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NOTE: THIS IS A TRUE WORK-IN-PROGRESS. WHAT IS HERE IS AN EARLY DRAFT OF A PORTION OF THE PAPER THAT MUST BE CONDENSED. A CHUNK OF THE PAPER REMAINS TO BE RESEARCHED AND ANALYZED. (Please fly past the footnotes as many are really notes for footnotes.)

I would be very grateful for any thoughts you might have about the central thesis, ways I might sharpen it, and concerns I should have as I try to support it.

Thank you for taking a look at this.

Abstract: Examining the ADA's Direct Threat Defense Through Critical Lenses: Perpetuating a Myth or Protecting the Public?

Recognizing that pervasive discrimination against disabled people continued to deny them equality of opportunity, economic self-sufficiency, and full participation, Congress enacted the Americans with Disabilities Act of 1990. This "emancipation proclamation" for disabled people was designed to eliminate intentional exclusion, but also to address the discriminatory effects of social and structural barriers, including those resulting from "antiquated attitudes," unfounded fears, and deep-seated stereotypes. At the same time, the ADA included a "direct threat defense" that allows employers, public entities, and public accommodations to exclude disabled people who present a *direct threat* to others or create an unsafe environment. At first glance, the defense seems uncontroversial, especially since it technically requires a showing that the individual presents a significant risk that cannot be eliminated by reasonable accommodation. Yet, the defense reflects and perpetuates the notion that disabled people are dangerous, and more dangerous than those without disabilities. And, as important, the presence of the defense likely disincentivizes employers, public entities and public accommodations from providing reasonable accommodations and modifications that would enable fuller participation; it also may lead to greater surveillance of people with disabilities that unfairly burdens their participation. In view of the long and sordid history of mistreatment of disabled individuals and viewing the language and application of the law through critical lenses, this article questions whether a law designed to uncover and irradicate irrational fears and stereotypes can continue to incorporate language reinforcing the stereotype of the dangerous disabled person. Using case examples and the writings of those potentially impacted by labels of dangerousness, the article will explore both how the presence of this defense contributes to the continuing exclusion of disabled people and the perpetuation of harmful stereotypes, with very

marginal impact on public safety. Finally, the article will propose that we eliminate the direct threat defense and explain how we can live just as safely without it.

Tentative Outline:

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III. A Critical Theory Analysis of the Direct Threat Defense
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I. Introduction

Recognizing that pervasive discrimination against disabled people[1] was continuing to deny them equality of opportunity, economic self-sufficiency, and full participation, in 1990, Congress enacted the Americans with Disabilities Act (ADA). This "emancipation proclamation" for disabled people was designed to eliminate intentional discrimination, but also address the discriminatory effects of social and structural barriers, including those resulting from "antiquated attitudes," unfounded fears, and deep-seated stereotypes. The ADA would prohibit disability-based discrimination in private employment (Title I), public services and activities (Title II), and public accommodations operated by private entities (Title III),[2] and, with delineated limitations, require accommodations or modifications to enable maximum participation by qualified disabled people.[3]

In addition to providing this comprehensive set of civil rights, the ADA and its implementing regulations also included a "direct threat defense." This defense allows employers, public entities, and public accommodations to exclude disabled people who present a *direct threat* to the health and safety of others or create an unsafe environment.[4] At first glance, the defense seems uncontroversial, especially since it technically requires a showing that the individual presents a significant risk that cannot be eliminated by reasonable

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[1] Although there is not absolute unanimity of opinion among disabled people about the preferred language to use when discussing disabled people, I will follow the convention preferred by disability justice advocates and use the term "disabled people" rather than "people with disabilities." For a more refined consideration of appropriate language in this context, see Annamma et al.: DisCrit: Intersectional Lineage, Emergence, and Futures 64-65 (discussing use of disability, dis/ability and (dis)ability to highlight different constructions of the nature and relationship of ability and disability).

[2] Title I, 42 U.S.C. § 12111, et seq.; Title II, 42 U.S.C. § 12131; Title III, 42 U.S.C. § 12181 et seq.

[3] 42 U.S.C. § 12112(b)(5)(A) (Title I) (requiring employers to make reasonable accommodations unless they would impose an "undue hardship"); 28 CFR 35.130(b)(7) (Title II) (requiring public entities to make reasonable modifications in programs and benefits unless doing so would cause a fundamental program alteration); 42 USC 12182(b)(2)(A)(Tittle III) (requiring private entities operating public accommodations to make reasonable modifications unless doing so would cause an undue burden or fundamental alteration and to remove architectural, communication, or transportation barriers unless such removal is not readily achievable).

[4] Cites needed plus note saying as explained in greater detail in section x, infra, this broad direct threat provision was added in direct response to employer concerns that they needed greater leeway to make employment-related decisions. s that they needed this protection under the Act. 42 U.S.C. § 12113 (b); 29 CFR 1630.2 (q) (defining qualification standards to include "safety"); 29 CFR 1630.2 (r) (defining direct threat); 28 CFR 35.130 (h); 42 U.S.C. §12182(b)(3); 28 CFR 36.208 (defining direct threat under ADA Title III and using the same criteria for assessing risk as used in the Title I regulations, 29 CFR 1630.2 (r), and Title II regulations, 28 CFR 35.139.

accommodation.[5] Yet, the defense reflects and perpetuates the notion that disabled people are dangerous, and more dangerous than those without disabilities. And, as important, the presence of the defense likely disincentivizes employers, public entities and public accommodations from providing reasonable accommodations and modifications that would enable fuller participation. In view of the long and sordid history of mistreatment of disabled individuals and viewing the language and application of the law through critical lenses, this article questions whether a law designed to uncover and irradicate irrational fears and stereotypes can continue to incorporate language reinforcing the stereotype of the dangerous disabled person.

I write about this not because it is the most salient issue in disability law today, nor the one that affects the most people entitled to disability-related protections and accommodations or modifications. Rather, I write about the defense because most take for granted that it is reasonable and necessary, and by perpetuating the myth of the dangerous and disordered disabled person,[6] it seems to undermine the very essence of the ADA and its goal of "normalizing" and "dis-othering" disability. And finally, I write about this defense because it has an underappreciated but significant impact on the lives of those disabled people who become subject to its exclusionary potential, as it did for two men I recently represented.

The Animating Examples: John and Samuel[7]

John: John, (a Latino man), developed PTSD after witnessing two IED blasts in Iraq that killed fellow Marines. John returned to the U.S. where he had approximately five years of intensive therapeutic and pharmacological treatment. When he felt strong enough to do so, he began the rigorous physical training to fulfill his long-term dream of serving his community as a firefighter. After qualifying for and passing the grueling physical test, an examining psychiatrist[8] found him "not qualified for service due to PTSD." John challenged the disqualification through a multi-year administrative review process and ultimately a federal court action. Throughout the process he found

[5] Cites.

[6] Add cite to studies showing very small, if any correlation between disability and dangerous conduct/criminality.

[7] While both clients gave permission to discuss their cases, I am using pseudonyms to protect their privacy.

[8] John was sent for a psychiatric exam after he listed a medication on his application and subsequently revealed that he was receiving treatment for PTSD. The Fire Department administers an MMPI test to all applicants and uses any aberrational results as a basis for requesting a psychiatric exam. [speak about the reliability of the MMPI and possibly the legality of the pre-employment request for the psych exam.]

himself in the virtually impossible position of having to establish in the abstract that he would not present a threat to himself or others if he was called to a fire.[9] Because the administrative process was so lengthy, John had little choice but to abandon his dream of becoming a firefighter and pursue a new career path.[10]

Samuel: After working for several years in a call center for a municipal agency, Samuel, (a Black man), began experiencing disturbing bodily vibrations that he believed were coming from a suspicious source. Despite an inability to sleep well due to the vibrations, Samuel continued to arrive at work on time and carry out his duties. When some co-workers noted that he appeared tired, he confided in them about the vibrations and said he "couldn't take it any longer." The co-workers reported this conversation to a supervisor, who decided that Samuel should be placed on immediate leave with a mandatory medical exam by an agency psychiatrist.[11] The psychiatrist determined that "a person with a 'compulsive disorder' like Samuel's would present an on-going threat at the workplace." Although an administrative law judge determined that there was no evidence that Samuel presented any threat in the workplace or that he was unable to perform his job, the employer continued to insist that Samuel presented a risk to health and safety and could not return to work. After exhausting the administrative review process, he brought a federal ADA claim. Even after the lawsuit was filed, his employer refused to accept the clearance for work determination from Samuel's treating physician and required medical clearance by an employer-approved psychiatrist. After years out of work while he pursued his claim, Samuel's employer agreed that he could return to his former position, but he received only partial compensation for his lost wages.[12]

While I served as counsel in both cases, believing that the employers acted illegally and that litigation was needed to correct an injustice, there was a small voice that asked me: "should a person with PTSD be a firefighter?";

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[9] Throughout the course of the litigation, the Department's medical staff took the position that PTSD and service as a firefighter were incompatible. In depositions, medical staff took the position…

[10] John ultimately obtained a monetary settlement of his ADA claim.

[11] Although Samuel was placed on leave based on provisions in the state civil service law, the standard is similar to that of the ADA's direct threat defense, and the factual arguments made by the employer were comparable to those presented by employers in ADA direct threat defenses. In addition, when he brought his federal ADA claim, his employer invoked the direct threat defense to his claim of disability-based employment discrimination.

[12] Samuel, like others in a similar position, felt he would prevail in his discrimination claim, and failed to look for other work. His claim for back pay damages was compromised by his failure to mitigate his damages. Because of the legal vulnerability of his claim for backpay, he accepted a settlement with limited backpay relief.

"wouldn't I be worried if a co-worker told me that they weren't sleeping because a suspicious source was causing them to experience bodily vibrations?" Although I could step back and see that there was no objective evidence that either man could not safely perform their desired position, with or without reasonable accommodations, I could see that my own ingrained biases at work—maybe these disabled men did pose some threats in their desired workplaces. If I had this knee-jerk reaction, it seemed that similarly situated disabled individuals could have real difficulties when confronted with the assertion that they presented dangers. It also led me to ask why the direct threat defense even had a place in a law designed to end disability-based discrimination as we know it. And could this provision be contributing to the scandalously low rates of employment for disabled individuals?[13] Could the provision, or its message, have spillover effects in other contexts?

In my clients' cases, I was particularly upset by at least two aspects of their experiences. First was my concern that neither employer had even considered an accommodation for either man as an alternative to denying or terminating employment. In John's case, he had successfully completed a challenging multi-part physical exam that had required him to crawl into tight spaces—something that could easily provoke anxiety in the best of us. Had he not been deemed "not qualified" based on PTSD, he would have attended the Fire Department's "Academy," a pre-employment orientation program that involves multiple simulations of fire-fighting experiences. Why didn't the Fire Department give John the opportunity to participate in the Academy to test his ability to safely perform the responsibilities of a fire fighter?[14] And in Samuel's case, why was he not given the opportunity for a short respite period, if he desired one. These options, or accommodations, were not even discussed with these men, despite actions taken specifically because of their respective disability. I had to ask: does the direct threat defense serve as a "get out of jail free" card, providing employers and others with the opportunity to exclude based on tenuous evidence and without any meaningful obligation to explore or consider ways to accommodate the disabled individual?

The other problematic aspect of these two cases was the fact that the medical and agency experts in each case were making decisions based on

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[13] stats on employment of PWD esp if there is a breakdown on PWMI or race. It is disheartening that the need to improve employment of people with disabilities was cited as a principal motivating factor for the ADA's enactment. See, e.g., Sept. 26, 2008 Statement of Sen. Harry Reid, 154 Cong. Rec. S9626-01, 154 Cong. Rec. S9626-01, S9626, 2008 WL 4372186(noting the significant work needed to address the low employment rates for persons with disabilities and the need to realize "the ADA's vision of full inclusion and acceptance of all people."). Decide whether to include other exclusion or problematic inclusion here: Stats on incidence of pw MI or mental disabilities in violent police encounters, and stats on disabilities in prison, esp with mental disabilities.

[14] When a high-ranking medical advisor for the employer was asked this question in a deposition, she stated that each slot in the Academy was costly.

categorical assumptions—stated with absolute medical certainty and without any uncertainty as to legality—that people with PTSD cannot serve safely as firefighters and that people diagnosed with obsessive-compulsive disorder cannot serve safely as telephone responders at a municipal agency. Of course, there might be some people with PTSD who could not successfully perform the duties of a firefighter, (just as many people without PTSD could not), but it could not possibly be that no one with PTSD could do so—especially after significant past and on-going treatment. And there may be some people experiencing severe symptoms of obsessive-compulsive disorder, who might not be able to perform their job functions for some period of time, but many with this diagnosis certainly can do so. Those familiar with the law in this area would say that these employers simply erred by not performing the legally required individualized assessment of the ability to perform the essential functions of the job. And in Samuel's case, the Agency persisted in relying on its doctor's generalized risk assessment, even after a neutral administrative judge found no particularized evidence to support a determination that Samuel posed any risk to either himself or others at the workplace. The problem is that for structural and psychological reasons, evaluators too often fail to give people in the clients' circumstances an individualized assessment that's based on objective and current evidence. The forces against those deemed to be dangerous are great, and only the truly tenacious have the inclination and will to fight these determinations.

For some time now, Disability Studies scholars have recognized that individuals who view themselves as "normal" experience "existential anxiety" or "dis-ease" in relationship to disabled individuals, who are deemed to lack the "independence, autonomy and control so valued in American cultural values."[15] Harlan Hahn appreciated that "repugnance to disabled bodily difference, combined with fear of also attaining such variation in the future, results in a sociological desire to segregate people with disabilities from the mainstream."[16] As a result of the prevailing ideal of "normal," and the fear of and nervous response to those deviating from this ideal, disabled individuals across the board have been subjected to overt or unconscious disparate treatment over the centuries.[17]

A critical analysis of the direct threat defense must begin with the fact that the ADA is the only federal law outlawing identity-based discrimination that explicitly permits exclusion based on a threat to health and safety; laws

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[15] Longmore, Disability History, 6, n. 7; 6-7. Harris, Aesthetics.

[16] *See*, Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. Soc. Issues 39, 43-44 (1988); Harlan Hahn, *Towards a Politics of Disability: Definitions, Disciplines, and Policies*, 22 Soc. Sci. J. 87 (1985); Longmore Disability History at 6-7; Harris Aesthetics.

[17] Longmore disability history, 6-7.

addressing discrimination based on gender, religion, nationality, age and race, do not include similar provisions.[18] Of course, some may say that threats to health and safety only occur in connection with disability characteristics—infection from contagious disease, an inability to manage dangerous equipment due to weakness or inability, or a behavioral outburst resulting from an acute psychosocial condition. But nondisabled people with a host of other characteristics can present threats because of political indoctrination or access to firearms, or similar phenomenon, and many people cannot safely operate potentially dangerous equipment.[19] Despite potential threats across-the-board, we have singled out disabled people as sources of danger. As such, the direct threat defense stands at cross purposes with the normalizing, integrationist mission of the ADA.

From an expressive theory perspective, the direct threat provision sends a devaluing attitudinal message about disabled people—that they are threatening, disordered, and dangerously unpredictable. It also may send the message that employers, state and local governments and public accommodations will typically exclude some significant number of disabled individuals on the basis of their potential threat, and that there is some implicit expectation that they will continue to do so.[20]

Further, the direct threat defense arguably stands at the intersection of ableism and racism, which devalue minds and bodies based on their deviation from the ideal norms of whiteness, intelligence, strength, ability and

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[18] I say this, not because I think that a direct threat provision should be included with respect to any other characteristics protected by anti-discrimination laws, but only to underscore that among all protected characteristics and classes, Congress has singled out disability for this unique treatment.

[19] See, e.g., January 6th Capitol riot, etc.

[20] See Alex C. Geisinger and Michael Ashley Stein, *Expressive Law and The Americans With Disabilities Act*, 114 Mich. L. Rev. 1061, 1066-67, 1077 (2016) (discussing McAdams's analysis of how the law impacts beliefs by providing three types of information or signaling, including attitudes toward the regulated behavior (attitudinal signals), the risks of engaging in the regulated behavior (risk signals), and how often the law is violated (violation signals)). Because the direct threat defense is not prohibitive, it is not clear that it sends a message about the risk of engaging in the prohibited conduct, despite regulatory and case law guidance that any risk should be significant. Although for similar reasons this direct threat provision doesn't fit neatly into the analytic frame of violations signaling, it may be sending the related message that many actors in decision-making roles are relying on direct threat exclusions. As noted with respect to "violations signaling," that sending the message that the law penalizes certain conduct because everyone is doing it yields the perverse response that it would be ok to similarly engage in the prohibited conduct. Kristen Underhill, *Conditions as Signals: The Expressive Content of Medicaid Work Requirements*, at 9-10, unpublished draft on file with author. Must contact her before citing. Similarly, it may be that the direct threat defense sends the message that many decisionmakers are resorting to the direct threat basis for exclusion, and therefore, it is permissible for others to do so. Note the language of the provision permits the conduct. Could have effect of encouraging others to rely on it.

productivity.[21] Here, we may see the threatening nature of the disabled person become exaggerated when the dangerous disabled person is Black, Indigenous, or other person of color. Because of unfounded and stereotypical fears about certain people with disabilities and persons with non-white racial characteristics, the direct threat defense, particularly when applied to disabled people of color, helps to validate and normalize these assumptions of dangerousness. In this context, ableism and racism validate and reinforce each other, normalizing assumptions and expectations about both race and ability in a potent intersectionality.[22] And, while it is undeniable that race and disability are also significantly impacted by other categories of subordination—such as class, ethnicity, gender, and sexuality--[23] this article will focus on the intersectionality of race and disability as a framework for understanding how this ADA provision helps to reify racial and disability categories and our prevailing "notions of normalcy."[24]

Disability Critical Race (DisCrit) scholarship and the disability justice movement have brought to the fore this interdependent and reinforcing nature of racism and ableism, which can be traced in the legal and ideological treatment of these statuses historically.[25] The myth of the dangerous disabled person and the long-standing effort in this country to "localize social problems within racialized bodies and minds labeled as defective, ill, insane, disordered, and feeble"[26] have fueled the Eugenics movement and the mass

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[21] See section infra.

[22] Morgan, Jamelia, Toward a DisCrit Approach to American Law, 7 (November 14, 2020), available at SSRN: https://ssrn.com/abstract=3730705, in DisCrit Expanded: Inquiries, Reverberations & Ruptures (Forthcoming 2021), citing to Annamma, Connor, and Ferri (2013) at 6, Dis/ability critical race studies (DisCrit): Theorizing at the intersections of race and dis/ ability. *Race Ethnicity and Education, 16*(1), 1-31. Annamma, Ferri and Connor, Disability Critical Race Theory: Exploring the Intersectional Lineage, Emergence and Potential Futures of DisCrit in Education, 42 Rev. Res. Edu. 46, 53 (2018) (discussing the "collusive nature of race and disability.").

[23] To be sure, multiple categories of subordination such as class, race, and gender serve to exacerbate the other-ness of disability, compounding damage and creating "emergent disability." Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 235-36 (2010).

[24] Morgan at 7. Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988). 1346-47: "As Alfred Blumrosen observes, "it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot] correct that subordination because it [can] never recognize it.'" A. Blumrosen, Twenty Years of Title VII Law: An Overview 26 (April 18, 1985) (unpublished manuscript on file in the Harvard Law Library). Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1528-29 (2000) (discussing expressive harms resulting from the "communication of negative or unjustified attitudes toward their victim.")

[25] See discussion, *infra*.

[26] Morgan, DisCrit 16-17.

institutionalization of disabled individuals. The direct threat defense seems to stand within this tainted tradition, sending an ableist and racist message.

The direct threat defense can be seen as little more than a necessary political evil for the passage of a law that was seen by many as a costly expansion of disability-related rights, especially for private actors. For this reason, many scholars that have addressed the provision have argued for the appropriate and limited application of the provision. But in light of its seemingly reasonable purpose and its inescapable ableist and racist function, it is important to look at its essence more critically. As Robert Gordon has instructed in the context of Critical Legal/Race Theory generally, "one should look not only at the undeniably numerous, specific ways in which the legal system functions to screw … people . . . but rather at all the ways in which the system seems at first glance basically uncontroversial, neutral, acceptable… Although society's structures of thought have been constructed by elites out of a universe of possibilities, people reify these structures and clothe them with the illusion of necessity."[27] It is important to examine our common-sense assumptions about the law and social relations to see what is real and what is socially determined—what is needed and what serves as a justification for existing power structures and hierarchies of value.[28] And the question is whether this embedded stereotype, reinforces or supports troubling stereotypes in other contexts, such as the "dangerous disabled students" who are Black, Indigenous and People of Color (BIPOC) who are excluded rather than accommodated within the education system, or the "dangerous disabled BIPOC men" who are sent to jail instead of receiving appropriate services in the community.

Judicial decisions in reported direct threat cases have been mixed. Some courts have scrutinized direct threat exclusions for evidence of real and significant risk of danger. Other courts have given challenged determinations less scrutiny and permitted exclusions when there has been questionable evidence of actual risk of harm, with some people with disabilities being denied the ADA's protection. In addition, the direct threat defense may lead to potential surveillance of employees for "threatening conduct," unfairly

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[27] Kimberle' Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1351, (1988) citing to Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW, *supra* note 41, at 284-86. "Gordon explains the interlocking social phenomena of reification and legitimation as follows: 'Though the structures are built, piece by interlocking piece, with human intentions, people come to 'externalize' them, to attribute to them existence and control over and above human choice [reification]; and, moreover, to believe that these structures must be the way they are [legitimation].' "Kimberle' Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1387 (1988) citing Gordon at 288. Check these quotes.

[28] Kimberle' Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1354 (1988), citing Gordon at 289.

burdening participation by disabled individuals. Listening to the voices of those who might fall within the web of this defense, the article will try to discern the best approach to the possibility of disability-related risks. Using case examples and the writings of those potentially impacted by labels of dangerousness, the article will explore both how the presence of this defense contributes to the continuing exclusion of disabled people and the perpetuation of harmful stereotypes, with very marginal impact on public safety.

It seems inescapable that the direct threat provision perpetuates the long-standing trope of the dangerous person with a disability-- and creates actual barriers to participation for some number of individuals like John and Samuel. In the employment context in particular, the defense will force some persons with disabilities, should they be lucky enough to obtain work, to become hypervigilant—not just to ensure that they perform their job functions successfully, but also to ensure that no one accuses them of conduct that might be threatening to others.

This article will examine how we can maintain reasonably safe workplaces, public programs and public accommodations without perpetuating the exclusionary stereotype of the dangerous person with a disability, especially for Black, Indigenous and People of Color with disabilities. While the article proposes that we eliminate the direct threat defense, it is just one step toward the eradication of structural biases against disabled people and disabled people of color. It is essential that if we remove the direct threat defense, that the same discriminatory impulses not re-surface in a more subtle guise such as creating a heightened standard for demonstrating the ability to perform essential work functions.

For revision: Part I provides a brief history of ADA's direct threat defense. Part II analyzes the expressive implications of the defense, situating that within the historical associations between disability, danger, and race and ethnicity, and considers its ableist and racist import. Part III considers the problem of assessing future risk, particularly in light of current evidence regarding implicit bias against people with disabilities and especially for disabled people of color. Part IV reviews direct threat cases and analyzes their impact on people with disabilities. Part V synthesizes the views of disabled people about the appropriate way to address actual disability-related threats in places of employment and other public locations. Part V will propose some tentative corrective measures.

II. The ADA's Direct Threat Defense

Before turning to the expressive implications of the Direct Threat Defense, it is important to understand its derivation and language. Those familiar with the legislative history and language of the Direct Threat Defense may wish to skip to Part II.

A. Direct Threat Under the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 (the Rehab Act)[29] is considered the precursor to the 1990 Americans with Disabilities Act (ADA). The Rehab Act was, as the name implies, a law principally designed to provide rehabilitation services, research and training opportunities to disabled people. The Act also provided some limited incentives and requirements to increase employment of disabled individuals, and in Section 504, added a general prohibition against disability-based discrimination by entities receiving federal financial assistance.[30]

Initially, the Rehab Act defined a "handicapped person" in relationship to the person's disabling condition and did not include any *direct threat* provision.[31] The original HEW regulations had no direct threat language. In response to public comments requesting greater clarity in the definition of a "qualified handicapped person," however, the Civil Service Commission added direct threat language into the final regulations governing disability-based discrimination in federal employment.[32] That provision broadly excluded from coverage as a "qualified handicapped person" all those who, with or without reasonable accommodation, "endangered" the health and safety of either the

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[29] 29 USC 701, et seq.

[30] Section 504 of the Rehabilitation Act of 1973, 29 USC 794 ("Section 504"). See, Regulations of the Department of Health, Education and Welfare Implementing Section 504, 42 Fed. Reg. 22676, 45 CFR Part 84, May 4, 1977.

[31] PL 93–112, September 26, 1973, 87 Stat 355. The original Act defined "handicapped individual" as "any individual who (a) has a physical or mental disability which for such individual constitutes or results in substantial handicap to employment and (b) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services." In 1974, Congress amended the Act, see Public Law 93-516, to define "handicapped individual" as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 42 FR 22676, May 4, 1977 (discussing earlier versions of the Rehab Act).

[32] *See 43 FR 12293, 12294, 12295, Mar. 24, 1978*, Subpart G, adopting 5 CFR 713.702(f), *, Redesignated as* 29 CFR 1613.702(f), *43 FR 60901, Dec. 29, 1978*, (transferring authority from the Civil Service Commission to the Equal Employment Opportunity Commission and redesignating certain regulations from 5 CFR Part 713 to 29 CFR Part 1613). The original proposed regulations did not include any threat language. See 42 FR 46541, Sept. 16, 1977. The final HEW regulations did not include any direct threat language. *See* 45 CFR Part 84, 84.3(k) (defining "qualified handicapped person" as one who can perform essential job functions or who meets the essential eligibility requirements for the service at issue); 84.13 (permitting the use of employment selection criteria with disparate impact on disabled individuals only when requirements are "job-related" and there are no alternative criteria that do not have such disparate impact); 42 FR 22676, 22677, 22680, May 4, 1977.

individual or others.[33] In 1978, Congress amended the Rehab Act definition of a "handicapped individual" to exclude from coverage under sections 503 and 504 of the Act, drug abusers and "alcoholics" whose related conduct would threaten the property and safety of others.[34] This was the only statutory provision addressing direct threat at that time.

B. The *Arline* Decision

In 1986, the Supreme Court was given the opportunity to address the question of when an employer could discharge an employee based on their alleged threat to others at the workplace. Elementary school teacher Gene Arline brought a Section 504 challenge to her 1979 termination from employment based on evidence that she had tuberculosis. In *School Bd. of Nassau County v. Arline*, the Supreme Court concluded that a person with a contagious disease may be a protected person under the Rehabilitation Act and can only be excluded from protection after an individualized assessment showing the significant risk of transmitting infection and the lack of any reasonable accommodation to eliminate that risk.[35]

The Supreme Court rejected the employer's contention that it should be permitted to exclude Ms. Arline because of the contagious effects of her disease (to be distinguished from the underlying condition), recognizing that such a blanket exclusion would permit disability-based discriminatory treatment.[36] The Court set out a standard for an individualized inquiry that would balance the right of disabled people to be free from exclusions based on stereotypes and unfounded fears regarding contagious diseases against legitimate concerns that an employee with a contagious disease could present a significant threat to the health and safety of others.[37] In 1988, Congress amended the Rehab Act to incorporate the *Arline* standard to permit a recipient

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[33] 29 CFR 1613.702(f) (1990) (defining a "qualified handicapped person" as one who "with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health or safety of the individual or others."). See *43 FR 12294, 12295, Mar. 24, 1978,* Subpart G, adding 1613.702(f)*, Redesignated at 43 FR 60901, Dec. 29, 1978.*

[34] Pub L No. 95-602, Sec. 122(a)(6), 92 Stat. 2955, 2984-85 (1978), referring to 29 USC 793 and 794.

[35] *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 277 (1977).

[36] 480 U.S. 273, 282 (1987).

[37] 480 U.S. at 287-88 (remanding for an individualized inquiry that includes: "[findings of] facts, based on reasonable medical judgments [of public health officials] given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.").

of federal financial assistance to exclude a person *with a contagious disease or infection* who is unable to perform their job duties or who presents a significant threat to the health and safety of others, that cannot be eliminated by a reasonable accommodation.[38]

C. The Legislative History of the ADA's Direct Threat Provision

By the mid-1980s, it was widely recognized that the Rehab Act had failed to adequately address the pervasive exclusion of disabled persons from many aspects of public life.[39] As a result, in 1990, Congress enacted the ADA to address these deficiencies by prohibiting disability-based discrimination by private entities and creating clearer obligations and sanctions for disability-based discrimination more generally.[40] The legislative history indicates that most in Congress wanted the ADA to meaningfully integrate individuals with disabling conditions or labels and were structuring the ADA with that purpose in mind. There was a vocal minority, however, that could not disentangle themselves from deep-seated prejudices against disabled people.[41]

At the time the ADA was debated and passed, the status of the direct threat limitations was as follows: 1) the Rehab Act had only a limited direct threat provision in the definition of a qualified person with alcoholism; 2) there was a broad direct threat Rehab Act regulation pertaining to employment; and 3) the *Arline* Court had spoken with respect to protections for individuals with contagious diseases that might be deemed to threaten the health and safety of others.

Against this backdrop, it was unsurprising that the original Senate ADA Bill proposed a limited "direct threat defense" that permitted an employer to exclude an individual who presented a direct threat to health or safety "*due to a*

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[38] Civil Rights Restorations Act of 1987, Pub. L. No. 100-259, sec 9, 102 Stat.28, 31-32 (1988). Rehabilitation Act Amendments of 1998, Workforce Investment Act of 1998, PL 105–220, August 7, 1998, 112 Stat 936, Sec. 6 (20)(D), 29 USC 705 (20)(D).

[39] National Council of the Handicapped, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS (1986).

[40] 42 USC 11201 et seq.

[41] For example, there was a group of conservative legislators that initially sought to exclude individuals with schizophrenia or manic depression from the Act's protections. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 451-52 (1991).

currently contagious disease or infection."[42] Some in the business community persuaded members of the House that this limited direct threat provision denied them the discretion they needed to refuse to hire or terminate persons deemed to present safety threats in the workplace.[43] The Senate subsequently agreed to a proposed House amendment to expand the Bill's direct threat defense beyond just a person with contagious diseases to cover *any individual with a disability* who poses a significant risk to the health or safety of others.[44]

To its credit, Congress included a related amendment defining a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[45] Employment decisions based on

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[42] S. 933, Oct. 16, 1989, 101st Cong 1st Session, Section 103(b) (emphasis added); 135 Cong. Rec. S10701-04, 135 Cong. Rec. S10701-04, S10703, 1989 WL 183109. Some legislators sought a blanket exclusion of persons with HIV/AIDS from the Act's protections. See e.g., 136 Cong. Rec. H4611-01, 136 Cong. Rec. H4611-01, H4612-13, 1990 WL 97268 (Comments of Rep. Dannemeyer). There was significant opposition to this effort that proved unsuccessful. See NATIONAL ORGANIZATIONS SUPPORTING THE INCLUSION OF AIDS IN THE AMERICANS WITH DISABILITIES ACT, 135 Cong. Rec. S10765-01, S10768, September 6, 1989; 135 Cong. Rec. S10765-01, 135 Cong. Rec. S10765-01, S10771, 1989 WL 183216 135 CONG. REC. 19812-13 (1989) (Comments of Senator Cranston) (observing that the ADA would not likely allow exclusion of a person with HIV/AIDS since medical research indicated very little risk of transmission through casual contact). See Ruth Colker, The Disability Pendulum: The First Decade of the Americans with Disabilities Act, 38 (New York University Press, 2005) (noting that "[n]o Senator objected to the accuracy of [Cranston's] statement that the ADA would protect individuals with HIV/AIDS.").

[43] Need this cite. Check that Bill initially placed this in the defenses section.

[44] 136 Cong. Rec. H4614-02, 136 Cong. Rec. H4614-02, H4623, 1990 WL 97270 (Statement of Rep Owens); 136 Cong. Rec. E1913-21 (daily Ed. June. 13, 1990) (Remarks of Mr. Hoyer);136 Cong. Rec. S9684-03, 136 Cong. Rec. S9684-03, S 9686, S9690, 1990 WL 97306 (check Harkin comments); H.R. REP. 101-485, 92, 1990 U.S.C.C.A.N. 445, 509 (remarks of Chuck Douglas) (observing that defense "was needed in order to address [the] concern about dangerous or unbalanced workers threatening co-workers."); H.R. REP. 101-485, 80-81, 1990 U.S.C.C.A.N. 512, 563-64 (discussing hope that the ADA would not become "become a shield for mentally unstable individuals such as the Louisville mass murderer [who used an assault rifle to kill seven co-workers]. We should not deprive employers of the right to screen employees for character traits that may endanger others.").

It is worth noting that despite the breadth of this direct threat provision, some House members insisted on including a separate provision governing food handlers with contagious diseases. See, e.g., 136 Cong. Rec. H4614-02, 136 Cong. Rec. H4614-02, H4621, 1990 WL 97270 (cmts of Rep Burton) 42 USC 12113(e).

[45] 136 Cong. Rec S 9684-99, S9686 (daily ed. July 13, 1990). This standard was intended to follow the Court's guidance in *Arline*. See 480 U.S. 273, 287, note 16 (1987),136 Cong. Rec. E1913-21 (daily Ed. June. 13, 1990) (Remarks of Mr. Hoyer); 136 Cong. Rec. H4582-02, 136 Cong. Rec. H4582-02, H4597-98, 1990 WL 97211; H.R. REP. 101-485, 76, 1990 U.S.C.C.A.N. 303, 358-59; 136 Cong. Rec. H4582-4606 At 4598 (daily ed., July 12, 1990) (defining significance of risk as determined by the magnitude, severity, or likelihood of risk to other individuals in the workplace).

speculative or remote risks would not be permitted.[46] The Act would require case-by-case determinations about threats to safety based on "well-informed judgment grounded in a careful and open-minded weighing of the [actual] risks and alternatives,"[47] not those based on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies" about risks that a diagnosis or disability "might impose."[48] So, in the case of a person with a significant "mental illness," the employer must consider whether the individual was receiving treatment and whether the condition was controlled by medications and could exclude such an individual only based on objective evidence of "a recent history of committing overt acts or making threats which caused harm or which directly threatened harm."[49] It was Congress's intent that the burden would be on the employer to provide credible, objective evidence demonstrating substantial risk; the individual with a disability would not be required to prove that he or she poses no risk.[50] Because of stigma and unfounded assumptions about risks presented by those with certain disabilities, members of Congress appreciated that compliance with the Act would likely require the training of public employees and others about disability.[51] And, before any person could be excluded based on an alleged direct threat, Congress expected that even with respect to questions of safety, employers would make reasonable accommodations to the known

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[46] H.R. REP. 101-485, 56-57, 1990 U.S.C.C.A.N. 303, 338. H.R. REP. 101-485, 45-46, 1990 U.S.C.C.A.N. 445, 468-69 (referring to the standard discussed in the Section 504 case, *Chalk v. U.S. District Court*, which acknowledged that despite unavoidable uncertainty in science, an employee can be excluded only upon the showing of "a significant risk ... to others.").

[47] Hearings on H.R. 2273, the Americans with Disabilities Act, before the Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights, 101st Congress, 1st Session, Serial No. 58, H.R. REP. 101-485, 56-57, 1990 U.S.C.C.A.N. 303, 338-39.

[48] 136 Cong. Rec. H4582-4606 At 4598 (daily ed., July 12, 1990); 136 Cong. Rec. H2421-02, 136 Cong. Rec. H2421-02, H2428, 1990 WL 65024 (Remarks of Mr. Hoyer).

[49] H.R. REP. 101-485, 45-46, 1990 U.S.C.C.A.N. 445, 468-69. For example, in the case of a person with a mental disability Congress assumed that a court would determine whether assessment of risk is based on valid medical evidence that is sufficiently recent to be credible. HR 4807 May 14, 1990 101st Cong., 2d Sess. 135 Cong. Rec. S10765-01, 135 Cong. Rec. S10765-01, S10766, 1989 WL 183216 (Remarks of Sen. Harkin in discussion with Senator Helms) (noting that people may experience different intensities of psychosocial conditions at different times, comparing "slight" manic depression with such severe manic-depression that the person "just cannot handle themselves any longer.").

[50] 136 Cong. Rec. H2421-02, 136 Cong. Rec. H2421-02, H2428, 1990 WL 65024 (Remarks of Mr. Hoyer). Same cite as two fns earlier.

[51] See generally H.R. REP. 101-485, 50, 1990 U.S.C.C.A.N. 445, 473 (noting, for example, that proper education about disabilities and related training could decrease the incidence of inappropriate arrest and jailing of disabled individuals because of their disabilities and the subsequent deprivation of medication that causes those individuals to further deteriorate while in jail).

physical or mental limitations of a qualified individual,[52] including accommodations such as flex work or reasonable time off for treatment, unless the accommodation would cause undue hardship.[53] Further, members specifically noted that the "direct threat" defense was not intended to justify generalized pre-job offer medical inquiries or examinations, including requests for psychological information or examinations in individual cases.[54]

Congress created a similar direct threat defense to a claim under Title III allowing public accommodations to exclude an individual with a disability who would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."[55]

D. The ADA's Direct Threat Language

Currently, there are direct threat provisions in the ADA's employment and public accommodations titles and in the regulations implementing the public services provisions. In general, Title I prohibits the use of qualification standards or other criteria that screen out or tend to screen out disabled people unless the relevant standard or criteria is shown to be job-related and consistent with business necessity.[56] It then goes on to provide an employer defense to a claim that job-related qualification standards, tests, or selection criteria have a disparate impact on disabled individuals, by showing that the criteria were job-related and necessary and reasonable accommodations could not enable the

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[52] 135 Cong. Rec. S10765-01, 135 Cong. Rec. S10765-01, S10798, 1989 WL 183216

[53] See generally, 136 Cong. Rec. H4614-02, 136 Cong. Rec. H4614-02, H4624, 1990 WL 97270 (remarks of Rep. Edwards).

[54] H.R. REP. 101-485, 45-46, 1990 U.S.C.C.A.N. 445, 468-69; 135 Cong. Rec. S10765-01, 135 Cong. Rec. S10765-01, S10768, 1989 WL 183216 (remarks of Harkin) (noting that requirement to make an initial (conditional) offer of employment before any medical inquiry would force employers to focus on abilities rather than "fears and unfounded prejudices" about psychosocial conditions such as manic depression and schizophrenia); 136 Cong. Rec. H2421-02, 136 Cong. Rec. H2421-02, H2424, 1990 WL 65024 (Comments of Rep. Hoyer) (supporting the prohibition against pre-employment medical inquiries and observing that many police departments conduct psychological testing after extending a conditional offer of employment.) There were, however, those opposed to the prohibition against pre-employment inquiries into mental and emotional fitness for employment, particularly for jobs involving public safety, such as police or schoolteachers. See e.g.,136 Cong. Rec. at 10459, 101-485, 93, 1990 U.S.C.C.A.N. 445, 510-11 (comments of Mr. Douglas).

[55] See, e.g., 136 Cong. Rec. E1913-01, 136 Cong. Rec. E1913-01, E1918, 1990 WL 80290 (speech of Stenny Hoyer); 136 Cong. Rec. H4582-02, 136 Cong. Rec. H4582-02, H4602, 1990 WL 97211 (Senate recedes to House version); H.R. REP. 101-485, 105, 1990 U.S.C.C.A.N. 303, 388; H.R. REP. 101-485, 58, 1990 U.S.C.C.A.N. 445, 481.

[56] 42 U.S.C. § 12112(b)(6).

individual's performance of the essential job functions.[57] The statute then specifies that a "qualification standard" that an individual "not pose a direct threat to the health or safety of other individuals in the workplace" would be permitted.[58] The Title II regulations allow a public entity to impose: "… legitimate safety requirements necessary for the safe operation of its services, programs or activities" based on actual risks, and not unfounded assumptions and stereotypes about disabled people.[59] While this language is focused on the program rather than the disabled person, it has similar implications.

Similarly, Title III of the ADA, creates a defense for public accommodations that exclude disabled individuals who pose a significant threat to the health or safety of others that cannot be eliminated by reasonable modification of policies, practices, or procedures or the provision of auxiliary aids or services.[60] Title III regulations also have a general provision permitting a public accommodation to impose "legitimate safety requirements" that are based on actual risks.[61]

Although the ADA provisions speak in terms of a threat to others, but not a threat to oneself, the relevant administrative agencies have included this

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[57] 42 U.S.C. § 12113(a). Title VII uses a similar standard (without the reasonable accommodation language) for a disparate impact claim. 42 U.S.C. 2000e-2(k)(1)(A)(i) (outlining the burden of proof for disparate impact cases with the complainant demonstrating disparate impact and the respondent demonstrating that "the challenged practice is job related for the position in question and consistent with business necessity.") One might think that this provision would be sufficient in the ADA, as it is in Title VII, to address any legitimate job-related basis for exclusion.

[58] 42 U.S.C. § 12113 (b). See 29 CFR 1630.2 (q) (defining qualification standards to include "safety"); 29 CFR 1630.2 (r) (defining direct threat as a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation, and requiring a risk assessment based on current, objective medical evidence that considers duration of risk, nature and severity of potential harm, and likelihood and imminence of potential harm.

It is worth noting that the statute has a separate provision addressing employment of individuals with infectious or communicable diseases. 42 U.S.C. § 12113(e). The provision requires the Secretary of Health and Human Services to annually develop and publish a list based on the most current medical and scientific information regarding infectious or communicable diseases that can actually be transmitted through food handling. Under this provision, a person with an infectious or communicable disease on the Secretary's list may be reassigned to another job if there is no reasonable accommodation, such as hygienic procedures or time off for recovery, that would eliminate the risk of transmission of infection through food handling. *Id.*

[59] 28 CFR 35.130 (h).

[60] 42 U.S.C. §12182(b)(3); 28 CFR 36.208 (defining direct threat under ADA Title III and using the same criteria for assessing risk as used in the Title I regulations, 29 CFR 1630.2 (r), and Title II regulations, 28 CFR 35.139.

[61] 28 CFR 36.301(b).

danger-to-self language in both the ADA and Rehab Act regulations.[62] In *Chevron USA, Inc. v. Echazabal*,[63] the Supreme Court chose to follow the language of the regulations to read into the ADA an employer defense to a Title I discrimination claim when the disabled individual's employment is likely to pose a threat to their own health and safety.

III. A Critical Theory Analysis of the Direct Threat Defense

a. The Competing Expressive Signals of the ADA and its Direct Threat Provision

The ADA was enacted to provide clear and comprehensive standards and sanctions to eliminate disability-based discrimination in public life. To achieve its goal of bringing disabled people into all aspects of mainstream life, the ADA created obligations to accommodate disabled people and remove existing social and structural barriers to their participation. In doing so, the ADA reinforces a social model of disability—one that recognizes that a person is not disabled by some inherent deficiency, but by the interaction with a physical and social environment constructed for individuals without disabilities.[64] The enactment of this civil rights bill to eliminate discrimination against people with disabilities, with specific standards of enforcement for violations sends the message that people with disabilities are worthy of respect and entitled to participation. The direct threat defense, however, sends an entirely different message.

Scholars have theorized about the ability of law to impact norms and behaviors through its "symbolic social meaning."[65] Although expressive law scholars use slightly different theoretical constructs, most recognize the law's

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[62] The legislative history indicates that Congress was only concerned about threat to the safety of others. Cite.

[63] 536 U.S. 73(2002).

[64] See, e.g., Michael Ashley Stein, Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA, 90 Va. L. Rev. 1151, 1182–83 (2004) ("By recognizing that many disadvantages associated with disability are the result of social construct rather than biological destiny, the ADA seeks to eliminate an environment that is artificially hostile to those impairments.")

[65] See Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 U. Va. L. Rev. 1151, 1169, 1177 (2004) (discussing "Geisinger's belief change theory), citing Geisinger at 72.

potential expressive value.[66] "When designed appropriately, law can cause individuals to alter their own behavior because either the law induces them to change their tastes (internalization) or creates a fear of bearing social sanctions (second order sanctions), or because of pressure brought to bear upon them through societal sanction (third order sanctions)."[67] In a similar conceptualization, others argue that the law conveys a message or information regarding: the conduct or essence of those subject to the law's terms (attitudinal signaling); the risks of engaging in the regulated behavior (risk signaling); and how often the law is violated (violation signaling).[68] Attitudinal signaling of a law communicates the beliefs and values animating a law and can reveal the lawmakers' (and society's) actual views regarding the subjects of the law.[69] This attitudinal signaling will be received and understood by those who hear the law's language, both the general public and those whose interests are impacted directly by the law's terms.[70] "Risk signaling," can alter behavior by conveying information about how one can behave to avoid identified hazards or sanctions.[71] In addition, the law's proscriptions send a message about the need to target certain violations, suggesting to some that violations of the law's terms will generate some disapprobation. At the same time, some scholars have suggested that "violations signaling," by sending the message that the law is needed to address certain undesired actions, can also have the

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[66] Compare McAdams to . Not all scholars, however, believe that law has "an expressive effect on normative value choices." See Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 U. Va. L. Rev. 1151, 1174-75 (2004) (discussing scholarly skepticism about law's expressive effect on norms and behavior and noting that social psychologists posit that individual behavior is determined by the individual's own attitude toward the behavior and the likely societal response to that behavior). Check this pro/con; Underhill manuscript at 9 Citing with caution to Robert Scott, The Limits of Behavioral Theories of Law and Social Norms, 86 Va.L. Rev. 1603, 1621-37 (2000)("arguing that expressive theories explaining how law influences social norms are imprecise and lacking in mechanisms to explain externalization.")

[67] Michael Ashley Stein, Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA, 90 Va. L. Rev. 1151, 1173 (2004).

[68] Kristen Underhill, *Conditions as Signals: The Expressive Content of Medicaid Work Requirements*, at 5, 8, 9, unpublished draft on file with author. Must contact her before citing. Richard H. McAdams, THE EXPRESSIVE POWERS OF LAW 13 (2015); Alex C. Geisinger, Michael Ashley Stein, *Expressive Law and The Americans With Disabilities Act*, 114 Mich. L. Rev. 1061, 1066-67, 1077 (2016) (discussing McAdams's analysis), citing McAdams book at 137-38.

[69] Underhill at 9. Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1528-29 (2000) check (discussing expressive harms resulting from the "communication of negative or unjustified attitudes toward their victim.")

[70] Underhill at 8.

[71] Underhill at 9. In the direct threat context, the risk signaling is really a "no risk" signaling, since on its face the provision is permissive rather than prohibitive.

perverse response of increasing violations. It does so by implying that many people are engaging in the now-prohibited conduct, so similarly situated actors may feel that they can do the same without too much real disapproval.[72]

Considering the ADA from an expressive law perspective, as a civil rights measure prohibiting disability-based discrimination, it sends the message that people with disabilities are entitled to equal treatment in employment and public activities. As such, it has the power to alter social norms toward disabled people by signaling that disability-based exclusion is morally wrong.[73] In addition, by creating a legal duty to refrain from disability-based discrimination or exclusion, the ADA sends the message that non-discrimination is an essential component of good citizenship and can encourage employers and public and private entities to follow the ADA's mandate to refrain from discriminatory actions and avoid its sanctions. As a further consequence of the ADA's messaging, the potential violator will refrain from disability-based discrimination to avoid any social disapprobation from those other members of society who have also absorbed the ADA's normative messaging.[74] Finally, there is the possibility that through violations signaling, employers, public entities and public accommodations will feel emboldened to engage in discriminatory actions by the messaging recognizing that the law was needed because similarly situated persons were also discriminating based on disability. In the case of the ADA as a whole, however, it is reasonable to assume that the attitudinal and risk signaling will outweigh any backlash impact from violations signaling.[75]

At the same time, conditions placed on a law's benefits—such as those provided by the direct threat provision—also "encode a set of values and goals" and establish the parameters of the relationships between the various actors governed by the law in question. [76] Under the expressive-politics theory of law, laws can deliver not only information "about social norms and risk, but also information about the relative standing of social groups," validating or

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[72] Underhill 9-10.

[73] See Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 U. Va. L. Rev. 1151, 1156-57 (2004), discussing Engel and Munger's Rights of Inclusion and the ADA's potential to inspire a sense of rights entitlement and bolster the self-image of people with disabilities.

[74] Michael Ashley Stein, Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA, 90 Va. L. Rev. 1151, 1188 (2004) (noting also that this normative messaging will be particularly effective with those entities that have excluded disabled people out of ignorance or thoughtlessness rather than actual animus.)

[75] In some ways this may be an overly simplistic analysis of the signaling of the ADA, particularly in light of the limitations on accommodations and modifications that are a central component of the law.

[76] Kristen Underhill, *Conditions as Signals: The Expressive Content of Medicaid Work Requirements*, at 5, 8, unpublished draft on file with author. Must contact her before citing.

devaluing the essence and cultural identity of those at the center of a law can either be validated or "disrespected."[77] The direct threat provision sends the message that at least some number of people with disabilities are inherently and uncontrollably dangerous and that they lack the ability to discern their own dangerousness or their actual ability to do the relevant work or engage in the public activity in question.[78] The direct threat's negative messaging certainly detracts from the ADA's overall integration messaging and serves as a countervailing signal. The defense sends such a message about the disabled person's inherent inferiority as a matter of the appropriate social order. In so doing, it acts to reinforce long-standing ableist and arguably racist social understandings.

b. A Dis/Crit Analysis of the Direct Threat Defense

Among the laws outlawing class-based discrimination, only the ADA has a provision allowing for exclusion based on the possibility that an arguably protected individual would present a threat to the health and safety of others (or themselves). This exclusion of dangerous disabled people from the Act's protection is wholly consistent with the long, historical subordination and marginalization of disabled people. After a short review of the history of treatment of "disabled people," this section will discuss ableism and the historical and current intersectionality of race and disability. Using the lens of ableism, the socially constructed system of human valuation and relative subjugation based on concepts of normalcy, intelligence, ability, and productivity,[79] the section will consider how the direct threat provision serves as the perfect tool for justifying and reinforcing hierarchies based on race and ability.

i. Situating the Defense within a History of Subordination

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[77] See McAdams interpreting Dan Kahan and Donald Braman on "expressive-politics theory of law." Underhill 10.

[78] To the extent that the direct threat defense has been found to include exclusions based on an individual's danger to themself, it also sends the message that people with disabilities are often critically vulnerable and fragile.

[79] Ableism has been defined as: "[a] system that places value on people's bodies and minds based on societally constructed ideas of normalcy, intelligence, excellence and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, colonialism and capitalism. This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person's appearance and/or their ability to satisfactorily [re]produce, excel and 'behave.'" Talila A. Lewis. Ableism 2020: An Updated Definition, available at https://www.talilalewis.com/blog/ableism-2020-an-updated-definition (last visited Feb. 22, 2021).

There is a long history of exclusion and subordination of disabled people. While this discrimination has impacted all disabled people—those with physical, sensory, intellectual or psycho-social disabilities--this history has been most extreme for persons deemed to have mental disabilities, and particularly so for those considered to have "mental illness," i.e., psycho-social or psychiatric disabilities.[80] This subordination of people with disabilities has also been exacerbated for those who are non-white, and particularly so for those who are Black.[81]

Discrimination against disabled people, and the intersectionality of disability and race has long been evident in U.S. history. The 19th century social categorization the "natural" versus the "unnatural" or the "normal" versus the "abnormal," privileged whiteness and physical and mental "normalcy" and disadvantaged those who were deemed to deviate from that "normal" status.[82] By the late 1800s, this notion of "normality" was used explicitly for managing and categorizing populations and to exclude and discriminate against racial minorities, women, and disabled individuals.[83] Around this time, many states and localities began to adopt "ugly laws." These laws prohibited those deemed "diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object," from public places and thoroughfares.[84] Susan Schweik observes that by focusing on physical disabilities and "deformities," these "ugly laws" had a particularly significant impact on disabled people of color within the context of a larger effort to "regulate property and labor" and criminalize poverty.[85] "Race (and the association between darkness and evil or the primitive) interacts with disability (and its association with death, damage, powerlessness, or incapability) and

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[80] Paul Longmore and Lauri Umansky, ed., THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES, 4, New York University Press, 2001 (noting that while there has been a "variety of disability experiences" all disabilities have had to struggle against "cultural devaluation" and for "self-definition and self-determination"); Michel Foucault, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 15 (Random House Inc. 1965) (discussing historical association of mental illness with evil, sin, and possession by demons).

[81] Need cite.

[82] Morgan 18 citing Annamma, et al, 2013, p. 16. Citing to *Whiteness as Property,* Cheryl Harris

[83] Baynton, D., Disability and the Justification of Inequality in American History, 33-34, in P.K. Longmore & L. Umansky (eds.), *The New Disability History,* New York, NY: New York University Press (2001). Retrieved **[date accessed]** from /?p=10654, available at https://www.uua.org/files/documents/bayntondouglas/justification_inequality.pdf.

[84] Susan M. Schweik, The Ugly Laws: Disability in Public, 1-2, New York University Press (2009), citing to Chicago City Code 1881. This 1881 ordinance was not the first "ugly law" enacted; that distinction falls to San Francisco in 1867, nor was it the last, with approximately Schweik, Ugly Laws, 3.

[85] Morgan Dis Crit at 10- need Schweik page.

ugliness to create an intensified and intersecting representation of the diseased as inferior, dangerously infectious, others."[86]

The treatment of persons with disabilities-- particularly those with mental disabilities or psycho-social conditions--as outsiders or " dangerous others" persisted throughout 20th century.[87] This inculcation of fear and "othering" of those with disabilities was used to fuel and justify eugenics laws and practices and the sterilization of those designated as "unfit," "degenerate," or

[86] Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 213 (2010). See Jeffrey A. Van Detta, "Typhoid Mary' Meets the ADA: A Case Study of the "Direct Threat' Standard Under the Americans with Disabilities Act, 22 Harv. J.L. & Pub. Pol'y 849, p. x, n. 355? (1999), citing to several appellate cases upholding the exclusion of those with contagious diseases, including, e.g., [check that all appellate cases] *City of Baltimore v. Fairfield Imp. Co.*, 39 A. 1081, 1084 (Md. App. 1898) (authorizing eviction sought by neighbors of a woman with leprosy, rejecting "modern theories and opinions of medical experts that the contagion is remote, and by no means dangerous," in the face of persistent public fears of contagion); *Everett v. Paschall*, 111 P. 879, 880-81 (Wash. 1910) (enjoining a landlord from allowing some tuberculosis patients to move into an apartment house, despite the Court's recognition that they posed no "medically verifiable threat to the neighbors" in the face of widely-shared public fears, even if unfounded).

[87] See, e.g., *City of Cleburne, Texas v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 473(1985) (noting the "bare desire to treat the retarded as outsiders, [as] pariahs who do not belong in the community.").

"dangerous" that swept up both disabled people and people of color.[88] It also supported the related mass institutionalization of persons with physical, intellectual and psycho-social disabilities.[89] This same trend is evident in the amendments to the immigration laws to exclude those deemed defective, including "lunatics," "idiots," and others incapable of providing for their own

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[88] (Baynton 2005 p. 32)." See also Morgan DisCrit at 16-17,19. See Buck v. Bell, 274 U.S. 200, 205-06 (1927) (allowing Virginia to involuntarily sterilize those with "hereditary forms of insanity, imbecility, etc.," who, according to prevailing eugenics thinking, would create a menace by procreating and passing along those defective "hereditary" mental conditions to offspring that would either commit crimes ("the insane") or starve ("imbeciles"). Alexandra Stern, **Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century (August 6, 2020)(noting that during the 20th century, over 60,000 people were sterilized in the U.S. under the guise of capacious categories of "feeblemindedness" and "mental defective," and in the state of North Carolina, which had the third highest number of sterilizations in the U.S., during the period from 1950-1966, Black women were three times more likely to be sterilized than white women and 12 times more likely to be sterilized as white men.** available at https://theconversation.com/forced-sterilization-policies-in-the-us-targeted-minorities-and-those-with-disabilities-and-lasted-into-the-21st-century-143144. Note she is part of the sterilization and social justice lab-- link at https://www.ssjlab.org/ **Admittedly, forced sterilization was used as a tool to limit reproduction by those in many marginalized communities. See, e.g., Madrigal v. Quilligan (seeking to redress coerced sterilization of class of women of Mexican origin) get case cite. Alexandra Stern, Sterilized in the Name of Public Health, Race, Immigration, and Reproductive Control in Modern California, Am. J. Pub. Hlth, 2005 July; 95(7): 1128-38. See Gillborn (2016) for history and re-emergence of genetic determinism).** Better cites? See Buck v. Bell, 274 U.S. 200, 205-06 (1927) (positing that offspring allowing Virginia to involuntarily sterilize those with "hereditary forms of insanity, imbecility, etc.," who, according to prevailing eugenics thinking would create a menace by procreating and passing along those defective "hereditary" mental conditions to offspring that would either commit crimes ("the insane") or starve ("imbeciles"). Alexandra Stern, **Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century (August 6, 2020)(discussing 1964 decision of the North Carolina Eugenics Board recommending the involuntary sterilization of a 20-year old Black woman with intellectual disability in light of her "aggressive behavior and sexual promiscuity.")** The whole rehabilitation history stemming from the medical model of disability that focuses on the defect within the mind and body of disabled people and seeks to "fix" the individual, is of a piece with the eugenics movement. Stein, Michael Ashley Stein, *Disability Human Rights*, 95 Cal. L. Rev. 75 (2007), 87-88.

[89] Evidence of over-reliance on institutionalization of persons with mental illness exists today. *See, e.g.*, Department of Justice Investigation of Alameda County, John George Psychiatric Hospital, and Santa Rita Jail, at 1, 7-11 (April 22, 2021), available at https://www.justice.gov/crt/case-document/file/1388891/download (last visited April 25, 2021) (concluding that Alameda County institutionalizes adults with mental health disabilities for average stays of six months to two years, despite their eligibility community-based public mental health services, in violation of the ADA).

needs.[90] And we see the simultaneous project to characterize Black men as "dangerous others" that justified the lynching, criminalization, and mass incarceration of Black men that leaves the tragic legacy of notorious racist acts involving, among many others, the Scottsboro Boys, Emmet Till, the Central Park Five, Trayvon Martin and George Floyd, as well as legislation enacted to address the alleged scourge of the *Superpredator.* The direct threat defense must be considered within this historical context.

ii. The Ableist and Racist Work of the Direct Threat Defense- A DisCrit Analysis

By suggesting that disabled people can be excluded from employment and public places because they may threaten the health and safety of others, the direct threat defense reinforces the notion that disabled people are inherently dangerous and "reif[ies] constructions of disability—particularly, psychiatric disabilities—as pathological, tormented, uncontrollable, violent, and deviant."[91] It seems fair to say that the "direct threat" defense sends the message that some disabled people are inherently and uncontrollably

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Around this same time, the immigration laws provided another opportunity for systemic exclusion of those given a disability label or designation. Beginning at least with the 1882 immigration exclusion of "lunatics," "idiots," and others incapable of providing for their own needs,[90] disability has long been a justification for denying citizenship to those races and ethnic groups characterized for their supposed tendencies to "feeble-mindedness, mental illness, deafness, blindness, and other disabilities…." Baynton traces the expansion of disability-related language in federal immigration laws used to exclude disabled people and the application of that disability language to less desirable ethnicities. Baynton 45-49 (Act of 1882 excluded "any 'lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge"; Act of 1891 replaced "unable to care for self" with "likely to become a public charge"; Act of 1907 prohibited entry by anyone deemed "mentally or physically defective, [causing a diminished] ability of such alien to earn a living"; Act of 1917 made it unlawful to seek the entry of "any alien afflicted with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living."). Baynton, D., Disability and the Justification of Inequality in American History, 33-34, 45-49, in P.K. Longmore & L. Umansky (eds.), *The New Disability History,* New York, NY: New York University Press (2001). Retrieved **[date accessed]** from /?p=10654, available at https://www.uua.org/files/documents/bayntondouglas/justification_inequality.pdf. Baynton at 33-34. See Morgan, Jamelia, Toward a DisCrit Approach to American Law 19 (November 14, 2020), in DisCrit Expanded: Inquiries, Reverberations & Ruptures (Forthcoming 2021) (Hereafter DisCrit), Available at SSRN: https://ssrn.com/abstract=3730705. Those specifically subject to exclusion were: "the deaf, blind, epileptic, and mobility impaired; people with curved spines, hernias, flat or club feet, missing limbs and short limbs; those with intellectual or psychiatric disabilities; intersexuals; men of 'poor physique' and men diagnosed with 'feminism.'" Morgan, Jamelia, Toward a DisCrit Approach to American Law 6-7, 19 (November 14, 2020), in DisCrit Expanded: Inquiries, Reverberations & Ruptures (Forthcoming 2021), available at SSRN: https://ssrn.com/abstract=3730705, citing, Annamma, Connor, and Ferri (2013).

[91] Morgan DisCrit at 13. See Morgan 4th A. at 41 (discussing "the social meanings that attach to disability and that work to construct disabled people as threatening, disorderly, or otherwise suspicious.")

dangerous and that they lack the ability to discern either their own dangerousness or their actual ability to do the relevant work or engage in the public activity at issue.[92] It plays on two long-standing stereotypes--the dangerous disabled person and the disordered/irrational/unpredictable disabled person. It suggests that some, or many, disabled people deviate from the normative notion of the safe and productive worker or the safe participant in public activities; as such, they are not worthy of participating or continuing to participate in employment or other public endeavors. This is not to say that anyone should truly threaten the health and safety of others. But no one should do this, regardless of their race or ability. Appropriately, neither Titles VI or VII of the Civil Rights Act nor their implementing regulations say that religious minorities who threaten the health and safety of others are not protected by the law. We say this only about disabled people. At a minimum, the direct threat defense sends a clear ableist message to both disabled individuals and society at large that disabled people are not as worthy as those deemed able-bodied and able-minded.

Ableism is the "oppression faced due to disability/impairment…[that] signals disability as a form of difference [and] constructs it as inferior."[93] Ableism treats disability as essential and permanent, rendering those with disabilities inherently lesser than those deemed "able," just as racism views color as an essential and degrading characteristic, rendering persons of color of lesser value than white people.[94] Recognizing these parallel social constructs, Adrienne Asch borrowed the theoretical framework of critical race theory to analyze how the ability/disability categorization creates a socially constructed hierarchy of human value based on an ideal norm of physical and mental health and vigor.[95] She appreciated that dominant or "normal" ways of functioning are privileged so that those who are less fit or able are subjected to

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[92] Ironically, by expanding the direct threat defense to those who pose a danger to *themselves* by engaging in a particular job or public activity, we also send the message that disabled people are also completely vulnerable and must be protected by more able actors.

[93] Morgan 4th A. 51 citing Liat Ben Moshe. Stein correctly asserts that under current social convention, biological atypicality is equated to "inherent lesser ability," and that accordingly, disability rights are seen as "special rights." Michael Ashley Stein, Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA, 90 Va. L. Rev. 1151, 1177-78 (2004). Consequently, it follows logically that people with disabilities are only capable of the less difficult and less financially rewarding jobs. He looks at Cleveland v. Policy Management System Corp, as the court presuming that the plaintiff could not perform work and put the burden on her to prove she could actually work with a reasonable accommodation. 1178-79.

[94]Disabled people and People of Color similarly find themselves at the bottom of the hierarchy founded on a "white, able-bodied archetype of normalcy, health, intelligence, sanity, and beauty." Ribet 217

[95] Cite to Asch; Bagenstos, Subordination. See Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 212 (2010) (hereafter "Surfacing Disability").

discrimination and oppression and denied a seat at the proverbial public table. This prevailing messaging stigmatizes any type of physical or mental deviation or "dis-ability," marking those so designated as shameful, worthless and lacking in credibility.[96]

Ableism is deeply engrained in our national psyche and has impacted those who might or might not have what is commonly defined as a disabling condition. Throughout much of the 19th and 20th centuries, disability stereotypes were used more broadly to subordinate racial minorities and women, with the denial of equal rights justified based on their assumed "physical, intellectual, and psychological flaws, deficits, and deviations from the male norm."[97] Thus, while historically, disabled people as a group have been ascribed an inferior status and subjected to unequal treatment, disability has also been used as evidence of or justification for inferiority for all groups.[98] In a phenomenon that reveals the depths of ableism, those demographic groups not "actually disabled" that were at least partially subordinated by disability labels fought against those stereotypes as unfounded and inapplicable to them, rather than challenge the assumption that disability was "an adequate justification for social and political inequality."[99] "This common strategy for attaining equal rights, which seeks to distance one's own group from imputations of disability and therefore tacitly accepts the idea that disability is a legitimate reason for inequality, is perhaps one of the factors responsible for making discrimination against people with disabilities so persistent and the

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[96] NEED Asch cite. "To synthesize this argument, one may be labeled crazy as a means of stigmatizing race, gender, class, sexuality, or age (or some intersection, in most instances), one may be made to feel crazy when attempting to assert a narrative or experiential framework counter to the prevailing hegemony, or one may in fact "go crazy," in the sense of developing prolonged cognitive and emotional dysfunction as a consequence of the trauma of subordination. Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 218–19 (2010).

[97] Some examples provided by Baynton are the attribution of disability to African Americans as insufficiently intelligent (often as a result of physiological defects) to participate in social life with white Americans, or that due to their physical and mental weaknesses, African Americans could not manage freedom and would quickly become disabled upon emancipation. Baynton at 37-39. In the case of women, antisuffragists argued that women's physical, mental, and psychological vulnerabilities made them incapable of the franchise, and/or, if they were given the right to vote, they would become disabled if given the significant responsibility of political participation. Baynton at 41-43.

[98] See, e.g, Baynton, 33-34, 41, 50-51.

[99] For example, Baynton explains that in response to arguments that they were either too disabled to vote or that the stress of the franchise would cause them to become disabled, suffragists contested that they were disabled, and so deserved to vote. In other words, they argued that they were not like persons with disabilities who were legitimately denied the right to vote, and that they (able-minded-bodied women) would not become disabled if given the right to vote. Id., 43.

struggle for disability rights so difficult."[100] Despite social, political and intellectual efforts to move from a medical model to a social model of disability that understands disability as stemming from the interaction with an inaccessible and hostile environment, "'citizens with disabilities have not yet fully succeeded in refuting the presumption that their subordinate status can be ascribed to an innate biological inferiority.'"[101]

Asch provided a critical theory lens for understanding disability-based subordination, but her scholarship had a singular focus on disability oppression. Today that scholarship has been critiqued for having a focus on the experience of White disabled people and failing to adequately consider the life situation of disabled people of color and the ways in which race and disability are used to reinforce both normalcy and White supremacy.[102] More recently, scholars have recognized that disability and race share "both hierarchy and a definition of normalcy or ideal physicality that privileges the top of the hierarchy." [103] As noted above, racial identity is conflated with medicalized or inherent disabilities and persons of color, particularly Black citizens, are deemed to be "feebleminded," intellectually disabled or "insane," with behaviors discredited as the product of these pathologized disabilities.[104] Further, disability is often used "as 'proof' of racial inferiority or as a basis to deny the reality of racial discrimination (i.e., 'it is not racism, you are just truly

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[100] Cite needed probably Bayton. See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1346-47 (1988), citing A. Blumrosen, Twenty Years of Title VII Law: An Overview 26 (April 18, 1985) (unpublished manuscript on file in the Harvard Law Library).
("'it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot] correct that subordination because it [can] never recognize it.'")

[101] Baynton at 51. citing Harlan Hahn. See generally Michael Ashley Stein, *Disability Human Rights*, 95 Cal. L. Rev. 75 (2007) (comparing medical model that views disability as an inherent limitation in the person with the social model that understands that it is the socially engineered environment and attitudes that determine the extent to which a person participates in social, political and cultural life).

[102] Because disability, like race, is treated as an inherent medical or biological defect that serves to justify subjugation and the denial of rights, it made sense for Asch to use the critical race frame of analysis to understand and explain disability subordination. While acknowledging Asch's contribution, Ribet criticizes her failure to consider the intersectionality of race and disability, concluding that the comparative use of disability as a singular category of oppression only makes sense when considering the white person with disability compared to the white person without disability or the person of color with disability compared to the person of color without disability. Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 221 (2010) (Noting that race conscious disability scholarship considers the "intersection between ableism and racism as systems of subordination.") Check- I had a note--Id. at 2.

[103] Ribet 212

[104] Morgan 4th A. at 14.

less capable')."[105] Thus, the method of viewing the experience of either disabled people or people of color in isolation denies the reality of intersectionality. As Beth Ribet notes, it is impossible to effectively address "stereotypes grounded in ableist racism or racist ableism regarding inferiority, incompetence and unworthiness… without a dual analysis of both White supremacy and the social construction of normalcy."[106]

Ableism serves at least two significant racist functions. First, by stigmatizing disability and projecting disability onto people of color, ableism helps legitimize or "naturalize" the exclusion of racial minorities (along with people with disabilities) from structures, institutions and prominent roles within institutions.[107] Second, the ableist messaging allows the white, non-disabled majority to evade social or political responsibility for actual harms resulting from poverty and the related experiences of medical neglect, malnutrition, and environmental racism, by situating the resulting "disability" as an inherent defect within those affected people of color.[108] Further, in a world that reinforces the message that the economy and society "impartially [reward] the superior over the inferior," we are led to the ineluctable conclusion that since most people of color and people with disabilities are

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[105] Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 210 (2010). Ribet 212 (noting that disability can be coded as evidence of inferiority, weaponized against persons of color and used to reinforce White supremacy.) See also discussion in historical section, supra.

[106] Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 210 (2010); Ribet 212 (noting that disability can be coded as evidence of inferiority, weaponized against persons of color and used to reinforce White supremacy.)

[107] Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 241 (2010)

[108] Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 241 (2010)

found at the bottom rung of our social and economic strata, they are in fact, inherently inferior and worthy of degradation and exclusion.[109]

Analyzing the "direct threat" message through the lens of ableism reveals the problematic implications of this ADA provision. The direct threat provision reinforces the socially enforced notions of the stereotypical productive, well-behaved employee and citizen. This inherent defect is stigmatized, with the individual shamed for their flaw, deemed to be without value within the social and economic realms of activity, as well as in-credible; and then "naturally" excluded from employment and full participation in public activities.[110]

The ADA's direct threat defense is a place where the "multidimensional identities" of disability and race are particularly salient[111]-- it is where the stereotype of the dangerous and unpredictable disabled person meets that of the dangerous and wild person of color, (most often the wild and dangerous Black man). For those caught in the web of this defense, the negative and dangerous aspect of their disability (exacerbated by race) is often seen as essential and permanent, rendering then "irredeemable." The direct threat defense thus legitimizes the socially constructed hierarchies of race and ability.[112]

The disability rights movement is subject to some criticism for its failure to acknowledge and challenge the "disablement of subordinated populations" by White supremacy. Ironically, this failure stems at least partially from the

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[109] Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 241 (2010). Kimberly Crenshaw made this point in her early piece on racial subordination: "Race consciousness also reinforces whites' sense that American society is really meritocratic and thus helps prevent them from questioning the basic legitimacy of the free market. Believing both that Blacks are inferior and that the economy impartially rewards the superior over the inferior, whites see that most Blacks are indeed worse off than whites are, which reinforces their sense that the market is operating 'fairly and impartially'; those who should logically be on the bottom are on the bottom.[189] This strengthening of whites' belief in the system in turn reinforces their beliefs that Blacks are *indeed* inferior. After all, equal opportunity *is* the rule, and the market *is* an impartial judge; if Blacks are on the bottom, it must reflect their relative inferiority. Racist ideology thus operates in conjunction with the class components of legal ideology to reinforce the status quo, both in terms of class and race." Kimberle' Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1380 (1988).

[110] See Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 241 (2010)

[111] See, Morgan citing Annamma, 2013, p. 2

[112] Morgan 11 citing Annamma et al., 2013, p. 12. See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988). 1346-47: "As Alfred Blumrosen observes, "it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot] correct that subordination because it [can] never recognize it.'" A. Blumrosen, Twenty Years of Title VII Law: An Overview 26 (April 18, 1985) (unpublished manuscript on file in the Harvard Law Library).

empowerment message of the movement itself—the movement's legitimate efforts to characterize disability as a basis for pride rather than a sign of any inherent defect in any person.[113]

In sum, ableism devalues minds and bodies based on their deviation from the ideal norms of intelligence, strength and productivity just as racism devalues bodies of color based on their deviation from the norm of whiteness and the associated characteristics of strength, intelligence, and ability. Ableism and racism validate and reinforce each other, normalizing assumptions and expectations about both race and ability in a potent intersectionality.[114] And, while it is undeniable that race and disability are also significantly impacted by other categories of subordination—such as class, ethnicity, gender, and sexuality-—in the context of the direct threat defense, the intersectionality of race and disability shape our "notions of normalcy" most significantly.[115]

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[113] Ribet at 245. See Longmore- new disability history at 33 noting the disparate and extraordinarily varied experiences of disability.

[114] Morgan, Jamelia, Toward a DisCrit Approach to American Law, 7 (November 14, 2020), available at SSRN: https://ssrn.com/abstract=3730705, in DisCrit Expanded: Inquiries, Reverberations & Ruptures (Forthcoming 2021), citing to Annamma, Connor, and Ferri (2013) at 6, Dis/ability critical race studies (DisCrit): Theorizing at the intersections of race and dis/ ability. *Race Ethnicity and Education, 16*(1), 1-31. Annamma, Ferri and Connor, Disability Critical Race Theory: Exploring the Intersectional Lineage, Emergence and Potential Futures of DisCrit in Education, 42 Rev. Res. Edu. 46, 53 (2018) (discussing the "collusive nature of race and disability.").

[115] Morgan at 7. Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988). 1346-47: "As Alfred Blumrosen observes, "it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot] correct that subordination because it [can] never recognize it.'" A. Blumrosen, Twenty Years of Title VII Law: An Overview 26 (April 18, 1985) (unpub- lished manuscript on file in the Harvard Law Library). See Beth Ribet, Surfacing Disability Through A Critical Race Theoretical Paradigm, 2 Geo. J.L. & Mod. Critical Race Persp. 209, 246 (2010) ("The challenge for Critical Disability/Race Theory is not small, conceptually or practically--how to acknowledge disability as very frequently deeply negative, and disablement as genuinely tragic and horrifying, without reinforcing the already relentless message that disability represents inferiority, is pathetic and worthless.")