minear, *Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality*, 4 J. OF LITERARY & CULTURAL DISABILITIES STUD. 127 (2010); *Deaf Man, 96, Freed After 68 Years in Hospital*, N.Y. TIMES (Feb. 6, 1994), http://www.nytimes.com/1994/02/06/us/deaf-man-96-freed-after-68-years-in-hospital.html [hereinafter *Deaf Man*].

178. *Deaf Man*, *supra* note 177.

179. *See* BURCH & JOYNER, *supra* note 48, at 2.

language[180] that was virtually impossible for others outside the school to understand, even those fluent in the American Sign Language taught at White deaf schools.[181] When he returned home, Wilson had difficulty communicating with his family and community, and they viewed him as "especially disruptive and uncontrollable."[182] His practice of "touching or holding people, stamping feet and waving arms (all common, acceptable, and meaningful interpersonal behaviors in the deaf world) were foreign and threatening to his hearing neighbors."[183] Wilson was likely considered even more threatening by White members of the community, as his education in a school for Black deaf children also meant he was unable to meaningfully communicate with White deaf individuals.[184] Furthermore, Wilson's method of communicating limited his ability to understand and navigate the Jim Crow rules that policed where Black bodies were permitted to be and how they were permitted to move.[185]

Likely concerned that Wilson's race and disability made him a threat, or at least a nuisance, when navigating the Jim Crow South, a family friend accused Wilson of assaulting and attempting to rape his wife in 1925.[186] When Wilson was unable to understand a White jailer's attempts at sign language upon his arrest, the jailer assumed that his "deaf voice, inarticulate and perhaps quite loud, [constituted] howls of insanity."[187] With Wilson unable to communicate effectively during a medical examination or at his "lunacy hearing," the state concluded that he was "insane and violent" and ordered his institutionalization in the criminal ward of the North Carolina State Hospital for the Colored Insane.[188] He was again viewed as threatening within the confines of this institution, and, in 1932, the hospital superintendent personally performed a surgical castration on Wilson.[189] No longer considered threatening, Wilson was

180. *Deaf Man, supra* note 177.

181. *See* BURCH & JOYNER, *supra* note 48, at 2-3, 7, 23-24.

182. *Id*. at 33.

183. *Id*.

184. *See id*. at 23-24; Ceil Lucas et al., *The Intersection of African American English and Black American Sign Language*, 17 INT'L J. OF BILINGUALISM 156, 158-59 (2015) (describing the author's transition from a segregated school for Black deaf students to a racially integrated school for the deaf as feeling "as if they were signing two different languages and in a foreign land").

185. *See* BURCH & JOYNER, *supra* note 48, at 33-34.

186. *See id*. at 34-36.

187. *Id*. at 36.

188. *Id*. at 37-38.

189. *Id*. at 41, 47-50.

removed from the criminal ward and sent to work on the hospital farm until his release sixty-two years later.[190]

Junius Wilson's mode of interacting with the world was a product of his race and his disability conjointly, and because he could not be understood simply by race or disability, he was not understood at all. Rather, his race, disability, and gender worked in concert to render Wilson so dangerously different that segregation, institutionalization, and sterilization were considered acceptable means of controlling his body. Wilson's experience sharply exemplifies the distinct discrimination that Black disabled bodies may face when they are flattened and secreted away.

The above accounts are just a few examples of the ways in which people of color with disabilities are subject to complex and compound forms of discrimination. In accordance with Justice Marshall's warning in *Cleburne* that, "[p]rejudice, once let loose, is not easily cabined,"[191] there are many permutations of how the world may discriminate against a person who exists at the intersection of race and disability. The Black disabled body may be feared like Eric Garner's body because it is assumed to be impervious to pain and unduly strong;[192] it may be deserted like Junius Wilson's body because it is assumed to be inconsequential and feeble; it may be condemned like Kalief Browder's body because it is assumed to be felonious and damaged;[193] it may be discarded like Sandra Bland's body

190. *Id*. at 49. After the appointment of a guardian ad litem and a protracted legal dispute, Wilson remained on the hospital grounds in a private cottage for the remainder of his life. *Id*. at 127–42.

191. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 464 (1985) (Marshall, J., dissenting).

192. *See* J. David Goodman & Michael Wilson, *Officer Daniel Pantaleo Told Grand Jury He Meant No Harm to Eric Garner*, N.Y. TIMES (Dec. 3, 2014), https://www.nytimes.com/2014/12/04/nyregion/officer-told-grand-jury-he-meant-no-harm-to-eric-garner.html?smid=pl-share (describing Officer Daniel Pantaleo's grand jury testimony that he "became fearful as he found himself sandwiched between a much larger man and a storefront window" and that he heard Eric Garner saying "I can't breathe, I can't breathe," but assumed that Garner's ability to speak meant he could indeed breathe); *see also* Nia-Malika Henderson, *Peter King Blames Asthma and Obesity for Eric Garner's Death. That's a Problem for the GOP.*, WASH. POST (Dec. 4, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/12/04/peter-king-blames-asthma-and-obesity-for-eric-garners-death-this-is-a-problem-for-the-gop/?utm_term=.6c25eb704cf0 (citing Rep. Peter King's comments that "[t]he police had no reason to know [Garner] was in serious condition . . . . You had a 350-pound person who was resisting arrest").

193. *See* Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), http://www.newyorker.com/magazine/2014/10/06/before-the-law (detailing Browder's deteriorating mental health and multiple suicide attempts during his roughly seventeen months in solitary confinement at Rikers Island jail).

because it is assumed to be resistant and erratic;[194] it may be derided like the body of John R.K. Howard's victim because it is assumed to be untrustworthy and inept;[195] it may be shattered like the bodies of Eleanor Bumpurs and Deborah Danner because it is assumed to be stubborn and volatile;[196] and it may be silenced like Abrehem Zemedagegehu's body because it is assumed to be alien and docile.[197] Or it may be erased entirely. In an effort to avoid that erasure, Part Three of this Article analyzes how a plaintiff experiencing discrimination at this intersection may assert their legal claims.

III. Situating an Intersectional Discrimination Claim Based on Race and Disability in Employment Discrimination Law

As the previous sections of this Article demonstrate, people of color with disabilities face myriad and complex forms of intersectional discrimination that are distinct from the discrimination experienced by either people of color or people with disabilities generally. This acknowledgement is a necessary foundation for recognizing that those who experience

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194. *See* David M. Perry & Lawrence Carter-Long, Ruderman Family Found., The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability: A Media Study (2013-2015) and Overview 17-18 (2016) (describing an officer's response to Bland after she complained of being slammed to the ground during arrest and informed officers of her epilepsy: "You should have thought about it before you started resisting."); Talbot, *supra* note 141.

195. *See* Avi Selk, *White Classmate Avoids Jail in Coat-Hanger Assault of Disabled Black Teenager*, Wash. Post (Feb. 26, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/26/slap-on-the-wrist-white-classmate-avoids-jail-in-coat-hanger-assault-of-disabled-black-teen/?utm_term=.86dc21d76af4 (describing a White high school student's legal defense after facing charges for kicking a wire hanger into the rectum of a Black classmate with disabilities, namely, that "the disabled teenager was a liar, coached by his parents").

196. *See* Alan Feuer, *Fatal Police Shooting in Bronx Echoes One from 32 Years Ago*, N.Y. Times (Oct. 19, 2016), https://www.nytimes.com/2016/10/20/nyregion/fatal-police-shooting-in-bronx-echoes-one-from-32-years-ago.html?_r=0 (recounting the stories of Danner and Bumpurs, both mentally ill, older Black women fatally shot by the police in their homes because they were perceived to be threats); Eli Rosenberg & Ashley Southall, *In Quick Response, de Blasio Calls Fatal Shooting of Mentally Ill Woman 'Unacceptable'*, N.Y. Times (Oct. 19, 2016), https://www.nytimes.com/2016/10/20/nyregion/nypd-sergeant-fatal-shooting-bronx-woman.html.

197. *See* Matt Zapotosky, *A Deaf Man's Jail Ordeal in Arlington: 'I felt stuck. I was stuck.'*, Wash. Post (Sept. 30, 2015), https://www.washingtonpost.com/local/crime/mistreatment-of-the-deaf-in-prison-in-2015/2015/09/30/0c1244e8-5e1a-11e5-9757-e49273f05f65_story.html?utm_term=.01da7540d6db (describing a deaf Ethiopian immigrant's detention for six weeks in the Arlington County jail for later withdrawn theft allegations, during which he was unable to effectively communicate with others about his basic needs or his arrest); Vallas, *supra* note 103, at 6.

discrimination based on the intersection of their race and disability deserve redress that is independent of the remedies proffered in response to racial discrimination or disability discrimination. Furthermore, an understanding of the various ways in which discrimination based on the intersection of race and disability may manifest provides critical context for developing legal theories and strategies to adequately remedy that discrimination. Given this context, the following sections of this Article focus on employment discrimination law, setting forth how plaintiffs can articulate and prove workplace intersectional discrimination claims based on race and disability, offering examples of such claims, and discussing the available remedies.

Several existing civil rights statutes have the potential to advance the law on intersectional discrimination. For example, the Fair Housing Act and the Affordable Care Act each prohibit discrimination because of race, disability, and other protected traits, presenting the opportunity for plaintiffs to use either of these statutes to assert an intersectional discrimination claim.[198] In other cases, plaintiffs may need to argue the elements of multiple statutes in order to assert an intersectional discrimination claim. For instance, any of the individuals noted at the conclusion of Part Two who were harmed during their interactions with law enforcement or corrections officials might use Title VI of the Civil Rights Act[199]—which prohibits discrimination because of race, color, or national origin—and Title II of the ADA[200]—which prohibits discrimination on the basis of disability—together to assert an intersectional claim against a state or local government actor.

Yet the case law analyzing intersectional discrimination claims has thus far centered on employment discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). This may be because *Jefferies v. Harris County Community Action Association*, most often cited as the first case to expressly recognize a claim of intersectional discrimination, was a Title VII case in which a Black woman alleged employment discrimination based on race, sex, and a combination of her race and sex.[201] Indeed, the breadth of protected traits covered by Title VII—race, color, religion, sex, and national origin—invites a wide variety of intersectional discrimination claims under the statute.[202] For example, Title VII creates room for both a Black male who alleges discrimination on the basis of race and sex

198. *See* 42 U.S.C. § 3604 (2012); 42 U.S.C. § 18116(a) (2012).

199. *See* 42 U.S.C. § 2000d (2012).

200. 42 U.S.C. § 12132 (2012). *See also* 42 U.S.C. § 12102(1) (2012) (defining disability as "a physical or mental impairment that substantially limits one or more major life activities").

201. Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980).

202. 42 U.S.C. § 2000e-2 (2012).

and a Syrian Muslim who alleges discrimination on the basis of national origin and religion to obtain relief.

Furthermore, the Equal Employment Opportunity Commission (EEOC) offers plaintiffs guidance by explicitly confirming that Title VII authorizes claims of employment discrimination "not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex)."[203] The guidance additionally explains that Title VII "prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute—e.g., race and disability, or race and age."[204] However, this guidance stops short of explaining exactly how plaintiffs can allege and prove these intersectional discrimination claims. While few plaintiffs explicitly assert intersectional discrimination claims, race and disability are separately the two most common protected traits cited in charges of discrimination filed with the EEOC.[205] For these reasons, employment discrimination is a useful place to focus this analysis of intersectional discrimination claims based on race and disability.

Section A below analyzes the applicable causation standard for employment discrimination claims based on the intersection of race and disability. Section B examines the evidence that plaintiffs will need to prove such claims, and Section C offers examples of claims they may assert. Lastly, Section D discusses the remedies available and their potential to offer plaintiffs thicker protection from the multidimensional forms of discrimination they face.

A. *What Causation Standard Applies to Intersectional Discrimination Claims Based on Race and Disability?*

The most critical, and perhaps most difficult, question to answer with regard to intersectional discrimination claims is the causation standard to which plaintiffs will be held. In other words, what role must the plaintiff's combination of protected traits play in the employer's conduct in order to prove that discrimination, rather than some legitimate reason, explains their harms? Courts analyzing the appropriate standard for employment discrimination claims under Title VII and the ADA primarily

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203. EEOC, EEOC COMPL. MAN., DIRECTIVES TRANSMITTAL NO. 915.003, at 15-8 (2006), https://www.eeoc.gov/policy/docs/race-color.pdf [hereinafter EEOC Compliance Manual].

204. *Id*. at 15-9.

205. *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited June 21, 2018). In FY 2017, 33.9 percent of charges included a racial discrimination claim and 31.9 percent included a disability discrimination claim. *Id*.

consider two standards—the "motivating factor" standard and the "but-for" standard.[206] Under the but-for standard, a plaintiff must show that she would not have been harmed were it not for the protected trait; whereas under the motivating factor standard, the plaintiff need only show that the protected trait was one among any number of factors that explain the harm.[207] A successful plaintiff asserting an intersectional discrimination claim based on race and disability must determine which of these standards will apply to her claim, and the answer begins with an examination of the standards that separately apply to race and disability discrimination claims.

The case law on the applicable standard for antidiscrimination statutes like Title VII and the ADA has evolved considerably over time, as courts have considered not only which standard applies to each statute but also whether different types of claims within a statute should be subject to the same standard.[208] These cases focus closely on the specific statutory language prohibiting discrimination. Title VII prohibits employment discrimination against any individual "because of such individual's race, color, religion, sex, or national origin,"[209] whereas Title I of the ADA prohibits employment discrimination "on the basis of disability."[210] A previous version of the ADA prohibited employment discrimination "because of the disability" of the individual.[211] For discrimination claims, the focus of this Article, both the Supreme Court and Congress have clarified that the motivating factor standard applies to Title VII cases. The standard under the ADA, by contrast, remains an unsettled question, but the trend of recent cases suggests that some courts may apply the stricter but-for standard to ADA claims. Facing the potential of two

206. *See infra* Section III.A.1. A third standard, requiring that the protected trait be the sole cause of the plaintiff's harm, applies to employment discrimination under the Rehabilitation Act, but the Supreme Court has rejected this standard for Title VII claims, and all circuit courts now reject this standard for ADA claims as well, despite the ADA's similarities to the Rehabilitation Act. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 n.7 (1989); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 315-17 (6th Cir. 2012) (collecting cases).

207. *See Price Waterhouse*, 490 U.S. at 240, 250.

208. *See infra* Section III.A.1. Both Title VII and the ADA prohibit not only discrimination based on the individual's protected status (status-based discrimination), but also retaliation against an individual because they complained of unlawful discrimination or participated in an investigation, proceeding, or hearing. *See* 42 U.S.C. §§ 12112, 12203 (2008); 42 U.S.C. §§ 2000e-2, 2000e-3 (2009).

209. 42 U.S.C. § 2000e-2 (2009).

210. 42 U.S.C. § 12112 (2009).

211. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

different standards, intersectional plaintiffs are left to wonder which will apply to their claim.

To answer this question, Subsection One reviews the relevant case law, and Subsection Two argues that the motivating factor standard is the better-reasoned approach for discrimination cases, especially for claims under the current version of the ADA. Subsection Three considers which standard should apply specifically in intersectional discrimination cases, drawing on Crenshaw's analysis of the paradoxical outcomes that will result from applying the but-for standard. As the intersectionality framework reveals, the but-for standard threatens to exclude from all relief plaintiffs who have faced the most complex forms of discrimination and are most in need of redress, in favor of those who can easily identify a singular source of their harm. Nonetheless, recognizing that some courts may apply the but-for standard to intersectional claims under Title VII and the ADA given the lack of guidance, Subsection Three also offers thoughts as to how plaintiffs asserting these claims can navigate the more difficult standard.

1. A Review of Case Law Analyzing Applicable Causation Standards

Recent Supreme Court decisions have created considerable uncertainty for litigants and lower courts, but the trend of these cases suggests that courts will apply the motivating factor standard to Title VII discrimination claims and the but-for standard to ADA discrimination claims. While the Supreme Court has not expressly addressed the applicable standard in ADA cases, its analysis of the standard for another statute, the Age Discrimination in Employment Act (ADEA), caused some courts to cautiously apply the but-for standard to ADA claims. This development in the case law thus indicates that plaintiffs alleging discrimination based on the intersection of race and disability could be subject to either standard.

The Supreme Court first addressed the applicable causation standard for Title VII claims in *Price Waterhouse v. Hopkins*, in which a female senior manager at an accounting firm alleged gender discrimination when she did not make partner.[212] A plurality of the Court agreed that the plaintiff could prevail under a "mixed motive" theory if she showed that her gender was a "motivating" factor in the employer's decision,[213] meaning that "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those rea-

212. Price Waterhouse v. Hopkins, 490 U.S. 228, 231-32 (1989).

213. *Id.* at 258.

sons would be that the applicant or employee was a woman."[214] If she did so, the employer could "avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[215]

To reach this holding, the Court focused on Title VII's statutory language prohibiting discrimination "*because of* such individual's . . . sex."[216] The Court rejected the argument that the words "because of" are "colloquial shorthand for 'but-for causation,' " and explained that, "since we know that the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[217] Accordingly, when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account."[218] Following *Price Waterhouse*, Congress amended Title VII to provide that a plaintiff establishes an unlawful employment practice when they demonstrate that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[219] While *Price Waterhouse* only concerned Title VII's causation standard, most circuit courts considering ADA claims thereafter also applied the motivating factor standard.[220]

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214. *Id*. at 250.

215. *Id*. at 244-45; *see id*. at 258.

216. *Id*. at 240 (citing 42 U.S.C. §§ 2000e-2(a)(1), (2) (1991)).

217. *Id*. at 240-41.

218. *Price Waterhouse*, 490 U.S. at 241 (1989).

219. 42 U.S.C. § 2000e-2(m) (1991). With respect to the employer's burden, however, Congress rejected *Price Waterhouse*'s holding that a defendant who proves they would have made the decision otherwise can defeat liability entirely; instead, Title VII provides that courts may grant declaratory relief, injunctive relief, and attorney's fees and costs in such cases. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (1991).

220. *See, e.g.*, Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008); Head v. Glacier Nw. Inc., 413 F.3d 1053, 1063-65 (9th Cir. 2005); Parker v. Columbia Pictures Indus., 204 F.3d 326, 336-37 (2d Cir. 2000); Baird ex rel. Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999); Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996); Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301 (8th Cir. 1995). *But see* Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005) (holding that, under the ADA, a plaintiff must show that they were denied benefits "solely by reason of disability"); Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 454 (6th Cir. 2004) (applying the sole causation standard to ADA claims relying on prior precedent). At least one commentator has identified ambiguity in whether the Eleventh Circuit adopted the motivating factor or but-for causation standard in *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1077 (11th Cir. 1996), since

The Supreme Court's analysis of the causation standard under the ADEA in *Gross v. FBL Financial Services, Inc.* complicated this case law.[221] In *Gross*, the Supreme Court again interpreted the statutory meaning of "because of," as the ADEA "makes it unlawful for an employer to take adverse action against an employee 'because of such individual's age.' "[222] In a 5-4 decision, the Court held that a plaintiff alleging disparate treatment[223] under the ADEA must prove that age was the but-for cause of the employer's decision, and that "[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age."[224] Writing for the majority, Justice Thomas focused on the fact that Congress amended Title VII after *Price Waterhouse* to codify the motivating factor standard but did not make similar changes to the ADEA.[225] The Court therefore found *Price Waterhouse* inapplicable—Justice Thomas even questioned whether the decision was "doctrinally sound"[226]—and turned to the plain language of the ADEA.[227] Relying on dictionary definitions of the phrase "because of" to mean "by reason of" and "on account of," the Court concluded that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' the employer decided to act."[228] According to the *Gross* majority, "[t]o establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[229]

However, the language of the ADEA and the Supreme Court's prior precedent both offer compelling reasons to reject the but-for standard set forth in *Gross*. As Justice Breyer and Justice Stevens point out in their dissenting opinions, "[t]he words 'because of' do not inherently require a

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the decision states that "[i]n everyday usage, 'because of' conveys the idea of a factor that made a difference in the outcome," but expressly states that "[t]he ADA imposes a 'but-for' liability standard." *See* Lisa Schlesinger, *The Social Model's Case for Inclusion: "Motivating Factor" and "But For" Standards of Proof Under the Americans with Disabilities Act and the Impact of the Social Model of Disability on Employees with Disabilities*, 35 CARDOZO L. REV. 2115, 2126-27 (2014).

221. Gross v. FBL Fin. Servs. Inc., 557 U.S. 167 (2009).

222. *Id*. at 170 (citing the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (2006)).

223. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (explaining that disparate treatment occurs when "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]") (internal quotation marks and citations omitted) (second alteration in original).

224. *Gross*, 557 U.S. at 180.

225. *Id*. at 174.

226. *Id*. at 179.

227. *Id*. at 175.

228. *Id*. at 176 (internal citations omitted).

229. *Id*.

showing of 'but-for' causation,"[230] and "the most natural reading of the text proscribes adverse employment actions motivated in whole or in part by the age of the employee."[231] Furthermore, the Court's longstanding precedent holds that its "interpretations of Title VII's language apply with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived . . . from Title VII."[232]

Justice Breyer offers an additional reason to reject the but-for standard, arguing that it is especially ill-suited for discrimination cases.[233] Justice Breyer explains that, for a typical tort plaintiff, "reasonably objective scientific or commonsense theories of physical causation make the concept of 'but-for' causation comparatively easy to understand and relatively easy to apply."[234] However, in a discrimination case, we often must "*ascribe* motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision."[235] The answer to "what would have happened if the employer's thoughts and other circumstances had been different . . . will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer."[236] Thus, "[a]ll that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision. And the fact that a jury has found that age did play a role in the decision justifies the use of the word 'because,' *i.e.*, the employer dismissed the employee because of his age (and other things)."[237]

This line of cases interpreting Title VII and the ADEA has muddied the waters for courts considering the appropriate standard in ADA discrimination cases.[238] Following *Gross*, some circuit courts have declined

230. *Gross*, 557 U.S. at 190 (Breyer, J., dissenting).

231. *Id*. at 182 (Stevens, J., dissenting).

232. *Id*. at 183 (internal quotation marks and citations omitted).

233. *See id*. at 190-91 (Breyer, J., dissenting).

234. *Id*. at 190.

235. *Id*. at 190-91.

236. *Gross*, 557 U.S. at 191.

237. *Id*.

238. These cases have also impacted the interpretation of ADA retaliation claims. In a subsequent 5-4 decision, the Supreme Court held that plaintiffs alleging retaliation under Title VII must satisfy the but-for standard. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013). This decision relied heavily on the language in Title VII prohibiting retaliation against an employee "because he has opposed any practice" made unlawful under Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII, comparing it to the language in *Gross*. *See id*. (citing 42 U.S.C. § 2000e–3(a) (2012)). Although *Nassar* concerned only Title VII's retaliation provision, most circuit courts to decide the question

to extend Title VII's motivating factor standard to ADA discrimination cases, instead applying the but-for standard.[239] Other circuits have expressed doubt that the motivating factor standard applies but have declined to answer the question, because the parties did not properly raise the issue or because the plaintiff's claim would fail under both standards.[240] Others have yet to take a clear position since *Gross*, but continue to apply the motivating factor standard in ADA cases relying on prior precedent.[241] The state of the case law is thus far from clear, but the trend of these cases suggests that some courts may be inclined to cautiously apply the but-for standard to ADA claims absent guidance otherwise.

2. Arguing Against the But-for Standard in Disability Discrimination Cases

In addition to the aforementioned reasons to reject the but-for standard in discrimination cases, there is further reason to reject this standard as it would apply specifically to disability claims. The *Gross* decision emphasizes that Congress codified the motivating factor standard under Title VII following *Price Waterhouse* but did not similarly codify this standard when it amended the ADEA.[242] However, although Con-

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since have also applied the but-for standard to the ADA's retaliation provision. *See, e.g.*, Lincoln v. BNSF Railway Co., No. 17-1085, 2018 WL 3945875, at * 28 (10th Cir. Aug. 17, 2018); Oehmke v. Medtronic, Inc., 844 F.3d 748, 758 (8th Cir. 2016); Hillmann v. City of Chicago, 834 F.3d 787, 795 (7th Cir. 2016); T.B. v. San Diego Unified Sch. Dist., 806 F.3d 451, 473 (9th Cir. 2015); EEOC v. Ford Motor Co., 782 F.3d 753, 767, 770 (6th Cir. 2015); Palmer v. McDonald, 624 F. App'x 699, 702-03 (11th Cir. 2015); Staley v. Gruenberg, 575 F. App'x 153, 155 (4th Cir. 2014); Feist v. La. Dep't of Justice, Office of the Att'y Gen., 730 F.3d 450, 454 (5th Cir. 2013). *See also* Palmquist v. Shinseki, 689 F.3d 66, 77 (1st Cir. 2012) (holding that retaliation claims under the Rehabilitation Act require but-for causation because "the ADA's but-for causation standard controls whether a defendant is liable for retaliation"). *But see* Proudfoot v. Arnold Logistics, LLC, 629 F. App'x 303, 308 n.5 (3d Cir. 2015) (declining to decide if the but-for standard applies to ADA retaliation claims because the plaintiff's claim would fail regardless); Flieger v. Eastern Suffolk BOCES, 693 F. App'x 14, 19 (2d Cir. 2017) (same).

239. *See, e.g.*, Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 234 (4th Cir. 2016); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010).

240. *See, e.g.*, Oehmke v. Medtronic, Inc., 844 F.3d 748, 756-57 n.6 (8th Cir. 2016); Doe v. Bd. of Cty. Comm'rs of Payne Cty., Okla., 613 F. App'x 743, 747 n.3 (10th Cir. 2015). *See also* Bukiri v. Lynch, 648 F. App'x 729, 731 n.1 (9th Cir. 2016) (associational discrimination claim).

241. *See, e.g.*, Phillips v. Victor Cmty. Support Servs., Inc., 692 F. App'x 920, 921 (9th Cir. 2017); Dillard v. City of Austin, 837 F.3d 557, 561 (5th Cir. 2016); Hoffman v. Baylor Health Care Sys., 597 F. App'x 231, 235 n.12 (5th Cir. 2015); EEOC v. LHC Group, Inc., 773 F.3d 688, 702 (5th Cir. 2014).

242. *Gross*, 557 U.S. at 174 (majority opinion).

gress did not explicitly address the causation standard when it amended the ADA in 2008, it did amend the language prohibiting disability discrimination in order to "mirror the structure of nondiscrimination protection in Title VII."[243] Prior to the ADA Amendments Act of 2008 (ADAAA), the ADA's statutory language included a general rule prohibiting discrimination against a qualified individual with a disability "because of the disability of such individual."[244] The ADAAA amended this language to prohibit discrimination "on the basis of disability."[245] A Report from the House Committee on the Judiciary explains why Congress "[a]lign[ed] the construction of the Americans with Disabilities Act with Title VII of the Civil Rights Act of 1964":[246]

> This more direct language, structured like Title VII, ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is even a "person with a disability" with any protections under the Act at all.[247]

In other words, finding that the "because of" language unduly distracted courts from the central inquiry of whether discrimination based on disability has occurred, Congress revised the statutory language in order to obtain similar protections for ADA plaintiffs as for Title VII plaintiffs. Thus, irrespective of *Gross*'s implications for cases interpreting the ADA's "because of" language, the decision arguably does not apply to cases decided under the ADAAA.[248]

Notwithstanding this legislative intent to align the ways in which ADA and Title VII cases are construed, some may argue that the stricter but-for standard is appropriate for disability cases on the ground that, unlike one's race, an individual's disability may interfere with their ability to work such that an employer may justifiably treat them differently. As an initial matter, the same argument about one's suitability for work has of-

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243. H.R. REP. No. 110-730(I), at *16 (2008).

244. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 331-32 (1990).

245. *See* 42 § U.S.C. 12112 (2009) (emphasis added).

246. H.R. REP. No. 110-730(I) at *6 (2008).

247. *Id*. at *16.

248. *See* Mark R. Deethardt, *Life After* Gross*: Creating a New Center for Disparate Treatment Proof Structures*, 72 LA. L. REV. 178, 212 (2011); Corey Stein, *Mixed-Motive Jury Instructions under the ADA and ADAAA: Are they Still Applicable in the Wake of* Gross v. FBL Financial Services, Inc. *and* University of Texas Southwestern Medical Center v. Nassar*?*, 44 SETON HALL L. REV. 1223, 1250-53 (2014).

ten been made with respect to sex,[249] but both the Supreme Court and Congress have clarified that the motivating factor standard properly applies to workplace discrimination occurring because of sex. More importantly, this argument confuses the question of causation with that of liability. In enacting the ADA, Congress accounted for the impact that one's disability might have on their ability to work by limiting the law's protection to those who, with or without reasonable accommodations, are qualified to perform "the essential functions of the employment," and by excusing employers from making accommodations that would impose an "undue hardship" on their operations.[250] But to say that the employer will not be *liable* in certain circumstances for treating an employee differently on the basis of their disability is no answer to the question of whether that disability has *caused* the employer's action or inaction. This argument for the but-for standard is therefore unavailing, and there is no apparent reason why the standard for proving that disability has caused a person's harms should be any different than the standard for proving that race or another protected trait has caused harm.

3. Identifying the Applicable Causation Standard for Intersectional Discrimination Claims Based on Race and Disability

Depending on the jurisdiction and how they frame their claims, plaintiffs alleging intersectional discrimination based on race and disability may be subject to either the motivating factor standard that applies to race discrimination claims or to the but-for standard that some courts apply to disability discrimination claims. Crafting a coherent theory for these intersectional claims will thus be challenging in the absence of guidance as to which standard applies. However, the Supreme Court's "plus discrimination" cases and EEOC guidance together suggest that plaintiffs may be able to assert such an intersectional claim entirely under Title VII and its motivating factor standard if they choose. If plaintiffs *do* file under both Title VII and the ADA, Crenshaw's intersectionality framework underscores the importance of applying the motivating factor standard, as

249. The prohibition of discrimination because of sex was added to Title VII by a Virginia legislator late in the debate process in what some have characterized as "a last-ditch, if ultimately unsuccessful, attempt to derail a piece of legislation to which he was fiercely opposed." Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1318 (2012). Some legislators opposed adding sex to the law based on the view that "workplace law and policy should acknowledge women's special role in the family." *Id.* at 1320. Further, when Title VII was amended in 1972, Congress explained that "discrimination against women continues to be widespread, and *is regarded by many as either morally or physiologically justifiable*." *Id.* at 1346 (emphasis added) (internal quotation marks and citations omitted).

250. 42 U.S.C. § 12111(8) (2008); 42 U.S.C. §§ 12112(a), (b)(5)(A) (2008).

the but-for standard risks unduly steepening the hill that plaintiffs must climb in order to prove their claims, inconsistent with the purposes of both Title VII and the ADA.

First, legal precedent in "sex plus" and "race plus" discrimination cases suggests that many plaintiffs may be able to assert intersectional discrimination claims entirely under Title VII, even where some of the protected traits in the intersection are protected by different civil rights statutes.[251] In a case decided just a few years after Title VII was first enacted, the Supreme Court recognized the "sex plus" theory of discrimination, by which a plaintiff alleges that they were discriminated against on the basis of sex under Title VII *plus* another trait, such as having children or being married.[252] The Supreme Court thus recognized that discrimination on the basis of sex plus an unrelated factor still constitutes sex discrimination under Title VII. Otherwise, as the Fifth Circuit later noted in *Jefferies*, if employers are "[f]ree to add non-sex factors, the rankest sort of discrimination against women can be worked by employers," for instance, if an employer treats employees differently based on physical characteristics.[253] Various lower courts have since similarly recognized this theory in Title VII "race plus" cases.[254]

When embracing the concept of intersectional discrimination, the court in *Jefferies* found the sex-plus cases instructive because they stood for the proposition that "[t]he effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class."[255] That is, the fact that an employer decided to treat married women unfavorably in particular but not all women does not mean that the employer did not discriminate based on sex. Specifically considering claims of Black women based on sex plus race, the court found that rejecting the plus discrimination theory in that context would create a "particularly illogical result, since the 'plus' factors . . . are ostensibly 'neutral' factors, while race itself is prohibited as a criterion for employment."[256] In other words, it defies logic and the purpose of the law if discrimination based on sex plus marital status, a status that is not itself a

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251. *See infra* notes 252-255.

252. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971) (per curiam).

253. Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980) (citing Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, J., dissenting), *vacated*, 400 U.S. 542 (1971)).

254. *See e.g.*, Craig v. Yale Univ. Sch. of Med., 838 F. Supp. 2d 4, 9 (D. Conn. 2011) (recognizing a "race plus" intersectional claim of discrimination against black males); Kimble v. Wisc. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 769-71 (E.D. Wis. 2010) (same); Jeffers v. Thompson, 264 F. Supp. 2d 314, 326-27 (D. Md. 2003) (recognizing a claim of "race-and-gender" bias by an African-American female plaintiff).

255. *Jefferies*, 615 F.2d at 1034 (internal citations omitted).

256. *Id.*

protected trait, is prohibited but discrimination based on sex plus race, a trait that *is* protected by Title VII, is permissible. As *Jefferies* and other courts have held, Title VII allows for both types of "plus" discrimination claims.

Likewise, there is no clear reason why a "race plus disability" claim would not similarly constitute a form of racial discrimination under Title VII. Otherwise, a plaintiff who wished to show that their race plus their parental status caused discriminatory harm could do so under the motivating factor standard, but a plaintiff who wished to show that their race plus their disability caused discrimination may have to satisfy the but-for standard. This result begs the question, what type of "protection" does the trait of disability receive if plaintiffs may be required to offer more stringent proof for this protected trait than for a purportedly neutral trait.

Secondly, the EEOC's guidance also suggests that plaintiffs may be able to assert intersectional discrimination claims based on race and disability entirely under Title VII. As the EEOC's Compliance Manual explains, an employer violates *Title VII* when they discriminate against an employee "because of the intersection of their race and a trait covered by another EEO statute—e.g., race and disability . . . ."[257] In other words, discrimination based on race and disability together *is* a form of discrimination based on race prohibited by Title VII. Accordingly, courts would be well within their reason to accept intersectional discrimination claims based on race and disability asserted entirely under Title VII.

However, for those plaintiffs who do allege intersectional discrimination under both Title VII and the ADA, some courts may be persuaded to apply the but-for causation standard based on the rationale that, where two different standards apply, courts should apply the strictest standard to the entire intersectional claim. Otherwise, a plaintiff could prove discrimination based on the intersection of race and disability under the motivating factor standard more easily than if they had solely alleged discrimination based on disability and been subject to the but-for standard. While this argument has some intuitive appeal, it overlooks the fact that the intersectional discrimination claim will fail if race has not actually motivated the employer's actions in some way. Plaintiffs will thus not succeed in any attempt to somehow "game the system" by adding unfounded allegations of racial discrimination to what would otherwise solely be a claim under the ADA in an effort to lower their causation standard. Furthermore, the 2008 changes to the ADA reveal that Congress meant to ensure that courts construed the ADA in line with Title VII,[258] and applying

257. EEOC Compliance Manual, *supra* note 203, at 15-9.

258. *See supra* notes 243-248.

the but-for standard to an intersectional claim asserted under both statutes would defeat that legislative purpose.

Kimberelé Crenshaw's intersectionality analysis offers further reason to reject the but-for standard in the context of intersectional discrimination claims by highlighting how this approach impacts those meant to benefit from antidiscrimination laws. As Crenshaw cautions, using "a singular 'but for' analysis to ascertain the effects of race or sex" limits antidiscrimination law such that "sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics."[259] Crenshaw offers a useful analogy to illustrate the consequences of this narrowly tailored understanding of discrimination:

> Imagine a basement which contains all people who are disadvantaged on the basis of race, sex, class, sexual preference, age and/or physical ability. These people are stacked—feet standing on shoulders—with those on the bottom being disadvantaged by the full array of factors, up to the very top, where the heads of all those disadvantaged by a singular factor brush up against the ceiling. Their ceiling is actually the floor above which only those who are *not* disadvantaged in any way reside. In efforts to correct some aspects of domination, those above the ceiling admit from the basement only those who can say that "but for" the ceiling, they too would be in the upper room. A hatch is developed through which those placed immediately below can crawl. Yet this hatch is generally available only to those who—due to the singularity of their burden and their otherwise privileged position relative to those below—are in the position to crawl through. Those who are multiply burdened are generally left below unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch.
>
> As this analogy translates for Black women, the problem is that they can receive protection only to the extent that their experiences are recognizably similar to those whose experiences tend to be reflected in antidiscrimination doctrine. If Black women cannot conclusively say that "but for" their race or "but for" their gender they would be treated differently, they are not invited to climb through the hatch but told to

259. Crenshaw, *supra* note 2, at 151.

> wait in the unprotected margin until they can be absorbed into the broader, protected categories of race and sex.[260]

As Crenshaw's analogy demonstrates, the but-for standard risks undermining the purpose of antidiscrimination statutes by limiting redress to those who are nearest to the source of privilege and can say that, but for a single factor, they too would be above ground.

Absent clear Supreme Court or legislative guidance, however, some courts may decide to hold intersectional discrimination plaintiffs to the but-for standard. Accordingly, the following section addresses how such plaintiffs may satisfy the but-for standard as applied to their intersectional claims.

B. *How Can Plaintiffs Prove Their Intersectional Discrimination Claims?*

After identifying the applicable causation standard, plaintiffs alleging intersectional discrimination must further determine what evidence they will have to marshal in order to meet that standard. In cases asserted under the "disparate treatment" legal theory, in which the plaintiff alleges that the defendant "simply treats some people less favorably than others" because of a protected trait,[261] some courts require the plaintiff to identify an employee without the protected trait who is otherwise similarly situated and was treated more favorably—unless the plaintiff has an admission from the decision maker that his or her actions were based on the animus toward the plaintiff because of the plaintiff's protected trait.[262] As the Supreme Court's prior case law and Crenshaw's intersectionality analysis illustrate, identifying such a comparator is not necessary to prove the discrimination. But even in jurisdictions where plaintiffs *are* required to provide a comparator because they do not have a direct admission from the defendant, a plaintiff alleging they were discriminated against because they are a person of color with a disability need not be hindered by either identity when they are seeking to prove discrimination based on the intersection of both.

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260. *Id*. at 151-52.

261. Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

262. *See e.g.*, Dickerson v. Bd. of Trs., 657 F.3d 595, 601 (7th Cir. 2011) (ADA case); St. Louis v. Fla. Int'l Univ., 60 So.3d 455, 459 (3d Cir. 2011) (Title VII case); Coleman v. B-G Maint. Mgmt., 108 F.3d 1199, 1204 (10th Cir. 1997) (Title VII case). *But see* EEOC, Notice No. 915.002, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities n.43 and accompanying text (May 23, 2007), https://www.eeoc.gov/policy/docs/caregiving.html#fn43 (explaining in accompanying text that "while comparative evidence is often useful, it is not necessary to establish a violation of" disparate treatment based on sex under Title VII).

The 1999 *Olmstead* decision, in which the Supreme Court recognized that unnecessary institutionalization of persons with disabilities is a form of discrimination, is instructive in determining the types of proof intersectional plaintiffs must provide.[263] Although *Olmstead* did not involve claims of intersectional discrimination, this decision rejected the argument that the plaintiffs could not show they were discriminated against under Title II of the ADA because they had "identified no comparison class, *i.e.*, no similarly situated individuals given preferential treatment."[264] Instead, Justice Ginsburg explained that "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA."[265] The Court rejected Justice Thomas's argument in dissent that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group," and his argument that "a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute."[266] In rejecting these arguments, the Court embraced an expansive understanding of discrimination consistent with intersectionality, even citing *Jefferies* for the proposition that "discrimination against [B]lack females can exist even in the absence of discrimination against [B]lack men or [W]hite women."[267] It also cited an ADEA case for the proposition that "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*."[268]

Moreover, the Court has readily found sufficient evidence of disparate treatment without a comparator in certain types of employment discrimination cases, such as harassment and stereotyping cases.[269] As courts and scholars have explained, a plaintiff can prove discrimination by pointing to the context of "surrounding circumstances, expectations, and relationships," with "comparison being but one technique among several for making that contextual evaluation."[270] Furthermore, in some cases,

263. Olmstead v. Zimring *ex rel.* L.C., 527 U.S. 581, 598 (1999).

264. *Id.*

265. *Id.*

266. *See id.* at 598 n.10 (majority opinion); *id.* at 617 (Thomas, J., dissenting).

267. *Id.* at 598 n.10 (majority opinion) (citing Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980)).

268. *Id.* (citing O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996)).

269. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998) (sexual harassment by a member of the same sex); Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36, 251-52 (1989) (plurality opinion) (sex stereotyping).

270. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 782-83 (2011) (citing *Oncale*, 523 U.S. at 82); *see also* Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 467-68 (2d Cir. 2001) (describing the circumstances that imply discriminatory

finding a comparator will be impossible because there is no one else who is similarly situated to the plaintiff; consider, for instance, an employee with a unique position, like an organization's CEO, or one in a homogenous workplace where all employees share the protected trait, such as an office where all secretaries are female.[271] For these reasons, the better-supported position is that plaintiffs may prove their disparate treatment claims even without a similarly situated comparator.

However, plaintiffs in courts that do require proof of a comparator can nonetheless succeed in proving intersectional discrimination, although "the more specific the composite class in which the plaintiff claims membership, the more onerous that ultimate burden [of proving a prima facie case of discrimination] becomes."[272] For example, if an intersectional plaintiff alleges they were discriminated against because they are a Black person with a disability, employers may argue that the plaintiff must identify a non-Black employee without a disability who was treated more favorably. Under this argument, it would not suffice to identify both a Black employee without a disability and a non-Black employee with a disability who were treated more favorably than the plaintiff because neither would be entirely outside of the plaintiff's protected class. But this argument is not consistent with the "more comprehensive view of the concept of discrimination advanced in the ADA,"[273] nor is it supported by Title VII case law.[274]

Logic dictates that an intersectional plaintiff required to provide a comparator for a disparate treatment claim need not identify a perfect counterfactual in order to prove discrimination. Consider, for example, a Venn diagram where one circle represents Black employees, one circle represents employees with disabilities, and the intersection of both circles represents Black employees with disabilities. A plaintiff who alleges that they were discriminated against because they exist in this intersection could prove that the intersection was the but-for cause of their harms by identifying a comparable employee who exists entirely outside of both circles, for instance, a White employee with no disabilities, that was treated more favorably. But the plaintiff can also demonstrate that this intersection was the but-for cause if they identify a comparable Black em-

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intent in the absence of a similarly situated employee, including the employer's use of "degrading" language or "invidious comments" and "the sequence of events leading to the plaintiff's discharge" (quoting Chambers v. TRM Copy Ctr. Corp., 43 F.3d 29, 37 (2d Cir. 1994))). *See also* Goldberg, *supra*, at 779-87.

271. *See* Goldberg, *supra* note 270, at 757-61.

272. Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003).

273. *Olmstead*, 527 U.S. at 598.

274. *See, e.g.*, Daniel v. Church's Chicken, 942 F. Supp. 533, 539 (S.D. Ala. 1996) (Title VII case explaining that comparators outside of the Black female plaintiff's class include White males, White females, and Black males).

ployee without disabilities and a non-Black employee with disabilities who were treated more favorably, even if neither of these employees were treated as favorably as the most advantaged employee. This is because such a plaintiff can show that, but for their unique combination of protected traits, they would not have experienced the unfavorable treatment. As this hypothetical reveals, allowing only an employee who is advantaged in every single way that the plaintiff is disadvantaged to serve as a comparator obscures the point of the intersectionality analysis: that the intersection itself, and not only its separate components, caused the harm.[275]

This is further illustrated by Crenshaw's basement analogy,[276] which represents the legal and cultural structures that control who is permitted to access spaces of opportunity, and, to paraphrase scholar and activist Anna Julia Cooper, "where and when [they] may enter."[277] Some individuals may be in that basement because of a singular identity or status, just out of reach from the opportunity that lies above and standing on the shoulders of others who are even farther away from opportunity. The individual on the bottom of the basement may not often be able to prove that absent a particular component of their intersectional identity—e.g., their race or gender or disability—they would be above ground. But such an individual *can* readily prove that absent their position at the intersection of various identities, they would not have the weight of so many others bearing down on them, further distancing them from opportunity. That individual experiences discrimination not only because they are in the basement, but also because they are positioned under the weight of other, relatively more advantaged individuals. As Part Two of this Article illustrates, Junius Wilson may very well have been subjected to incarceration, sterilization, and institutionalization if he had been a Black person without disabilities or a White person with disabilities. Yet, it is nearly certain that he would not have been quite so far below ground, where he was forgotten for sixty-eight years, but for the fact that he was a Black deaf man. But for his position at the intersection of race and disability, he too might have been just grazing the ceiling, with a chance to crawl through the hatch.

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275. *See* Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) ("When a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.").

276. *See supra* note 260 and accompanying text.

277. *See* ANNA JULIA COOPER, A VOICE FROM THE SOUTH 31 (Xenia, Ohio, Aldine Printing House 1892).

C. *What Kinds of Intersectional Discrimination Claims Might Plaintiffs Bring?*

Evaluating the potential for intersectional discrimination claims based on race and disability further requires considering the contexts in which a plaintiff may assert this type of claim. The following section therefore describes several fact patterns—some hypothetical and some real—that illustrate the various contexts in which a plaintiff's experience of workplace discrimination is characterized not only by their race or disability, but by the intersection of both.

One context in which race and disability may intersect to cause employment discrimination is where the plaintiff's status as a person with a disability is in question because of race-based assumptions and stereotypes. The definition of disability under the ADA as an impairment that substantially impacts a major life activity is meant to be construed broadly.[278] It includes having "a record of such an impairment" and "being regarded as having such an impairment."[279] Pursuant to the implementing regulation, the standard for determining whether an individual has a disability under the ADA is "not meant to be a demanding standard."[280] Though it requires an individualized assessment, "the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis."[281] However, a review of federal cases in which the plaintiff asserted separate claims under both Title VII and the ADA reveals instances in which employers have dismissed a Black employee's assertions of a physical disability and instead regarded them as a person with a mental health disability, reflecting the implicit biases about Black disabled bodies discussed in Part Two.[282]

For example, in *Caldwell v. Nodiff*, the plaintiff, a Black female police officer, asserted separate discrimination claims on the basis of her race, gender, and disability under Title VII and the ADA.[283] Following her diagnosis with hypertension, her supervisor commented that she was using too much sick time and placed her on the Sick Abuse list, even though she had submitted doctors' notes regarding her absences.[284] Her symptoms worsened and she was diagnosed with severe hypertension, which required her to use more sick time.[285] A new supervisor began

278. 42 U.S.C. § 12102(1) (2012).

279. 42 U.S.C. § 12102(4)(A) (2012).

280. 29 C.F.R. § 1630.2(j)(1)(i) (2012).

281. 29 C.F.R. §§ 1630.2(j)(1)(iii), (iv) (2018).

282. *See supra* pp. 36-40.

283. *See* Caldwell v. Nodiff, No. 13-162, 2014 WL 641356, at *1 (E.D. Pa. Feb. 18, 2014).

284. *Id.*

285. *Id.*

"'harassing' [the] plaintiff about her use of sick days and repeatedly asked [the] plaintiff if she was being domestically abused, if she was on drugs, and if she had a drinking problem."[286] The plaintiff "was sick checked at her home multiple times, unlike other officers with similar numbers of hours worked," and she lost vacation/sick time when she left for doctor's appointments, "whereas other officers did not lose such time."[287]

She complained about her treatment to a supervisor, who told the plaintiff that she was "emotionally distressed" and "then took [the] plaintiff, involuntarily, to a mental-health facility, where she was released within ten minutes."[288] Days later, the plaintiff's supervisor took her firearm away on the ground that she was "mentally unable to carry a weapon," and sent her home from work the following day "because she had been deemed a 'mentally unstable person.' "[289] The plaintiff was prohibited from returning to work until she was able to meet with a department psychiatrist nearly eight weeks later, who immediately returned her to work.[290] On her first day back, her supervisor said that she could no longer call out sick and told her he "didn't care" when she explained the symptoms of her hypertension.[291] Over the next few years, the plaintiff was repeatedly sick checked at her home, while her male nondisabled coworkers were not sick checked when they called out sick.[292] In addition, she was repeatedly subjected to drug tests, whereas "officers who were out sick, but did not have disabilities, or who were not [B]lack or female, did not get drug tested so frequently."[293] Eventually, one of the plaintiff's supervisors advised her that another supervisor "wanted her medically evaluated because he did not believe she was disabled with hypertension."[294] The plaintiff became sick again, and while she was in the hospital, the supervisor who questioned her disability reassigned her to the day shift, even though she had twice requested to remain on the night shift so that she could attend doctors' appointments and get adequate sleep.[295] Her high blood pressure and hypertension ultimately prevented her from being able to return to work.[296]

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286. *Id*.
287. *Id*.
288. *Id*.
289. *Caldwell*, 2014 WL 641356, at *1.
290. *Id*.
291. *Id*. at * 2.
292. *Id*.
293. *Id*.
294. *Id*.
295. *Caldwell*, 2014 WL 641356, at *2.
296. *Id*.

Although this plaintiff did not assert an intersectional discrimination claim, the district court held that she had sufficiently stated plausible claims separately under Title VII and the ADA.[297] The court specifically rejected the defendants' argument that the plaintiff failed to state a claim because she "d[id] not allege that other [W]hite, male, non-disabled employees were treated differently."[298] Rather, the court held that "[a] plaintiff is not required to show someone outside her protected group was treated dissimilarly," and that she "need show only 'some causal nexus between h[er] membership in a protected class' and the employer's adverse action."[299] The court accepted as evidence of such causal nexus the plaintiff's allegations that she was drug tested more often than officers who were neither disabled nor Black nor female, and that she was sick checked more often than nondisabled male officers. [300] Furthermore, the drug tests and sick checks were both in violation of the department's policies.[301] *Caldwell* illustrates that a plaintiff who asserts discrimination based on multiple protected traits need not identify an exact mirror-image as counterfactual. It is enough for such a plaintiff to show that the intersection of their various identities has placed them under the weight of others at the bottom of the basement.

The facts of *Caldwell* are similar to an Eighth Circuit decision in which a Black woman was again assumed to be mentally ill following her request to be accommodated for a physical disability. In *Norman v. Union Pacific Railroad Company*, plaintiff Kimberly Norman was a Black woman who worked as a train dispatcher.[302] Her company offered long-term disability benefits that were limited to twelve months in duration for employees with a mental illness or nervous disorder, but unlimited for employees with other disabilities.[303] Norman sought long-term benefits after she was diagnosed with irritable bowel syndrome and also requested specific accommodations.[304] Her employer approved the long-term benefits, but denied her requests for accommodations.[305] In addition, "[s]hortly after the diagnosis, the company questioned whether Norman's disability was caused by mental illness" and "demanded that Norman undergo an independent medical examination."[306] She complied with the request but

297. *Id*. at *6.
298. *Id*. (internal citations omitted).
299. *Id*. (second alteration in original) (internal citations omitted).
300. *Id*.
301. *Caldwell*, 2014 WL 641356, at *6.
302. Norman v. Union Pac. R.R. Co., 606 F.3d 455, 457 (8th Cir. 2010).
303. *Id*.
304. *Id*. at 457-58.
305. *Id*.
306. *Id*. at 458.

did not hear from her employer again until she received a letter explaining that her long-term benefits had expired due to the twelve-month limit on benefits relating to a mental illness.[307] The company instructed Norman to submit a release signed by her physician showing that she was fit to return to work.[308] Norman instead appealed the termination of her benefits, arguing that her disability was physical rather than mental.[309] Eventually, the company agreed that she was entitled to continued benefits due to her physical condition and extended her benefits for several months.[310] Nonetheless, the company refused to reinstate Norman on the ground that she had not submitted the return-to-work release.[311]

Norman filed suit separately alleging race, gender, and disability discrimination under Title VII and the ADA, asserting that her employer treated a White male train dispatcher more favorably when he was in fact diagnosed with a mental health disability.[312] The Eighth Circuit affirmed the district court's grant of summary judgment to the employer on both claims, finding that Norman's failure to submit the release defeated her claim that she was terminated because of her perceived mental health disability.[313] For the same reason, the court held that Norman could not prove that she was similarly situated to her White male coworker under Title VII because, unlike Norman, he had submitted the release.[314]

Although Norman's claims were ultimately unsuccessful due to her failure to submit the release, the Eighth Circuit found that she sufficiently established that she was regarded as a person with a disability under the ADA because her employer "mistakenly regarded Norman as mentally ill."[315] However, by asserting that the employer "mistakenly" regarded Norman as having a mental health disability, the court is perhaps more charitable towards the employer than necessary. Indeed, as the court points out, Norman "sought medical treatment exclusively for physical ailments, underwent a psychiatric evaluation only because [the employer] demanded it, and never received an independent diagnosis of mental illness."[316] Whether due to the way the claims were framed or the court's own understanding of the claims, the analysis of Norman's ADA claim is devoid of any consideration of the role that her race may have played in

307. *Id.*
308. *Norman*, 606 F.3d at 458.
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 459.
314. *Norman*, 606 F.3d at 459.
315. *Id.*
316. *Id.*

the employer's perception of her as mentally ill. The court assumes the employer's conduct to be nothing more than a mistake without evaluating whether it may have occurred precisely because Norman was a Black woman asserting her right to a reasonable accommodation for a physical disability. Reading race out of the employer's conduct in turn erases the possibility that Norman was discriminated against because she stood at the intersection of race, disability, and gender. Though doing so likely would not have saved Norman's claims in this instance, this case illustrates the types of circumstances in which plaintiffs should marshal supporting evidence and call upon courts to consider whether intersectional discrimination best explains their harms.

One can readily imagine other contexts in which a plaintiff may assert intersectional discrimination on the basis of race and disability in the workplace. For example, consider a restaurant that has a policy of refusing to hire individuals who are HIV-positive based on a fear that HIV/AIDS can be transmitted through food. The restaurant management further assumes that Black people are more likely than others to have HIV/AIDS, and thus turns away Black jobseekers while allowing non-Black jobseekers to proceed to the next stage in hiring. The ADA permits an employer to impose standards requiring that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,"[317] but the determination as to whether the individual poses such a threat "shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[318] The restaurant's blanket policy of refusing to hire HIV-positive individuals without first making an individualized assessment of their ability to perform the essential job functions violates the ADA.[319] Further, by rejecting the Black prospective employees, the restaurant also violates Title VII's prohibition on failing or refusing to hire an individual because of their race.[320] Finally, it violates both laws by rejecting job applicants because of the intersection of their race and their—real or perceived—disability. As with many of the individuals described in the first half of this paper, the Black prospective employees, both those who are HIV-positive and those who are simply regarded as being HIV-positive, exist

317. 42 U.S.C. § 12111(3) (2008), *see also* 42 U.S.C. §12113(b) (2008) (defining "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation").

318. 29 C.F.R. § 1630.2(r) (2018).

319. *See* EEOC, *How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers* ex. 13, https://www.eeoc.gov/facts/restaurant_guide.html#n_4_ (last modified Sept. 29, 2014) [hereinafter EEOC Guide for Restaurants].

320. 42 U.S.C. § 2000e-2(a)(1) (2012).

at the crossroads of multiple discriminatory assumptions. The employer assumes they are more likely to have the disability because of their race and further assumes they are more threatening to others because of that disability. By asserting an intersectional discrimination claim, such a plaintiff can better explain the forces that have combined to cause them harm.

The context of providing reasonable accommodations for a disability further exemplifies how intersectional discrimination based on race and disability may manifest in the workplace. Race-based stereotypes and assumptions may directly cause a failure to accommodate. Consider, for example, an employer who thinks that Black people are lazy and refuses a Black employee's requests for a modified schedule or restructured job duties related to a disability because the employer assumes the employee is malingering. Or imagine an employer who thinks Black people have bad attitudes and are more aggressive, and therefore declines to participate in the informal, interactive process that the ADA contemplates employees and employers will engage in to determine the appropriate accommodations.[321] As these examples illustrate, the intersectional discrimination framework presents an opportunity for plaintiffs to seek redress for more complex forms of discrimination. The following section examines the nature of such redress.

D. *What Types of Remedies Can Redress Intersectional Discrimination?*

Some may question the benefits of asserting an intersectional discrimination claim under Title VII and the ADA if doing so brings the same remedies as if one had simply filed separate claims under either statute; Professor Crenshaw's intersectionality framework offers an answer. In her basement analogy, Crenshaw describes a hatch that is "generally available only to those who—due to the singularity of their burden and their otherwise privileged position relative to those below—are in the position to crawl through. . . Those who are multiply burdened are generally left below unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch."[322] Crenshaw's analogy reveals that if a remedy is extended only to the persons nearest the hatch, the others who have been harmed and deserve redress will inevitably be left behind. Adequately remedying the harms of intersectional discrimination based on race and disability requires something different than if the person had been singularly harmed by discrimination based on either race or disability. The dynamics of intersectionality are thus critical

321. *See* 29 C.F.R. § 1630.2(o)(3) (2018).

322. Crenshaw, *supra* note 2, at 152

to crafting legal remedies because if courts overlook the unique harms that those in the intersection experience, the remedies they provide will leave some who proved their claims "to wait in the unprotected margin."[323] A remedy so limited is little remedy at all.

For example, an employer found liable for having a general policy against providing sign language interpreters to its employees as a reasonable accommodation may try to remedy that discrimination by providing American Sign Language interpreters. But such a remedy will be of limited benefit to someone who, like Junius Wilson, was taught to communicate using a form of sign language specific to Black Americans. While it is true that any remedy for an employer's failure to accommodate must be tailored to the employee's individual needs, intersectionality analysis usefully forces the individualization that is at the heart of the ADA. Furthermore, intersectionality analysis also has the potential to prompt remedies that incorporate diverse perspectives into the employer's decision-making before further harm occurs. For instance, a court may order an employer to provide training to its human resources staff on topics like how to assess whether an employee poses a direct threat or how to identify reasonable accommodations during the interactive process. However, such trainings will be lacking unless they also consider the role that an employee's race plays in whether they are perceived as threatening or whether they are believed when they seek a provider's help for a disabling condition. By making courts and employers acknowledge the intersectional plaintiff and specifically address their harms, rather than barreling through or swerving around the intersection, plaintiffs and advocates can guard against shallow and ineffective legal remedies.

Additionally, monetary damages can be a powerful tool for changing employers' incentives and prompting organizational change, but the assessment of damages will be incomplete if courts do not consider the specific harms that come from being discriminated against due to the intersection of multiple identities. Both Title VII and the ADA generally authorize compensatory damages,[324] which are designed to compensate the plaintiff for their economic losses and emotional harms.[325] To achieve this purpose, however, courts assessing compensatory damages must give

323. *Id*.

324. *See* 42 U.S.C. § 1981a (2012); 42 U.S.C. § 2000e-5(g) (2012); 42 U.S.C. § 12117(a) (2012).

325. *See* EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991* (1992), https://www.eeoc.gov/policy/docs/damages.html (Title VII and the ADA also authorize punitive damages, which are "awarded to punish the respondent and deter future discriminatory conduct."); *See also* 42 U.S.C. § 1981a (2012).

careful consideration to the complex and compound forms of harm that plaintiffs subjected to intersectional discrimination experience.

For example, in her essay regarding the stigma she faced seeking and receiving treatment for depression and bulimia, Latria Graham describes being told by her family that her eating disorder was a "[W]hite girl's problem," and further experiencing a "series of micro-aggressions from therapists and other patients" based on her race.[326] Additionally, recent research suggests that psychotherapists consider the patient's presumed race, gender, and class when offering appointments. According to the research, "an identifiably [B]lack, working-class man would have to call 80 therapists before he was offered a weekday evening appointment," whereas a "middle-class [W]hite woman would only have to call five."[327] The EEOC considers psychiatric expenses as among the types of harms that can be remedied with compensatory damages.[328] But this begs the question of whether a person of color with disabilities will be further compensated for the anguish they face wrestling with whether to even seek treatment for a "[W]hite person's disability" or for the added stress and inconvenience of being denied an appointment or for the exacerbation of their distress due to a lack of culturally competent care.[329] If courts evaluate claims for damages without also considering whether these types of harms are attributable to the employer's conduct, then they will risk inadequately compensating individuals who have indeed been harmed.

While the remedies for intersectional discrimination claims may be of the same form as for other claims—declaratory, injunctive, and monetary relief—the intersectionality framework meaningfully informs what it means for a plaintiff to have their harms truly redressed. Importantly, although plaintiffs must carefully articulate their claims and put forth adequate supporting evidence, the responsibility for achieving more robust remedies for intersectional discrimination does not rest on plaintiffs alone, especially since many plaintiffs in employment discrimination cases are

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326. Latria Graham, *The Stigma of Being Black and Mentally Ill: How Racism is Preventing Me from Getting the Help I Need*, ELLE (Apr. 9, 2016), http://www.elle.com/culture/a35487/racism-and-stigma-mental-health/.

327. Olga Khazan, *Not White, Not Rich, and Seeking Therapy*, THE ATLANTIC (June 1, 2016), https://www.theatlantic.com/health/archive/2016/06/the-struggle-of-seeking-therapy-while-poor/484970/; *accord* Heather Kugelmass, *"Sorry, I'm Not Accepting New Patients" An Audit Study of Access to Mental Health Care*, 57 J. OF HEALTH & SOCIAL BEHAVIOR 168, 169 (2016).

328. *See* EEOC Guide to Restaurants, *supra* note 319.

329. Notably, Black Americans are less than half as likely (7.6 percent) as White Americans (16.6 percent) to have used a mental health service in the past year. U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2011 NATIONAL SURVEY ON DRUG USE AND HEALTH: MENTAL HEALTH FINDINGS 21 (2012).

pro se.[330] Courts must take special care to avoid flattening these claims into claims based on a single protected trait in their effort to ascertain the cause of plaintiffs' harms.

IV. CONCLUSION

This Article makes the case for why intersectional discrimination claims based on race and disability are important and how courts and litigants should go about considering such claims in the context of employment discrimination. The intersectionality framework teaches that people of color with disabilities are sometimes subject to discrimination that mirrors the discrimination experienced by people of color without disabilities and sometimes mirrors the discrimination experienced by White people with disabilities. And, at other times, they experience discrimination that mirrors neither, because it is the unique product of their race and disability together. While proving intersectional discrimination claims may be challenging given the Supreme Court's jurisprudence on the applicable causation standards, plaintiffs held to the more demanding but-for standard can prove their claim by showing that they would not have been treated unfavorably absent the specific nexus of their race and disability.

Litigating such claims is a worthwhile endeavor because limiting a plaintiff to asserting that they were discriminated against either because of race or because of disability, but not because of both operating together, erases an important perspective on the complex nature of discrimination and threatens to lead to shallow or misinformed legal remedies. While this Article focuses in particular on the context of employment discrimination, extending this analysis to other areas of the law where race and disability intersect will be an important next step for advancing antidiscrimination law.

Finally, it is important to note that the above analysis of how to robustly protect the civil rights of the individual who experiences intersectional discrimination because they exist at the bottom of Kimberelé Crenshaw's basement is not simply an exercise in altruism. Instead, as Crenshaw and others before her have counseled, it is a recognition of the fact that the civil rights of *all* Americans are yoked together, and thus we

330. *See* LAURA BETH NIELSEN ET AL., AM. B. FOUND., CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987-2003, 13 fig.2.14 (2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf (23 percent of employment discrimination cases are filed by pro se plaintiffs).

are all better served by the vigorous enforcement of antidiscrimination laws. Or, as Crenshaw puts it: "When they enter, we all enter."[331]

331. Crenshaw, *supra* note 2, at 167.