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The Aesthetics of Disability

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THE AESTHETICS OF DISABILITY

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The foundational faith of disability law is the proposition that we can reduce disability discrimination if we can foster interactions between disabled and nondisabled people. This central faith, which is rooted in contact theory, has encouraged integration of people with and without disabilities, with the expectation that contact will reduce prejudicial attitudes and shift societal norms. However, neither the scholarship nor disability law sufficiently accounts for what this Article calls the "aesthetics of disability," the proposition that our interaction with disability is mediated by an affective process that inclines us to like, dislike, be attracted to, or be repulsed by others on the basis of their appearance. The aesthetics literature introduces a significant complication to uncritical reliance on contact as the theoretical and remedial basis for our inclusive ideal. Contact and engagement with the aesthetics of disability may fail to provide the benefits assumed by contact theory, but more perversely, under certain conditions, they may trigger negative affective responses that may stunt the very normative change sought through antidiscrimination law. This Article proposes a novel theoretical lens to more accurately reflect the complexity of the aesthetic–affective process of discriminatory behavior in the context of disability.

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INTRODUCTION

Disability rights law has failed to change public hearts and minds about people with disabilities.[1] Nearly three decades ago, Congress identified the primary barrier facing people with disabilities as prejudicial attitudes, a product of historical segregation and invisibility. Prescriptively, Congress designed the Americans with Disabilities Act (ADA) to ensure that people with disabilities are not denied access to employment, public services, and places of public accommodations. The ADA also advanced integration as a prospective tool to reduce disability discrimination—a familiar remedial

1. This Article uses "people first" language consistent with the view within the U.S. disability rights movement. See What Is People First Language?, The Arc, https://www.thearc.org/who-we-are/media-center/people-first-language [https://perma.cc/83K4-MWAL] (last visited Apr. 6, 2019) ("By placing the person first, the disability is no longer the primary, defining characteristic of an individual, but one of several aspects of the whole person. . . . It eliminates generalizations and stereotypes, by focusing on the person rather than the disability.").

strategy in the civil rights playbook. What explains the absence of meaningful normative shifts in the context of disability?

Disability legal theories do not account for the ways in which the *aesthetics of disability* mediate rights and the integrative ideal. The aesthetics of disability are visible sensory and behavioral markers that trigger particular aesthetic and affective judgments about marked individuals. Disability rights law, like other areas of antidiscrimination law, relies on contact theory and its chosen prescription, integration. The contact hypothesis posits that increasing opportunities for interactions between diverse groups can, under the right conditions, foster greater acceptance. The problem in the context of disability, however, is that the literature does not fully engage with the negative affective[2] responses to disability that are triggered when nondisabled and disabled persons interact.[3] When the literature does engage negative emotions about disability, these emotions are understood to be a product of a history of segregation of people with disabilities, and it is assumed that the negative valence will change over time. The aesthetics of disability trigger affective processes, however, and some emotions, such as fear or disgust,[4] make it hard to recognize, respect, adjudicate, and enforce the rights of people with disabilities.

We need look no further to find evidence of the failure to change social norms of disability than the recent case of a police officer in Arizona who assaulted an innocent teenager with Autism Spectrum Disorder (ASD)[5]

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2. This Article uses "emotion," "affect," and "feeling" interchangeably in line with the more recent theoretical conventions in philosophy and psychology. See, e.g., Dan Goodley et al., Feeling Disability: Theories of Affect and Critical Disability Studies, 33 Disability & Soc'y 197, 198 (2018) ("[W]e use affect and emotion interchangeably . . . to acknowledge that biology and society are firmly wrapped up with one another.").

3. This Article focuses on those with apparent or more visible disabilities, which tend to be individuals with physical disabilities, such as wheelchair users; however, atypical behavior is also included as are any other perceptible markers associated with disability. See Michael W. Shelton & Cynthia K. Matthews, Extending the Diversity Agenda in Forensics: Invisible Disabilities and Beyond, 38 Argumentation & Advoc. 121, 121 (2001) (defining and describing invisible disabilities to include both physical and mental conditions).

4. Interdisciplinary scholars have explored the role of emotions in shaping legal and nonlegal judgments. See, e.g., Daniel S. Hamermesh, Beauty Pays: Why Attractive People Are More Successful 125 (2011) ("Beauty matters in labor markets—and it surely also matters in an immense variety of non-economic activities."); Martha C. Nussbaum, Upheavals of Thought: The Intelligence of Emotions 22 (2001) (arguing that "emotions are forms of judgment"); see also Daniel Kelly, Yuck! The Nature and Moral Significance of Disgust 2 (2011) (tracing the evolution of disgust and noting that "[a] swell of recent work has raised disgust from relative obscurity to new levels of visibility"); William Ian Miller, The Anatomy of Disgust 180 (1997) (explaining that "[b]y being so much in the gut, the idiom of disgust has certain virtues for voicing moral assertions"). This Article is the first, however, to consolidate and reconcile the research across multiple legal and nonlegal disciplines and propose a new theoretical lens by which to understand discrimination in the context of disability rights law.

5. Adding context to the story of Connor Leibel, the innocent teenager, ASD affects approximately one of every forty-one children. See Guifeng Xu et al., Prevalence of Autism Spectrum Disorder Among US Children and Adolescents, 2014-2016, 319 JAMA 81, 81

because the officer apparently could not control his affective response to the aesthetics of disability. Connor Leibel waited in a playground while his aide crossed the street to run an errand, something they had done in the past to increase Connor's independent living skills.[6] A police officer approached Connor after the officer, patrolling the neighborhood, became suspicious of Connor's erratic, repetitive movements, and suspected drugs.[7] Connor was not high on drugs; he was stimming, a self-soothing method using repetitive movements.[8] A police body camera captured the escalation between the officer and Connor:[9] The officer asks Connor to look him in the eye and does not get the response he expects. The officer then grabs Connor and forces him to the ground, restraining him with handcuffs behind his back. Connor, fearing that he will be "taken away" by the officer, alternates between screaming and attempting to self-soothe: "I'm okay, I'm okay, help! . . . I'm okay . . . I need help . . . Am I going to go away? . . . I'll breathe . . . What are you doing? Am I going to go away?"[10]

Integration, as a principle norm in disability rights law, has operated on autopilot without critical examination for nearly thirty years. Approximately one in five people in the United States has one or more disabilities.[11] Disability rights law undoubtedly has increased the visibility of people with disabilities in society.[12] Remote

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(2018). Over 600,000 students in public schools receive special-education services with a classification of autism. See Joel McFarland et al., U.S. Dep't of Educ., NCES 2018-144, The Condition of Education 2018, at 74 (2018), https://nces.ed.gov/pubs2018/2018144.pdf (on file with the *Columbia Law Review*) (showing that students with autism account for approximately nine percent of the 6.7 million students receiving special-education services).

6. Complaint at 6, Leibel v. City of Buckeye, No. 18-CV-01743 (D. Ariz. Jan. 30, 2019), 2019 WL 367995 [hereinafter Leibel Complaint].

7. Id. at 6–7.

8. "'Stimming,' or 'self-stimulatory behavior,' is the repetition of physical movements and sounds, or the repetitive movement of objects, common in individuals with developmental disabilities, and most prevalent in people with autism." Id. at 6. Connor held a piece of string in his hand while he was stimming. Id. at 7; see also Steve Silberman, Opinion, Making Encounters with Police Officers Safer for People with Disabilities, N.Y. Times (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/opinion/police-disabilities-safety.html (on file with the *Columbia Law Review*) (discussing a "pattern of law enforcement failing to uphold the mandates of the Americans [w]ith Disabilities Act").

9. Leibel Complaint, supra note 6, at 7.

10. ABC15 Ariz., Police Body Camera: Arizona Officer Detains Teen with Autism, YouTube (Sept. 18, 2017), https://www.youtube.com/watch?v=uErofKXMwq0 [https://perma.cc/BL4Q-YZAV]; see also Leibel Complaint, supra note 6, at 6–8 (pleading relevant facts of the case).

11. The total number of people in the United States with one or more disabilities is approximately 56.7 million. Matthew W. Brault, U.S. Census Bureau, P70-131, Americans with Disabilities 2010: Household Economic Studies 4 (2012), https://www2.census.gov/library/publications/2012/demo/p70-131.pdf [https://perma.cc/3GTK-UZSE].

12. This is certainly the case for people with physical disabilities and other aesthetic markers discussed in this Article. Cf. Jasmine E. Harris, Reconciling Privacy and Publicity Norms in Disability Antidiscrimination Law 16–18 (Mar. 21, 2019) [hereinafter Harris, Reconciling Privacy] (unpublished manuscript) (on file with the *Columbia Law Review*) (arguing that society is more aware of people with more apparent disabilities but has yet to

institutions[13] and sheltered workshops have largely disappeared.[14] A majority of children receive special-education services in mainstream schools and inclusive classrooms.[15] Indisputably, contact between people with and without disabilities has increased.

Increased contact alone has proven insufficient, however, to shift societal norms of disability. Negative attitudes and bias are popularly attributed to those who were raised in a different era or time and who lacked interaction with people with disabilities. The remedial narrative claims newer generations—who were raised with the ADA—will be the ones who bring attitudinal change and extract the full potential of antidiscrimination laws. But a recent qualitative study concluded that one in five adults aged eighteen to thirty-four admits to having intentionally avoided talking to a person with disabilities due to uncertainty about how to communicate.[16] This study is quite sobering. We have yet to account for this in the ways in which we think about disability. Failure to assert, interpret, and enforce rights has significant consequences, including invisibility and social erasure.[17]

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contend with the high percentage of people with invisible disabilities).

13. See, e.g., infra section II.A (discussing the Willowbrook State School in New York); see also Amie Lulinski et al., Coleman Inst. for Cognitive Disabilities, Univ. of Colo., Use of State Institutions for People with Intellectual and Developmental Disabilities in the United States: Data Brief (1), at 1–2 (2018) (presenting data showing that the use of state-operated residential institutions for people with intellectual and developmental disabilities has steadily decreased since its peak in 1967).

14. Cf. Christina A. Samuels, Trump Team May Change Rules on Jobs for Students with Disabilities, Educ. Wk. (July 17, 2018), https://www.edweek.org/ew/articles/2018/07/18/trump-team-may-change-rules-on-jobs.html [https://perma.cc/ZJS4-QQEP] (explaining the Department of Education's notice of proposed rulemaking to amend regulatory definitions implementing the Workforce Innovation and Opportunity Act (WIOA)). See generally Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425 (2014) (codified at 29 U.S.C. § 3101 (2017)) (limiting job placements at sheltered workshops and other employment settings where people with disabilities earn subminimum wages).

15. The number of students receiving special-education services of any disability classification is approximately 6.7 million, or thirteen percent of the total number of public-school students in the United States. McFarland et al., supra note 5, at 74. Ninety-five percent of students who receive special-education services attend nonspecialized, mainstream public schools. Id. at 76.

16. Hardeep Aiden & Andrea McCarthy, Scope, Current Attitudes Towards Disabled People 3 (2014), https://research-information.bristol.ac.uk/files/88783477/Aiden_and_McCarthy_2014.pdf [https://perma.cc/JC6W-YSAB]. Scholars outside the law have explained social awkwardness and other antisocial reactions to disability as a function of "interactional uncertainty, attitudinal ambivalence, belief in a just world, and magical thinking." Justin H. Park et al., Evolved Disease-Avoidance Processes and Contemporary Anti-Social Behavior: Prejudicial Attitudes and Avoidance of People with Physical Disabilities, 27 J. Nonverbal Behav. 65, 66 (2003).

17. Civil rights are rights of inclusion that fundamentally go against the grain. David M. Engel & Frank W. Munger, Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities 3 (2003) ("[Civil rights] outrage at the very moment when they most effectively insist on an identity and a legal status for the person who invokes them. When civil rights are *not* asserted, the consequences can be profound: invisibility, the erasure of the individual from membership in the community.").

Scholars in other disciplines, such as neuroscience,[18] anthropology,[19] psychology,[20] and philosophy,[21] have begun to challenge core field-defining assumptions about discrimination, appearance, and emotions.[22] Recent developments in aesthetic theory, for instance, signal a new understanding of the ways in which aesthetic judgments operate, not just for art and literature but for a number of everyday objects including human bodies.[23] Why we like what we like matters to antidiscrimination law, particularly in the context of disability, where the disabled body may disrupt norms of symmetry, beauty, and effortlessness in inescapable ways.[24]

This Article is the first to critically examine the role of aesthetics and affect in disability antidiscrimination law.[25] Disability law scholars have

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18. See, e.g., Lisa Feldman Barrett, How Emotions Are Made: The Secret Life of the Brain 19, 35–36 (2017) [hereinafter Barrett, How Emotions Are Made] (discussing the neuroscience of "degeneracy" which challenges the notion that emotions have unique fingerprints).

19. See, e.g., Sara Ahmed, The Cultural Politics of Emotion 15, 36–39 (2d ed. 2014) (discussing how emotions—fear, disgust, shame, and love—"shape individual as well as collective bodies"); Sara Ahmed, Happy Objects, *in* The Affect Theory Reader 29, 29 (Melissa Gregg & Gregory J. Seigworth eds., 2010) (framing "affect" as "sticky," relational, and constructed).

20. See generally Ellen Winner, How Art Works: A Psychological Exploration (2018) (discussing the experience of art and its relation to everyday relationships and behavior).

21. See, e.g., A.W. Eaton, Taste in Bodies and Fat Oppression, *in* Body Aesthetics 37, 37–39 (Sherri Irvin ed., 2016) ("[T]he standard picture is misguided in its underestimation of the role of aesthetics in instituting and maintaining oppression.").

22. Tom Mashberg, Do You Like 'Dogs Playing Poker'? Science Would Like to Know Why, N.Y. Times (July 8, 2018), https://www.nytimes.com/2018/07/08/arts/design/do-you-like-dogs-playing-poker-science-would-like-to-know-why.html (on file with the *Columbia Law Review*) ("The mysteries of the aesthetic response, and the creative impulse, have become a burgeoning area of inquiry for scientific researchers across many disciplines.").

23. See Eaton, supra note 21, at 37–39.

24. See Rosemarie Garland-Thomson, Disability and Representation, 120 PMLA 522, 523 (2005) [hereinafter Garland-Thomson, Disability and Representation] ("The way we imagine disability through images and narratives determines the shape of the material world, the distribution of resources, our relationships with one another, and our sense of ourselves.").

25. Legal scholars in other areas have discussed appearances, emotions, and interdisciplinary literature, albeit separately. See, e.g., Deborah L. Rhode, The Beauty Bias: The Injustice of Appearance in Life and Law 11 (2010) [hereinafter Rhode, Beauty Bias] (condemning appearance discrimination because "it offends principles of equal opportunity and individual dignity"); Susan A. Bandes, Introduction to The Passions of Law 1, 1–2 (Susan A. Bandes ed., 1999) ("Emotion pervades the law . . . [yet] [i]n the conventional story, emotion has a certain, narrowly defined place in law."); Tristin K. Green, Racial Emotion in the Workplace, 86 S. Cal. L. Rev. 959, 964–65 (2013) (arguing that "[e]motion today takes a central position in the study of interracial interaction within the social sciences" and advocating for "bring[ing] racial emotion to the fore of conceptualizing and addressing discrimination in the workplace"); Deborah L. Rhode, The Injustice of Appearance, 61 Stan. L. Rev. 1033, 1035 (2009) (arguing "that discrimination based on appearance is a significant form of injustice, and one that the law should remedy"). This Article integrates the aesthetics and emotions literatures across disciplines and applies key lessons to disability rights law in particular. Future articles may explore the ways in which aesthetics comparatively (and

not yet drawn upon the transformative potential of key research conclusions in other disciplines studying aesthetics and affective responses to craft structural and individual remedies.[26] The structural origins of aesthetic taste and emotions have significant implications for the ways in which we think about the nature of prejudice, the process of discrimination, and legal remedies for antidiscrimination law more broadly. For instance, the aesthetics of disability offer a theoretical lens to challenge how race, gender, and other sensory markers of identity can trigger affective responses that can undermine even the most intellectually enlightened and well-intentioned social progressive.

Contemporary disability rights debates lay bare the challenges of community integration—including, for example, the astounding rates of sexual assault and abuse against people with disabilities living in community

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in absolute terms) operate in other areas of antidiscrimination law, such as race, gender, and sexual orientation.

26. Disability studies scholars have developed a rich literature engaging with aesthetic and affective norms in society. See, e.g., Elizabeth Barnes, The Minority Body: A Theory of Disability 168–69 (2016) (discussing the normative conception of disabled bodies as having "played the natural lottery" and lost); Simi Linton, Claiming Disability: Knowledge and Identity 2 (1998) (examining "disability studies as a field of inquiry, its historical roots, present configuration, and explanatory value"); Ato Quayson, Aesthetic Nervousness: Disability and the Crisis of Representation 14–31 (2007) ("[T]he literary representation of disabled persons and the aesthetic nervousness that attends such representation can be taken as an analogue to the real-life responses toward people with disabilities by society at large."); Susan M. Schweik, The Ugly Laws: Disability in Public 2 (2009) (aiming "first, to provide a fuller account of the story of unsightly subjects than has yet been written; second, to rethink aspects of U.S. culture through the insights of disability theory . . . and finally, to illuminate the conditions of disability"); Tobin Siebers, Disability Aesthetics 2–3 (2010) [hereinafter Siebers, Disability Aesthetics] (using the term "disability aesthetics" as the examination of the role of disability in art and literature); Rosemarie Garland Thomson, Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature 12 (1997) [hereinafter Garland Thomson, Extraordinary Bodies] (coining the notion of the "normate" or culturally constructed corporeal normativity); Susan Wendell, The Rejected Body: Feminist Philosophical Reflections on Disability 173–77 (1996) (discussing the ways in which the distinction between body and mind advocated by some theorists does not fully capture the complex experience of bodily pain associated with some disabilities); Lennard J. Davis, Introduction to The Disability Studies Reader 1, 6 (Lennard J. Davis ed., 4th ed. 2013) [hereinafter Davis, Disability Studies Reader] (discussing the fitness of the body and its connection to eugenics and national identity); Harlan Hahn, The Appearance of Physical Differences: A New Agenda for Research on Politics and Disability, 17 J. Health & Hum. Servs. Admin. 391, 411 (1995) [hereinafter Hahn, The Appearance of Physical Differences] ("From this perspective, both the normative standards supporting the attributes of the dominant group and the ubiquitous media depictions . . . may be even more politically relevant—and oppressive—than verbal displays of bias or intolerance."); Anita Silvers, Formal Justice, *in* Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy 13, 73 (Anita Silvers et al. eds., 1998) (rejecting the notion that differences in bodies are the result of "any biological mandate or evolutionary triumph" but arguing instead that they are the product of dominant preferences); Brian Soucek, Aesthetic Judgment in Law, 69 Ala. L. Rev. 381, 382 (2017) (discussing the ways in which state actors make decisions about "what is art, or what counts as artistically or aesthetically valuable").

settings;[27] police violence in encounters with people with disabilities;[28] legislative attempts to roll back rights of public accommodations under Title III of the ADA;[29] resistance to structural reform with a preference for individual relief;[30] the rise of designer babies and genetic manipulation;[31] cuts to Medicaid and Medicare programs;[32] and funding deficits for special education at both the federal and state levels despite increasing eligibility numbers.[33] Almost three decades after the ADA, this is a key moment to take stock of the challenges of implementation, diagnose the root issues, and reassess remedial paths. It is not enough to say that disability stigma exists like race or gender, and that we need a post-rights structural approach such as antisubordination.[34] It is necessary to dig

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27. See, e.g., Jasmine E. Harris, Sexual Consent and Disability, 93 N.Y.U. L. Rev. 480, 491 & n.39 (2018) [hereinafter Harris, Sexual Consent and Disability] (noting that rates of sexual assault against people with intellectual disabilities are seven times that against nondisabled people and that most victims live in community settings).

28. See David M. Perry & Lawrence Carter-Long, The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability 1 (2016), http://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf [https://perma.cc/TY8X-45DC] (finding that people with disabilities comprise a "third to half of all people killed by law enforcement officers" and are "the majority of those killed in use-of-force cases that attract widespread attention"); see also infra section III.B.2 (discussing aesthetics of disability in risk assessment).

29. E.g., The ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2017) (requiring additional procedural and administrative hurdles, including extended notice and cure period, to owners or operators of places of public accommodation before a plaintiff may file suit under Title III of the ADA).

30. See, e.g., A.H. v. Ill. High Sch. Ass'n, 881 F.3d 587, 589–90, 596 (7th Cir. 2018) (affirming the district court's rejection of the plaintiff's structural accommodation request to create a separate division for para-ambulatory runners because the nature of track competition is inherently discriminatory).

31. See, e.g., Brigham A. Fordham, Disability and Designer Babies, 45 Val. U. L. Rev. 1473, 1475–76 (2011) (discussing people with disabilities' stakes in genetic selection and the double standard imposed on people with disabilities who wish to make genetic decisions "to produce a child with physical attributes commonly associated with disability"); Lisa C. Ikemoto, The Racialization of Genomic Knowledge, 27 Seton Hall L. Rev. 937, 943–50 (1997) (discussing racial identity and ethical considerations of various genetics research initiatives).

32. See, e.g., John Nichols, Disability-Rights Activists Are the Real Heroes of the Health-Care Fight, Nation (July 28, 2017), https://www.thenation.com/article/disability-rights-activists-are-the-real-heroes-of-the-health-care-fight/ [https://perma.cc/A3TH-8WRG] (describing recent threats to repeal the Affordable Care Act and effective grassroots protests by disability-rights advocates to block Medicaid cuts).

33. See, e.g., U.S. Dep't of Educ., 2018 Determination Letters on State Implementation of IDEA 3–4 (2018), https://sites.ed.gov/idea/files/ideafactsheet-determinations-2018.pdf [https://perma.cc/8GEN-MKPJ] (showing that less than half of states are adequately meeting their obligations to serve students with disabilities under special-education law).

34. See, e.g., Ruth Colker, Anti-Subordination Above All: A Disability Perspective, 82 Notre Dame L. Rev. 1415, 1482 (2007) ("From an anti-subordination perspective, the issue is not the benefits to the nondisabled community; instead, the issue is the benefit to the historically subordinated group—individuals with disabilities."); Zoë Brennan-Krohn, Note, Employment for People with Disabilities: A Role for Anti-Subordination, 51 Harv.

deeper into the moment of subordination and mine it to see what is there—how it happens, why it happens, whether there are opportunities to intervene, and when the law has a comparative remedial advantage over other forms of intervention.

The central claim of this Article is that aesthetics research complicates our understanding of the remedial aspiration of contact which, in turn, compels us to reconsider how best to structure integration to get to broader goals of inclusion. Uncovering structural preferences around beauty and bodily functionality does not mean, however, that disability rights law should move away from integration in service of inclusive communities. Nor does it support repeal of legal prohibitions on discrimination if attitudes do not change. Rather, this Article lays the groundwork to develop a more comprehensive governing theory of disability rights that better captures the aesthetic and affective nature of disability discrimination. Disability rights law has conflated the meta-goals of building an inclusive society with mere integration due, in part, to a misguided understanding of contact theory. As a result, prescriptive interventions largely focus on granting access to spaces occupied by nondisabled people through reasonable accommodations without attention to the predicate conditions, intended beneficiaries, or, even definitionally, the meaning of integration.[35] Legislative reforms to public benefits law, the argument goes, will enable people to live successfully in the community, and, as a result, nondisabled people will come to accept people with disabilities and lift attitudinal barriers to inclusion. The formula for social acceptance is: Add, accommodate, and stir for the desired results. Uncovering aesthetic and emotional difficulties with integration at the individual level in the disability context complicates but should not erase integration as a central value. The interdisciplinary research opens space for a richer theorizing of integration as the collective normative goal.

This Article proceeds in four parts. Part I contends that integration is the guiding normative principle in all aspects of disability rights law. Disability statutes, regulations, doctrine, and scholarship privilege integration as *the* chosen prescription. Congress explicitly sought to address negative stereotypes and prejudice against people with disabilities by removing barriers to integration in employment and public programs and accommodations. While this may seem somewhat uncontroversial, the ADA is the only antidiscrimination statute with such a clear normative orientation and *remedial* mission. Part II argues that reliance on integration comes directly from the race context, particularly school desegregation and the contact hypothesis. Yet unlike contact's relative reduction of prejudice in the context of race and sexual orientation, empirical studies challenge

C.R.-C.L. L. Rev. 239, 266 (2016) (arguing that integration in employment may not work and suggesting adoption of an antisubordination approach instead).

35. See, e.g., Samuel R. Bagenstos, The Future of Disability Law, 114 Yale L.J. 1, 4 (2004) [hereinafter Bagenstos, The Future of Disability Law] (arguing for investment in welfare law reform).

contact's ability to shift prejudicial norms when nondisabled and disabled people interact. Part III answers the natural question of *why* contact has not worked as expected in the context of disability. I advance a novel descriptive claim that the aesthetics of disability mediate legal rights. These physical and sensory markers of difference—for instance, facial disfigurement, non-normative speech, or, as in Connor Leibel's case, atypical behavior—produce emotional responses (for example, fear, attraction, contempt, disgust) that are often viewed as noncognitive, visceral, and thus involuntary reactions. Contemporary research in affect theory and neuroscience, however, suggests that while the body certainly feels a range of emotions almost instinctively, the speed signals the depth of collective norms of beauty and emotions. Said differently, aesthetics and emotions are "made."[36] Finally, Part IV addresses the normative and prescriptive potential of the aesthetics of disability through a special-education case study. The aesthetics of disability as a theoretical lens has normative implications for how legislators, courts, and scholars should think about the future of disability rights law. The Article concludes with a preliminary prescriptive agenda and offers legal, policy, and research considerations that will begin to confront the aesthetics of disability in antidiscrimination law.

I. CONTACT AS PRESCRIPTIVE

Integration serves as the primary antidiscrimination intervention in disability rights law due largely to its reliance on the integrative principles and established doctrine in the school-desegregation context. The notion is that if one comes into contact with someone with a disability, this intergroup contact will decrease prejudice and, in turn, reduce discrimination. The origin of this faith lies in social science literature and its early influence on prescriptions for racial prejudice and discrimination in the education context. Yet the contact hypothesis gets absorbed into law and policy in ways that do not heed its cautionary caveats and instability over time. This Part explains the role of the contact hypothesis in shaping integration and the ways in which a particular conception of integration (specifically, mainstreaming) emerges out of *Brown v. Board of Education*.[37] Disability rights advocates then intentionally adopt *Brown*'s integration model to shape their antidiscrimination agenda.

A. *The Contact Hypothesis*

Antidiscrimination law's prescription of choice, integration, was influenced by the work of social scientists on the harms of racial segregation

36. Barrett, How Emotions Are Made, supra note 18, at 279 ("Emotions are very real creations of social reality, made possible by human brains in concert with other human brains.").

37. 347 U.S. 483 (1954).

and the use of intergroup contact as a remedy.[38] That is, integration is an example of how the contact hypothesis operates. The contact hypothesis is a cognitive theory of prejudice that uses intergroup contact as a means of generating new beliefs and information.[39] Racial and ethnic categories (and by extension, disability) reflect a pernicious type of social categorization that shapes the nature of stereotypes.[40] Social scientists posit that negative prejudicial beliefs develop because people create categories based on differences in physical appearance that are visibly salient: "Even a fragment of visibility . . . focuses people's minds on the possibility that everything may be related to this fragment . . . . Where visibility does exist, it is almost always thought to be linked with deeper lying traits than is in fact the case."[41]

The contact hypothesis places in-group members at the center of its remedial strategy and seeks to address their moral development by opening up their existing spaces to outgroup members. The nature of the contact holds potential to exacerbate or reduce prejudice under certain conditions,[42] in part, by reducing intergroup anxieties and threat.[43] Theoretically,

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38. See, e.g., Aimi Hamraie, Building Access: Universal Design and the Politics of Disability 65 (2017) (arguing that in the Jim Crow South, "[t]he consequence of racism . . . was disability"); Michael F. Potter, Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a "Racial Inclusionary Ordinance," 63 S. Cal. L. Rev. 1151, 1182 n.156 (1990) ("The integrationist ideology was based, in part, on the contact hypothesis.").

39. Prejudice scholars rebuked emotions in favor of the "cognitive revolution" of the 1960s and 1970s. See Eliot R. Smith & Diane M. Mackie, Aggression, Hatred, and Other Emotions, *in* On the Nature of Prejudice: Fifty Years After Allport 361, 363 (John F. Dovidio et al. eds., 2005) [hereinafter After Allport]. There was a deliberate shift from a focus on the irrational nature of prejudice manifested by groups such as the Nazis and the Klu Klux Klan in the 1950s to an acceptance of prejudice as a more natural part of cognitive sorting that could be undone through opportunities for contact to change beliefs. Id. at 364 ("Emotions may have fallen out of favor in theories of prejudice in part because of this shift in focus from the extreme bigot to the more 'normally' prejudiced person."). Interestingly, even Gordon W. Allport's original thesis in the 1950s recognized "hot emotions" that mediate relations, but this part of his work was largely ignored by scholars with the dawn of the cognitive revolution in the 1960s and has only recently been reclaimed. See id. at 371.

40. See John F. Dovidio et al., Introduction to After Allport, supra note 39, at 1, 5 [hereinafter Dovidio et al, Introduction].

41. Id. (internal quotation marks omitted) (quoting Gordon W. Allport, The Nature of Prejudice 109, 132 (25th anniversary ed. 1979)).

42. See Jared B. Kenworthy et al., Intergroup Contact: When Does It Work and Why?, *in* After Allport, supra note 39, at 278, 279 (enumerating four elements of contact: (1) equal status, (2) common goals, (3) institutional support, and (4) a perception of similarity between the two groups). Later empirical research has challenged Allport's treatment of these as "required" rather than as "facilitating factors." See Thomas F. Pettigrew & Linda R. Tropp, Allport's Intergroup Contact Hypothesis: Its History and Influence, *in* After Allport, supra note 39, at 262, 271.

43. See Dovidio et al., Introduction, supra note 40, at 6–7 ("Intergroup contact that arouses identity or realistic threat increases bias, whereas appropriately structured, cooperative contact can reduce prejudice, at least in part by reducing intergroup anxiety and threat.").

intergroup interactions occasion increased similarity of perspectives and, hence, can reduce prejudicial attitudes and discriminatory conduct.[44] Intergroup contact counters negative stereotypes (again, held by the ingroup members) and supports the development of positive attitudes about outgroup members "by providing sensitizing information to the norms, lifestyles, values, and experiences of others—[that is,] familiarity erases ignorance and paves the way for positive interaction."[45] Gordon W. Allport's work is the foundational literature on the social psychology of intergroup relations and prejudice.[46] A very specific model of integration becomes a prescriptive application of the contact hypothesis to antidiscrimination law through "personal acquaintance, residential contact, occupational contact, and the pursuit of common goals."[47]

B. *Contact and* Brown*'s Mainstreaming Model*

Key social science research on the cognitive nature of prejudice strategically shaped early civil rights law in the context of race. The equation of segregation with discrimination derives from the particular history of racial relations in the United States.[48] As in the context of disability, the law excluded African American children from schools and places of public accommodations.[49] The Supreme Court in *Brown v. Board*

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44. See Christopher G. Ellison & Daniel A. Powers, The Contact Hypothesis and Racial Attitudes Among Black Americans, 75 Soc. Sci. Q. 385, 385 (1994) ("[C]ontact, particularly close and sustained contact, with members of different cultural groups promotes positive, tolerant attitudes. By contrast, the absence of such contact is believed to foster stereotyping, prejudice, and ill will toward these groups.").

45. Chad Trulson & James W. Marquat, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc'y Rev. 743, 745 (2002).

46. Allport offered descriptive insights on the role of social categorization and stereotypes, diagnostic insights regarding the complex causes of prejudice, and prescriptive insights about the alterability of group identities through contact. See Dovidio et al., Introduction, supra note 40, at 1–2; see also Irwin Katz, Gordon Allport's *The Nature of Prejudice*, 12 Pol. Psychol. 125, 126 (1991) (describing Allport's view of contact as rooted in "human relations" and responding to structural problems).

47. Dovidio et al., Introduction, supra note 40, at 9.

48. See, e.g., Brief on Behalf of ACLU et al. as Amici Curiae Supporting Appellants at 17, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1952 WL 82040 ("[It is] an area of certainty that segregation and equality cannot co-exist."); see also *Brown*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal.").

49. See, e.g., Robert A. Burt, Beyond the Right to Habilitation, *in* The Mentally Retarded Citizen and the Law 417, 432 (Michael Kindred et al. eds., 1976) ("[T]he adequacy of in-community resources is not an afterthought. It is central to the inquiry into whether separate treatment for the mentally retarded person is not inherently unequal just as racially segregated education was found inherently unequal in *Brown v. Board of Education*."); see also Fred Pelka, What We Have Done: An Oral History of the Disability Rights Movement 1–4 (2012) (discussing the ways in which *Brown* and the racial justice movement influenced the structure of early disability rights litigation, including a relationship between disability rights leader Jacobus tenBroek and Thurgood Marshall); Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1211–12 (1982) (arguing

of Education found the practice of maintaining separate public schools unconstitutional, emphasizing, in particular, the stigmatic effects of segregation on Black students in public schools.[50] At the district court level, Judge Huxman, who presided over the trial in *Brown*, noted that the plaintiffs' case emphasized that "segregation, racial segregation, [wa]s the prime and controlling factor of the equality of the whole curriculum, and that the[] physical factors [wer]e secondary."[51] The emphasis on segregation as per se detrimental to the "experience" of public education framed the harm in terms of the individual Black student who was psychologically damaged by his exclusion from white students and teachers. The focus on integration as an end goal[52] is clear in, for example, the following cross-examination of the plaintiffs' expert witness:

> Q. You think that the negro child was simply by edict of law forced into the white school, whether the white school was ready to receive him or not, and however much he was in the minority and however much he was left out of [social activities and other] things, he would still be happy merely because he had found his way into the white school, is that right?
>
> A. I think on a long-range plan[, yes,] he would be happier than on the other way.[53]

In the time between the Court's decisions in *Brown I* and *Brown II*, the Court expanded its underlying rationale for its original holding. Rather than focusing entirely on racial segregation's stigmatizing effect on individual Black students, the Court employed the term "discrimination"

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that class counsel in *Pennhurst*, like counsel in *Brown*, ignored the views of parents and guardians who opposed or raised concerns about deinstitutionalization).

50. See 347 U.S. at 492–95. In particular, footnote eleven of the opinion cites the work of social scientists to support the Court's reasoning regarding segregation as harmful to Black children. See id. at 494 & n.11 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [of harm] is amply supported by modern authority."); Michael Heise, *Brown v. Board of Education*, Footnote 11, and Multidisciplinarity, 90 Cornell L. Rev. 279, 281 (2005) (emphasizing the importance of "*how* the Court articulated *Brown*").

51. Transcript of Proceedings June 25 & 26, 1951 at 119, Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951) (Civ. No. T-316) [hereinafter Brown Trial Transcript] (on file with the *Columbia Law Review*).

52. See Martha Minow, In *Brown*'s Wake: Legacies of America's Educational Landmark 9–10 (2010) [hereinafter Minow, In *Brown*'s Wake] ("[W]e believed that the surest way for minority children to obtain their constitutional right to equal educational opportunity was to require removal of all racial barriers in the public school system . . . . Integration was viewed as the means to our ultimate objective, not the objective itself." (internal quotation marks omitted) (quoting Robert Carter, The Unending Struggle for Equal Educational Opportunity, 96 Tchrs. C. Rec. 619, 621 (1995))). But see Sheryll Cashin, The Failures of Integration: How Race and Class Are Undermining the American Dream, at XII (2004) (noting that African Americans have become "integration weary"); Risa L. Goluboff, The Lost Promise of Civil Rights 198–201 (2007) (arguing that "integration" was not the explicit or even primary goal of civil rights leaders, particularly given the holding in *Plessy v. Ferguson* of "separate but equal").

53. Brown Trial Transcript, supra note 51, at 126–27.

to describe a broader harm at play in *Brown*. This, in turn, allowed the Court to invalidate laws enforcing segregation as discriminatory ipso facto because they were "activated by bias and prejudice, and thus for that reason alone . . . violat[ive] [of] the Constitution."[54] Post-*Brown* decisions appear to use the terms "segregation" and "discrimination" interchangeably.[55] As a result, this early association of segregation as discrimination led to a call for integration as a natural remedy and goal of civil rights advocacy. This position received support from a growing social science literature on the value of contact to reduce prejudice and promote social acceptance.[56] In fact, the *Brown* litigation team ushered in a nascent practice of extralegal citations with a nod to Justice Brandeis and his famous "Brandeis brief" in *Muller v. Oregon*.[57]

After *Brown*, the contact hypothesis continued to influence key civil rights legislation—most notably the Civil Rights Act and the Fair Housing Act.[58] Floor debates explicitly referenced contact and integration as a means of shifting social norms of racial and gender discrimination.[59] Yet

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54. See Reginald Oh, Discrimination and Distrust: A Critical Linguistic Analysis of the Discrimination Concept, 7 U. Pa. J. Const. L. 837, 850 (2005) (noting that the Court omitted a remedy in its original opinion); id. at 846 ("In *Brown II*, a case asserting the appropriate remedy for school segregation, the Court managed to go through the entire opinion without ever mentioning the word 'segregation' itself."); see also Albert P. Blaustein & Clarence Clyde Ferguson, Jr., Desegregation and the Law: The Meaning and Effect of the School Segregation Cases 150–53 (1957) (noting that the word "segregation" is not present in *Brown II* even though "one would have expected to have found [it] repeated many times"); Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*, 117 Harv. L. Rev. 1470, 1478 (2004) ("*Brown* is often invoked as an opinion prohibiting states from classifying on the basis of race. But in so recalling *Brown*, we reason from an understanding that emerged from struggles over enforcement of the decision, rather than from an understanding that prevailed at the time the case was decided."). A discussion of how these discursive moves muddied federal equal protection doctrine is beyond the scope of this Article.

55. See generally Oh, supra note 54, at 852–53 (discussing how the linguistic shift by the Court from discussion of "the harms of segregation to the harms of discrimination . . . opened up a linguistic Pandora's box [about] the 'true' meaning of *Brown* and . . . Equal Protection").

56. See, e.g., David L. Hamilton & George D. Bishop, Attitudinal and Behavioral Effects of Initial Integration of White Suburban Neighborhoods, 32 J. Soc. Issues 47, 65–66 (1976) (discussing success of even minimal contact in decreasing whites' anxiety over black entry into their neighborhoods).

57. See generally Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605 (using social science data to support constitutional claims challenging the hours of female laundry workers).

58. See Trulson & Marquart, supra note 45, at 745 ("The equal status contact hypothesis was set out by Allport in the same year as [*Brown*]. *Brown* signaled the beginning of the end of de jure segregation . . . . [T]he contact hypothesis was subjected to numerous tests, most often in the aftermath of racial contact by way of racial desegregation.").

59. Title VI Enforcement in Medicare and Medicaid Programs: Hearings on Enforcement of Title VI of the 1964 Civil Rights Act on Medicare and Medicaid Before the Subcomm. on Civil Rights & Constitutional Rights of the H. Comm. on the Judiciary, 93d Cong. 125 (1973) (statement of Dr. Paul B. Cornely, Past President, American Public

social scientists cautioned legislators that desegregation alone did not reflect the tenets of contact theory: "All interracial contact is assumed to constitute 'integration.'"[60] This is not to undermine or oversimplify the impact of *Brown*; scholars continue to debate *Brown*'s wins and losses,[61] its sociopolitical aftermath,[62] and its macro influence on civil rights movements.[63] Rather, it is to highlight the ways in which integration—spatial integration generating contact—vacillated between an antidiscrimination tool and an end goal itself.

Brown advocated a particular model of integration, mainstreaming Black students *from* all-Black, segregated schools *to* white schools, without attention to the design and quality of the education itself.[64] Post-*Brown* research and scholarship has challenged the view that *Brown* was a "victory" for Black students. The central narrative in *Brown* professed the poorer quality of Black schools relative to white schools and the lasting psychological effects on Black children of being educated in separate schools under sanction of law. Segregation, according to the Court, made Black schools inherently bad. Yet the plaintiffs in *Brown* articulated other reasons for their willingness to join the class action—namely, choice. Black parents did not take issue with the quality of the Black schools; in fact, they praised the teachers and communities built around those schools.[65]

Health Association) (discussing the need for and societal implications of integration of Black students at medical schools).

60. Thomas F. Pettigrew, Another Look at the "Evidence on Busing," Nat'l Ctr. for Res. & Info. on Equal Educ. Opportunity Newsl., May 1973, at 3, 16; see also id. at 5 ("Desegregation is achieved by simply ending segregation and bringing blacks and whites together; it implies nothing about the quality of the interracial interaction. Integration involves Allport's four conditions for positive intergroup contact, cross-racial acceptance, and equal dignity and access to resources for both racial groups.").

61. See, e.g., Goluboff, supra note 52, at 238–70.

62. See, e.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 36–37 (2012) (tracing the political impact of *Brown* in the United States); Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 479–81 & n.32 (1976) (challenging litigation strategy that focused on "maximum integration" but overshadowed parents' interests).

63. See, e.g., Minow, In *Brown*'s Wake, supra note 52, at 6 ("[E]quality in law and policy in the United States increasingly calls for mixing English-language learners with English-speaking students and disabled with nondisabled students, but students' residential segregation and school assignments often produce schools and classrooms divided along lines of race, ethnicity, and socio-economic class.").

64. See James S. Liebman, Desegregating Politics: "All-Out" School Desegregation Explained, 90 Colum. L. Rev. 1463, 1472 (1990) (stating that the focus of desegregation before the 1970s was "simply 'enroll[ing] a few Negro children in formally all-white schools'" (quoting J. Wilkinson, From *Brown* to *Bakke*: The Supreme Court and School Integration, 1954–1978, at 132 (1979))).

65. Interview by Blackside, Inc. with Linda Brown Smith in Topeka, Kan. (Oct. 26, 1985), http://digital.wustl.edu/e/eop/eopweb/smi0015.0647.098lindabrownsmith.html [https://perma.cc/JZ44-XVEY] ("I remember Monroe School, the all-black school that I attended, as being a very good school, uh as far as quality is concerned, the teachers were

For some parents, *Brown* was about school choice and broader principles of segregation as limiting the universe of choices.[66] Interestingly, the mainstreaming model did not account for the Black teachers and administrators in the Black schools that closed post-*Brown*; this issue developed through a related case, *Brooks v. School District of City of Moberly*.[67] These teachers lost their jobs and were not part of the integration model in white schools; while these teachers filed suit and went up to the Eighth Circuit only a few years after *Brown*, their case was ultimately unsuccessful.[68] The mainstreaming model merely moved Black students to white schools without attention to key institutional-design choices such as who would be teaching the students, choices that have a significant effect on the quality of education students of color receive.[69]

Still, *Brown* produced a vetted "civil rights blueprint" with three key elements. First, children became the quintessential (and palatable) sympathetic victims of discrimination, and education became the key spatial and ideological target for integration. Education, as the Court announced in *Brown*, "is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[70] Second, a paternalistic narrative called for integration as a prescription to save Black children from per se deficient, segregated environments. The agency of Black parents and their children, which ignited the flames of racial justice before *Brown*, did not always align with the institutional and structural demands of emerging civil rights movements. Third, shifts in social norms of racial bias were expected byproducts of integration, natural consequences of the law's emphasis on integration as discussed in footnote eleven in *Brown*.[71] At the time, however, there was no real discussion about what happens during contact itself—that is, when you add students of color to white spaces (such as

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very good teachers, they set very good examples for their students, and they expected no less of the student.").

66. Id. ("My father was like a lot of other black parents here in Topeka at that time. They were concerned not about the quality of education that their children were receiving, they were concerned about the amount—or distance, that the child had to go to receive an education.").

67. 267 F.2d 733 (8th Cir. 1959), cert. denied, 361 U.S. 894 (1959) (mem.).

68. See id. at 740 (affirming the trial court's determination that the teachers failed to prove that the school board's decisions were based on racial discrimination).

69. Interview by Kisha Turner with Celestine Diggs Porter in Norfolk, Va. (Aug. 2, 1995), https://library.duke.edu/digitalcollections/media/pdf/behindtheveil/btvct08070.pdf [https://perma.cc/6Z4B-CPQB] ("But . . . they just transferred everybody—you know, moving them from one place to the other. . . . They should have had teachers first, and they didn't do that. . . . It did something to [the students]. It made them hate. . . . [And it made them think] nobody's here for me.").

70. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

71. See supra note 50 and accompanying text.

schools or places of public accommodations), as the Civil Rights Act and its progeny did, what actually happens? Who are the intended beneficiaries, and how do you resolve tension among, at times, competing interests? What is the role of the law in shaping intergroup contact post-physical integration to achieve its antidiscrimination goals? These discussions happened much later when scholars discussed the practical (and sometimes unexpected) challenges of integration such as white flight.[72]

Other historically marginalized groups seeking sociopolitical rights, witness to the traction gained by racial-justice movements, embraced this civil rights blueprint with integration at its core.[73] Yet the sociopolitical contestation around race that led to the Civil Rights Act was largely absent from the road to the Americans with Disabilities Act.[74] Dr. Martin Luther King described the bill that would become the Civil Rights Act as "the child of a storm, the product of the most turbulent motion the nation has ever known in peacetime."[75] By contrast, the ADA was not born in a storm, "but rather in a metaphorical weather inversion in which the long developing pressures were about to be unleashed."[76] The absence of public debate about disability rights as civil rights relegated equality of opportunity to an aspirational goal rather than elevating it to a moral imperative worthy of the remedial power of law.

C. *The Effects of Contact*

Allport cautioned that contact, as originally conceived, was more of a "hypothesis" than a "theory" and even questioned whether contact itself would generally reduce prejudice absent certain positive conditions.[77]

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72. See Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 641–42 (1983) ("To recognize that white flight interferes with the effectiveness of a desegregation remedy in a legally relevant way is the starting point for sensible legal analysis of the remedial problem it poses.").

73. See infra section II.A.

74. Lennard J. Davis, Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest U.S. Minority Its Rights 14–15 (2016) [hereinafter Davis, Enabling Acts]; Michael E. Waterstone, The Costs of Easy Victory, 57 Wm. & Mary L. Rev. 587, 593 (2015) ("There is no organized anti-disability movement, politicians do not regularly take public stands on matters important to the disability community, and views on disability issues are not a factor in judicial selection or confirmation. . . . This lack of conflict reflects low public engagement on disability issues.").

75. Martin Luther King Jr., Hammer of Civil Rights, Nation (Mar. 9, 1964), https://www.thenation.com/article/hammer-civil-rights/ [https://perma.cc/V6W2-WX9A].

76. Davis, Enabling Acts, supra note 74, at 15 ("[T]here was no Selma or Birmingham in the disability movement. . . . [N]ational demonstrations . . . were, and perhaps had to be, coordinated and orchestrated."); see also Mary Johnson, Before Its Time: Public Perception of Disability Rights, the Americans with Disabilities Act, and the Future of Access and Accommodation, 23 Wash. U. J.L. & Pol'y 121, 121–22 (2007) (explaining that the absence of public debate was a deliberate legislative strategy adopted by disability rights advocates and legislative allies).

77. Pettigrew & Tropp, supra note 42, at 271 (noting that "Allport held his optimal factors to be essential conditions for intergroup contact to diminish prejudice").

Contemporary social scientists challenge previous constructions of the contact hypothesis primarily on two grounds. First, the "positive factors" requirement is vague and advances an open-ended prescription with the potential for limitless conditions. As a result, "optimal" contact is impossible.[78] Second, contact's original formulation failed to identify or theorize the actual processes involved in the intergroup contact's effects, or how they would generalize such effects to other situations, the entire outgroup, or other outgroups not involved in the contact.[79] Consequently, contemporary scholars of prejudice have pivoted in their research agendas from an examination of "positive factors" to an explicit search for "negative factors operating in contact situations . . . that may inhibit the development of positive contact outcomes."[80] For example, recent research studies: (1) seek to identify the "moderators and mediators of intergroup contact's effects";[81] (2) adopt a disaggregated methodological approach that examines contact's effects on specific outgroups;[82] and (3) explore the ways in which particular histories and relations between in-groups and outgroups trigger particular emotional responses that may hinder contact's effectiveness.[83]

Meta-analysis of intergroup contact studies shows overall positive results in the reduction of prejudice on the basis of increased contact.[84] However, disaggregation of the data by marginalized group tells a more complex story about the relative success of current versions of contact to mitigate negative intergroup prejudices.[85] The largest effects occurred in the context of contact between heterosexuals and gays and lesbians. Perhaps because the difference is not physically apparent as a relative matter, the effects with this marginalized group were significantly larger than those for studies with racial and ethnic groups.[86] By contrast, studies involving contact between people with disabilities and nondisabled

78. See id. (arguing that "with an ever-expanding list of necessary conditions, it becomes increasingly unlikely that any contact situations could meet these highly restrictive conditions").

79. Id.; see also Daniel A. Miller et al., Effects of Intergroup Contact and Political Predispositions on Prejudice: Role of Intergroup Emotions, 7 Group Processes & Intergroup Rel. 221, 222 (2004) (calling for greater attention to the role of emotions in intergroup relations, particularly in the mediation of intergroup contact and political predispositions); infra sections III.A, IV.A.

80. Pettigrew & Tropp, supra note 42, at 272.

81. Id.

82. Id. at 273.

83. Id.

84. Id. at 266–68 (describing meta-analysis covering data from the 1940s to the present for over 250,000 individuals).

85. Id.; see also Ryan D. Enos, What the Demolition of Public Housing Teaches Us About the Impact of Racial Threat on Political Behavior, 60 Am. J. Pol. Sci. 123, 139 (2016) (challenging contact theory and concluding "that proximity is often not a valid measure of social interaction and that, in segregated contexts, proximity may increase conflict").

86. Pettigrew & Tropp, supra note 42, at 267–68.

persons produced significantly smaller average effects. Those with mental disabilities or mental illness in contact with those without mental disabilities or mental illness produced the lowest average measure of success.[87] Some social scientists argue that, as a result, "[i]t may be especially difficult to achieve truly equal status between groups in these intergroup contexts due to an exaggerated focus on the stigma, and the perceptions of unpredictability and dangerousness often associated with [disabilities]."[88] Notably, these meta-analyses tend to group all people with disabilities together without due attention to key variables such as the nature of the disability (defined, for example, by type, severity, degree of visibility, or functional capacities) or the ways in which disability identity intersects with other identity categories such as race, ethnicity, nationality, class, or gender.

Recent studies by education scholars reveal that meaningful inclusion of students with disabilities in general-education classrooms is more complicated than the classic narratives profess.[89] Historically, states excluded students with known, severe, or visible disabilities who required support from schools and created separate institutions, schools, and classrooms for those students.[90] Similar to racial integration, the physical integration of students with disabilities into neighborhood schools largely resulted in shared physical space rather than inclusion.[91]

The Individuals with Disabilities Education Act (IDEA) assumes that including students with disabilities in general-education classrooms results in progress or benefits to the student, the class, or, as contact theory posits, society more broadly. Interestingly, the IDEA offers no preference for or prioritization of these beneficiaries as a measure of success. Exposure is different from meaningful access or "appropriateness," the operative legal standard codified in the IDEA.[92] If one is to evaluate the success of

87. Id. at 268; see also Patrick Corrigan et al., An Attribution Model of Public Discrimination Towards Persons with Mental Illness, 44 J. Health & Soc. Behav. 162, 172–73 (2003).

88. Pettigrew & Tropp, supra note 42, at 266 (citing examples of other scholars).

89. See, e.g., Allison F. Gilmour, Has Inclusion Gone Too Far?, Educ. Next, Fall 2018, at 9, 16, https://www.educationnext.org/files/ednext_xviii_4_gilmour.pdf [https://perma.cc/QV92-X55Q] (describing how special-education policies and practices have "narrowly focused on [students with disabilities]'s outcomes without considering the confluence of factors that can affect a classroom").

90. See infra notes 114–127 and accompanying text.

91. "Inclusion is always reciprocal. Everyone in an inclusive setting contributes for the good of the whole. If a member receives (or takes) but does not give, he is not included. He's a recipient of charity, a guest, or a thief." Sheryle Dixon, Inclusion—Not Segregation or Integration Is Where a Student with Special Needs Belongs, 39 J. Educ. Thought 33, 35 (2005) (internal quotation marks omitted) (quoting Kathie Snow, Disability Is Natural: Revolutionary Common Sense for Raising Successful Children with Disabilities 391 (2001)).

92. Gilmour, supra note 89, at 10 ("The Individuals with Disabilities Education Act (IDEA), first signed into law in 1975 as the Education for all Handicapped Children Act, mandates that [students with disabilitie]s receive a free appropriate public education (FAPE) in the least-restrictive environment (LRE) possible.").

the disability rights movement purely on the basis of integration—or moving more students with disabilities from segregated educational environments into general-education settings—then the movement has been tremendously successful: More than sixty percent of all students with disabilities spend more than eighty percent of their school day in general-education classrooms alongside their nondisabled peers.[93]

If success, however, includes other factors such as learning outcomes or shifts in negative attitudes or increased social acceptance, the research suggests a more complicated story. In terms of curricular benefits, a review of placement data posits that some students with disabilities exposed to general-education curriculum classrooms are not actually learning the curriculum, and worse, may be falling further behind their peers in academics and skills acquisition.[94] "Though federal laws stress the importance of educating [students with disabilities] in the regular classroom, there is no good evidence that placement there improves the outcomes of these students."[95] Research on the attitudes of nondisabled students toward students with visible disabilities in integrated settings has produced mixed results and varies along a number of axes including type of disability, severity, and visibility and the type of contact (whether structured or unstructured).[96] For example, a number of studies have found that contact with students with intellectual disabilities in general classroom environments does not necessarily promote positive attitudes and, in some cases, may actually lead to more negative attitudes. This is so because the type of contact highlights the aesthetic and functional dissimilarities rather than commonalities between children with and without intellectual disabilities.[97] One national study of close to 6,000 middle school students about their attitudes regarding the inclusion of peers with intellectual disabilities noted that, although prior research claimed contact with and exposure to people with intellectual disabilities directly influences attitudes, students with a classmate with an intellectual disability did not hold attitudes about

93. Id. at 10 fig.1 (citing data from the National Center on Education Statistics, Digest of Education Statistics).

94. Id. at 11–12. For example, one meta-analysis found that students with disabilities score about 1.2 standard deviations below their nondisabled peers in reading, which amounts to a lag of approximately three years of academic growth. Id. at 11. Note that these studies present aggregate data and use umbrella terminology rather than offering disaggregated statistics to account for differences along such dimensions as types of disabilities or visibility of those disabilities, for example.

95. Id. at 11–12. The author focuses on educational outcomes measured by demonstration of content proficiency, progression from grade to grade, and alignment with state and federal educational standards. Id.

96. See, e.g., Gary N. Siperstein et al., A National Study of Youth Attitudes Toward the Inclusion of Students with Intellectual Disabilities, 73 Exceptional Child. 435, 436 (2007) [hereinafter Siperstein et al., Youth Attitudes] (comparing existing studies and highlighting inconsistencies). "Most studies to date have essentially provided only a glimpse of a much larger picture." Id. at 437.

97. Id. at 436.

their peers with intellectual disabilities different from those who did not report this type of contact.[98]

In the employment context, the studies suffer from many of the same inconsistencies in outcomes, perhaps also the result of the absence of disaggregation or due to differences in methodology.[99] Studies agree, however, that the integrative effort—that is, the actual process of increasing the number of people with disabilities in integrative employment settings—has been less successful than in the contexts of education and public accommodations, where increased integration (visibility) is uncontested. Less than twenty percent of people with disabilities are employed in the formal economy as compared with more than seventy-seven percent of nondisabled people.[100] In a comprehensive literature review, one study concluded that employers have become more willing to endorse hiring workers with disabilities after the ADA, though in their actual hiring practices, they are still more likely to hire a nondisabled person.[101] "[E]mployers' fears and negative expectations, rather than the existence of external barriers, . . . create[] obstacles to hiring people with disabilities."[102] Such fears include the costs of accommodations, fear of greater legal restrictions on regulating their employment and its termination, and safety and liability concerns that may arise.[103] Many of these fears have been deemed irrational or inconsequential in research studies, however, suggesting that the average costs of reasonable accommodations, for example, are at most de minimis.[104]

The primary lesson from these studies is that the degree to which disabilities are physically manifest and the particular setting of the contact are positively correlated with the importance of the structure of the contact between people with and without disabilities. Importantly, the takeaway is not that integration should be discarded as a tool of disability

98. Id. at 450–51.

99. See Brigida Hernandez et al., Employer Attitudes Toward Workers with Disabilities and Their ADA Employment Rights: A Literature Review, 66 J. Rehabilitation 4, 5 (2000) (highlighting disparate findings in studies analyzing employer attitudes toward workers with disabilities).

100. Gary N. Siperstein et al., A National Survey of Consumer Attitudes Towards Companies that Hire People with Disabilities, 24 J. Vocational Rehabilitation 3, 3 (2006).

101. Id. at 4.

102. Id.

103. See, e.g., Sharon L. Harlan & Pamela M. Robert, The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation, 25 Work & Occupations 397, 422 (1998) ("The employer's desire to avoid the expense of purchasing equipment, services, or architectural modifications may well be part of the explanation for their resistance [to providing accommodations].").

104. See id. ("[N]ational studies have shown consistently the average cost of providing reasonable accommodation is extremely low."); see also Michael Ashley Stein, The Law and Economics of Disability Accommodations, 53 Duke L.J. 79, 104 (2003) (describing empirical data showing that one-half of accommodations cost less than five hundred dollars and also save companies fifty dollars per dollar spent on accommodations).

antidiscrimination law, nor is it that inclusion should be abandoned as a normative goal. The more granular findings on the structure of contact can help inform remedial designs. For example, in the education context, researchers concluded that students without intellectual disabilities were most likely to engage in superficial interaction—such as passing them a pencil or saying hello in passing—with their peers with intellectual disabilities.[105] Respondents in the study believed that integration, theoretically, helped them develop greater social acceptance of differences but that they were unlikely to move beyond the superficial interactions in school settings.[106] Participants' perceptions of their peers' competence and their expectations of the impact of inclusion on their own education explained more than fifty percent of the variance of youths' willingness to interact with a student with intellectual disabilities.[107] Students supplement their judgments regarding the "competency" of disabled children—developed "predominantly from secondary sources" such as media and conversations with teachers and parents—by engaging in superficial interactions with their peers and by making observations in the classroom setting that would necessarily rely on visible manifestations or markers of competence.[108]

II. THE LOGIC OF DISABILITY RIGHTS LAW

Integration holds a favored prescriptive role in disability rights law.[109] Congress explicitly defines economic, political, and social segregation of people with disabilities as discrimination under the Americans with Disabilities Act.[110] While prior civil rights laws emphasized economic and political exclusion as actionable discrimination, the ADA was the first civil rights legislation to explicitly target social isolation as a form of discrimination. Members of Congress, some of whom had personal experiences with disability,[111] framed disability discrimination as a product of antiquated social norms that inhibit social inclusion and acceptance. As a result, the ADA uniquely articulates as a central goal the elimination of prejudicial attitudes and norms to remedy discrimination. This Part describes the development of integration as a remedial ideology.

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105. Siperstein et al., Youth Attitudes, supra note 96, at 451.

106. Id.

107. Id. at 452.

108. See id. at 450–51.

109. References to "disability rights law" include major federal statutes such as the Americans with Disabilities Act, Rehabilitation Act, Fair Housing Act, and Individuals with Disabilities Act.

110. See infra section II.B.

111. See Davis, Enabling Acts, supra note 74, at 3–6 (discussing bipartisan sponsors of the ADA who either were themselves disabled or had a close family member with a disability—including Representative Tony Coelho, a person with epilepsy, Senator Tom Harkin, who had a deaf brother, and Senator Ted Kennedy, whose son had a leg amputation).

A. *Framing Disability Discrimination as Segregation*

To understand how and why integration gets imported into disability rights law, it is important to first appreciate the way in which discrimination against people with disabilities emerges in public discourse and the unexplored tensions among inclusion, the value of integration, and individual needs. Early nuisance ordinances, known as the "ugly laws," criminalized the sight of disability in public spaces.[112] Inaccessible and inhospitable public spaces policed the presence of disability. This de facto segregation complemented eugenic laws and policies designed to hide and eliminate disability altogether.[113] The shift from publicly endorsed segregation to popular condemnation came about as a result of television and newspaper exposés of state institutions for people with severe intellectual and developmental disabilities. Congressional leaders attributed the widespread abuse and neglect to the physical separation of people with disabilities in these remote institutions, many of which were located in rural communities outside of the public's eye.[114] In 1972, a television news reporter, on a tip from a whistleblower,[115] covertly entered the Willowbrook State School, one of the largest public institutions at the time,[116] and with one cameraman publicized rampant human rights abuses occurring there.[117] Two months

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112. See Schweik, supra note 26, at 23–24; see also Jasmine E. Harris, Processing Disability, 64 Am. U. L. Rev. 457, 466–68 (2015) (discussing local ordinances criminalizing disability in public spaces).

113. See Jasmine E. Harris, Commentary: Forced Sterilization and *Buck v. Bell*, *in* Feminist Judgments: Reproductive Justice Rewritten (Kimberly Mutcherson ed., forthcoming 2019) (manuscript at 3–4) (on file with the *Columbia Law Review*) (describing the early history of eugenic laws and policies in the United States).

114. See, e.g., 134 Cong. Rec. 9384 (1988) (statement of Sen. Simon) ("In spite of progress resulting from laws such as . . . the Rehabilitation Act, this sizeable part of our population remains substantially hidden . . . in institutions[,] . . . in nursing homes[,] . . . in the homes of their families. . . . Because they are hidden, we too easily ignore the problem and the need for change."). Institutions spatially isolated outside of cities and far from community life operated as self-contained campuses and provided local employment for surrounding rural areas. See Wolf Wolfensberger, The Origin and Nature of Our Institutional Models 20 (1975).

115. Dr. Michael Wilkins, a doctor employed by the institution, passed a key to an investigative news reporter, Geraldo Rivera, who entered the institution without notice to capture real-time footage. Geraldo Rivera, Willowbrook: A Report on How It Is and Why It Doesn't Have to Be That Way 9–14 (1972).

116. See N.Y. State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 958 (2d Cir. 1983) (noting that Willowbrook housed over 5,700 people, over sixty-five percent above its official capacity).

117. Geraldo Rivera offered the following testimonial upon first entering Willowbrook:

> [T]he . . . smell of the place staggered me. It was so wretched that my first thought was that the air was poisonous and would kill me. . . . I saw . . . a grotesque caricature of a person, lying under the sink on an incredibly filthy tile floor in an incredibly filthy bathroom. . . . It was skinny. It was twisted. It was lying in its own feces. . . . Sitting next to this thing was another freak . . . making a noise. It was a wailing sound . . . . I said out loud, but to nobody in particular, "My God, they're children."

Rivera, supra note 115, at 3.

after the news story aired, several families of residents filed a class action lawsuit against Willowbrook, *New York State Ass'n for Retarded Children v. Carey*,[118] which, like many civil rights cases in this period, challenged alleged violations of statutory (and, on occasion, constitutional) rights and produced a remedial consent decree.[119]

Federal courts resolving constitutional and statutory claims in the context of institutionalized persons with mental disabilities framed the harm as a product of unnecessary social isolation and segregation.[120] In *Halderman v. Pennhurst State School & Hospital*, for example, the district court held that "[t]hese institutions are the most isolated and restrictive settings in which to [educate, train, and] treat the retarded."[121] Early court decisions laid the conceptual and doctrinal groundwork for the "least restrictive environment" in special education[122] and the "integration mandate" in ADA regulations.[123] Courts held that such isolation was counterproductive to the broader theoretical investment in habilitation (skills training) as a way to "normalize" people with intellectual and developmental disabilities.[124] In *Pennhurst*, the court stated, "The environment at Pennhurst is not

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118. 393 F. Supp. 715 (E.D.N.Y. 1975).

119. Id. at 316, 318; see also Harold Baer, Jr. & Arminda Bepko, A Necessary and Proper Role for Federal Courts in Prison Reform: The *Benjamin v. Malcolm* Consent Decrees, 52 N.Y.L. Sch. L. Rev. 3, 11–12 (2007–2008) (discussing the use of consent decrees in structural reform litigation such as class actions in "school desegregation, mental health, prison reform, environmental, and antitrust litigation").

120. See Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1303 (E.D. Pa. 1977); see also Bruce G. Mason & Frank J. Menolascino, The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface, 10 Creighton L. Rev. 124, 157 (1976) (framing constitutional harms in institutional cases). But see Wyatt v. Stickney, 325 F. Supp. 781, 784–85 (M.D. Ala. 1971) ("There can be no legal (or moral) justification for the State of Alabama's failing to afford treatment—and adequate treatment from a medical standpoint—to the several thousand patients who have been civilly committed to Bryce's for treatment purposes.").

121. 446 F. Supp. at 1303.

122. See Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972) (holding that students with intellectual and behavioral disabilities shall not be excluded "unless such child is provided . . . a constitutionally adequate prior hearing and periodic review" and the school district "shall provide . . . a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability"); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 285 (E.D. Pa. 1972) (recognizing the consent agreement before the court requiring the school district to provide students with intellectual disabilities "a free public program of education and training appropriate to the child's capacity").

123. *Pennhurst*, 446 F. Supp. at 1321–22 (holding that "confinement and isolation of the retarded in . . . Pennhurst is segregation in a facility that clearly is separate and *not* equal" and "equal protection principles . . . prohibit the segregation of the retarded in an isolated institution such as Pennhurst where habilitation does not measure up to minimally adequate standards"); see also 28 C.F.R. § 35.130(d) (2018) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

124. See, e.g., *Pennhurst*, 446 F. Supp. at 1298 (reasoning that "[r]etardation is wholly distinct from mental illness" and "is primarily an educational problem and not a disease

conducive to normalization. It does not reflect society. It is separate and isolated from society . . . . Pennhurst provides confinement and isolation, the antithesis of habilitation."[125] Accordingly, courts saw community-based integration as the natural remedy to support habilitation and inclusion.[126] Pursuant to the Willowbrook consent decree, for example, the court required New York State to reduce the population at Willowbrook from 5,700 to 250 through relocation and integration into "community placements" designed "to ready each resident, with due regard for his or her own disabilities and with full appreciation for his or her own capabilities for development, for life in the community at large."[127]

Pre-ADA, Congress codified emerging doctrinal principles of nondiscriminatory habilitation in Spending Clause legislation, most notably, special-education laws[128] and section 504 of the Rehabilitation Act of 1973 (Rehab Act).[129] The Rehab Act articulated the model language proscribing disability discrimination.[130] Congress responded to concerns about involuntary

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which can be cured through drugs or treatment" but that "with proper habilitation, the level of functioning of every retarded person may be improved").

125. Id. at 1311, 1318.

126. See id. at 1311–12 (discussing relocation of residents from Pennhurst to smaller community-based programs dispersed across nearby counties).

127. N.Y. State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 959 (2d Cir. 1983) (internal quotation marks omitted) (quoting 1 Mental Disability L. Rep. 58, 67 (1976)).

128. See Education of the Handicapped Act, Pub. L. No. 91-230, tit. 6, 84 Stat. 121, 175–88 (1970) (codified as amended at 20 U.S.C. §§ 1400–1482 (2012)) (renamed Individuals with Disabilities Education Act (IDEA) by Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1141–42 (1990) (codified as amended at 20 U.S.C. § 1400(a))); see also Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 5(a), § 612(5)(B), 89 Stat. 773, 781 (codified as amended at 20 U.S.C. § 1412(a)(5)(A)) (conditioning federal education funds on a state's promise to educate children with disabilities "to the maximum extent appropriate" with nondisabled children). The legislative history of the IDEA includes a congressional task force report which presents the findings from a study on the education of children with disabilities—in part, the result of the *Mills* and *Pennsylvania Ass'n for Retarded Children* cases in 1972. Congress notes in its findings that more than half of all children with disabilities, or about four million children, were not receiving appropriate educational services with approximately one million excluded entirely from any public education. Education for All Handicapped Children Act of 1975, sec. 3(a), § 601, 89 Stat. 773, 774.

129. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (2012)); see also Vocational Rehabilitation Services to the Handicapped: Hearings on H.R. 8395 and 9847 Before the Select Subcomm. on Educ. of the Comm. on Educ. & Labor, 92d Congress 196 (1972) [hereinafter Rehab Act Hearings] (statement of Milton Ferris, Chairman, Vocational Rehabilitation and Employment Committee, National Association for Retarded Children, Wakefield, R.I.) ("With the new concept of depopulating our various giant institutions by one-third or more in favor of community facilities, the role of the vocational rehabilitation agency is vital in providing more community services for the severely handicapped involved.").

130. Rehab Act § 504 ("No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); see also Rehab Act Hearings, supra note 129, at 249 (statement of Rep. Carey) ("[W]hy do people [with disabilities] in this country continue to remain

sterilization and segregation "which caused [people with disabilities] to live among society 'shunted aside, hidden, and ignored.'"[131] Congress saw the prohibition of disability-based discrimination as a direct extension of the protections afforded other minority groups identified in the Civil Rights Act of 1964.[132]

The regulation implementing the Rehab Act's nondiscrimination provision was the first regulatory authority on integration in disability rights law. Section 41.51 requires all recipients of federal financial assistance to "administer programs and activities in the *most integrated setting appropriate* to the needs of qualified handicapped persons."[133] Thereafter, plaintiffs used section 504 to challenge segregated public services in education, health care, and housing. Known as the "integration mandate," this interpretation laid the foundational bricks for the ADA's normative orientation.[134]

Constitutional arguments advanced in favor of a more rigorous standard of review of state action in the context of disability focused on the prescriptive role of integration. The Supreme Court, for example, in *City of Cleburne v. Cleburne Living Center, Inc.*, rejected the Fifth Circuit's holding below but did not criticize its dicta that although the city's zoning ordinance did not implicate a constitutionally recognized fundamental right, "[w]ithout group homes . . . the retarded could never hope to integrate themselves into the community."[135] Furthermore, Justice Marshall's

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outside the boundaries of life in our society? . . . Not only do many rehabilitation workers fail to understand that people [with disabilities] can be rehabilitated, but some of them are not too anxious to deal with such people.").

131. Alexander v. Choate, 469 U.S. 287, 296 (1985) (quoting 117 Cong. Rec. 45,974 (1971) (statement of Rep. Vanik)); see also 118 Cong. Rec. 525 (1972) (statement of Sen. Humphrey) ("The time has come when we can no longer tolerate the invisibility of the handicapped in America. . . . [T]oo often we keep children, whom we regard as 'different' or a 'disturbing influence,' out of our schools and community activities altogether . . . .").

132. Compare Rehab Act § 504 ("No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."), with Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2012)) ("No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). This comparison has been recognized by courts as well. See Ams. Disabled for Accessible Pub. Transp. (ADAPT) v. Skinner, 881 F.2d 1184, 1187 (3d Cir. 1989) ("[S]ection 504 . . . [is] commonly known as the civil rights bill of the disabled.").

133. 28 C.F.R. § 41.51(d) (2018) (emphasis added); see also 42 U.S.C. § 15009(a)(1)–(2) (providing for the statutory right of people with developmental disabilities to receive "appropriate treatment, services, and habilitation" in a setting that is "least restrictive of [their] personal liberty").

134. Section 504 of the Rehab Act was "the first federal language that clearly and uncompromisingly guaranteed the civil rights of people with disabilities . . . . Section 504 was only forty-four words, yet its tweet-like length belied the volumes of language it would generate in the coming years." Davis, Enabling Acts, supra note 74, at 11.

135. 473 U.S. 432, 438 (1985) (referencing the Fifth Circuit's decision in this case).

dissent in *Cleburne* underscores the importance of the group home as a site of contact between disabled and nondisabled persons to remedy "outmoded and perhaps invidious stereotypes": "[G]roup homes have become the *primary means* by which retarded adults can enter life in the community. . . . Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of a community."[136] Although the majority ultimately refused to elevate the standard of constitutional review, the Court in *Cleburne* did not dispute the history of segregation experienced by this group and, in fact, underscored the prescriptive value of integration in antidiscrimination law.

B. *The Americans with Disabilities Act and* Olmstead

Integration of people with disabilities into community life is the core normative mission of contemporary federal disability rights law, and, by the time the early ADA bills hit the desk of congressional staffers, integration had also become a familiar legal prescription to remedy the effects of segregation.[137] The ADA best expresses Congress's unwavering commitment to promoting contact between people with and without disabilities as a means of addressing prejudice,[138] a key congressional target.[139] Disability was a civil rights issue "about the right of individuals to have access to the world that everyone else [was] part of."[140] Until 1990, however, people with disabilities did not have the full range of civil rights that nondisabled

136. Id. at 461, 465 (Marshall, J., concurring in the judgment in part and dissenting in part) (emphasis added).

137. See Joseph P. Shapiro, No Pity: People with Disabilities Forging a New Civil Rights Movement 144 (1993) ("[I]n a society where disabled people are remote, we have not understood the need to adjust attitudes, programs, and laws to fit the changing reality of disabled people who now seek independence. As a result, integration . . . has become a primary goal of today's disability movement.").

138. The high costs and economic inefficiencies of segregating people with disabilities played a notable role in the advancement of the ADA. See, e.g., Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 457 (1991) ("Congress expressly determined that the costs of continued segregation of persons with disabilities were outweighed by the benefits of integration—on both an economic and a moral basis."); see also 42 U.S.C. § 12101(a)(8) (finding that discrimination "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"); Emily Blumberg, Recent Development: *Forest Grove School District v. T.A.*, 45 Harv. C.R.-C.L. L. Rev. 163, 163–64 (2016) (noting the concerns over the costs of educating individual students at nonpublic schools); Admissions: Tuition & Fees, The Lab School, https://www.labschool.org/admissions/tuition-and-fees [https://perma.cc/2D5A-689C] (last visited Apr. 6, 2019) (stating that the annual tuition for one student in a D.C. nonpublic school serving students with learning disabilities is between $50,650 and $52,500 per year).

139. See 42 U.S.C. § 12101(a)(2) ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . ."); id. § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including . . . segregation . . . .").

140. Davis, Enabling Acts, supra note 74, at xiii.

citizens enjoyed (with the exception of those rights provided through federally funded programs).

Congressional debates demonstrate the ways in which segregation itself was understood as discrimination: "To be segregated is to be misunderstood, even feared. . . . [O]nly by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression."[141] While economic realities drove congressional action on employment in particular,[142] the overarching goal of the ADA was to shift social norms that prevented people with disabilities from accessing employment, public services, and places of public accommodations.[143]

Regulatory guidance, particularly with respect to public programs and services under Title II, mirrors the integration mandate issued under the Rehab Act.[144] Public entities must "administer services, programs, or activities in the most integrated setting appropriate to the needs of

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141. 136 Cong. Rec. 11,430 (1990) (statement of Rep. Collins); see also H.R. Rep. No. 101-485, pt. 3, at 26 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 449 (recognizing that the ADA intended to end exclusion and segregation of handicapped); id. at 50 (rejecting the separate-but-equal approach to public services for the disabled); S. Rep. No. 101-116, at 20 (1989) (noting the need for a "clear and comprehensive" mandate to integrate the disabled into the "economic and social mainstream of American life"); id. at 6 ("One of the most debilitating forms of discrimination is segregation imposed by others."); 136 Cong. Rec. 11,430 (1990) (statement of Rep. Collins) ("A basic goal which runs through this landmark civil rights legislation . . . is to fully integrate disabled Americans into all aspects of life in our country."); Id. at 10,877 (statement of Rep. Miller) ("[I]t has been our unwillingness to see all people with disabilities that has been the greatest barrier to full and meaningful equality. Society has made them invisible by shutting them away in segregated facilities."); 135 Cong. Rec. 8514 (1989) (statement of Sen. Kennedy) (describing "American apartheid" and the "unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society"); 134 Cong. Rec. 9384 (1988) (statement of Sen. Simon) ("[Persons with disabilities] remain[] substantially hidden. They are hidden in institutions. They are hidden in nursing homes. . . . Because they are hidden, we too easily ignore the problem and the need for change.").

142. People with disabilities were (and continue to be) among the poorest, least employed, and least educated of all minority groups in the United States. For example, people with disabilities are nearly twice as likely as nondisabled people to have an annual household income of $15,000 or less. Davis, Enabling Acts, supra note 74, at x. The poverty and educational inequities are compounded at the intersection of other marginalized identities such as race, national origin, gender, or sexuality. See generally Nanette Goodman et al., Nat'l Disability Inst., Financial Inequality: Disability, Race and Poverty in America (2017) (exploring how the intersection of race and poverty exacerbates the challenges people of color with disabilities face).

143. Pelka, supra note 49, at 505 ("It was an attitudinal thing. That was why we needed the [ADA], to change the attitudes foremost." (quoting Ambassador C. Boyden Gray)).

144. 28 C.F.R. § 35.130(d) (2018) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."); see also James Leonard, The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act, 52 Ala. L. Rev. 91, 144 (2000) ("The clearest expression of the mainstreaming goal is found in the Title II regulation which requires that a 'public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'" (quoting 28 C.F.R. § 35.130(d) (1990))).

qualified individuals with disabilities."[145] The text of this regulation, like that interpreting the Rehab Act's nondiscriminatory provision, includes language requiring individual assessment and design with an eye toward maximizing integration.[146]

The ADA experienced fifteen years of doctrinal growing pains, similar to the early years of the Rehab Act, as courts grappled with threshold questions of eligibility and the scope of remedial coverage.[147] At their core, the doctrinal debates concerned the breadth of congressional intent for this newly minted minority classification. Nevertheless, throughout this period, courts continued to understand Congress's chosen ends and means to remedy disability discrimination as integration.

The Supreme Court's decision in *Olmstead* best illustrates the role of integration as a central organizing principle in disability rights law.[148] Plaintiffs L.C. and E.W., two adult women with intellectual and mental disabilities, challenged their institutional residential placement, arguing that Title II of the ADA and its regulations entitled them to "the most integrated setting appropriate to their needs," which, in their case, was treatment outside of an institutional setting.[149] The facts underlying *Olmstead* developed at the tail end of the deinstitutionalization movement when most large-scale institutions were closed and people with intellectual and developmental disabilities, in particular, were moved into smaller residential, community-based settings.[150] In order to receive necessary medical and support services to which the law entitled them, L.C. and E.W. had to trade participation in the general community for life in an institution. The Supreme Court adopted the Attorney General's view that "undue institutionalization qualifies as discrimination 'by reason of . . .

145. 28 C.F.R. § 35.130(d).

146. Id.; see also supra notes 133–134 and accompanying text (describing the Rehab Act's integration mandate).

147. See, e.g., Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187 (2002) (interpreting the meaning of "substantially limits" in the ADA); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999) (holding that monocular individuals must meet the same evidentiary burden as others under the ADA); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 518–19 (1999) (holding that an individual's ADA eligibility should consider his functionality when he is medicated); Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999) (finding that ADA eligibility should consider measures that mitigate an individual's impairment); Bragdon v. Abbott, 524 U.S. 624, 628 (1998) (addressing the ADA's application to individuals with HIV); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 625 (6th Cir. 2000) (considering whether a student who claims a reading disability is eligible for relief under the ADA).

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

149. L.C. ex rel. Zimring v. Olmstead, 138 F.3d 893, 895, 897–98 (11th Cir. 1998).

150. See Sheryl Larson et al., Inst. on Cmty. Integration/UCEDD, Coll. of Educ. & Human Dev., Univ. of Minn., Residential Services for Persons with Developmental Disabilities: Status and Trends Through 2010, at 17 tbl.1.6 (2012), https://rtc.umn.edu/docs/RISP2010.pdf [https://perma.cc/YQ48-2HMK] (illustrating that the greatest number of institutional closures occurred in the period between 1990 and 1994 (fifty-four closures) and the total number of institutional closures through the end of 1999 was 114).

disability.'"[151] Isolation of people with disabilities reflected an entrenched belief that people with disabilities were inherently unequal, inferior beings.[152] In turn, these negative attitudes, fear, and stereotypes, the government argued, could spill over into employment, public accommodations, and transportation.[153] Furthermore, as both Congress and the Attorney General recognized, they would "perpetuate . . . indefinitely unless efforts were taken to increase interaction between persons with disabilities and non-disabled persons."[154]

Congress amended the ADA in 2008 to directly respond to the Supreme Court's narrow interpretation of its scope of coverage and key remedial provisions.[155] Yet Congress retained its integrative intent: "[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[156] With *Olmstead* in place, private and public litigation today largely focuses on "*Olmstead* enforcement" actions as applied to different public programs and services under Title II—such as employment, residential programs (from institutional settings to community settings), and education—to increase contact between disabled and nondisabled persons.

C. *Integration "Above All" in Disability Rights Scholarship*

Disability rights scholars understandably privilege integration. Professor Jacobus tenBroek's[157] work first shaped the scholarly framework for defining disability discrimination and its potential remedies. In 1966, Professor tenBroek penned two key law review articles advancing principle tenets of disability rights law. In one article, aptly titled *The Right to Live in the World*, Professor tenBroek advanced a social constructivist view of disability discrimination.[158] He deliberately related the nature of disability discrimination to that experienced by racial minorities and women, familiar

151. *Olmstead*, 527 U.S. at 597 (quoting 42 U.S.C. § 12132 (1995)).

152. Id. at 600.

153. Brief for the United States as Amicus Curiae Supporting Respondents at 18, *Olmstead*, 527 U.S. 581 (No. 98-536), 1999 WL 149653.

154. Id.

155. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

156. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328 (codified as amended at 42 U.S.C. § 12101 (2012)). For an in-depth discussion of the ADA Amendments Act of 2008 (ADAAA), see generally Chai R. Feldblum et al., The ADA Amendments Act of 2008, 13 Tex. J. on C.L. & C.R. 187 (2009).

157. Notably, Professor tenBroek, then a political science scholar at the University of California–Berkeley, wrote in the area of constitutional law and slavery. His scholarship became an important part of the research and lawyering by Thurgood Marshall when he was special counsel for the NAACP preparing to argue *Brown v. Board of Education* before the U.S. Supreme Court. Pelka, supra note 49, at 2–3.

158. Jacobus tenBroek, The Right to Live in the World: The Disabled in the Law of Torts, 54 Calif. L. Rev. 841 (1966).

emerging paradigms.[159] He argued that disability law "should be controlled by a policy of integrationism—that is, a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so."[160]

"[I]f there is one goal that has achieved near-consensus status among disability rights supporters, the goal of integration is a strong candidate."[161] The ADA Amendments Act of 2008 underscored the integrative mission, and contemporary legal scholars focus on how to make this a reality. Prescriptive contributions take integration as a shared starting point and proffer ways to make integration meaningful through legislative and regulatory edits, the provision of broader economic and social supports,[162] framing rules to help change attitudes,[163] adoption of alternative theoretical frames,[164] doctrinal interventions,[165] and cross-area discussions about shared vulnerability and human capabilities.[166]

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159. See id. at 858; see also Jacobus tenBroek & Floyd W. Matson, The Disabled and the Law of Welfare, 54 Calif. L. Rev. 809, 814 (1966) ("[T]o an extent only beginning to be recognized, [disability discrimination] is the product of cultural definition—an assumptive framework of myths, stereotypes, aversive responses, and outright prejudices, together with more rational and scientific evidence.").

160. TenBroek, supra note 158, at 843.

161. Samuel R. Bagenstos, Abolish the Integration Presumption? Not Yet, 156 U. Pa. L. Rev. Online 157, 157 (2007), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1003&context=penn_law_review_online [https://perma.cc/H9Z6-DL2B] [hereinafter Bagenstos, Abolish the Integration Presumption?]; Leonard, supra note 144, at 144 (noting that contemporary disability rights scholars agree that "[i]ntegration of the disabled into American society is one of the overarching goals of the ADA").

162. See, e.g., Bagenstos, The Future of Disability Law, supra note 35, at 4; Mark C. Weber, Disability and the Law of Welfare: A Post-Integrationist Examination, 2000 U. Ill. L. Rev. 889, 890–93 (examining disability theories and arguing that welfare law offers a viable theoretical path).

163. See, e.g., Elizabeth F. Emens, Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act, 60 Am. J. Comp. L. 205, 231–32 (2012) (arguing that the ADAAA offers possibilities to consider the ways in which disability itself is understood as a negative state); Elizabeth F. Emens, Framing Disability, 2012 U. Ill. L. Rev. 1383, 1385–88 [hereinafter Emens, Framing Disability] (describing a tension between disability antidiscrimination law and "mainstream discourse about disability" and prescribing "framing rules" for "the moments when nondisabled people make decisions that implicate their future relationship to disability").

164. See, e.g., Michael Ashley Stein, Disability Human Rights, 95 Calif. L. Rev. 75, 76–77 (2007) (developing a "disability human rights paradigm" that combines aspects of the social model of disability, the human right to development, and the human "capabilities" approach).

165. See, e.g., Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153 U. Pa. L. Rev. 579, 602 (2004) (arguing that there is similarity between ADA accommodations and other antidiscrimination remedies because both remedy exclusion from employment through cost shifting); Michael E. Waterstone, Disability Constitutional Law, 63 Emory L.J. 527, 533 (2014) [hereinafter Waterstone, Disability Constitutional Law] (arguing for a more nuanced understanding of equal protection in the context of disability for state laws that facially discriminate against people with disabilities, particularly those with mental disabilities).

166. See, e.g., Martha C. Nussbaum, Women and Human Development: The Capabilities Approach 74–80 (2000) (advancing ten human capabilities to fully realize human

Disability law, however, has incorrectly framed the core problem driving disability discrimination. Congress believes that deficits in experience with and information about disability—largely the product of a history of segregation and social isolation—inform or generate flawed beliefs about the capabilities of people with disabilities (and, in turn, support implicit biases, stereotypical norms, or discriminatory conduct).[167] This framing naturally sets up integration as a choice prescription to correct assumptions about disability.[168] This progression is logical given the dominance of integration in the civil rights remedial playbook, the cognitive theories of prejudice and stereotypes in social psychology during the 1960s and 1970s, and an early theoretical rejection of emotions as irrational and extracognitive.[169] Thus, prescriptively, legal and policy interventions targeted cognitive recategorization of people with disabilities from outgroup members to in-group members through intergroup contact.[170]

If, however, the problem is a broader structural aesthetic and affective distaste for disability that drives the production and maintenance of prejudicial beliefs, as this Article argues,[171] then individual experiences with disability through integration only reach beliefs and knowledge about disability. Contact, then, does not address how people feel when they engage with the aesthetics of disability.[172] Even if one designs that contact

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development); Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 Yale J.L. & Feminism 1, 9–15 (2008) (constructing a theory of shared human vulnerability); Amartya Sen, Development as Capability Expansion, *in* Human Development and the International Development Strategy for the 1990s, at 41, 43–44 (Keith Griffin & John Knight eds., 1990) (discussing foundations of the human capabilities approach).

167. See supra section II.B (discussing ideological underpinnings of the ADA and Congress's desire to remedy social isolation and discrimination faced by people with disabilities).

168. See supra Part I (advancing this argument).

169. See, e.g., Susan T. Fiske, Stereotyping, Prejudice, and Discrimination, *in* 2 The Handbook of Social Psychology 357, 357–64 (Daniel T. Gilbert et al. eds., 1998) (outlining major theoretical trends in research on stereotyping, prejudice, and discrimination); Diane M. Mackie et al., Intergroup Emotions and Intergroup Relations, 2 Soc. Personality Psychol. Compass 1866, 1866–67 (2008) (characterizing traditional approaches to intergroup theory as "overly static").

170. See, e.g., David W. Johnson et al., Interdependence and Interpersonal Attraction Among Heterogeneous and Homogeneous Individuals: A Theoretical Formulation and a Meta-Analysis of the Research, 53 Rev. Educ. Res. 5, 8 (1983) (concluding that cooperative experiences between people with and without disabilities promote a stronger process of acceptance than do competitive and individualistic experiences).

171. See infra Part III.

172. See Michelle Clare Wilson & Katrina Scior, Implicit Attitudes Towards People with Intellectual Disabilities: Their Relationship with Explicit Attitudes, Social Distance, Emotions and Contact, PLOS ONE, Sept. 14, 2015, at 1, 13–14, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0137902 [https://perma.cc/TU7U-9J4F] (finding that negative implicit attitudes are more likely to influence individuals' behavior and "may drive subtly prejudiced non-verbal behaviours, interfering with the formation of positive social relations").

with the ideal facilitators prescribed by social scientists, such as equal status and common goals, the fact remains that the nondisabled person encounters disabled markers that equal status under the law or assigned common tasks may not address.

Contemporary empirical studies show how cognitive-based contact theories fall short.[173] Those in the dominant in-group may discount or reject the new information through cognitive coping processes such as attributional reasoning or cognitive dissonance.[174] Thus, changes in stereotypes and prejudice may not happen even with contact as currently understood and implemented.[175] Other studies suggest the weak effect of contact on the ability to change group stereotypes.[176] Consider this in the race context. Post–Civil War, some white Southern Baptist ministers invited Black ministers and their families to regular Sunday lunches. Ideologically, these ministers and their families sincerely rejected Jim Crow laws and openly advocated for their demise. Yet there are a number of examples of white women, also fervent advocates of desegregation, whose interaction with Black bodies triggered affective reactions of disgust and repulsion. For example, one woman tried to eat at the same table as African Americans but "could not keep her food down, running home in tears":

> Though her conscience was serene, and her enjoyment of this association was real, yet she was seized by an acute nausea which disappeared only when the meal was finished. She was too honest to attribute it to anything other than her anxiety welling up

173. See, e.g., Miller et al., supra note 79, at 224 ("[C]ontact leads to increased knowledge about the outgroup, which should help undermine inaccurate stereotypes. . . . Despite its intuitive appeal, the available evidence offers only partial support for this picture.").

174. Id.

175. See Lauren K. Huckstadt & Kristin Shutts, How Young Children Evaluate People with and Without Disabilities, 70 J. Soc. Issues 99, 110 (2014) (finding that schooling environment had no impact on children's evaluations of individuals with disabilities, regardless of whether the school had dedicated inclusion programs or not); Frank H. Kobe & James A. Mulick, Attitudes Toward Mental Retardation and Eugenics: The Role of Formal Education and Experience, 7 J. Developmental & Physical Disabilities 1, 6 (1995) (finding that short-term educational and direct contact experiences had little impact on fundamental attitudes and beliefs about eugenics and intellectual disability). But see Jacqueline J. Freudenthal et al., Assessing Change in Health Professions Volunteers' Perceptions After Participating in Special Olympics Healthy Athlete Events, 74 J. Dental Educ. 970, 978 (2010) (pointing out that this experience moved volunteers toward a positive perspective from which they were looking forward to interactions with individuals with intellectual disabilities); Jessica L. McManus et al., Contact and Knowledge as Predictors of Attitudes Toward Individuals with Intellectual Disabilities, 28 J. Soc. & Pers. Relationships 579, 580 (2010) (finding that participants' greater positive experiences, such as more contact, with individuals with intellectual disabilities predicted more positive attitudes).

176. See Pettigrew, supra note 60, at 5–7 (finding strong effects of contact on affective measures as well as those tapping overall group evaluation).

> from the "bottom of her personality," as she expressed it, creeping back up from her childhood training.[177]

Although seemingly innate and visceral, and counter to her professed normative beliefs, this woman's embodied response was "grounded within the historical sedimentation of racist myths and representations" of "white [fables] . . . [of] self-aggrandizement: smelly Negroes; hyper-sexed Blacks; ugly baboons; coons; Black savages."[178]

Justin Dart, one of the key architects of the ADA, traveled the country in the 1980s to meet with people with disabilities and collect their experiences of discrimination to advance early bills in the Senate and House of Representatives. Countless entries in his compiled "discrimination diaries" reflect a similar, deep public disgust with disability.[179] The diaries are replete with examples of aesthetic–affective responses to disability that mediate rights.[180] For example, reminiscent of the southern minister's spouse above, Mr. Dart received the following testimony: "My friend Chuck . . . was asked to leave a restaurant where he was dining. Chuck was born without arms and another patron was offended by having to watch Chuck eat with his feet."[181] Chuck triggered disgust among restaurant patrons who could not physically eat in his presence and led the restaurant to deny him access to a public accommodation. Eating with his feet made people think about the typical use of feet and their association with the ground, dirt, and disease. Consequently, Chuck's nonnormative eating style appeared ugly and distasteful to the patrons, thus challenging collective notions of cleanliness and health. Yet if one polled the patrons upon arrival whether they would object to a person with a disability dining with them in the same establishment, they likely would have expressed few (if any) objections in the abstract.[182] Despite these vivid aesthetic and affective depictions of disability discrimination, and the circulation of social science revisions to earlier contact theories of

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177. George Yancy, White Embodied Gazing, the Black Body as Disgust, and the Aesthetics of Un-Suturing, *in* Body Aesthetics, supra note 21, at 243, 245–46 (quoting Lillian Smith, Killers of the Dream 148 (1949)).

178. Id. at 246.

179. See H.R. Rep. 101-485, pt. 2, at 29–30 (1990), as reprinted in 1990 U.S.C.C.A.N. 1, 311–12 (recounting Judith Heumann's testimony regarding her lived experience with segregation and exclusion as a wheelchair user, some based explicitly on aesthetics, such as being asked to leave an auction house because she and her disabled friend were "disgusting to look at").

180. Dart's discrimination diaries have never been fully assembled in one place. There is currently a collective national effort to transcribe the thousands of pages of original letters, testimony, and exhibits provided to Mr. Dart during his national interviews. While I have not transcribed records from each state forum (nor has the web effort produced such transcription), I have access to the submissions, and they are on file with the *Columbia Law Review*.

181. Letter from Tim Harris to President George H.W. Bush (May 22, 1989), *in* Disability Diaries, California, at 22 (unpublished compilation) (on file with the *Columbia Law Review*).

182. Some of this may be due to the social pressure to express a nondiscriminatory view. Given that this testimony dates back to pre-ADA days, there may have been greater discontent expressed at the onset in the hypothetical above.

antidiscrimination,[183] courts and advocates continued to push (and ultimately codify) a cognitive-based contact theory of integration without sufficiently interrogating its structural designs.

Although disability rights scholars have proffered several innovative and notable interventions to increase access for people with disabilities, these prescriptions generally accept the theoretical underpinnings of contact as unproblematic as structured in current disability rights laws. Their remedial frameworks generally do not disrupt the definition of discrimination as segregation per se, nor challenge integration as the law's remedial end goal rather than a means of achieving broader norms of equality. While current scholarly interventions rightly seek to restructure integrative efforts and designs, many of the recommendations double down on integration itself as an end goal and seek to make it more qualitatively meaningful—for example, through welfare law reforms that expand social safety nets and increase opportunities for contact.[184] Professor Elizabeth Emens's work on "framing disability," for example, attributes prejudicial attitudes to pervasive information deficits about the lives of people with disabilities.[185] With this diagnostic lens, Professor Emens's proposed prescription for discrimination focuses on ways to generate more accurate and diversified information at critical moments when nondisabled people are primed to consider disability—for example, when undergoing prenatal testing, purchasing disability insurance, applying for driver's licenses, or reading warning labels.[186] Default framing rules, however, do not engage directly either the aesthetic or affective

183. By the mid to late 1980s and early 1990s, social science researchers revisited earlier theories of prejudice and discrimination that omitted affective processes to better understand the persistence of prejudice and discrimination. See, e.g., Samuel L. Gaertner & John F. Dovidio, The Aversive Form of Racism, *in* Prejudice, Discrimination, and Racism 61, 65 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (advancing an "aversive theory of racism" that whites avoid interactions with Blacks and other minority groups not because they hate them but, rather, because interacting with members of these groups arouses negative emotions of awkwardness, anxiety, and uncertainty).

184. See, e.g., Bagenstos, The Future of Disability Law, supra note 35, at 4. For instance, while Title I of the ADA prevents discrimination in employment, a person with limited mobility may need personal assistance each morning to actually get to the office, without which the person may be unable to remain employed. Personal-assistance services are not part of the employer's duties under Title I to provide "reasonable accommodations," which instead may be covered by Medicaid or private insurance. Consequently, the logic goes, if we invest in health care to include personal-assistance services, then this individual (and others similarly situated) will remain in the workforce and support the nondiscrimination principles of Title I. Employment allows for greater contact with nondisabled persons who, over time, will accept this individual.

185. Emens, Framing Disability, supra note 163, at 1408–10 (explaining and defining "framing rules" as "rules about the information, context, and wording that frame a decision, as well as the timing of the frame").

186. Id. at 1410–34. Emens, however, does consider the ways in which nondisabled people perceive the "happiness" of people with disabilities (the "disability paradox"), but she does not specifically engage aesthetic and affective literatures to rethink the construction of disability discrimination. Id. at 1391–93.

dimension of disability discrimination; instead, affective dimensions are often seen as a positive externality of antidiscrimination laws rather than an explicit target. There is no challenge to the premise that contact theory, as imported into disability rights law, could itself be problematic or less effective without critical disaggregation.[187]

Similarly, Professor Martha Minow's work on the "dilemma of difference"—while grappling with the challenge of institutional designs that must account for, accommodate, and yet not generate or perpetuate difference—does not address the question of aesthetic and affective barriers that disrupt her prescriptive "social relations" approach to law and jurisprudence. Professor Minow contends that prescriptive success requires direct contention with difference and favors a "social relations approach." This approach, like the social model of disability, focuses on the way in which individuals relationally respond to the difference.[188] She calls for a reciprocal and inclusive "dialogue" between the "normal" and "abnormal" to inquire "how all people, with all their differences, should live."[189] In other words, Professor Minow relies on the power of contact to generate more inclusive and reflective institutions without a discussion about the aesthetic–affective process that disrupts the ameliorative benefits of contact. Contemporary critiques of Professor Minow's work in this area focus on questions of participatory inclusiveness—who gets to speak for groups of those marked abnormal—but do not challenge the underlying reliance on contact theory.[190]

Scholars outside of law have called attention to the ways in which outgroup members trigger existential or aesthetic anxieties. Professor Harlan Hahn's work most notably identifies the ways in which people with apparent disabilities make nondisabled people uncomfortable because the former are associated with death, poor health, and asexual, deficient bodies.[191] In this sense, the aesthetics of disability introduced in this Article build on his initial insight, expand upon it, and apply it to a new context—antidiscrimination law.

An interesting debate recently ensued between disability rights scholars Ruth Colker and Sam Bagenstos in the special-education context regarding the default presumption of integration.[192] Professor Colker,

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187. See infra section IV.C (arguing for disaggregation as a prescriptive response to the aesthetics of disability).

188. Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 211–13 (1990).

189. Id. at 213.

190. See Book Note, Talking Through Our Differences, 104 Harv. L. Rev. 1120, 1122 (1991) (arguing that Minow's focus on the relational approach leaves open the possibility that applications of the approach will not be fully inclusive).

191. See, e.g., Hahn, The Appearance of Physical Differences, supra note 26, at 392.

192. Compare Ruth Colker, The Disability Integration Presumption: Thirty Years Later, 154 U. Pa. L. Rev. 789, 792–93 (2006) [hereinafter Colker, The Disability Integration Presumption] (discussing "whether [the integration presumption] continues to be the

reflecting on the ideological and practical problems associated with integration of some students with disabilities,[193] rightfully questions the continued reliance on the "integration presumption" which, she contends, may not benefit the individual child.[194] Professor Bagenstos, by contrast, strongly defends the need for an "integration presumption" in the context of education where students with disabilities have a history of isolation and exclusion.[195] He asserts that the presumption is there to remedy this history of segregated education. Furthermore, he argues that because the IDEA calls for an individualized education program, the presumption shifts depending on the needs of the child.[196] This individualization, he contends, renders Professor Colker's concerns moot.[197] However, Professor Colker's main argument is that the very existence of a presumption endangers the individualization because it is often misunderstood in terms of broader structural priorities such as funding to bring the student into a mainstream classroom at large cost without sufficient attention to developing alternative placements along a continuum between full mainstreaming and separate schools.[198]

III. THE AESTHETICS OF DISABILITY

An examination of what happens with contact in the context of disability reveals, therefore, a more complicated picture. Familiarity may breed contempt rather than acceptance—and visible manifestations of functional capacity matter. Why? Contact triggers aesthetic–affective responses to disability that make it hard for nondisabled people—unaccustomed to the broad spectrum of capabilities of people with disabilities—to overcome deeply rooted and seemingly intuitive aesthetic judgments. This Part argues that disability rights law does not sufficiently account for the ways in which the *aesthetics of disability* mediate rights.

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most appropriate educational strategy for all children with disabilities"), with Bagenstos, Abolish the Integration Presumption?, supra note 161, at 157–58 (arguing that Colker "fails to establish that the IDEA's individualized integration presumption imposes significant costs, and . . . seems to downplay significant benefits of that presumption").

193. Professor Colker is one of the only disability rights legal scholars to question the theoretical and practical application of integration as a normative and policy default in the context of disability rights law. Her analysis is limited to the special-education context. Her critique does not include the reliance on a limited version of contact theory as the underlying prescriptive engine, however. This Article critiques reliance on integration by challenging its application of contact theory and how aesthetics disrupt contact's prescriptive potential of disability rights laws more broadly.

194. Colker, The Disability Integration Presumption, supra note 192, at 796 (questioning the IDEA's "integration presumption because, for some children, it hinders the development of an appropriate individualized educational program").

195. Bagenstos, Abolish the Integration Presumption?, supra note 161, at 163–64.

196. Id. at 161.

197. Id.

198. Colker, The Disability Integration Presumption, supra note 192, at 821.

A. *Why Aesthetics and Affect Matter*

The literature on aesthetics and affect offers key lessons that challenge conventional conceptions of disability discrimination with implications for how lawmakers design legal interventions.[199]

1. *Aesthetics Are Structural and Consequential.* — When we think about discrimination, we do not generally think of appearance-based discrimination as actionable.[200] We tend to think of taste in bodies and minds (including behavioral functionalities) as individual preferences generally beyond legal regulation. Whether someone is attracted to people with hazel eyes who can run a six-minute mile seems to be about individual choice rather than animus.

Yet appearances (and the ways we feel about them) mediate access to economic, social,[201] and political rights and influence behavior.[202] The aesthetic–affective process is "felt at the level of the body but is always socially and culturally conditioned."[203] The aesthetic markers themselves—from eye or hair color to height and build—become visible measures of success, privilege, and, consequently, social control.[204] They shape decisions

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199. Equality law scholars in other areas have challenged the effectiveness of contact theory based on perceptional discrimination. See, e.g., Rhode, Beauty Bias, supra note 25, at 1035; Angela Onwuachi-Willig & Mario L. Barnes, By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White, 2005 Wis. L. Rev. 1283, 1310 (describing findings that discrimination can arise without contact); Russell K. Robinson, Perceptual Segregation, 108 Colum. L. Rev. 1093, 1161–62 (2008) ("[I]t is doubtful that the most common, perfunctory interracial interactions in workplaces and educational contexts help instill a deep understanding of the forces that create perceptual segregation."); Brian Soucek, Perceived Homosexuals: Looking Gay Enough for Title VII, 63 Am. U. L. Rev. 715, 716–18 (2014) (arguing that people who fit a certain perception as gay receive more legal protection).

200. See Tobin Siebers, In/Visible: Disability on the Stage, *in* Body Aesthetics, supra note 21, at 141, 143 ("[Aesthetics appear] raw precisely because they occur in the most mundane circumstances, when feelings of attraction and repulsion, of acceptance and rejection, surge forth with embarrassing immediacy, fierceness, and clarity. . . . [T]hey are so familiar to the experience of being human.").

201. One study of college students found that surveyed students would prefer to marry "an embezzler, drug user, or shoplifter than someone who is obese." Rhode, Beauty Bias, supra note 25, at 27.

202. See Goodley et al., supra note 2, at 199 ("Emotions and embodied feelings need to be part of sociological and critical psychological thinking. . . . Affect theory responds to the ways in which affects are mobilised by economic and cultural forces. Affect theories are interested in the ways in which contemporary citizens are 'thrown into a constellation of affections . . . .'" (quoting Robbie Duschinsky et al., Wait Up! Attachment and Sovereign Power, 28 Int'l J. Pol. Culture & Soc'y 223, 224 (2014))); Mackie et al., supra note 169, at 1874–75 ("Particular emotions have a privileged association with motivation to act . . . . Intergroup emotions are a powerful force for both directing and regulating interactions between social groups." (citation omitted)).

203. Goodley et al., supra note 2, at 199.

204. See, e.g., Michel Foucault, Discipline and Punish: The Birth of the Prison 184 (Alan Sheridan trans., Pantheon Books 1977) (1975) [hereinafter Foucault, Discipline and Punish] ("[N]ormalization becomes one of the great instruments of power at the end

to abort a fetus,[205] the degree of supervision and medical attention given to patients,[206] and job offers and promotions,[207] all of which influence physical,[208] mental,[209] and financial health and quality of life.[210] Appearance also impedes access to accommodations for people with "invisible" disabilities—for example, people who can assimilate or "cover" more easily. As described by a woman with severe bronchial asthma:

> The cortosteroids I take daily give my face a rosy glow; appearances are deceiving. I am the picture of good health, and my disability is not obvious to other people. Yet my history of respiratory and cardiac arrests makes my handicapping condition more life threatening than those with recognizable disabilities.[211]

Aesthetics and emotions also inform assessments about competence, irrespective of actual distinctions in cognitive capacity: Grades and behavioral evaluations assigned students in school[212] and course evaluations of

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of the classical age. . . . [T]he marks that once indicated status, privilege and affiliation were increasingly replaced . . . by . . . degrees of normality indicating membership of a homogenous social body but also playing a part in its classification [and] hierarchization."); John Rajchman, Foucault's Art of Seeing, October, Spring 1988, at 88, 91 (discussing Foucault's concern with "how things were *made* visible, how things were *given* to be seen, how things were '*shown*' to knowledge or to power").

205. See, e.g., Kathleen LeBesco, Revolting Bodies? The Struggle to Redefine Fat Identity 59 (2004) ("[A] survey of married couples revealed that 11 percent would abort a child known in advance to be genetically predisposed to obesity."); Chris Kaposy, Opinion, The Ethical Case for Having a Baby with Down Syndrome, N.Y. Times (Apr. 16, 2018), https://www.nytimes.com/2018/04/16/opinion/down-syndrome-abortion.html (on file with the *Columbia Law Review*) (reporting that when prenatal testing shows Down Syndrome, sixty-seven percent of fetuses are aborted).

206. See, e.g., Eaton, supra note 21, at 43 (discussing a study of more than six hundred health care professionals' aesthetic attitudes toward patients that showed more than fifty percent viewed "morbidly obese" patients (defined as having a Body Mass Index of greater than forty) as "awkward, unattractive, ugly, and noncompliant").

207. See, e.g., Rhode, Beauty Bias, supra note 25, at 27 (discussing studies that show that appearance "skews judgments about competence and job performance," including the assessment of resumes and the rating of written materials).

208. See id. at 35–41 (discussing various unhealthy and dangerous practices stemming from "beauty bias," including foot binding, female genital mutilation, physically restrictive fashion items such as corsets, impure beauty products, risky cosmetic surgeries, and eating and exercise disorders).

209. See id. at 39–41 (describing "mental health difficulties associated with appearance," including depression, anxiety, and low self-esteem).

210. See Hamermesh, supra note 4, at 4 (noting that consumer spending on apparel and beauty-related services and products totaled $400 billion in 2008, or roughly five percent of all consumer spending that year).

211. Testimony by Joy Canfield-Cansleet (Apr. 25, 1989), *in* Disability Diaries, New York, at 233 (unpublished compilation) (on file with the *Columbia Law Review*).

212. See, e.g., Margaret M. Clifford & Elaine Walster, The Effect of Physical Attractiveness on Teacher Expectations, 46 Soc. Educ. 248, 251 (1973) (finding that "attractive children appear to have a sizeable advantage over unattractive ones" in a study of teachers' perceptions of children's educational potential based on normative attractiveness).

faculty are examples.[213] Such considerations can also inform judgments about a person's moral or ethical character[214] and leadership skills.[215] Aesthetic judgments are deeply rooted in the adjudication of rights—for example, juror determinations of a witness's trustworthiness,[216] a defendant's guilt,[217] sentences, and damages awards during trials.[218] They also mediate the rights of others with whom people with disabilities interact. Consider the recent trial of a former Rutgers University Professor, Marjorie Anna Stubblefield, for the sexual assault of D.J., a thirty-two-year-old man with significant mental and physical disabilities (including communication impairments) who the state argued was incapable of sexual consent.[219] D.J. never testified and appeared only once before the legal decisionmakers, when the prosecution invited D.J.'s mother to introduce him to the jury, effectively as a "demonstrative exhibit."[220] After a guilty verdict, one juror reported that she and other jurors found D.J.'s appearance most probative of Stubblefield's credibility: "I couldn't

213. Daniel S. Hamermesh & Amy Parker, Beauty in the Classroom: Instructors' Pulchritude and Putative Pedagogical Productivity, 24 Econ. Educ. Rev. 369, 375 (2005) ("[There is] little doubt that measures of perceived beauty have a substantial independent positive impact on instructional ratings [of faculty] by undergraduate students.").

214. See, e.g., Eaton, supra note 21, at 42 (discussing the "halo bias" or the "halo effect," "a strong tendency to rate individuals perceived to be physically attractive higher than those deemed less attractive with respect to personality traits and characteristics such as intelligence, various types of competence, and trustworthiness").

215. See, e.g., Brad Verhulst et al., The Attractiveness Halo: Why Some Candidates Are Perceived More Favorably than Others, 34 J. Nonverbal Behav. 111, 116 (2010) (finding that physical attractiveness influences assessments of competence in elected leaders).

216. Ronald Mazzella & Alan Feingold, The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis, 24 J. Applied Soc. Psychol. 1315, 1319–25 (1994) (discussing the results of the authors' study, which showed that "mock jurors were less likely to find physically attractive defendants guilty than physically unattractive defendants").

217. Cf. Estelle v. Williams, 425 U.S. 501, 512 (1976) (holding that states cannot force an accused criminal defendant to stand trial before a jury while dressed in identifiable prison garb, consistent with the constitutional presumption of innocence).

218. Researchers designed simulated trial settings to study the effects of appearance. See, e.g., David B. Gray & Richard D. Ashmore, Biasing Influence of Defendants' Characteristics on Simulated Sentencing, 38 Psychol. Reps. 727, 736 (1976) ("The present findings clearly support the existence of a social discrimination hypothesis in the treatment of 'unattractive' convicted offenders for certain kinds of samples."); Cookie Stephan & Judy Corder Tully, The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors, 101 J. Soc. Psychol. 149, 150 (1977) ("[P]hysical attractiveness influenced the decision of the simulated jurors. . . . [They] found in favor of the attractive plaintiff significantly more often than they found in favor of the unattractive plaintiff . . . . The attractive plaintiff was also awarded significantly more money in damages . . . .").

219. State v. Stubblefield, 162 A.3d 1074, 1075 (N.J. Super. Ct. App. Div. 2017).

220. See Daniel Engber, The Strange Case of Anna Stubblefield, N.Y. Times Mag. (Oct. 20, 2015), https://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html (on file with the *Columbia Law Review*) ("His mother led him in, holding up his tiny frame at the armpits. She walked him down the aisle and over toward the jury, as his head rolled back and his eyes seemed to focus on the ceiling lights. 'Jury, this is my son,' she said.").

understand why she did it when I did see [D.J.] . . . . I was like . . . 'You're going to leave your husband and your kids for someone like this?'"[221] This example illustrates that as people with disabilities participate in the adjudication of their rights and those of others, the appearances of disability (and emotions they trigger) directly affect how those rights are interpreted.

In many ways, we have moved from an ideology-based to aesthetics-obsessed body politic.[222] Aesthetic tastes are at the core of aesthetic judgments and present structural challenges, though they are often conceived of as individual preferences. Taste is a "standing disposition for evaluative sentiments regarding some x—whether a particular thing or kind of thing—where these sentiments are partially or fully constituted by or based on pleasurable or displeasurable responses to some of x's properties."[223]

An emergent subfield within aesthetics called "everyday aesthetics" applies the concept of "taste" to everyday objects beyond art, including food, fashion, pop culture, cars, and, for the purposes of this Article, people and their bodies. Collective taste in bodies is a set of aesthetic preferences for particular body types, features, and bodily functional capabilities that govern dominant forms of cultural expression and happiness.[224] It shapes wholesale, or in significant part, individual taste in bodies.[225] While collective taste can vary, increased technology and connectivity have actually decreased the heterogeneity associated with different national, ethnic, and cultural tastes—converging, for example, on the ideals of beauty in the United States.[226]

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221. Harris, Sexual Consent and Disability, supra note 27, at 490–91 (internal quotation marks omitted) (quoting Bill Wichert, Juror Explains Why Professor Was Convicted of Sexually Assaulting Disabled Man, NJ.com (Oct. 3, 2015), https://www.nj.com/essex/index.ssf/2015/10/why_was_professor_convicted_of_sexual_assaulting_d.html [https://perma.cc/78J8-8FYX]). For a discussion of the evidentiary challenges to reliance on aesthetics, see id. at 553–56; see also David M. Perry, Sexual Ableism, L.A. Rev. Books (Feb. 25, 2016), https://lareviewofbooks.org/article/sexual-ableism [https://perma.cc/EML4-LFL2] ("To the juror, sexual desire for a disabled body . . . is a mark of deviance. So although the purpose of the trial, ostensibly, was to determine whether D.J. required protection and to avenge wrongs done to him, the juror's determination of guilt depended on disgust.").

222. See Julie Allan, The Aesthetics of Disability as a Productive Ideology, *in* Ideology and the Politics of In(Exclusion) 32, 32 (Linda Ware ed., 2004) ("Ideology has both remained the same elusive beast and become something else.").

223. Eaton, supra note 21, at 41.

224. Id. at 37–38.

225. This Article uses the term "bodies" throughout to include the functional capacities of bodies as well as minds.

226. See Michelle Lelwica et al., Spreading the Religion of Thinness from California to Calcutta: A Critical Feminist Postcolonial Analysis, 25 J. Feminist Stud. Religion 19, 35–36 (2009) (discussing the exportation of white-European and American ideals of thinness to developing nations).

The aesthetics literature in the context of obesity offers a particularly useful illustration of this point and its relation to disability.[227] A popular justification for an aesthetic distaste for obesity in the United States is that obese people are unhealthy.[228] "Obesity" is one of four standard weight categories defined by the "body mass index" (BMI).[229] In fact, it is the category that reflects the highest percentage of body fat based on weight and height and, statistically, has shown some correlation with health risks such as heart disease.[230] But "fatness"[231] (the presence of more body fat) is not an objective measure of health; it is a negative marker given meaning by a society that defines beauty and desirability, in large part, according to "thinness."[232] On the other end of the BMI spectrum, extreme thinness—despite its association with eating disorders like bulimia or anorexia—is aestheticized and even heavily coveted in some cases. The "pro-Ana" subculture (short for anorexia), for example, follows a "fairy-like goddess[,] . . . [a] young woman with silky blond curls, glimmering white skin, butterfly wings, and a slender body."[233] Ana's "disciples"—predominantly women—characterize bulimia and anorexia as "lifestyle choices, rather than illnesses" counter to "mediocre standards of ordinary people."[234] While perhaps an extreme example, one need not look beyond everyday images in popular media to see more common forms of "pro-Ana" at work with fundamentally the same message: In order to be "happy, healthy, and beautiful one must be remarkably thin."[235] Rather than locating fatness solely within the person, some feminist scholars argue, the norms of thinness reflect broader aesthetic

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227. See, e.g., Eaton, supra note 21, at 42 ("[E]veryday taste has far-reaching moral, psychological, social, and economic ramifications that are nowhere more apparent than in the case of taste in bodies.").

228. See, e.g., id. at 44–45 (describing the "health objection" to "fatness").

229. See About Adult BMI, CDC, https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html [https://perma.cc/S3JW-MYGP] (last updated Aug. 29, 2017).

230. Obesity Definition, Harvard T.H. Chan Sch. of Pub. Health, https://www.hsph.harvard.edu/obesity-prevention-source/obesity-definition/ [https://perma.cc/2WW6-VBDN] (last visited Jan. 25, 2019).

231. I use this term in conjunction with the linguistics and rhetoric of the "fat movement" that tries to detach itself from medicalization and medical terms such as "obesity." See Eaton, supra note 21, at 39 (explaining that it is "standard practice" in the fat movement to use the word "fat" in a value-neutral sense, to combat the medicalization of fat and subvert "the all-too-common notions that fat is unacceptable, inferior, unappealing, and must be eliminated"); Obesity Definition, supra note 230.

232. "[T]he health objection is a red herring, adduced *post facto* to justify and disguise what is at bottom a discriminatory attitude." Eaton, supra note 21, at 45–46. This is not to dismiss the real health risks associated with extreme cases of obesity but rather to point out that the pervasive societal fears of "fatness" are constructed and highly gendered.

233. Lelwica et al., supra note 226, at 19.

234. Id. at 19–20.

235. Id. at 23; see also id. at 20 (revealing that "80 percent of ten-year-old girls have dieted" and 75 percent of "healthy-weight adult women" in the United States believe they are "too fat").

norms, similar to race and gender, that are used to oppress marginalized populations.[236]

2. *Aesthetic–Affective Processes Are Habitual.* — In addition to the structural nature of aesthetics discussed above, recent challenges to the classic theory of emotions[237] should make us rethink our understanding of disability discrimination. Emotions, like anger or disgust, do not have unique genetic or biologically determined fingerprints; they are not inborn but learned.[238] According to the classic view of emotions, certain facial expressions (such as a startled, wide-eyed expression) evolved to convey internal mental states such as fear or anxiety; as a result, humans are innately capable of identifying and distinguishing these "universal" expressions.[239] Many researchers across disciplines accept as uncontested the premise that expressions are biologically based and universally recognized.[240]

This premise underwrites critical institutional designs in the law. For example, several evidentiary objections to the default exclusion of hearsay evidence, such as excited utterances, rely on the belief that people in or immediately after stressful situations are more prone to tell the truth than to lie.[241] Similarly, criminal law views emotions as erratic, involuntary disruptions of the cognitive functioning needed to form mens rea.[242] Thus, the physical reaction is the product of emotion, not reason.[243]

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236. See, e.g., Eaton, supra note 21, at 39 ("Body size is often omitted from the familiar list of features on which modern forms of oppression center—the list often looks like 'race, class, gender, disability, etc.'—and fatism is rarely specifically mentioned . . . . Yet fatism is one of the most ubiquitous . . . forms of oppression in our culture today."); Lelwica, supra note 226, at 21–22 (noting how scholars of the critical feminist framework have highlighted the connections between fatism and other forms of oppression and domination).

237. See, e.g., Lisa Feldman Barrett, Was Darwin Wrong About Emotional Expressions?, 20 Current Directions Psychol. Sci. 400, 400 (2011) (describing the "basic emotion" approach, which "hypothesize[s] that certain physical movements in the face and body are evolved adaptations that are biologically basic in their form and function").

238. See Joseph E. LeDoux & Richard Brown, A Higher-Order Theory of Emotional Consciousness, 114 PNAS E2016, E2022 (2017) (noting that emotional schema are learned).

239. See, e.g., Azim F. Shariff & Jessica L. Tracy, What Are Emotion Expressions For?, 20 Current Directions Psychol. Sci. 395, 397 (2011) (building on Darwin's evolutionary theory of emotions through current research studies).

240. See, e.g., id.

241. See Fed. R. Evid. 803(2); Fed. R. Evid. 803(2) advisory committee's notes to 2012 amendment (explaining the underlying theory justifying the hearsay exception: "[S]imply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication").

242. Take, for example, crimes of passion, which operated in common law as a partial excuse or justification for intentional homicide. Muneer I. Ahmad, A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion, 92 Calif. L. Rev. 1259, 1303–04 (2004); see also Bandes, supra note 25, at 1–2 (describing the broad reach of emotions in law).

243. Goodley et al., supra note 2, at 198 (noting that affect is "a physical response rooted in biology"); Kristyn Gorton, Theorizing Emotion and Affect: Feminist Engagements,

Current neuroscience research reveals that emotions are not discrete voluntary actions, as previous theories speculated, but are instead "constructed." They reflect a series of similar neural connections that are more accurately understood as "emotion categories," a "statistical summary" of neural activity.[244] Think of disgust, for example, as a meta-category like "bread," which can vary in type and kind—white, wheat, banana nut, challah—but which across categories shares some key basic ingredients in common, such as flour or salt. In this way, anger, another emotion, can be compared to a "cupcake," which shares flour and salt as common ingredients but gets combined in different ways with other ingredients to produce something different. Anger, then, is not a particular bodily pattern—like rapid heartbeats or sweaty palms—reducible to its individual properties. The sensory and bodily experiences and our perception of others' emotions are not biologically determined but constructed social realities.[245] However, the physical experience is real (down to the micro-neural level); over time our brains give meaning to these bodily sensations, which are informed by past experiences and contextual cues.[246] In sum, our brains are predictive, and not reactive, to the senses.

Thus, contrary to the view that certain aesthetic, emotional, and, by extension, behavioral responses to disability are visceral, contemporary neuroscience, social science, and humanities studies reveal that aesthetic and affective judgments are habitual.[247] We perceive them to be "visceral" or innate because they produce a biological or somatic response.[248] Classic distinctions between the body and mind (and others) create the perception that bodily reactions are usually distinct from the emotional arena—as are the distinctions between the reasoning mind and the emotional self.

The literature on affect suggests that different emotion categories may be more or less malleable, depending on the aesthetic trigger and the values it either supports or challenges. One study, for example, explored the distinctions between three similar negative emotion categories: anger, disgust, and contempt.[249] The study found that each differs in its antecedent

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8 Feminist Theory 333, 334 (2007) ("[F]eeling is negotiated in the public sphere and experienced through the body.").

244. Barrett, How Emotions Are Made, supra note 18, at 36 (discussing emotion categories through metaphors related to baked goods). This Article modifies and builds on Professor Lisa Barrett's metaphor.

245. See id. at 34–35 (discussing the "neuroconstruction theory" of emotions).

246. See id. at 33–35 (explaining how emotions are constructed socially, psychologically, and neurologically).

247. See id. at 25–26 (advancing a social-constructivist account of emotions to argue that how we process stimulation is "habitual").

248. The work of evolutionary psychologists shows that the habitual nature of aesthetics and affective responses can be problematic in other ways by positioning people with disabilities as "unhealthy" or "sick." See, e.g., Park et al., supra note 16, at 67–69 (discussing evolutionary psychology as the basis for attitudes toward people with physical disabilities).

249. Cendri A. Hutcherson & James J. Gross, The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt, 100 J. Personality & Soc. Psychol. 719, 723–24 (2011).

appraisals and functional behavioral consequences.[250] Anger is evoked by appraisals of self-relevance, leading to direct attack when the perceiver sees the target as a personal or imminent threat.[251] When an individual does not perceive the harm as directly to the self, however, passive avoidance behavior is the likely behavioral response.[252] Anger is more of a fleeting emotion; when the perceived threat subsides, so does the anger toward the individual.[253]

By contrast, individuals who are not imminently engaged in threatening behavior, but whose past behavior suggests they should be avoided to reduce the risk of harm, evoke disgust and contempt.[254] An appraisal that another person is morally untrustworthy produces disgust in the appraiser. Feelings of disgust tend to linger and, as a result, inhibit the appraiser from interacting with objects (including people) marked as contaminated through direct or indirect contact with that object (or person).[255] Finally, contempt seems uniquely related to a judgment that someone is incompetent or unintelligent.[256] Recall the study of nondisabled middle school students' reactions to peers with intellectual disabilities.[257] When nondisabled students saw their peers with disabilities demonstrating their competence in typical ways, they were more likely to seek out more personal interactions.[258] Reliance on the assistance of individuals perceived to be incompetent is understood as a waste of time or resources in a market-driven economy.[259] As a result, nondisabled people may have a stronger, longer-lasting affective response to someone who is nonverbal and whom they perceive to be incompetent than to a wheelchair user with no speech impairments. Moral disgust and contempt last longer than anger, because they are based on assessments of a person's character or competence instead of whether that person presents an imminent threat.[260]

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250. Id. at 733.

251. Id. at 720, 733.

252. See id. at 732–33.

253. See id. at 730 (noting that anger is perceived to last for less time and be easier to remedy than disgust and contempt).

254. Id. at 720.

255. Id. at 721 ("Once marked as capable of malicious behavior, an individual should be consistently avoided, regardless of whether he or she subsequently performs a few benevolent actions.").

256. Id. at 733; see also id. at 721 ("Contempt may function to diminish interaction with individuals who cannot contribute in a meaningful way to the group, especially those individuals judged to be lower or less capable than the self, yet who do not behave in intentionally malicious ways." (citation omitted)).

257. See supra notes 96–98 and accompanying text.

258. Siperstein et al., Youth Attitudes, supra note 96, at 452.

259. See Hutcherson & Gross, supra note 249, at 721.

260. Id.

3. *Aesthetics and Affect Are "Sticky"*[261] *Norms.* — While aesthetics and emotions are habitual, generating prescriptive possibilities, the literature cautions that they are particularly sticky norms.[262] Collective taste in bodies "resists rational persuasion and is often norm-discordant"—that is, illogically conflicts with one's explicitly (and sincerely) held normative commitments.[263] An individual's aesthetic sensibilities are difficult to shift through cognitive reasoning.[264] Thus, a persuasive argument why one ought not be repulsed by Auggie Pullman, R.J. Palacio's fictional protagonist in *Wonder*, a novel about a boy with facial disfiguration,[265] will do little to challenge the underlying repulsion one feels and experiences somatically. This is so, even though Auggie's physical difference has no bearing on his functional capabilities. In this way, taste reflects a "sentimental bias" rooted in cultural perceptions of bodily perfection as the ideal (and prime determinant) of happiness.[266] Even when someone can subscribe to a nondiscriminatory approach to interacting with Auggie, addressing the sentimental bias attached to Auggie's physical appearance is much more difficult and socially taboo and does not automatically follow intent to avoid discriminatory conduct.[267] "Awareness" can establish a troubling dynamic between nondisabled and disabled people which makes equality unimaginable for some people. For example, helping any nondisabled peer, friend, or colleague is seen as a "favor" but transforms into "care" (elevated to an almost charitable status) in the context of disability.[268] Consequently, aesthetic–affective norms—reflected, for example, in collective taste in bodies—resist classic antidiscrimination prescriptions of awareness, education, and retraining.

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261. See Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. Chi. L. Rev. 607, 608 (2000) ("[N]orms stick when lawmakers try to change them with 'hard shoves' but yield when lawmakers apply 'gentle nudges.'").

262. See infra Part IV (offering initial prescriptions on how to reform disability rights law to reflect the stickiness of the aesthetics of disability). For some outgroups—for example, gay men—emotional reactions are "*the* strongest predictor of overall evaluations, stronger even than stereotypes." Miller et al., supra note 79, at 222 (emphasis added).

263. Eaton, supra note 21, at 48.

264. Id. ("A person's sense of, for instance, the beautiful and the ugly, or the sexy and the repulsive, or the dumpy and the chic, is relatively immune to argument and evidence and is rarely undermined by contrary cognitive considerations.").

265. See generally R.J. Palacio, Wonder (2012).

266. Walter Rathjen, Dental Technology, Oral Health and Aesthetic Appearance: A Historical View, 13 Icon 105, 105 (2007) ("[I]n the hierarchy of aspects characterising the aesthetic perception of a person the face is the most important factor.").

267. Eaton, supra note 21, at 48 ("[O]ne can have both the justified belief that fat hatred governs social relations and the conviction that this is morally wrong *yet nevertheless find oneself disgusted by fat bodies.*").

268. See The Goldfish, Blogging Against Disablism Day 2014 - Against "Awareness," Diary of a Goldfish (Apr. 30, 2014), http://blobolobolob.blogspot.com/2014/04/blogging-against-disablism-day-2014_30.html [https://perma.cc/4X68-R57P] ("Give your non-disabled friend a lift? That's a favour. Give your disabled friend a lift? That's *care*, have a medal, bask in the warm-fuzzy of your own philanthropy.").

B. *Examples of Aesthetics in Disability Rights Law*

Aesthetic–affective processes negotiate rights and disrupt the remedial effects of disability antidiscrimination efforts in different spaces.[269] While attentive to the goals and other variables driving the institutional designs and policy choices, this section offers examples of how aesthetics can undermine disability antidiscrimination goals.

1. *Access to and the Quality of Rights.* — The aesthetics of disability negotiate access to and the quality or extent of legal protections. For example, people with disabilities seeking protection from discrimination in employment, public services, and public accommodations must prove as a threshold matter that they meet one of three definitions of "disability"—existence of a present physical or mental impairment that substantially limits one or more life activities, a record of such impairment, or being "regarded as" having such an impairment.[270] Under Title I of the ADA, an individual is protected from disability discrimination in employment when the individual is, statutorily defined, a person with a disability and when they are "qualified," meaning the individual can perform the duties of employment, with or without a reasonable accommodation. Under Title I, failure to provide a reasonable accommodation to an "otherwise qualified individual with a disability" constitutes disability discrimination. Thus, the individual must have an impairment that "substantially limits" but one that also does not disqualify her from performing what employers deem the "essential functions" of a job.[271]

But the aesthetics of disability can directly block access to employment and limit the scope of opportunities available to people with apparent disabilities. Consider the following experience of a job applicant with a visible disability:

> I submitted a resume to a medical health facility. During the interviewing process I was asked if I was . . . really the person in the resume. I could tell from that point on that the interview was over. Cosmetically, my appearance was a deterrent to their organization[272] . . . . [Also,] the agency I [was] assigned for the internship for my master's [degree] refused my application based on concern that my disability was a liability working with the clients. Therefore, I could not experience the internship of my

269. The role of aesthetics in disability rights law is broader than court-based adjudication of these rights for two reasons. First, research shows that civil rights laws are among the least invoked of all laws. See Engel & Munger, supra note 17, at 3. Second, court-based adjudication is on the decline because of the rise of alternative dispute resolution mechanisms (some voluntary and others mandatory waivers of court-based dispute resolution). See, e.g., Judith Resnik, The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75, 162 U. Pa. L. Rev. 1793, 1802 (2014).

270. 42 U.S.C. § 12102 (2012).

271. Id. §§ 12102, 12111; see also Michelle A. Travis, Disqualifying Universality Under the Americans with Disabilities Act Amendments Act, 2015 Mich. St. L. Rev. 1689, 1721.

272. The applicant, Christine Molina, did not state the type of disability but referred to physical disabilities.

> choice. They did explain that they were fearful I would chase away clients due to the awkwardness of my disability.[273]

Reminiscent of the rationale of customer-based preferences in the context of race discrimination, the potential employers above justified the applicant's exclusion on the basis of affective responses of consumers who might experience negative emotions that deter and discourage business.[274]

Aesthetics also affect the ways in which people with less apparent disabilities are received by others in the workplace. Consider the following example: Wendie, an environmental science professor with a serious back injury that compromises her ability to sit, self-identifies as a person with a disability.[275] She is described as a white woman, normatively beautiful, well-dressed, and thin.[276] Her disability caused her to stand and walk more often rather than drive such that she gained physical muscle tone, and given her location in California, acquired a tan.[277] She recalls a conversation with her nondisabled coworker: "I remember saying to somebody that I was severely disabled[,] and they were like[,] '*But you look fabulous*' [s]o I was like '*Well, thank you.*'"[278]

Although Wendie identifies openly as a person with a disability, she may not be received this way. The colleague above received her warmly, but perhaps such response would change if Wendie sought an accommodation from her employer. In addition to the potential hurdles of proving the need for accommodations when one looks "fabulous," Wendie may also receive negative feedback from colleagues who, if her accommodation was granted and they knew this, may see a fundamental disconnect between her beauty and disability and see her as "gaming" or taking advantage of the system, rather than receiving a necessary entitlement under the ADA. The aesthetics of Wendie's disabilities, while perhaps allowing her to avoid certain forms of discrimination or harassment in the workplace, might trigger cognitive dissonance for coworkers and supervisors who, even after the disclosure of her disability, would consider her as "not disabled enough" to claim the perceived benefits of disability rights laws.

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273. Testimonial of Christine Molina, *in* Disability Diaries, Arizona, at 97 (unpublished compilation) (on file with the *Columbia Law Review*). This example predated the ADA, but one would expect there to be a cognizable claim on the merits, assuming evidence of the agency's discriminatory rationale.

274. See, e.g., Roby v. McKesson Corp., 219 P.3d 749, 754 (Cal. 2009) (noting a supervisor's expressed disgust with a plaintiff with severe panic attacks in a wrongful termination case). The plaintiff in *Roby*, a customer service liaison, took medication with physical side effects such as body odor, excessive sweating, and sores on her arms, and her supervisor regularly called her "disgusting." Id.

275. Julie-Ann Scott, Almost Passing: A Performance Analysis of Personal Narratives for Physically Disabled Femininity, 38 Women's Stud. Comm. 227, 242 (2015).

276. Id.

277. Id.

278. Id.

Aesthetic discomfort can also deny litigants with disabilities their due process rights. Recall the prosecutor's affirmative use of the victim, D.J., as an aesthetic demonstrative in the Stubblefield case that discounted Stubblefield's credibility.[279] A case pending before the Eleventh Circuit offers a similar illustration of judicial discomfort and disgust with sensory details about disabilities. There, the trial judge granted the defendant leasing agent's motion to exclude counsel's references to and discussion of the plaintiff's daughter's disabilities as unfairly prejudicial pursuant to Federal Rule of Evidence 403 in a housing discrimination case.[280] While judges maintain considerable discretion regarding questions of evidentiary admissibility, the Federal Rules of Evidence reflect a strong preference for the admission of relevant evidence.[281] Federal Rule of Evidence 403 embodies this sentiment by allowing judges to exclude relevant evidence only when "its probative value is *substantially* outweighed" by "*unfair* prejudice."[282]

The appellant sought to provide the lay jury with relevant contextual and probative details about her daughter K.J.'s Fabry disease[283] and autism. The court held that the only relevant information was that K.J. had multiple disabilities.[284] However, one key issue in the case concerned the appellant's request to install a chain lock on the front door of the apartment to prevent K.J. from eloping as she was highly prone to do.[285] The appellees opposed the request for reasonable modification.[286] In addition, and perhaps most illustrative of the aesthetics point, the appellant sought to contextualize her need to lease the apartment at issue and move from her prior residence as the direct result of K.J.'s cecostomy and fecal incontinence.[287] K.J.'s disability required the appellant or a nurse to flush the stoma, or hole on the surface of the abdomen, twice daily, a task which could take between five and ten hours.[288] The trial court repeatedly

279. See supra notes 219–221 and accompanying text.

280. Brief for the Appellant at 16, Johnson v. Jennings, No. 18-10537-C (11th Cir. Aug. 10, 2018), 2018 WL 3998136 [hereinafter Johnson Appellate Brief].

281. The Federal Rules of Evidence have a very low threshold for the admission of evidence pursuant to Federal Rule of Evidence 401: "Evidence is relevant if . . . it has any tendency to make a fact of consequence more or less likely than without the evidence." Fed. R. Evid. 401.

282. See Fed. R. Evid. 403 (emphasis added).

283. See Johnson Appellate Brief, supra note 280, at 3–4 ("Fabry Disease is [an] extremely rare genetic disorder, which causes episodes of pain, particularly in the hands and feet (acroparesthesias); a decreased ability to sweat (hypohidrosis); cloudiness of the front part of the eye . . . (corneal opacity); problem with the gastrointestinal system; ringing in the ears (tinnitus); and hearing loss.").

284. Id. at 16 (noting that the district court held that a detailing of K.J.'s disabilities "is unnecessary, unduly prejudicial, consumes undue time, and creates distractions contrary to 403").

285. Id. at 6.

286. Id.

287. Id. at 5–6.

288. Id. at 4–5.

denied counsel the opportunity to ask and witnesses the ability to answer questions related to K.J.'s disabilities, including asking the home nurse about her duties: "What difference does all that make except to pander for sympathy and to emphasize the child's disabilities and the vivid and extreme nature of them?"[289]

2. *Determinations of Threat and Risk.* — The aesthetics of disability influence which bodies are surveilled, questioned, abused, and subjected to punishment. The determination of whether a particular body constitutes a direct threat to the safety of the individual or others relies on perception and heuristic devices. Consider how non-normative appearance triggers safety concerns. Dennis Theriault, a man who uses a wheelchair and has cerebral palsy,[290] sued the New Hampshire Department of Safety under Title II of the ADA for requiring him to take a road test before renewing his driver's license.[291] This test was not a mandatory part of the renewal procedure for all applicants.[292] He previously held a license to operate a vehicle equipped with hand controls for eight years without incident, accident, or citation.[293] The licensing examiner required such additional testing when he noticed Theriault's hand shaking, a manifestation of his cerebral palsy.[294] The First Circuit, affirming the trial court's decision, held that although the Department of Motor Vehicles discriminated against Mr. Theriault, such discrimination was permissible under the ADA because of the state's duty to determine whether he posed any "direct threat" to public safety.[295]

Courts have had great difficulty in determining when something constitutes an actual threat versus one that is shaped by prejudicial stereotypes and risk aversion.[296] In Theriault's case, the court said that the state "cannot be faulted for erring on the side of caution when safety

289. Id. at 19.

290. Theriault's cerebral palsy reduced "his ability to use his legs and cause[d] involuntary hand movements. He use[d] a walker to travel short distances and a manual wheelchair or electric scooter for longer distances." Theriault v. Flynn, 162 F.3d 46, 47 (1st Cir. 1998).

291. Id. at 46.

292. Id.

293. Id. at 48.

294. Id. at 46. The issue was whether the state's request that the plaintiff take the test as part of the renewal process violated the ADA's nondiscrimination clause. Id. at 49. Theriault argued that his condition had not changed, and perhaps even had improved, since the last renewal, and that he had never had an accident during his eight years of driving. Id. at 49.

295. Id. ("In the face of a licensing officer's judgment, based on direct observation, that an applicant has a condition that could impact his or her ability to drive safely, we think the Commissioner may reject reliance on an applicant's statement that the condition at issue has not changed materially . . . .").

296. This phenomenon occurs throughout mental disability law as well as in the context of policing, sentencing, and other risk assessments in criminal law. See, e.g., Jessica M. Eaglin, Constructing Recidivism Risk, 67 Emory L.J. 59, 94–99 (2017) (discussing how stereotypes and unconscious bias affect risk assessment in the sentencing context).

is at issue, providing, of course, that the triggering judgment is based not on stereotypes but on observable, relevant circumstances."[297] But part of the stereotypes about cerebral palsy stem from a misunderstanding about the impact of "observable" physical movements on actual impairments and functional capabilities. Cerebral palsy, the most common childhood motor impairment, is also one of the most misunderstood disabilities because of the significant physical manifestations that deviate from typical body movements.[298] The First Circuit here offered the following caveat or admission to its decision: "We recognize that, in so holding, we effectively are saying that it is not 'discrimination' within the meaning of the ADA to rely on the symptoms or appearance of a disability to single out a person for an individualized assessment."[299] The Supreme Court has cautioned in multiple cases, however, that analysis of direct threat requires an individualized assessment in order to avoid biased decisions on the basis of misleading stereotypes.[300] The record in *Theriault* does not say whether the state requested any less invasive means of addressing its safety concerns; one could imagine, for example, a letter or similar document certifying his fitness to drive or explaining what shaking signifies, not for people with cerebral palsy writ large, but for Mr. Theriault.

Another critical example of aesthetics mediating access to public accommodations and services in the name of public safety is policing.[301] Perception is critical to the law enforcement enterprise in which officers, by training, use appearances to manage public safety, determine legitimate interventions, and modulate the use of force. Negative encounters with police officers and other community members—who perceive people with particular markers or engaged in non-normative behaviors to be engaged in "suspicious," potentially criminal behavior—can be quite traumatic

297. *Theriault*, 162 F.3d at 49.

298. See Peter Rosenbaum et al., A Report: The Definition and Classification of Cerebral Palsy, Developmental Med. & Child Neurology, Supp. Feb. 2007, at 8, 8 (defining cerebral palsy as a "group of disorders of movement and posture causing activity limitation attributed to a static disturbance in the developing brain, often accompanied by associated impairments and secondary health conditions"); see also Data & Statistics for Cerebral Palsy, CDC, https://www.cdc.gov/ncbddd/cp/data.html [https://perma.cc/53E9-LWMK] (approximating that 1 in 323 children in the United States has cerebral palsy).

299. *Theriault*, 162 F.3d at 50.

300. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86 (2002) (Hepatitis C); Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (asymptomatic HIV); Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287 (1987) (tuberculosis). I refer to these cases not as illustrations of aesthetics at work but rather for the applicability of the Court's holdings on the individualization of risk assessment to counter implicit biases.

301. See, e.g., City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1772–73 (2015) (discussing the scope of Title II's applicability to policing); Estate of Saylor v. Regal Cinemas, Inc., 54 F. Supp. 3d 409, 425 (D. Md. 2014) ("[C]ourts have also recognized an implicit duty to train officers as to how to interact with individuals with disabilities in the course of an investigation or arrest.").

and even deadly for the individual.[302] Contact in these instances, as the Connor Leibel case in the Introduction showed, is a barrier to the realization of rights and has significant collateral consequences for both the individuals involved and the broader normative mission of the ADA.

In many ways, the current policing debates are about aesthetics at the intersection of race and disability. While the contours of reasonable accommodations in policing continue to develop without input from the Supreme Court,[303] several recent cases underscore the critical importance of the aesthetics of disability at work. In 2016, for example, Arnaldo Rios-Soto, a twenty-seven-year-old Latinx man on the autism spectrum sat in the middle of the street by his group home in Miami holding his favorite toy truck and rocking back and forth.[304] He was practicing self-soothing behavior, common for people who are on the spectrum. Charles Kinsey, Rios-Soto's behavioral specialist (and an African American man), was attempting to get him to go back to the home when law enforcement officers arrived.[305] Despite Kinsey's attempts to inform the officers that Rios-Soto possessed a toy and not a weapon, the officers aimed a rifle at Rios-Soto.[306] One officer fired the rifle, missing Rios-Soto and shooting Kinsey.[307] A cellphone video went viral documenting the moments leading up to the shooting and showing Kinsey lying horizontally on the sidewalk with his arms raised while attempting to identify himself, Rios-Soto, and the toy truck.[308] The officer who shot Kinsey later said that he believed Rios-Soto was making strange, suspicious movements with something in his hands suggesting that he had a weapon.[309]

3. *Spatial Designs and the Built World.* — The aesthetics of disability also affect the design of public and private spaces with both practical and expressive implications. Architectural design is a civil rights issue in the

302. See, e.g., Aneri Pattani & Audrey Quinn, What Happened Next to the Man with Autism Whose Aide Was Shot by Police, Wash. Post (June 22, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/06/22/what-happened-next-to-the-man-with-autism-whose-aide-was-shot-by-police (on file with the *Columbia Law Review*) (discussing the post-traumatic stress experienced by Arnaldo Rios-Soto and the impact on his life).

303. See *Sheehan*, 135 S. Ct. at 1772–74 (dismissing the case on other grounds without reaching the Title II question).

304. Complaint at 2, Soto v. City of North Miami, No. 17-CV-22090 (S.D. Fla. filed June 5, 2017), 2017 WL 2417391.

305. Id. at 8–9.

306. Id. at 10–12.

307. Id. at 12.

308. See Francisco Alvaro et al., North Miami Police Shoot Black Man Who Said His Hands Were Raised While He Tried to Help Autistic Group-Home Resident, Wash. Post (July 21, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/21/fla-police-shoot-black-man-with-his-hands-up-as-he-tries-to-help-autistic-patient/ (on file with the *Columbia Law Review*).

309. Id.

disability context.[310] Disability rights law has made notable strides in the removal of physical barriers to accessing public services and public accommodations (including transportation). Titles II and III place affirmative duties on public and private entities to remove physical barriers to access for people with disabilities.[311] In fact, many credit disability rights' advocates' "U.S. Capitol Crawl"—when physically disabled adults and children dragged their bodies up the front stairs of the U.S. Capitol building—as an influential visual protest of the lack of architectural accessibility, an issue being debated at the time within the walls of the Capitol.[312] Congressional members and staff, forced to walk over the bodies of adults and children with physical disabilities, had mixed reactions—from anger and contempt to pity and disgust. "Framed by the stairs in a striking image, these public bodies communicate[d] what signs and chants alone c[ould] [not]: this building, a symbol of governance and democratic citizenship for all—an embodiment of the nation itself—was not designed with disabled people in mind."[313] In this way, built forms convey "material rhetorics" which "reveal cultural assignments of knowledge and power."[314]

Examination of our contemporary-built world illustrates both the ways in which the promises of the ADA are not yet realized and the role of aesthetics in negotiating necessary changes. The continued prevalence of stairs, for example, may be invisible to nondisabled persons but is experienced by people with mobility impairments as a constant reminder of exclusion. Disabled painter Sunaura Taylor's work, *Thinking Stairs*, illustrates the lived experience of encountering stairs: "When I go out . . . it's as if the stairs are all bright red. It's as if they are all talking about me. But I don't know what they are saying. . . . They are manifestations of something more sinister: discrimination."[315] They communicate that the artist, Taylor, is out of place—that they were designed without her in mind.[316]

Disability design elements such as ramps, curb cuts, handrails, and braille and sound-activated devices are viewed as aesthetically displeasing,

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310. See Hamraie, supra note 38, at 255 (quoting the architect of a building designed with the disabled in mind as saying that "[e]veryone has a right to inspiring, supportive places in which to live and work").

311. See 42 U.S.C. § 12182 (2012); see also 29 U.S.C. § 794 (2012) (prohibiting federal discrimination against individuals on the basis of disability); Architectural Barriers Act, 42 U.S.C. §§ 4151–4156 (predating the ADA and applying only to federally owned or operated buildings).

312. Davis, Enabling Acts, supra note 74, at 191–98 (describing the organizing and political strategy behind the iconic image of the "Capitol Crawl"); Pelka, supra note 49, at 517–18 (describing the "crawl-up" as both "theater" and "a statement").

313. Hamraie, supra note 38, at 1.

314. Id.

315. Id. at 3.

316. Id.

ugly, and disruptive.[317] Defendants in ADA Title II and III actions often make these descriptive claims as part of their legal arguments. For example, in *Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co.*, a plaintiff class of wheelchair users sued defendant Abercrombie & Fitch under Title III of the ADA for "failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities"[318] except when "structurally impracticable."[319] One of Abercrombie's brands, Hollister, marketed as a beach lifestyle brand, included a raised platform as its main entranceway to mirror the entrance to a beach shack. The main entrance, however, was inaccessible to wheelchair users who had to use a back door to gain access to the store. Once inside, customers in wheelchairs had to maneuver around very narrow aisle spaces and ask for assistance in moving physical barriers to the store.[320] Defendants argued that they had complied with the applicable statutory and regulatory requirements for accessibility and therefore could design the outer space in accordance with its desired aesthetic and brand.[321] Abercrombie CEO Mike Jeffries notably remarked during an interview that sex is effectively the "emotional experience" shaping its lifestyle brand and its market which he described as "the cool kids . . . the attractive all-American kid with a great attitude and a lot of friends. A lot of people don't belong, and they can't belong. Are we exclusionary? Absolutely."[322]

The plaintiff class, in turn, argued that Abercrombie impermissibly distinguished between the design of the store and its use to discriminate against people with disabilities: "Because Abercrombie 'uses' its porches as the central feature of the 'Hollister experience,' [that is, to mimic a surfer's beach shack] . . . it denies disabled customers the full and equal enjoyment of that experience in violation of [the ADA]."[323] Although the district court and the dissenting Tenth Circuit judge agreed with this argument, the Tenth Circuit majority found that Hollister was not liable

317. See, e.g., Sui v. Price, 127 Cal. Rptr. 3d 99, 104 (Ct. App. 2011) ("Simply put, there is nothing unreasonable about prohibiting the open, long-term parking of disabled vehicles. The association was perfectly reasonable in prohibiting this unsightly intrusion upon the aesthetics of their common interest development.").

318. 765 F.3d 1205, 1217 (10th Cir. 2014).

319. Id. at 1220.

320. Id. at 1208.

321. Id. at 1217.

322. Benoit Denizet-Lewis, The Man Behind Abercrombie & Fitch, Salon (Jan. 24, 2006), https://www.salon.com/2006/01/24/jeffries/ [https://perma.cc/7AJP-6VM8].

323. *Colo. Cross-Disability Coal.*, 765 F.3d at 1219. Specifically, it violates 42 U.S.C. § 12182(a) (2012). Part of the case before the district court turned on whether the outside "porch" was an "entrance" or a "space," the latter of which must be readily accessible and the former of which could, according to applicable regulations and standards, be an alternative location that is not the main entrance to the establishment. The Tenth Circuit rejected this reading of the case. *Colo. Cross-Disability Coal.*, 765 F.3d at 1221.

for a discriminatory design in violation of the "overarching aims of the ADA."[324]

Private homeowners' associations have also advanced aesthetic arguments in opposition to individuals' efforts to make their homes physically accessible. Recently, a family purchased and received necessary permits to renovate a dilapidated home in a historic neighborhood in Chicago. The renovation plans included an attached two-car garage with a wheelchair ramp, an elevator, and two accessible bathrooms to ensure that their daughter, a wheelchair user, could access the family home and minimize exposure to inclement weather.[325] The Old Town Triangle Association (OTTA) and neighborhood residents vehemently opposed the renovations, particularly the front-facing garage, which they said would disrupt the aesthetic unity of the neighborhood.[326] In a letter to the zoning board, the OTTA President argued that the garage would ruin "one of the beautiful, and historic, lines of Victorian homes in Chicago" and the family "should have put their child's needs first and moved to a neighborhood more conducive to her needs."[327]

Zoning cases also demonstrate the ways in which forced proximity (or the possibility thereof) generates negative affective responses from nondisabled community residents. In *City of Cleburne v. Cleburne Living Center, Inc.*,[328] perhaps the most famous zoning example in disability law, the majority reasoned that the denial of a group home's permit was based on "irrational prejudice" regarding contact with people with disabilities, their functional capacities, and perceived risks, rather than fact.[329] However, while eschewing the use of stereotypes in the case at bar,

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324. *Colo. Cross-Disability Coal.*, 765 F.3d at 1224–25 (holding that it was error to impose liability for the design of Hollister stores based on the "overarching aims" of the ADA and the finding that the porch is a "space" that must be accessible because it is the entrance used by a "majority of people"). The dissent reviewed the overarching aims of the ADA focused on integrated access to public accommodations and noted that "Abercrombie's use of the porch violates the ADA by denying customers who use wheelchairs the opportunity to participate and instead providing them a separate, unequal, non-integrated benefit." Id. at 1229 (McHugh, J., dissenting).

325. Mitchell Armentrout, Dispute Continues over Handicapped-Accessible Garage in Old Town Triangle, Chi. Sun-Times (Nov. 16, 2018), https://chicago.suntimes.com/entertainment/old-town-triangle-garage-dispute-accesible-lincoln/ (on file with the *Columbia Law Review*). The elevator, in particular, was an attempt to minimize the daughter's exposure to inclement weather and to ensure mobility. Id.

326. Jonathan Ballew, Historic Old Town Building Would Look 'Horrible' with Accessible Garage for Teen in Wheelchair, Neighbors Say, Block Club Chi. (Nov. 15, 2018), https://blockclubchicago.org/2018/11/15/historic-old-town-building-would-look-horrible-with-accessible-garage-for-teen-in-wheelchair-neighbors-say/ [https://perma.cc/7CMV-JJGG].

327. Id.

328. 473 U.S. 432 (1985).

329. Id. at 450; see also id. at 462–63 (Marshall, J., concurring in part and dissenting in part) ("Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them.").

the Court determined that state decisions more broadly would be subject to "rational basis" review.[330] The decision shaped antidiscrimination arguments in subsequent zoning cases; objections to group homes now emphasize the "aesthetic and zoning code considerations" rather than "intentional discrimination on the basis of [disability]," making it harder to prove discrimination under applicable laws and regulations.[331]

IV. REFRAMING DISABILITY RIGHTS LAW

Aesthetic–affective responses to disability influence who has access to civil rights, when they may exercise existing rights, and how meaningful rights are for individuals and groups.[332] This Part has three goals. First, this Part proposes a new theoretical lens—the aesthetics of disability—to reorient our understanding of the problem of disability discrimination. Second, this Part uses a recent special-education case to illustrate how the aesthetics of disability operate: (a) as barriers to contact between nondisabled and disabled people, and, (b) when contact does occur, as perversions of the contact theory, exacerbating rather than ameliorating prejudice. Third, this Part sketches a preliminary agenda for responding to the aesthetics of disability in antidiscrimination law.

A. *The Process of Disability Discrimination*

Aesthetic theory can expand our understanding of the nature of disability discrimination and the qualities and meaning attributed to certain physical, mental, sensory, and behavioral markers that shape intergroup contact. The study of aesthetics is apropos because it concerns the way in which "some bodies *feel* in the presence of other bodies" and the

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330. Waterstone, Disability Constitutional Law, supra note 165, at 539.

331. Town & Country Adult Living, Inc. v. Village/Town of Mt. Kisco, No. 02 Civ. 444(LTS), 2003 WL 21219794, at *4 (S.D.N.Y. May 21, 2003) (holding that the plaintiff could not show a likelihood of success on the merits in support of a motion for preliminary injunction because the plaintiff could not show that the zoning board's refusal was due to discriminatory animus rather than aesthetic considerations). Interestingly, at least one plaintiff has argued that the harm associated with denial of zoning permissions to build a rehabilitation and transitional living facility for people with disabilities in the community "deprived [the community] of 'important social, professional, business and economic, political and aesthetic benefits' of associating with disabled persons," invoking the benefits of contact theory. Kessler Inst. for Rehab. v. Mayor of Essex Fells, 876 F. Supp. 641, 652 (D.N.J. 1995); see also Evans v. ForKids, Inc., 306 F. Supp. 3d 827, 836 (E.D. Va. 2018) ("Similarly, the consistent motivations behind a landlord's or residential association's desire not to allow a structural modification to an existing building are either the desire to maintain consistent aesthetics or the desire to prevent structural modifications being performed by any tenant, regardless of disability."); Rudolf Steiner Fellowship Found. v. De Luccia, 685 N.E.2d 192, 193 (N.Y. 1997) (describing how an "entrance [was moved] to the back of the building for safety and aesthetic reasons").

332. See Engel & Munger, supra note 17, at 3 ("Civil rights differ from other forms of legal entitlement [because] [t]hey concern themselves not only with the legal interests of those who belong to civil society but also with the issue of membership itself.").

judgments made about them.[333] Disability has earned a valued position in the contemporary study of aesthetics because it supports the artistic enterprise of thinking about what makes a human being.[334] This project examines the ways in which collective aesthetic and affective reactions to disability have undermined the explicit normative goals of disability rights law.

Disability studies scholars,[335] like aestheticians, have long contended with the role of the body in social exclusion.[336] The "body is both the subject and object of aesthetic production," as "it creates other bodies prized for their ability to change the emotions of their maker."[337] Yet "all bodies are not created equal when it comes to the aesthetic response . . . . The senses revolt against some bodies, while other bodies please them."[338] In this way, aesthetic and affective theories concern representations and how they make us feel. Emotions mediate legislative drafting, interpretation, and enforcement. One's proximity to the "normate," a set of stock physical and functional characteristics, becomes a measure of social acceptance and, to some degree, a collective target for happiness and success.[339] Aesthetic and affective constructions of disability—such as beauty or disgust—then, are tethered to political and social responses of acceptance or rejection, a central concern of antidiscrimination scholars, courts, and legislators.

The birth of statistics in the nineteenth century brought an ideological shift in which averageness became the ideal in North American

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333. Siebers, Disability Aesthetics, supra note 26, at 1 (emphasis added).

334. See id. at 2.

335. Scholars in other disciplines have contended with the social construction of the body as well. See, e.g, Judith Butler, Bodies That Matter: On the Discursive Limits of Sex, at xi (2011) (noting, in the context of gender, that "'sex' not only functions as a norm, but is part of a regulatory practice that produces the bodies it governs").

336. See Siebers, Disability Aesthetics, supra note 26, at 2–3 (discussing how representations of disability generate "aesthetic feelings of pleasure and disgust [that] are difficult to separate from political feelings of acceptance and rejection"). This concept has not been used or theorized, however, in disability rights law. In addition, my concept of aesthetics of disability describes the process of disability discrimination and how representations trigger certain responses based on a collective taste for bodies that excludes people with disabilities. Other disability studies scholars have appropriated aesthetic concepts to advance their ideas. See, e.g., Harlan Hahn, The Politics of Physical Differences: Disability and Discrimination, 44 J. Soc. Issues 39, 42–43 (1988) (defining "existential anxiety" as "the perceived threat that a disability could interfere with functional capacities deemed necessary to the pursuit of a satisfactory life" and "aesthetic anxiety" as "the fears engendered by persons whose appearance deviates markedly from the usual human form or includes physical traits regarded as unappealing").

337. Siebers, Disability Aesthetics, supra note 26, at 1.

338. Id.

339. Garland Thomson, Extraordinary Bodies, supra note 26, at 8 (defining the "normate" as "the social figure through which people can represent themselves as definitive human beings").

culture.[340] An "aesthetic of standardization" works "as [a] metaphor for ableist values and notions of what it means to be human."[341] A body that deviates from the standard, such as one that requires ramps or non-normative workspaces, therefore requires accommodation and disrupts perceived maximum efficiency. Society has three behavioral responses to non-normative bodies—isolation and social exclusion, treatment with the goal of curing or rehabilitating to the established norm, or extinction of differences. State institutions exert disciplinary or bio-power over bodies of groups and individuals in service of these goals.[342] Disability law and policies over time have embodied all of these policy goals—for instance, institutions (segregation), health care (rehabilitation), and eugenics (elimination). This provides broader surveillance authority to police deviations from established norms. These norms are replicated and circulated through academic disciplines to define and teach social norms and proscribe deviance.[343]

The aesthetics of disability, as markers of corporeal deviation, reflect the ways in which certain bodies disrupt a constructed ideal of an optimal "docile body" and its celebrated set of functional capacities that position the ideal market actor.[344] As Michel Foucault described, "[I]t is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals. The individual, that is, is not the *vis-à-vis* of power . . . [but] one of its prime effects."[345]

Aesthetic norms, rather than explicit legal regulation, are the primary instruments of social control. Aesthetics of beauty, form, and behavior are the norms of self-regulation for people with and without disabilities who aspire to normalcy.

1. *Aesthetic Markers of Disability.* — One way to identify the aesthetics of disability in law is to look at the evidentiary markers identified by courts as relevant descriptively, normatively, or legally. Aesthetic markers of

340. See Davis, Disability Studies Reader, supra note 26, at 2–3 (using the birth of statistics to explain how the concept of a norm or average became "paradoxically a kind of ideal, a position devoutly to be wished").

341. Julia Gruson-Wood, Ableism Kitsch: The Aesthetics of Disability-Related Ethics 19 (2009) (unpublished manuscript) (on file with the *Columbia Law Review*).

342. See Foucault, Discipline and Punish, supra note 204, at 135–36, 191–92 (discussing state regulatory control over "docile bodies" that could be "subjected, used, transformed, and improved," in part, through medical science).

343. See, e.g., Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, at xviii (3d ed. rev. 1987) (developing, for the first time, a means to collect and generate statistical data through partnerships with the U.S. Census Bureau).

344. Cf. Foucault, Discipline and Punish, supra note 204, at 138–39 (explaining the theory of the "docile" body).

345. Michel Foucault, Two Lectures, *in* Power/Knowledge 78, 98 (Colin Gordon et al. trans., Harvester Press 1980).

disability generally fall into two categories, appearance-related or behavioral–functional, although these are intimately connected.[346] The following chart reflects common examples of evidence courts have found probative of the existence, absence, knowledge, or functional deficits of disability:

FIGURE 1: EXAMPLES OF AESTHETIC TRIGGERS OF DISABILITY

Sensory Domain	Appearance-Related Marker	Behavioral–Functional Marker
Sight	• Dirt on bodies[347] • "Fatness"[349] • Diaper-like garments for incontinence[351] • Bodily excretions (for example, saliva or drool, urine, feces)[353]	• Incontinence[348] • Absence of eye contact[350] • Infrequent pointing[352] • Walking in a slow, limping, or tilted fashion[354]

346. This Article proposes this original taxonomy for organizational purposes.

347. See, e.g., The Lepers of Molokai, 1 Brit. Med. J. 1026, 1026 (1909) ("The fact that a leper is unclean, however, should be insisted upon; and he gives it as his opinion that, from what little is known of the disease, the segregation of lepers should be rigidly maintained.").

348. See, e.g., M. Swash, New Conceptions in Incontinence, 290 British Med. J. 4, 4 (1985) ("Incontinence, defined as the inadvertent or uncontrolled passage of faeces or urine or both, is a disability associated with profound social consequences.").

349. See, e.g., George L. Maddox & Veronica Liederman, Overweight as a Social Disability with Medical Implications, 44 J. Med. Educ. 214, 217–19 (1969) (discussing the disabling effect of body fat); Lucy Wang, Note, Weight Discrimination: One Size Fits All Remedy?, 117 Yale L.J. 1900, 1922–23 (2008) (discussing legal theories for when "fatness" constitutes a perceived disability, actionable under Title I of the ADA, the "regarded as" prong).

350. See, e.g., Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 50 (5th ed. 2013) [hereinafter Am. Psychiatric Ass'n, DSM-5] (defining criteria for diagnosing Autism Spectrum Disorder as including "[d]eficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language").

351. See, e.g., State v. Stubblefield, 162 A.3d 1074, 1076 (N.J. Super. Ct. App. Div. 2017) (describing a male victim with a disability as "severely disabled with cerebral palsy . . . [who] could not speak words, wore a 'diaper,' and needed assistance in every area of daily living").

352. Id.

353. See, e.g., Elizabeth Altieri, Seeing Disability in New Ways, 203 Counterpoints 109, 111 (2003) (describing a picture "of a child lying prone in a meager hospital gown, bound to a bench, a puddle of urine beneath him"); Tobin Siebers, What Can Disability Studies Learn from the Culture Wars?, 55 Cultural Critique 182, 185–86 (2003) (discussing the ways in which art uses excrement to invoke disability).

354. See, e.g., Rosemarie Garland-Thomson, Shape Structures Story: Fresh and Feisty Stories about Disability, 15 Narrative 113, 119 (2007) (describing wielding a cane, riding a wheelchair, and limping as "obvious disabilities").

Sensory Domain	Appearance-Related Marker	Behavioral–Functional Marker
Sight	• Physical deformities or asymmetries[355] • Blindness or low vision[357] • Facial tics[359]	• Repetitive motions (for example, rocking or stimming)[356] • Use of assistive visual or mobility devices[358]
Sound	• Speech impairments (for example, stuttering, slow, rapid, or disjointed speech)[360]	• Non-verbal communication or muteness[361]

355. See, e.g., Elizabeth F. Emens, Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act, 60 Am. J. Comp. L. 205, 217 (2012) ("[S]ometimes others' attitudes are precisely what is disabling about a particular condition. Think here of facial scarring."); Rosemarie Garland-Thomson, Feminist Disability Studies, 30 Signs 1557, 1558 (2005) [hereinafter Garland-Thomson, Feminist Disability Studies] (explaining that the author uses the phrase "the traits we think of as disability" to refer to "deformities" or "abnormalities").

356. See, e.g., Stephen Poulson, Autism, Through a Social Lens, Contexts, Spring 2009, at 40, 41 ("A characteristic associated with autism is repetitive self-stimulating behavior, called stimming. The most common examples are rocking, pacing, repeating words, stacking objects, and banging one's head, among others.").

357. See, e.g., Garland-Thomson, Feminist Disability Studies, supra note 355, at 1564 (explaining that blindness is a "paradigmatic trope of disability . . . [with] Helen Keller and her predecessor Laura Bridgman as poster children, iconic objects appropriated by the empathetic self that developed during the Enlightenment"); Anne Waldschmidt, Disability Goes Cultural: The Cultural Model of Disability as an Analytical Tool, *in* Culture – Theory – Disability: Encounters Between Disability Studies and Cultural Studies 19, 19 (Anne Waldschmidt et al. eds., 2017) (quoting disability studies scholar Lennard J. Davis remarking, "[D]isability seems so obvious – a missing limb, blindness, deafness. What could be simpler to understand?").

358. See, e.g., Hamraie, supra note 38, at 182 ("Code compliance approaches often required people seeking barrier-free access to convince others of the degree of their impairment through 'biocertification'—for example, use of a wheelchair or assistive device or official proof of a diagnosis."); Jesus Diaz, Does the Universal Symbol for Disability Need to Be Rethought?, Fast Co. (Aug. 10, 2018), https://www.fastcompany.com/90216071/does-the-universal-symbol-for-disability-need-a-redesign [https://perma.cc/W56M-RU8B] (discussing wheelchair use as the universal symbol for disability and why it is insufficient).

359. See, e.g., Andrew Buckser, Before Your Very Eyes: Illness, Agency, and the Management of Tourette Syndrome, 22 Med. Anthropology Q. 167, 170 (2008) ("TS is a disease defined in large part by its visibility and the stigma attached to it; the twitches, jerks, barks, and curses associated with Tourette can produce profound social difficulties.").

360. See, e.g., Speech or Language Impairments, Project IDEAL, http://www.projectidealonline.org/v/speech-language-impairments/ [https://perma.cc/5PLC-SE5F] (last visited Mar. 25, 2019) (defining speech and language impairment as "a communication disorder that adversely affects the child's ability to talk, understand, read, and write" and providing examples including stuttering).

361. See, e.g., Wills v. Gregory, 92 N.E.3d 1133, 1135 (Ind. Ct. App. 2018) (affirming the lower court's modification of child custody after the mother suffered a stroke that resulted in "some disabilities" including aphasia, a speech impairment that "affects [the mother's] ability to express herself"); Harlan Lane, Do Deaf People Have a Disability?, 2 Sign Language

Sensory Domain	Appearance-Related Marker	Behavioral–Functional Marker
Sound	• Accented speech[362] • Appropriate target, volume, and content of speech (for example, self, others, children, profanity)[364]	• Deafness or hearing impairment[363] • Use of assistive listening or communication devices (for example, hearing aids, sign language, communication boards)[365]
Taste	• Tied to developmental activity of sustenance[366]	• Incapacity to self-feed using typical methods (for example, Chuck's use of feet,[367] use of tube, or use of other assistive feeding devices)[368]

Stud. 356, 367 (2002) (discussing muteness as it relates to deafness and disability).

362. See, e.g., Patricia A. Prelock et al., Speech-Language Impairment: How to Identify the Most Common and Least Diagnosed Disability of Childhood, Medscape J. Med. CME (June 11, 2008), https://www.medscape.org/viewarticle/575732 (on file with the *Columbia Law Review*) ("Unfortunately, non-native speakers of English, speakers of various dialects (whose language also varies within dialect), and bilingual or multilingual speakers are frequently classified as language delayed or disordered when, in fact, they are language different.").

363. See, e.g., Waldschmidt, supra note 357, at 19 (including "deafness" among the list of "obvious" disabilities).

364. See, e.g., id. (discussing stuttering and other impairments related to the speed, quality, and control of speech); see also Larry Burd, Language and Speech in Tourette Syndrome: Phenotype and Phenomenology, 1 Current Developmental Disorders Rep. 229, 230 (2014) (listing common vocal tics); Understanding Coprolalia, Tourette Ass'n of Am., https://tourette.org/resource/understanding-coprolalia/ [https://perma.cc/Y4S3-KFWY] (last visited Mar. 21, 2019) ("Coprolalia is the medical term used to describe one of the most puzzling and socially stigmatizing symptoms of Tourette Syndrome—the involuntary outburst of obscene words or socially inappropriate and derogatory remarks.").

365. See, e.g., Oliver J. Corrado, Hearing Aids, 296 Brit. Med. J. 33, 33 (1988) (discussing the use of hearing aids for people with hearing loss).

366. See, e.g., Charlotte Aull Davies, Food and the Social Identities of People with Learning Disabilities, Disability Stud. Q. (2007), http://dsq-sds.org/article/view/21/21 [https://perma.cc/9FVV-DUZC] (examining how "food and its provision are factors in defining and sustaining essentially undesirable, stigmatizing aspects of the social identities of people with learning disabilities").

367. See supra notes 180–182 and accompanying text.

368. See, e.g., Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1103 (C.D. Cal. 2000) (noting that the student's individualized education programs "consistently identified self-feeding as a goal and objective").

Sensory Domain	Appearance-Related Marker	Behavioral–Functional Marker
Taste	• Certain types of foods considered abnormal to ingest[369]	• Incapacity to eat certain foods (e.g., ingestion of liquids only, allergies, dietary restrictions)[370]
Touch	• Tied to awareness of what are normatively appropriate expressions (for example, emotional and physical regulation)[371] • Tied to awareness of where, when, and by whom touching is normatively appropriate (for example, family, friends, same-sex intimacy, public, private)[373]	• "Inappropriate" touching of self or others (for example, public masturbation, excessive hugging)[372] • Motor functioning (for example, capacity to hold a fork, spoon, brush)[374]

369. See, e.g., In re Guardianship of P.D., No. 08CA5, 2009 WL 1830784, at *1 (Ohio Ct. App. May 26, 2009) (describing behaviors of a child with severe autism including "behavior that is both dangerous to himself and to those around him . . . [including] the ingestion of inedible items, including his own feces"); Am. Psychiatric Ass'n, DSM-5, supra note 350, at 329–30 (defining "pica" as a neurological and eating disorder whose key feature is "the eating of one or more nonnutritive, nonfood substances on a persistent basis over a period of at least 1 month").

370. See, e.g., T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist., 806 F.3d 451, 462 (9th Cir. 2015) (noting that the student receiving special education services had a specific accommodation for gastronomy tube feeding); Key Med. Supply, Inc. v. Sebelius, No. 12-752, 2013 WL 1149516, at *3 n.5 (D. Minn. Mar. 19, 2013) (highlighting the association of types of feeding tubes with people with disabilities).

371. See, e.g., Dennis v. Caddo Parish Sch. Bd., No. 09-1094, 2011 WL 3117864, at *3 (W.D. La. July 26, 2011) (noting that "inappropriate touching" and "crude language" were manifestations of special education students' behavioral and emotional disabilities).

372. See, e.g., Matter of William T., 5 N.Y.S.3d 563, 565 (App. Div. 2015) ("Petitioner's chief psychologist, Suzanne Fraser, testified that respondent's developmental disability involved his inability to control his urges to engage in pedophilic and exhibitionist activities—which included several instances of respondent exposing his genitalia to young females or masturbating in public . . . .").

373. See, e.g., Dep't of Educ. v. M.F. ex rel. R.F., 840 F. Supp. 2d 1214, 1221 (D. Haw. 2011) ("M.F.'s disability-related issues caused problems with incidents of 'inappropriate touching.'"); State v. Kleyman, No. 93896, 2010 WL 3042464, at *2 (Ohio Ct. App. 2010) (recounting the testimony of a caregiver for a victim with intellectual and developmental disabilities who described the victim as "socially inappropriate" and unable to "discern appropriate touching from inappropriate touching").

374. See, e.g., Philip v. Ford Motor Co., 328 F.3d 1020, 1025 (8th Cir. 2003) (finding that in determining whether someone meets the ADA definition of disability, "[t]he type of evidence most relevant to establishing a substantial limitation in the major life activity of performing manual tasks, includes, for example, an individual's ability to do household chores, bathe, brush one's teeth, prepare meals, do laundry, etc.").

Sensory Domain	Appearance-Related Marker	Behavioral–Functional Marker
Smell	• Body odors, emissions (for example, sweat, feces, urine, mucus, saliva, gas, vomit, blood)[375]	• Capacity for self-care (for example, bathing, cleanliness)[376]

The chart illustrates a collective preference that emphatically denies vulnerability, mortality, and uncertainty. The sensory markers above aesthetically deviate from the normate.[377] This is why people with these markers stand out.[378] The specific markers themselves may change over time in response to fluctuating visions of "normal" or "typical" but establish an aesthetic baseline.[379] The literature articulates the classic baseline male as "a young, married, [able-bodied,] white, urban, northern, heterosexual Protestant father of college education, fully employed, of good complexion,

375. See, e.g., Fallon v. CTSC, LLC, No. 13-00176, 2013 WL 9853376, at *6 (D.N.M. Sept. 26, 2013) (quoting plaintiff's claim that his employer "discriminated against [him] by perceiving him as having a disability (body odor issue)"); Jackson v. Norton Hosp., No. 3:10CV-762-S, 2011 WL 1399838, at *2 (W.D. Ky. Apr. 13, 2011) (noting that plaintiff claimed "the employees at Norton made fun of her body odor and 'disability'"); Smallwood v. Brown, 10 Vet. App. 93, 97 (2007) (describing appellant's "foot disability" as "excreting a particularly foul-smelling drainage that seems to suggest that he may qualify as an exceptional case [for disability benefits]").

376. See, e.g., Barnett v. Barnhart, 362 F.3d 1020, 1022 (8th Cir. 2004) (noting the discrepancy between petitioner's statement to the Social Security Administration that after the disability, she continued to perform daily tasks such as "personal hygiene and most household tasks" and her statement at the evidentiary hearing that "she could not manipulate her fingers or use her right wrist"); Cason v. Rochester Hous. Auth., 748 F. Supp. 1002, 1005 (W.D.N.Y. 1990) ("In some instances, the social worker conducts a nursing evaluation, during which a variety of specific questions concerning the applicant's disability, personal hygiene and ability to live independently are asked."); Jordan v. Shulkin, No. 16-0073, 2017 WL 2124515, at *4 (Vet. App. 2017) ("The Board failed to discuss whether this evidence rose to the level of an inability to maintain personal hygiene, as required for 100% disability rating, much less whether it was evidence of 'neglect of personal appearance and hygiene' as mentioned in the exemplary symptoms of a 70% disability rating.").

377. Garland Thomson, Extraordinary Bodies, supra note 26, at 6–7; see also Garland-Thomson, Representation and Disability, supra note 24, at 524 ("[W]e are expected to look, act, and move in certain ways so we'll fit into the built and attitudinal environment. If we don't, we become disabled.").

378. See Allan, supra note 222, at 35–36 ("[W]e live in a society of the spectacle. [O]ur perceptions of reality are structured by a series of aestheticized images of it through the media and advertising." (citations omitted) (citing Slavoj Zizek, Mapping Ideology (1994))).

379. For example, note the evolution of preferences for the ideal female body type and form from Marilyn Monroe to Kate Moss to Kim Kardashian. See Julia Belluz, Our Changing Ideal of Female Beauty, in One Gif, Vox (Jan. 21, 2015), https://www.vox.com/2015/1/21/7862237/beauty-ideal-by-decade [https://perma.cc/URL5-L437] ("The ideal body type for women fluctuates with every passing decade: the voluptuous curves of the 50s (think Marilyn Monroe) gave way to . . . 'heroin chic' in the 90s (Kate Moss). Now, big butts . . . are the thing (Kim Kardashian).").

weight and height, and a recent record in sports."[380] The sensory markers above delineate "disqualified bodies,"[381] or "spoiled identities,"[382] relative to a fictional unmarked, neutral body. They serve two functions: to signal one's identity as "typical" and delineate "atypical." Notice the four normative values represented—self-reliance and independence, intelligence and reason, beauty, and health.[383]

Certain abilities—that is, functional capacities—are marked to the extent that they deviate from those abilities representative of "typically" functioning individuals advancing core values. In the context of disability, behaviors that are popularly associated with certain disabilities, such as head banging, once seen as a biologically based marker of intellectual or developmental disabilities, are now understood differently as social responses. An expert witness for the Department of Justice, in *Wyatt v. Stickney*,[384] an institutional-reform case in Alabama, testified that "eccentric mannerisms, the rocking back and forth, peculiar behavioral mechanisms . . . sit[ting] in a semi-stupor in a place, without any activity . . . is due to neglect and is not an outcome of [intellectual disability] itself."[385] Although media attention helped advance the movement for deinstitutionalization, it also provided vivid (and often the first and only) representations of intellectual disabilities like those of the Willowbrook State School in 1976.[386]

Aesthetic theories help explain why particular markers highlighted by the chart above are disfavored.[387] In the context of disability, three

380. Erving Goffman, Stigma: Notes on the Management of a Spoiled Identity 128 (First Touchstone ed., Simon & Schuster 1986) (1963).

381. Michelle Jarman et al., Theorising Disability as Political Subjectivity, 17 Disability & Soc'y 555, 557 (2002).

382. Goffman, supra note 380, at 19.

383. See infra notes 384–387 and accompanying text.

384. 344 F. Supp. 387 (M.D. Ala. 1972), aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

385. Brief of Amici Curiae American Ass'n on Mental Deficiency et al. at 33, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (No. 72-2634). The expert also noted that there is ample documentation that "individuals who come to institutions and can . . . talk will stop talking, who come to institutions and can feed themselves will stop feeding themselves; in other words, [there is] a steady process of deterioration." Stanley S. Herr, Rights and Advocacy for Retarded People 108 (1983) (internal quotation marks omitted) (quoting Dr. Gunnar Dybwad).

386. See supra section II.A (discussing the early framing of disability and its introduction to a national audience).

387. See, e.g., Jonathan Drimmer, Comment, Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 UCLA L. Rev. 1341, 1350 n.36 (1993) ("Another problem commonly faced by people with disabilities is that society often considers a disability to be 'ugly,' and believes that people with unattractive exteriors have unattractive interiors. People who are 'unattractive' receive substantially worse treatment by society."); see also Harlan Hahn, Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas, 4 S. Cal. Rev. L. & Women's Stud. 97, 141 (1994) ("The social and cultural values that have defined the prominent attributes of a visible disability as physically unattractive may deprive disabled

aesthetic values have shaped public attitudes and conduct: beauty,[388] effortlessness, and health. The law reinforces health and beauty in a number of ways—for example, damages awards in the personal injury context[389] or, as previously discussed, architectural design.[390]

While beauty and health are more straightforward as highly salient and accepted aesthetic values,[391] effortlessness requires some explanation. The effortless value helps explain the ways in which society ranks and identifies functional capacity and incapacity. The collective taste for effortlessness—the collective taste for bodies, movements, speech, writing, intellectual endeavors, or other objects that appear effortless—directly conflicts with representations and perceptions of people with apparent disabilities. Though we socially praise effort, "we prize effortlessness."[392] Our modern appreciation for the effortlessness displayed by some athletes and artists may derive from foundational aesthetic theories valuing "effort" or "effortlessness."[393] Perceptions of effortlessness are "highly cognitively

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adults of many significant sources of satisfaction in life, from personal relationships to employment.").

388. People have used disability as a vitriolic synonym for "ugly." See, e.g., Davila v. FedEx Trade Sys., No. L-08-74, 2010 WL 346139, at *6 (S.D. Tex. Jan. 22, 2010) (recounting deposition testimony in a sexual harassment suit alleging that an employee at the defendant's company "made deprecating comments about her gender and physical disability" and "always said that she was ugly and that she was fat and that she was huge"); Torres v. Ind. Family & Soc. Servs. Admin., 905 N.E.2d 24, 26 (Ind. Ct. App. 2009) (recounting how the subject of a restraining order verbally and physically attacked another person with marks of physical disability while shouting, "You sit there just staring at me and not blinking. At least I don't have your disability. I'm not ugly. I just can't hear well.").

389. See Kershaw v. Tilbury, 8 P.2d 109, 110 (Cal. 1932) (en banc) (per curiam) (providing factual background, in action for damages against physicians for malpractice, regarding how "[t]he mother, fearing an operation would leave an ugly scar on the child's leg and that an operation might result in permanently disabling her daughter from future dancing, sought the services of a drugless physician"); Reilly v. Straub, 282 N.W.2d 688, 690 (Iowa 1979) (noting, in a medical malpractice suit related to complications during childbirth, that "defendant does not seriously dispute that plaintiff's arm is *deformed*, *unattractive*, and eighty-five percent permanently disabled" (emphasis added)); Boucher v. Louisiana Coca-Cola Bottling Co., 46 So. 2d 701, 703 (La. Ct. App. 1950) (describing testimony of an expert who noted, as part of the determination of damages, that the plaintiff's "residual scar is noticeable and ugly").

390. See supra notes 317–331 and accompanying text.

391. See, e.g., supra notes 233–236 and accompanying text (discussing the pro-Ana movement).

392. Barbara Gail Montero, Aesthetic Effortlessness, *in* Body Aesthetics, supra note 21, at 180, 180.

393. Id. at 180–81. Though current aesthetics scholars have moved away from effortlessness as an ideal, in part, because of a desire to disrupt classic norms, effortlessness was a foundational principle. For example, Daoist thinkers called it "wu-wei" or effortless action by both the artist and the politician. Id. at 180. Daoists also developed the concept of "de" which is "a type of charisma that allows rulers to persuade neither by force nor decree but merely in virtue of their magnestism." Id. at 182. Similarly, Italian Renaissance theorist Baldassare Castiglione called on his contemporaries to "practice in all things a certain nonchalance which conceals all artistry and makes whatever one says or does seem uncontrived or effortless." Id. at 180–81.

penetrable," meaning that "our beliefs about it affect how we experience it."[394] Consequently, one may listen to a musical's score before seeing the actual musical and come to appreciate the effortless talent of the artists. However, if one instead sees the performance live and notices that a member of the orchestra is sweating profusely and appears to be working hard to produce the sound (as if it is difficult), one might not hear the music in quite the same way.[395] The illusion of ease as a mark of beauty or mastery runs counter to the experience of people with some physical disabilities who may have to exert significant effort to perform "ordinary" movements in an inaccessibly built world.[396]

Thus, collective tastes for normative representations of beauty, health, and effortlessness situate people with atypical sensory markers as risky. The brain engages in affective appraisal assessing the way in which the marker makes the perceiver feel on two dimensions—pleasantness or unpleasantness and calmness or arousal.[397] Whether one feels pleasantness or arousal depends on the particular "emotion concepts" tied to engagement with the aesthetics of disability.[398] We relate these sensations to present context and past experience and assign an emotion concept to them.[399] For example, bodily excretions are socially unacceptable because of their association with disease and contagion, but when present in a child they may be viewed as developmentally appropriate, such as in the case of a drooling infant. While the child is equally human, she is not perceived to have equal social status. The perceiver can hold this child at arm's length knowing there is no apparent identity threat. A drooling adult, however, evokes a different response. The law demands equal treatment and status of the adult who drools and the one who does not, but the perceiver is

394. Id. at 186.

395. Id. at 187. Professor Barbara Montero describes this phenomenon as "proprioceptive [or physical] sympathy" in which "we feel, in watching a graceful movement, that our body, though stationary, is in some way attuned to the body of the graceful individual . . . . [I]t is the process by which upon watching someone else move, one feels as if one were moving in a similar way oneself." Id. at 189.

396. It does seem that when we watch effortless movement, one of the things we enjoy is the feeling gained from the performance of a difficult movement in a smooth, coordinated, efficient way.

397. Barrett, How Emotions Are Made, supra note 18, at 72–74. This is similar to the stereotype content model in social psychology. See Susan T. Fiske, Managing Ambivalent Prejudices: Smart-but-Cold and Warm-but-Dumb Stereotypes, 639 Annals Am. Acad. Pol. & Soc. Sci. 33, 35 (2012) (describing the "Stereotype Content Model," which describes the dimensions—warmth and competence—along which a person perceives another whom she is meeting for the first time).

398. See Kristen A. Lindquist & Lisa Feldman Barrett, Constructing Emotion: The Experience of Fear as a Conceptual Act, 19 Psychol. Sci. 898, 898–99 (2008) (explaining emotions as "conceptual acts").

399. Other disciplines understand, label, and explain these phenomena as related to implicit biases and the operation of heuristic devices for everyday decisionmaking. See, e.g., Daniel Kahneman, Thinking, Fast and Slow 9–10 (2011) (describing this process in behavioral economics).

less likely to see the drooling adult as an equal because appearance deviates from normative images of beauty and health. The perceiver is likely to draw upon a common emotion concept of unpleasantness and disassociate by discounting the person's humanity or equal status. This allows the perceiver to hold the drooling adult at arm's length, much like the child. Affect assignment, therefore, shapes the appropriate behavioral responses—ignorance, avoidance, attack (regulated by criminal law), or exclusion (regulated by antidiscrimination law).

Interestingly, aesthetics work alongside implicit biases to mitigate the strength and impact of the bias based on one's aggregate proximity to aesthetic norms. Beauty, health, and effortless norms, then, can shift the degree of desired contact and the remedial effect of that contact. Consider, for example, the ways in which Jerry's Kids conformed to aesthetic norms of beauty, such as the adorable Shirley Temple child in a wheelchair, and effortlessness, such as the child on the spectrum who perfectly executes the most challenging piano sonata or the blind child opera star.[400] These individuals gain popular acceptance "despite" their disabilities because they have other aesthetic features that allow them to "overcome" disability.

2. *Aesthetic–Affective Processes at Work.* — In the first instance, a person is assessed descriptively, with particular note of those markers that deviate from the baseline above. The seemingly individual and "visceral" experiences that are triggered collapse two intermediate processes—what this Article calls "aesthetic trigger"[401] and "affective appraisal"[402]—that obscure the constructed, collective dimensions of disability discrimination. The popular understanding of discriminatory conduct begins with the individual noticing some marker of difference, the "aesthetic trigger." Consider, for example, in the context of disability that Jim, a nondisabled person, meets Tina, a new employee and his new project teammate. They are both client representatives at a paper company. Although Tina just joined the firm, she has three more years of experience than Jim does. When Jim first meets Tina, he hears a slight stutter in her speech. After they shake hands, Jim watches Tina walk over to her cubicle with what appears to be a pronounced limp. Later that afternoon, Jim notices Tina has a facial tic—her head and neck tilt to the side every so often. Jim, wanting to hear more about Tina's prior job, sits next to her in the lunchroom. Jim physically winces each time he sees Tina's tic so much so that he has

400. See Bradley A. Areheart, When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma, 83 Ind. L.J. 181, 199–200 (2008) (discussing the use of celebrity-hosted telethons to raise money to "cure" particular disabilities, among the most famous being the Jerry Lewis Muscular Dystrophy Telethon to raise money for "Jerry's kids" with muscular dystrophy); Jill Elaine Hasday, Mitigation and the Americans with Disabilities Act, 103 Mich. L. Rev. 217, 261 n.148 (2004) (noting the backlash from disability rights advocates to the use of telethons to pathologize disability).

401. See supra Figure 1.

402. See supra note 397 and accompanying text.

to excuse himself. The physical wincing is his "affective appraisal."[403] He genuinely wants to get to know his new colleague, but he feels that he cannot physically be near her and, thus, avoids her, choosing to take all breaks outside of the office rather than have to come up with excuses for not interacting with her. He attributes his feelings of disgust and physical distaste to his interactions with Tina. This is his "affective attribution."[404]

Over time, Jim sees that Tina generates high-quality work and demonstrates her competency to him and others. Jim then gets promoted and has to assign a new project leader to work with him on major client accounts. Tina has produced quality work, though she has received a few negative reviews from clients who, unofficially, told Jim that they preferred to work with another team member, Mya. Mya, a nondisabled, typically attractive woman, has poorer performance reviews but higher client ratings. Jim's reluctance to interact with Tina—the proximity is part of the job description—leads him to choose Mya for the promotion. However, because Mya has had more interaction with and experience presenting to the client, she arguably appears more qualified on paper.

Although contact cured Jim's initial association of disability with incompetence (to the extent that such association existed in the first place)[405] when he saw Tina's contributions, he continues to avoid her because of her non-normative appearance and behavior (tics); that is, Jim's perception of her as aesthetically displeasing leads him to feel disgust (affective assignment).[406] The aesthetic–affective process leads Jim to exclude Tina from the potential promotion despite her performance.[407] This would be a very tough case for current disability antidiscrimination law to remedy despite what appears to be a pretextual employment decision.[408]

Jim (consciously or unconsciously) compares these physical markers or behaviors above—Tina's tic, limp, and stutter—to deeply engrained

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403. See Amy Coplan, Feeling Without Thinking: Lessons from the Ancients on Emotion and Virtue Acquisition, 41 Metaphilosophy 132, 141 (2010) ("[A]n affective appraisal involves a series of bodily changes that gauge how some stimulus or situation bears on the organism's well-being and prepare the organism to respond accordingly.").

404. "Affective attribution," or "affective evaluation," refers to an "attitude toward general stimuli, which influences future formation of attitude toward a new but similar stimulus." Ping Zhang, The Affective Response Model: A Theoretical Framework of Affective Concepts and Their Relationships in the ICT Context, 37 MIS Q. 247, 258 (2013).

405. Disassociating disability and incompetence was an explicit normative goal of the ADA. See supra section II.B (discussing legislative history and congressional intent).

406. See supra section III.A.2 (discussing the ways in which disgust and other emotions work).

407. The hypothetical suggests that the negative client review may also be a product of aesthetics.

408. See, e.g., Carmack v. Nat'l R.R. Passenger Corp., 486 F. Supp. 2d 58, 89 (D. Mass. 2007) ("[A] plaintiff claiming that he is [sic] disabled cannot merely show that his employer perceived him as *somehow* disabled; rather he must prove that the employer regarded him as disabled *within the meaning of the ADA*." (internal quotation marks omitted) (quoting Cornwell v. Dairy Farmers of Am., Inc., 369 F. Supp. 2d 87, 103 (D. Mass. 2005)) (misquotation)).

collective taste in bodies and minds, the affective appraisal. Appraisals are subjective interpretations of objects or events; accordingly, they may vary at the individual level in response to the same object or event despite the existence of some accepted normative reaction.[409] Appraisals are not perceptions of innate characteristics of objects, "but rather of the object's implications for the perceiver (or the perceiver's group), so that a generally positive object" may still trigger negative emotions in the individual perceiver.[410] Recall the earlier discussion of moral emotions—anger, disgust, and contempt.[411] All three of these affective responses distinguish behaviors that violate three moral ethics: (1) contempt for violations of community (respect for the hierarchical and communal obligations of an individual to society); (2) anger for violations of autonomy (disregard for the personal rights or freedoms of the individual perceiver); and (3) disgust for violations of divinity (disrespecting the sacredness of religious norms or causing degradation or pollution to oneself or another).

B. *Case Study: Aesthetics and Integration in Special Education*

Consider the following special-education example of how aesthetics mitigate rights. Note how the aesthetics of disability operate and the baseline assumptions about the value of integration (and for whom). M.C. is a fifteen-year-old student in a mainstream public school receiving special-education services for a communication disorder, visual and processing impairments, and after-effects of an early stroke.[412] She also has "cerebral palsy that affects her left-side movement and visual field and that impairs the use of her left arm."[413] The particular disabilities make oral movements and swallowing difficult, reducing her speech intelligibility and frequently causing her to drool.[414] Her academic performance is average to low-average.[415] M.C.'s father described M.C. as "sociable and want[ing] friendships but does not have friends due to her drooling and language issues."[416] Although M.C. expresses a sincere interest in social activities, "she is never invited to a peer's house, a sleep over, movies, or parties[,] . . . people are repelled when M.C. hugs them and gets them wet with her drool," and her drool "falls on her papers,

409. Smith & Mackie, supra note 39, at 367.

410. Id. at 367–68.

411. See supra notes 249–260 and accompanying text.

412. Stanley C. v. M.S.D. of Sw. Allen Cty. Schs., 628 F. Supp. 2d 902, 905–06 (N.D. Ind. 2008). The legal standard for receipt of special-education services is that one or more categories of disability negatively affect a student's ability to access a "free appropriate public education" (FAPE). Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1) (2012).

413. *Stanley C.*, 628 F. Supp. 2d at 906.

414. Id.

415. See id.

416. Id.

homework, and reading materials, and . . . makes other students avoid her."[417]

The aesthetics of M.C.'s disabilities negatively shape her statutory right to a "free appropriate public education" under the Individuals with Disabilities Education Act.[418] M.C.'s parents filed a number of due process complaints to challenge the school district's placement of M.C. and components of her individualized education program (IEP).[419] In fact, her parents advanced a version of this Article's aesthetic– affective discrimination theory (though not explicitly using this language) in three interesting ways. First, her parents argued that the school district failed to provide M.C. with a "free appropriate public education" in violation of the IDEA, in part, because it did not consider the effect of drooling on her ability to learn and develop her social skills, both targeted areas for development in her IEP.[420] Second, because she could not meaningfully access mainstream education, M.C.'s parents argued, they should receive reimbursement for the tuition and expenses they paid for M.C. to attend a private program.[421] M.C.'s parents unilaterally removed her from the mainstream public school setting in favor of a more restrictive (less integrative) educational placement that focused on academics and socialization to prepare her for independent living.[422] Third, M.C.'s parents claimed the school district overvalued the social benefits of the mainstream integrated setting rather than necessary academics and skills in developing and implementing her IEP.[423] The district court, in a detailed and lengthy decision, granted summary judgment for the school district.[424] The court doctrinally relied on procedural deference to local school

417. Id. Also, M.C.'s "elementary school would not allow [her] to eat [lunch] in the school cafeteria because of her drooling." Id.

418. 20 U.S.C. § 1400(d)(1)(A) (2012) ("[The purpose of the IDEA is] to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special-education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . .").

419. *Stanley C.*, 628 F. Supp. 2d at 909–10.

420. Id. at 972, 974. The parents argued that the school did not conduct a Functional Behavioral Assessment (FBA), an empirically based assessment to determine the ways in which particular behavioral manifestations operate and their antecedents and effects. M.C.'s parents said that the FBA would help the school construct a Behavioral Intervention Plan to intentionally develop ways to mitigate the effects of drooling on M.C.'s ability to learn and access the educational experience. Id. at 913. When developing an IEP, the IEP team, "[i]n the case of a child whose behavior impedes his or her learning or that of others, [shall] consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." 34 C.F.R. § 300.346(a)(2)(i) (2006).

421. See *Stanley C.*, 628 F. Supp. 2d at 923.

422. Id. M.C.'s parents assumed, of course, that students with disabilities at the private school would not respond poorly to M.C.'s aesthetic markers.

423. Id. at 929 ("[T]he social benefit of education in the public school is not enough to outweigh the [academic and social] benefits of intensive therapy.").

424. Id. at 905.

districts[425] combined with a reading of the IDEA's integration mandate that assumes placement in a mainstream, general-education classroom "raises expectations" and progress for all children with disabilities.[426]

The Supreme Court of the United States recently revisited the applicable standard for receiving an "appropriate" education under the IDEA.[427] For children accessing a general-education curriculum in the mainstream classroom, the IDEA typically aims for grade-level advancement, which, as some commentators have noted,[428] would seem inconsistent with the needs of a child. The school district, by virtue of finding the child eligible for special-education services, has determined that the child is not making progress in the general-education setting.[429] For students receiving a modified curriculum, the Supreme Court said that a school cannot satisfy its IDEA obligations by planning for "barely more than *de minimis* progress" because "'merely more than *de minimis*' progress from year to year can hardly be said to . . . [be] an education at all."[430]

When we apply an aesthetic–affective lens, therefore, this example raises two related questions about disability law and policy. First, who benefits from the current model of integration? Is it M.C., her parents, other students in the classroom, or the school district? The IDEA says the focus is on the individual student's needs, but the quality of the contact with her peers, teachers, and administrators in the school setting should matter in the calculus of whether the IEP and a given placement is "appropriate." Second, this case is about the "least restrictive environment"

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425. See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206–07 (1982) (describing how courts give significant deference to school districts in matters of "sound educational policy" in the special-education context).

426. *Stanley C.*, 628 F. Supp. 2d at 922–23 ("Congress found that the education of children with disabilities can be made more effective by having high expectations for them and by 'ensuring their access to the general education curriculum in the regular classroom' in order for them to meet developmental goals . . . ." (quoting 20 U.S.C. § 1400(c)(5)(A) (2012))).

427. See Endrew F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 999–1001 (2017) ("To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.").

428. See, e.g., Colker, The Disability Integration Presumption, supra note 192, at 796–97 ("At first glance, the breadth of the integration presumption is baffling. . . . Each child needs an IEP because a regular program does not meet their educational needs. Why, then, would we presume that the regular classroom is the best program for them?"); Gilmour, supra note 89, at 11 ("It is a mistake to equate the setting . . . (that is, the general-education classroom) with the actual progress a student is making. Such an assumption ignores the fact that students are found eligible for special-education services precisely because they are failing to progress in general education.").

429. See 20 U.S.C. § 1401(3)(A)(ii) (defining a "child with a disability" as one who "needs special education and related services").

430. *Endrew F.*, 137 S. Ct. at 1001 (reasoning that the IDEA demands more, requiring "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances").

and the integration presumption.[431] If the integrative setting is not beneficial academically or socially for M.C.,[432] and aesthetics may be perverting the normative goals for the broader student population, as the example suggests, then is contact successful? For whom? Raising these questions does not undermine integration as a core remedy; instead these questions call for a deliberate articulation of end goals, intended beneficiaries, and benchmarks to better understand how to develop meaningful remedies to advance clear normative values. There is an assumption that M.C.'s social and emotional development would achieve greater success in the segregated setting because students with disabilities would be more accommodating of M.C.'s aesthetic markers, which ultimately proves untrue.

M.C.'s case illustrates central challenges with contact and aesthetics in the context of disability, both of which stunt desired normative shifts. Aesthetics may serve as a barrier to contact even when people want to interact (as Jim and Tina's example showed).[433] When contact does occur (as M.C.'s case shows), aesthetics may generate (or exacerbate) disgust, as demonstrated by M.C.'s classmates and Jim. Consider the ways in which M.C.'s drool undercuts the antiprejudicial goals of contact. The case record reflects M.C.'s overwhelming desire to interact with other students, build friendships, and participate in typical adolescent life. The school district's theory of the case emphasized the social benefits on balance in favor of contact between M.C. and her peers. "[T]he benefits of the 'opportunity to learn, socially and knowledge-wise, from her peers . . . needs to be balanced with those of a more therapeutically intensive but also more socially isolated educational placement.'"[434] Teachers, administrators, and experts testified that M.C. made "noticeable social gains"[435] in the mainstream public school setting including her participation in reading groups, attendance at school dances, and interaction with peers during free

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431. 34 C.F.R. § 300.114(a)(2)(ii) (2012) (providing that a child with a disability may only be removed from the regular educational environment when "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily").

432. Assessment of contact's relative success at the individual level must consider what M.C. wants, which may change over time. Any individualized approach must be person centered and maximize opportunities for the individual to drive the decisionmaking process with or without accommodations or support.

433. See supra section IV.A.2.

434. Stanley C. v. M.S.D. of Sw. Allen Cty. Schs., 628 F. Supp. 2d 902, 934 (N.D. Ind. 2008) (quoting Transcript of Record at 3659, *Stanley C.*, 628 F. Supp. 2d 902 (No. 1:07-CV–169–PRC)) (recounting expert testimony from Dr. Stauffer on behalf of the school district).

435. Id. at 932. The school counselor noted, "I really see a different [M.C.] this year. She was more mopey last year. I think she loves it here." Id. at 936 (quoting Transcript of Record at 2987, *Stanley C.*, 628 F. Supp. 2d 902 (No. 1:07-CV–169–PRC)). The school psychologist said "one of the things that was important that I saw she can be a part of her peer group, be accepted within that peer group . . . . This is a talent she can take beyond this building . . . into the working world." Id. (quoting Transcript of Record at 2987, *Stanley C.*, 628 F. Supp. 2d 902 (No. 1:07-CV–169–PRC)).

time.[436] "[R]emoving [M.C.] from social and emotional interaction with her peers would be a detriment to her."[437]

Contrary evidence strongly suggests that the school's understanding of M.C.'s social success was superficial at best and illegal at worst. For example, M.C.'s mother testified that "M.C. cried hysterically after each dance . . . [and] has been excluded by her regular education peers at social events and in the cafeteria."[438] The occupational therapist at the public school noted in an evaluation that "[w]hen M.C. wants to express affection toward a peer, she may attempt to hug and she is not always aware of how her drooling affects her social relationships."[439] The parents' experts testified that "although M.C. wants friends, her social interactions with peers are unsuccessful . . . . [They] did not reciprocate her social overtures."[440] The school district's legal duty to create and implement an appropriate IEP did not attend to the aesthetics of disability and, therefore, failed to provide an appropriate education in accordance with the IDEA.

C. *New Prescriptive Pathways*

My critique of the way in which integration has developed in the disability context does not mean that reversion to segregated public accommodations, residential, educational, or employment settings is desirable. Rather, this Article calls for a deliberate reflection on the origins and evolution of the normative orientation of disability rights law. By showing how integration developed and what it looks like today, this Article begins a difficult conversation on the future of disability rights law, one which must attend to aesthetics to successfully mitigate and reduce prejudice.

Prescriptive responses to the aesthetics of disability require disaggregation along several axes. First, aesthetic–affective responses require a degree of visibility. Certain disabilities may be more apparent than others; wheelchair users, for example, are the quintessential models used in public spaces and by the media to represent disability (think disability parking placards or diversity marketing materials that include a wheelchair user). Psychosocial, intellectual, or developmental disabilities, in some cases, may offer non-normative physical or behavioral markers that can trigger affective responses (such as facial features of Down Syndrome) but, more often, do not present any visible markers. Aesthetics still operates

436. Id. at 935, 955–56.

437. Id. at 935 (second alteration in original) (quoting Transcript of Record at 3676, *Stanley C.*, 628 F. Supp. 2d 902 (No. 1:07-CV–169–PRC)) (recounting expert testimony from Dr. Couvillion on behalf of the school district).

438. Id. at 956.

439. Id. at 955 (alteration in original) (quoting Transcript of Record at 3073, *Stanley C.*, 628 F. Supp. 2d 902 (No. 1:07-CV–169–PRC)).

440. Id. at 956. M.C. reported to teachers at her alternative placement that the students in her public school "made fun of her drooling and poor articulation" and how much she valued "acceptance from her friends" at the alternative placement. Id. at 937.

in these spaces, albeit differently where individuals may choose to disclose, "pass," or deliberately perform identity by drawing attention to one of the physical or behavioral markers previously discussed.[441] One of the innovations of the ADA was its definition of disability discrimination, which includes people "regarded as" disabled who may not have a disability or who may have an impairment, and are treated as having a disability, but the impairment does not meet the statutory definition (substantially limiting one or more major life activities).[442] Courts have limited plaintiffs' relief under this definitional prong;[443] a broader recognition of the aesthetics of disability should assist courts in expanding the scope of "regarded as."

Second, the goals of education, employment, and public accommodations vary and will affect the nature and scope of remedial designs to advance particular antidiscrimination norms. While a widely accepted mission statement for public education has proven elusive, policymakers generally understand it to include training for democratic citizenship and economic self-sufficiency. States must offer an "appropriate" education to all children of a certain age. By contrast, employment advances financial goals of economic productivity; employers are not required to hire people with disabilities unless they meet the essential requirements of a position with or without reasonable accommodations. Disrupting the operation of aesthetics may require attention to specific facilitating conditions such as critical mass and visibility which may vary based on setting. For example, the general recommendation offered by social scientists that a reduction in prejudice and discrimination requires a critical mass of outgroup members may require classrooms to be structured differently but, in the workplace, it may require—in addition to affirmative action in the hiring process—the creation of incentives for individuals to publicly disclose less-visible disabilities.[444]

Institutional redesigns would benefit greatly from more empirical research on contact and disability disaggregated according to the axes discussed above.[445] One could imagine a series of empirical studies in

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441. This is the subject of a current project and beyond the scope of this Article. See Harris, Reconciling Privacy, supra note 12, at 1–3.

442. See Mark A. Rothstein, Innovations of the Americans with Disabilities Act: Confronting Disability Discrimination in Employment, 313 JAMA 2221, 2221 (2015) (describing how the ADA's definition of disability expanded on the traditional notion of disability).

443. See Arlene B. Mayerson, Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent, 42 Vill. L. Rev. 587, 591–98 (1997) (collecting cases and regulations demonstrating the high barrier plaintiffs must overcome to receive relief in disability cases).

444. See Harris, Reconciling Privacy, supra note 12, at 38–39 (developing a "publicity" approach to disability discrimination in the workplace).

445. Returning to Allport's positive facilitating factors, employment and, in particular, education offer equal status, opportunities for friendship development, and common goals in ways that engagement in public accommodations may not. In recent months, education scholars have increasingly called for empirical research in order to build a solid

mainstream schools, for instance, to test the effects of contact along a continuum of aesthetic markers of disability. That is, take two second-grade classrooms in the same school[446] with a number of students with different disabilities and aesthetic markers—for example, compare a child with dyslexia with no aesthetic markers of disability to a child with severe quadriplegia with several aesthetic markers of disability such as use of a wheelchair, breathing tube, and facial and bodily deformities.[447] On day one, survey the students to gauge their attitudes about disability.[448] Midway through the semester and on the last day of school, repeat the survey. The data collection could yield information about the ways in which students responded to different aesthetic markers initially, over time, and what effect contact had not only on the students with disability but the nondisabled students in the classroom, the teacher, and even administrators. This would take seriously the lessons from *Brown* and *Moberly* to pay due attention to the integration of other key components of successful integration—such as teachers with disabilities or with special-education certifications. The point is not to discuss the specific design of much-needed research studies[449] but to identify that (1) empirical data on contact and disability are lacking and (2) studies should examine the effects of contact not only from the perspectives of the person with a disability but also from other stakeholders who could or should benefit from the contact, such as M.C.'s classmates and her teachers, Tina, Mya, Jim, and the paper company.

Empirical studies should shape specific remedies, but several possible prescriptive pathways may emerge.[450] A "contact plus" approach accepts the contact theory as invaluable and seeks to improve the ways in which we codify it in disability rights laws and policies. Are there particular areas where contact works better or worse than others such

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empirical foundation for prescriptive interventions. See, e.g., Gilmour, supra note 89, at 9 (noting that "research has yielded only weak evidence that inclusion confers benefits on SWDs" and calling for new "research that can inform future discussion[s] about inclusion and how it can work well for all stakeholders").

446. See id. (reviewing existing data on integration and special education and identifying research limitations and methodological flaws).

447. The goal here is not to structure specific studies for empirical researchers but rather to suggest ideas for data collection that currently do not exist and could prove tremendously helpful in developing legal (and other) prescriptions.

448. There are existing disability-specific attitudinal scales in psychology. A researcher may use an existing one or develop a student-specific version.

449. This is an interdisciplinary project I hope to explore in the future through collaborations with empiricists and psychology scholars.

450. This Article focuses on those prescriptions most relevant to law and policy. Several nonlegal solutions might assist in the legal interventions. For example, aesthetic theory emphasizes representation as a focus on remedial efforts. According to Aristotle, moral and ethical education is one way to "shape a person's affective orientation" and guide society to appreciate something through exposure. See Eaton, supra note 21, at 48–53. One may want to educate on the emotions—to teach people how to feel about certain groups.

that we should invest more heavily in certain areas or settings (schools, places of public accommodations, employment)? For instance, empirical studies may reveal, as suggested above, that critical mass is among the most important determinants of contact's effectiveness. An empirical study here might look to see if contact changes depending on the number of students with disabilities in a classroom or the type of aesthetic markers—visual, auditory, or olfactory. If students in a classroom possess a broad spectrum of disabilities with different aesthetics markers and functional capabilities—for example, a person with dyslexia who comes out as disabled, a wheelchair user, a student with Down Syndrome, Auggie, Tina, the student with severe quadriplegia, D.J., and M.C.—the research may tell us that we should invest more heavily in a diversity approach to disability to reduce prejudice and discrimination.

Using an aesthetic–affective lens could enhance the work of scholars thinking about meaningful access, accommodations, and universal designs. Aesthetics may demand different accommodations even when, for example, the person does not functionally require accommodations.[451] Reasonable accommodations to meet the aesthetic–affective process in employment, for example, could include employers designing a hiring process that involves a series of initial screening interviews that mask the appearance of the candidate (conducting interviews over the phone, for example).[452] Similarly, the legal standard for a FAPE might consider aesthetic markers in developing an "appropriate" IEP. Accordingly, an aesthetic–affective critical lens would help the school district (and adjudicators) understand M.C.'s drooling as an impediment to her education which may require additional support and services to address. Here, the integration presumption will continue and the school would focus on providing accommodations and services to make mainstream education meaningful. The results of empirical studies could also inform current debates on the use of default rules or presumptions. When integrative goals conflict with individual needs or preferences, which way should the scales tip? This will help develop default rules or presumptions that intentionally make these difficult choices and better guide administrative law and federal judges deciding these cases. It may be the case that the "I" in "IEP" favors "integrative" rather than "individualized" when the potential to shape structural norms is strong.

Finally, and most controversially, the empirical studies may reveal that structural changes in the context of disability require more gradual

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451. The ADA does not currently provide reasonable accommodations for covered individuals "regarded as" disabled and subject to discrimination on that basis. See 42 U.S.C. § 12201(h) (2012) (omitting reasonable accommodations for people "regarded as" disabled).

452. See, e.g., Claudia Goldin & Cecilia Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 716 (2000) (finding that "blind auditions may account for 25 percent of the increase in the percentage of orchestra musicians who are female").

and differentiated integration to shift the normate. For instance, it is possible that further study will show that placing nondisabled students in classrooms with a diverse array of students with disabilities of varying degrees of deviation from the aesthetic "norm" actually *reduces* attitudinal shifts by the nondisabled students. Such a finding might suggest that the aesthetics of disability are so powerful—that exposure to students with numerous markers of disability evokes such a strong response among nondisabled persons—that a "contact slow" strategy would be more effective at changing social norms. Such an approach in the education context might consider expanding the continuum of available placements within a school and integrating children at a slower and more structured pace, where nondisabled students are gradually integrated with students with additional aesthetic markers of disability so as to begin the difficult task of breaking down and reformulating our norms around physical appearance. Aesthetics, of course, should not be the sole determinant of whether a general education classroom is "appropriate" for the student. The interdisciplinary literature, however, deserves a place in the calculus.

CONCLUSION

Disability rights norms will not shift unless we pay due attention to the ways in which society feels about the visible markers of disability. Understanding the collective aesthetic responses and why they reflect structural biases creates opportunities to address them in meaningful ways. While the ADA has increased the visibility of some people with disabilities, it has not shifted the aesthetic tastes and emotion categories that underwrite disability discrimination. The aesthetics of disability offers a multipurpose lens to reorient disability rights scholars and critically examine passive reliance on contact to craft antidiscrimination remedies. Attention to aesthetics research offers new opportunities to define what integration should mean in different settings as a path to a more inclusive society.