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Intersectional Cohorts, Dis/ability, and Class Actions

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ABSTRACT

This Article occupies the junction of dis/abilities studies and critical race theory. It joins the growing commentary analyzing the groundbreaking lawsuit by Compton, California students and teachers against the Compton school district brought under federal disability law and seeking class certification and injunctive relief in the form of teacher training, provision of counselors, and changed disciplinary practices. The federal district court denied the defendants' motion to dismiss but also denied the plaintiffs' motion for a preliminary injunction and class certification, resulting in prolonged settlement talks. The suit is controversial because it seeks to address the trauma suffered by Black and Latinx students in poor, violence-torn inner-city communities by characterizing the students as having disabilities.

The Article disagrees with legal scholarship thus far, which posits that using disability law to help these students both stigmatizes them and ignores current disability law's focus on individual claims. Instead, this Article asserts that concerns about stigma are outweighed by the potential to assist distressed students. Doctrinally, it contends the concern for individual claims is overstated because

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one major goal of disability law is to remove social barriers that inhibit the flourishing of people with dis/abilities. By analyzing the social construction model of dis/abilities implicit within current law, this Article shows that group-based claims like those of the Compton students are a valid use of the class certification power.

This Article's key contribution to the dis/abilities studies and critical race literatures is the creation of a theory of "intersectional cohorts." Members of intersectional cohorts share similar self-identities, attributed identities, and identity performances to the extent that it is appropriate to think of them as a discrete and cohesive group in relation to a particular issue. This is a way to explore the meso-level of discrete and cohesive social groups who share multiple identities without devolving into a micro-level theory of each individual or essentializing identities through a macro-level theory of broad social groups.

Understanding poor Black and Latinx students in violence-torn neighborhoods as an intersectional cohort presumes that they have shared experiences and responses to their environment sufficient to constitute a class that should be certified in the Compton suit and in other similar lawsuits. This approach is supported by the scientific research on Adverse Childhood Experiences (ACEs) and their relationship to complex trauma and disability. We hope this analysis will serve as a model for future theoretical and applied analysis of intersectional cohorts, especially with respect to dis/abilities.

INTRODUCTION

Being a poor Black[1] student in a violence-plagued inner-city can be stressful. Take Chiron, the fictional high school student depicted in the 2017 Oscar-winning Best Picture, *Moonlight*.[2] Chiron, a poor Black youth in a drug-ridden community, is emotionally sensitive as a young child. After becoming a teenager, he is violently bullied in a school environment that seems indifferent to his experience. Chiron responds to this violence by becoming "hard" himself, ultimately transforming into a drug-dealing adult. Chiron's story is an illustration of the trauma faced by poor Black male students in violence-plagued inner-cities.

Because of their intersecting identities and social location,[3] a significant percentage of the larger cohort of Black and Latinx[4] students of all genders in impoverished and violence-plagued inner-city communities[5] suffers complex trauma because of exposure to poverty, violence, and racism. This exposure creates the need for a different learning environment: curricula, teacher training, and disciplinary methods that recognize the trauma students have faced. Disability laws as currently written aim to remove barriers that prevent persons with dis/abilities[6] from fulfilling their potential.[7] This

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1. We capitalize Black and White to emphasize that race is socially constructed. *See infra* Part III.

2. *See* MOONLIGHT (A24 Films 2016). We note concerns about using a Hollywood depiction of hardscrabble inner-city life to develop arguments about the real thing. The movie is merely an illustration that helps our narrative, not evidence.

3. By "social location," we refer to a place with particular social meaning. In our culture, "urban," "rural," and "suburban" are used to imply certain types of communities. By "social position" we mean the positionality of a person within the matrix of identities. The trauma we are discussing calls for analysis of both social location and social position because it is the result of an intersection of the students' identities (poor, Black and Latinx, young) that is exacerbated by their geographic location (urbaphobia — non-urbanites fear of the inner-city — reflected in aversion to entering the "hood," over-policing, disinvestment, etc.). Using intersectionality theory, we argue the law fails these youth because it does not recognize that their intersectional identities affect their trauma in ways that are shared by the group. *See infra* Part IV (creating theory of intersectional cohorts).

4. We recognize that other racial minority students, such as South Asians, are, in some cases, challenged by violence-plagued, inner-city environments. Students of color (and even Whites) in these social locations could likely be considered part of the same intersectional cohort, though their appearance in skin tone, dress, and so on might exempt them from some negative treatment to such an extent as to remove them from the cohort.

5. In this Article, we discuss only the cohort of students whose communities fit this description.

6. We are part of a small group of scholars seeking to introduce the term "dis/ability" to the legal scholarship. *See* Steven L. Nelson, *Special Education,*

Article argues for achieving that purpose by acknowledging that Black and Latinx students living in poverty constitute discrete and cohesive intersectional cohorts[8] deserving of class certification and broad remedies under current disability law.

Overrepresentation, and End-Running Education Federalism: Theorizing Towards A Federally Protected Right to Education for Black Students, 20 LOY. J. PUB. INT. L. 205, 214–15 (2019) (using term); *cf.* Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidisciplinary, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1424 (1998) (contending antisubordination's intersectionality/multidimensionality approach best suited to address "social injustice against sexual minorities based on race/ethnicity, class, dis/ability, sex/gender and other axes of social or legal status"). We use the slash when referring to the actual state of being socially constructed as dis/abled but omit the slash when referring to *current* understandings of disability under the law. We are influenced to shift our way of referring to dis/ability by a book that, like this Article, merges Critical Race Theory and Dis/ability Studies. The text that launched the recent movement toward using this term is DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION (David. J. Connor et al. eds., 2016) (collecting chapters synthesizing Critical Race Theory and Dis/abilities Studies scholarship in the education context). Editors for the *DisCrit* anthology describe two reasons for using this term:

> We utilize the term *dis/ability* to 1: counter the emphasis on having a whole person represented by what he or she cannot do, rather than what he or she can, and 2: disrupt notions of the fixity and permanency of the concept of disability, seeking rather to analyze the entire context in which a person functions.

Id. at 1. We agree that this shift in language can help deemphasize the implication that persons with dis/abilities are lacking. The editors later expand upon their reasoning, stating:

> The latter ["disability"] overwhelmingly signals a specific inability to perform culturally defined expected tasks (such as learning or walking) that come to define the individual as primarily and generally unable to navigate society. We believe the slash in the word dis/ability disrupts misleading understandings of disability, as it simultaneously conveys the social construction of both ability and disability.

Id. at 6–7. As do those editors, we retain the word "disability" when "referring to its official or traditional use." *Id.* at 7. As we discuss *infra* Part III, the acknowledgment that dis/ability is socially constructed is crucial to helping realize the full potential of disability statutes.

7. *See infra* notes 146–54 and accompanying text (discussing goals of disability law).

8. *See infra* Part IV.A (defining and explicating the term "intersectional cohorts"). In the term "intersectional cohort," we use the word "cohort" as it is commonly defined: "A group of people with a shared characteristic." *Cohort*, LEXICO.COM, https://www.lexico.com/en/definition/cohort [https://perma.cc/67AJ-HQG4] (last visited Oct. 2, 2019). When calling an intersectional cohort "discrete," we are referring to the fact that it contains a coherent set of individuals that is different from many other social groups. When calling an intersectional cohort "cohesive," we are referring to the fact that it contains a set of individuals that share similar identity characteristics, experiences, and responses to societal treatment. Put another way, by "discrete," we mean distinct from other potential groups — for example, Black women domestic servants during Jim Crow could be analyzed

A lawsuit brought by students from Compton, California, *P.P. v. Compton Unified School District* (the *Compton* case),[9] shows how a claim based significantly upon racial discrimination might be recharacterized as a disability claim under current law.[10] Compton, famously the home of the "gangsta" rap group N.W.A.,[11] is now a mostly working-class and poor town with high crime rates[12] and a population that is about 57% Latinx, 40% Black, 1% Asian, and 1% White.[13] The *Compton* plaintiffs assert they have suffered numerous Adverse Childhood Events (ACEs),[14] leading to complex trauma[15]

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separately from Black men of that period — and by "cohesive" we mean that they have a shared identity to some extent in the similarity of how they see themselves, are seen, and/or respond to their environment. We leave elaboration of the relation of "intersectional cohorts" to specific social science understandings of "cohort" for a future publication.

9. P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1126, 1144 (C.D. Cal. 2015) (denying plaintiffs' motion for preliminary injunction); P.P. v. Compton Unified Sch. Dist., 2015 WL 5752770, at *1 (Sept. 29, 2015) (denying without prejudice plaintiffs' motion for class certification). A case similar to the *Compton* case was filed by Native American students with disabilities against the Bureau of Indian Education. *See* Stephen C. by Frank C. v. Bureau of Indian Educ., 2018 WL 1871457 at *8 (D. Ariz. Mar. 29, 2018) (refusing to dismiss allegations that the department's refusal to create systems that deal with students' exposure to adversity and complex trauma so as to facilitate meaningful access to educational opportunities); Christie Renick, *Bureau of Indian Education Failed to Educate Tribal Youth, Lawsuit Alleges*, CHRONICLE SOC. CHANGE (Jan. 12, 2017), https://chronicleofsocialchange.org/featured/suit-alleges-feds-failed-in-education-of-tribal-youth/23939 [https://perma.cc/GPU6-QK3N]. As that case deals with a different intersectional cohort, we leave discussion of *Stephen C.* for another time.

10. On the *Compton* case, see generally *infra* Part I.

11. N.W.A., STRAIGHT OUTTA COMPTON (Ruthless Records 1988).

12. The designation of communities as "high crime," and therefore susceptible to a higher rate of police stop and frisk, is problematic. *See* Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse to Practice Circuit*, 73 MIAMI L. REV. 1, 31, 56 (2018) (criticizing "high crime area" doctrine). Even the notion that "crime" is defined in particular ways that generally exclude white-collar (and White-perpetrated) harms is problematic.

13. *See* NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 97 (2018) (utilizing 2016 data).

14. ACEs are Adverse Childhood Events. They include "things like physical and emotional abuse, neglect, caregiver mental illness, and household violence." *ACEs and Toxic Stress: Frequently Asked Questions*, CTR. ON DEVELOPING CHILD, HARV. UNIV., https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions/ [https://perma.cc/Y5MS-EM4A] (last visited Jan. 13, 2020). Suffering more ACEs correlates with suffering more "things like heart disease and diabetes, poor academic achievement, and substance abuse later in life." *Id.*

15. Complex trauma includes:

> [S]tressors that are: (1) repetitive, prolonged, or cumulative (2) most often interpersonal, involving direct harm, exploitation, and maltreatment including neglect, abandonment, or antipathy by primary caregivers or other ostensibly responsible adults, and (3) often occur at developmentally

and educational disability under current law.[16] According to developmental research, ACEs include "specific traumas identified as having particularly negative long-term effects,"[17] including abuse, neglect, and household dysfunction. The plaintiffs allege that their schools failed to fulfill their duties under the federal disability laws. They seek teacher training for working with trauma victims, counselors educated in helping student victims, curricular reform, and changes from traditional discipline to restorative justice techniques.[18]

The *Compton* plaintiffs moved the court to certify a class action against the Compton Unified School District (CUSD) and grant them a temporary injunction requiring the requested district-wide changes. CUSD responded that applicable disability laws should lead only to individualized determinations of disability and narrow remedies limited to those individuals.[19] Although the court determined that

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> vulnerable times in the victim's life, especially in early childhood or adolescence, but can also occur later in life and in conditions of vulnerability associated with disability, disempowerment, dependency, age, infirmity, and others.

Lisa Firestone, *Recognizing Complex Trauma*, PSYCHOL. TODAY (July 31, 2012), https://www.psychologytoday.com/us/blog/compassion-matters/201207/recognizing-complex-trauma [https://perma.cc/4TZJ-VLGQ] (citing Christine Courtois, *Understanding Complex Trauma, Complex Reactions, and Treatment Approaches*, GIFT FROM WITHIN, https://www.giftfromwithin.org/pdf/Understanding-CPTSD.pdf [https://perma.cc/GAD2-E42K] (last visited Jan. 27, 2020)).

16. *See, e.g.*, First Amended Complaint at ¶¶ 13, 14–21, 23–27, 28–31, 35–37, P.P. v. Compton Unified Sch. Dist., 135 F. Supp.3d 1098 (C.D. Cal. 2015) (No. 15-3726) (claiming ACEs lead to complex trauma and schools' failure to accommodate); DOWD, *supra* note 13, at 97–114 (considering ACEs research and the *Compton* case).

17. *See* DOWD, *supra*, note 13, at 100–01.

18. *See, e.g.*, First Amended Complaint, *supra* note 16, at ¶¶ 6–8 (alleging that there is a national scientific consensus on how to educate children with complex trauma, which includes training teachers about complex trauma, engaging in whole-school remedies, and using restorative justice techniques rather than traditional discipline; and that the CUSD had failed to adopt any of these practices despite awareness of the trauma suffered by its students).

19. It is true that in general, current disability laws focus on individual rights and remedies. But the concern that persons with dis/abilities be treated as individuals exists to protect persons with dis/abilities and does not preclude class actions and group remedies. When a plaintiff brings an individual action under the current disability laws, he or she must prove membership in the protected class (for example, that the plaintiff is a person with a disability). This is done by an individualized determination. *See*, *e.g.*, Kemp v. Holder, 610 F.3d 231 (5th Cir. 2010) (holding that the plaintiff was not an individual with a disability under the original statute and that the ADAAA, the amendments to the original ADA, should not be applied retroactively). The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–85 (2004), another example, requires that schools create individual education plans (IEPs) for children with disabilities. *See* 20 U.S.C. § 1414. IEPs are plans created by a team of faculty members and parents that establish the academic progress and goals for the individual student and the means for achieving those

the plaintiffs satisfied the "commonality" requirement of Federal Rule of Civil Procedure 23(a), it denied the class certification motion without prejudice because, it concluded, the plaintiffs had not demonstrated "numerosity," as they had not proved that the roughly 25% of the student population that was exposed to complex trauma

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educational goals. For an excellent explanation of the IEP process, see generally KYRIE E. DRAGOO, CONG. RESEARCH SERV., R41833, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), PART B: KEY STATUTORY AND REGULATORY PROVISIONS (2017), https://fas.org/sgp/crs/misc/R41833.pdf [https://perma.cc/KTM3-MGTQ]. In addition to the individual processes and remedies provided by the current disability laws, however, the federal disability laws also permit class actions so long as the named plaintiffs fulfill the class action requirements. *See*, *e.g.*, Lacy v. Cook Cty. Ill., 897 F.3d 847 (7th Cir. 2018) (holding that lower court had properly certified a class action in Title II ADA case). Moreover, Section 504 of the Rehabilitation Act (as well as the ADA) permits class actions alleging discriminatory effect — disparate impact causes of actions — that do not require a showing of intentional discrimination. *See* Alexander v. Choate, 469 U.S. 287 (1985) (holding that even though not all disparate effects are prohibited by the statute, many are). Finally, class actions alleging that the defendant has engaged in a discriminatory pattern or practice against persons with disabilities are viable. When bringing those class actions in the initial litigation stages, the plaintiffs do not have to prove that each individual in the class is a victim of the challenged policy or practice. In fact, in a number of cases, the courts have held that the plaintiffs do not need to establish that each member of the class has been harmed by the defendant's policies or practices during the liability phase of the case. *See* United States v. Denver, 943 F. Supp. 1304 (D. Colo. 1996) (ADA case alleging pattern and practice); *see also* Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324, 336–42, 360–62 (1977) (holding that the plaintiffs did not have to demonstrate that each member of the class had suffered illegal discrimination during the liability phase of a Title VII case; instead, the plaintiffs had to prove a pattern and practice of discrimination to prove liability, and in the remedial stage it is defendant's burden to prove that individual class members did not suffer illegal discrimination). The ADA regulations require the state to modify policies and practices that harm individuals and classes of individuals with disabilities. Moreover, the regulations prohibit state institutions from applying eligibility criteria that screen out persons with disabilities. For example, the regulations for Title II of the ADA state:

> (7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.
>
> (8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability *or any class of individuals with disabilities* from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 C.F.R. § 35.130 (7)(i), (8) (2016) (emphasis added). These regulations anticipate changes to policies, practices, procedures, and eligibility criteria when individuals *or classes of individuals* are harmed by them on the basis of disability.

had actually developed disabilities.[20] Even though the federal district court denied the motion to certify a class, it also denied a motion to dismiss the claims, concluding that the allegations stated a claim for relief under the substantive law.[21] The district court's denial of the preliminary injunction, absent class certification, appears to be largely due to the court's discomfort with creating a class remedy without individualized determination of the students' disabilities.[22] This, effectively, is a causation argument — whether the trauma from living in a poor and violence-torn community *caused* each of the putative class members to suffer a disability (under the law as currently interpreted). The court's decision presumably resists the conclusion that a large percentage of the cohort created by the shared experiences of being a Black and Latinx youth in a "high crime,"[23] inner-city[24] neighborhood is likely to suffer complex trauma and emotional, mental, or physical disabilities. The court's decision is arguably consistent with the disability law's focus on individual remedies.[25] In essence, though, its holding would require not only a showing that a large percentage of the school population suffered complex trauma but also the very difficult showing of evidence *on an individual basis* that Black and Latinx students' exposure to complex trauma had resulted in definable disabilities. The Article argues that courts, when faced with motions to certify class actions in cases similar to *Compton*, should grant the motion to certify the class if the plaintiffs provide evidence of expert testimony that the plaintiffs as a

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20. *See* P.P. v. Compton Unified Sch. Dist., 2015 WL 5752770, at *5–10; *18–19 (Sept. 29, 2015) (questioning whether the plaintiffs had yet established numerosity and typicality necessary for class certification). For a more expansive explanation of the federal rules concerning class action certification, see *infra* note 195.

21. *See* P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1126, 1144 (C.D. Cal. 2015) (denying defendants' motion to dismiss).

22. *See Compton Unified Sch. Dist.*, 2015 WL 5752770, at *5–10; *18–19 (questioning whether the plaintiffs had yet established numerosity and typicality necessary for class certification).

23. One could try to use a more neutral term by referring to neighborhoods as having high crime rates, but as we suggest *supra* at note 12, that would not be a neutral designation either. We thus call these "high crime" neighborhoods with quotation marks to indicate that that is how they are often referred to, not an agreement with the characterization.

24. Unfortunately, the "inner-city" racial minority neighborhoods we are referring to are often impoverished. *See*, *e.g.*, *Quick Facts: Compton City*, U.S. CENSUS, https://www.census.gov/quickfacts/comptoncitycalifornia [https://perma.cc/KR3M-8ZKY] (last visited Jan. 16, 2020) (stating that 23% of Compton residents are poor). Hence, we will imply poverty in future references to inner-city communities.

25. *See* First Amended Complaint, *supra* note 16 (identifying individual focus).

group suffered ACEs that lead to complex trauma and learning and emotional disabilities. At the liability phase of the case, evidence that the class representatives have suffered ACEs, complex trauma, and disabilities combined with expert evidence demonstrating causation is sufficient to prove the plaintiffs' case. Thus, at the remedial phase of the case, courts should grant broad-based class remedies requested by the plaintiffs such as modifications of school policies and practices to assure adequate education of children even in the absence of each putative class member's showing that they suffered individual harm. At this stage of the case, the defendant may respond by proving that individual members of the class have not suffered disabilities as a result of ACEs and complex trauma, proof that would require the court to deny individual remedies as to those individuals.

This Article considers whether the concept of dis/ability — as it intersects with race, class, gender, age, and geography — can and *should* be used to do more to help us understand and promote the well-being of kids like Chiron and the plaintiffs in the *Compton* case. It argues that when there is ample expert evidence that exposure to complex trauma causes learning, emotional, and physical dis/abilities, the plaintiffs should not have to make individual showings of dis/ability of the putative class members. At least at the liability stage, a showing that a significant percentage of the population has suffered multiple ACEs and complex trauma should satisfy the law's numerosity requirement because the racism, poverty, and violence that children in this environment so often face is significantly likely to lead to ACEs, complex trauma, and dis/ability. Because the *Compton* plaintiffs are a discrete and cohesive intersectional cohort, they should be presumed to suffer similar fates from their ACEs — a cognizable disability under current law — at least for the purposes of certifying a class when the individual plaintiffs allege they have suffered serious disabilities.[26]

Ultimately, this Article reframes the debate about the interactions between race and dis/ability in schools by proposing an innovation in critical race theory's intersectionality theory.[27] The highly regarded

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26. *See infra* note 8 (defining "discrete" and "cohesive vis a vis intersectional cohorts); *infra* notes 33–34 and accompanying text (summarizing basis for intersectional cohort concept); *infra* Part IV.A (defining intersectional cohorts).

27. On intersectionality, see generally *infra* Part IV.A. To understand how we alter intersectionality theory, one first needs to consider how anti-essentialism relates to intersectionality. Key critical race theorists Devon Carbado and Cheryl Harris say the following:

> Although [intersectionality's founder, Kimberlé] Crenshaw does not employ the language of essentialism, one can read her intervention as an effort to

legal scholar who first analyzed intersectional identities and coined the term "intersectionality," Kimberlé Crenshaw, has described the theory's mission as including the investigation of "how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism."[28] Likewise, preeminent sociologist of race and gender Patricia Hill Collins defines intersectionality as "the critical insight that race, class, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but as reciprocally constructing phenomena that in turn shape complex social inequalities."[29] For

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> de-essentialize white-centered representations of gender; to disrupt the ease and naturalness with which white women can stand in for all women; and to mark the discursive, political, and doctrinal consequences of the representational practice of treating what happens to white women as the baseline from which to determine what happens to all women — the erasure of Black women's identities and experiences as women.
>
> Simultaneously, Crenshaw indicts the way in which antiracist advocacy treats what happens to Black men as the baseline for defining racism, obscuring Black women's experience as Black people."

Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2201 (2019). On the basis of that thinking from Crenshaw, via Carbado and Harris, we contend that Crenshaw's work necessarily assumes some of the anti-essentialist insights from the Black feminists of the 1970s and 80s. But those insights are that essentialism is harmful when one non-representative group stands for the whole, not that a subgroup of the whole cannot be used as a basis for analysis of the subgroup's characteristics and experiences are sufficiently similar. Devon Carbado points out that neither Crenshaw nor he agrees that Crenshaw's work is simply "expanding upon" anti-essentialism. We agree.

28. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243 (1991).

29. Patricia Hill Collins, *Intersectionality's Definitional Dilemmas*, 41 ANN. REV. SOC. 1, 2 (2015). We note that we do not feel the need to choose between Crenshaw's and Collins's similar, though differently emphasized, approaches to intersectionality. We take our basic understanding from Crenshaw, whose work we read first, but utilize more of Collins's work to distinguish among macro-, micro-, and meso-levels of analysis. *See infra* notes 173–85 and accompanying text (distinguishing levels of analysis). Likewise, law and anthropology scholar Khiara Bridges defines intersectionality as "refer[ring] to 'the interaction between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in terms of power.'" KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 233 (2019) (quoting Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67, 68 (2008)). For Bridges, it boils down to a way to "think and talk about the experiences of multiply subordinated individuals and groups." *Id.* at 233. In an article about violence against women of color, intersectionality theory's founder described her project as expanding upon an anti-essentialist approach to identity, but once again, the anti-essentialism espoused by Crenshaw is the inappropriate essentialism of assuming that all women have the same experiences as White women and all Blacks

instance, everyone has a race and a gender, but women of color are generally subordinated by multiple social inequalities in the form of both racism and sexism.[30] The intersection of being a woman and of color thus impacts that group of people differently than it does men of color or women who are White.

This Article makes two key contributions to the literatures on intersectionality theory and dis/abilities studies.[31] First, at a theoretical level, we coin the term "intersectional cohorts." This allows us to extend intersectionality theory by demonstrating that, implicitly, it has always been concerned with appropriate ways to define cohorts of identity groups. As German sociologists Gabriele Winker and Nina Degele have noted, there is a happy medium between the harmful essentialist analyses of large groups and requiring that every individual be defined with such specificity that no patterns can be discerned.[32] The desire to avoid over-essentializing is a reason to distinguish discrete and coherent intersectional cohorts from large macro-level groups. Appropriate uses of intersectional cohorts include people sharing similar experiences, environments, self-identities, attributed identities, and identity performances to such extent that it is appropriate to think of them as both a discrete and a cohesive group in relation to a particular issue.[33]

Second, doctrinally, we argue that considering the *Compton* students to be a discrete and cohesive intersectional cohort allows a group-based analysis of dis/abilities that helps explain why the

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have the same experiences as Black men. *See* Crenshaw, *supra* note 28, at 1242 ("Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. And so, when the practices expound identity as woman or person of color as an either/or proposition, they relegate the identity of women of color to a location that resists telling.").

30. *See, e.g.*, BRIDGES, *supra* note 29, at 249 (noting "there may be a danger that attaches to the claim that privileged individuals have identities that are as intersectional as those possessed by subordinated individuals").

31. *Cf.* Kimani Paul-Emile, *Blackness as Disability*, 106 GEO. L. J. 293 (2018) (arguing disability law frameworks might work better than race law in addressing racial discrimination because it does not always require a showing of intent); *But cf.* Claire Raj, *Disability Law as an Agent of School Reform*, 94 WASH. L. REV. (forthcoming 2020) (manuscript on file with the authors) (contending disability law cannot be used for pervasive school reform for racial minority children); DOWD, *supra* note 13, at 97–114 (creating developmental equality theory, applying it to *Compton* litigation).

32. *See* Gabriele Winker & Nina Degele, *Intersectionality and Multi-Level Analysis: Dealing with Social Inequality*, 18 EUR. J. WOMEN'S STUD. 51, 53 (2011) (calling for analysis of patterns within and across groups).

33. *See supra* note 8 (defining "discrete" and "cohesive" intersectional cohorts); *see infra* notes 167–70 and accompanying text (defining and distinguishing self-identity, attributed identities, and identity performances).

plaintiffs deserve class certification and a broad remedy.[34] As distinguished Professor Crenshaw, who first articulated intersectionality theory, implicitly acknowledged when arguing for recognizing Black women's intersectional employment discrimination claims, law sometimes requires generalizing, but not too much, in order to recognize harms.[35] Recognizing poor, Black or Latinx students in violence-torn urban environments as a class in cases like *Compton* is appropriate because of their shared self-identities and identity performances in response to their common attributed identities, especially given that their claim is backed by the science of ACEs.

This Article proceeds as follows. Part I uses *Moonlight* to frame a discussion of the allegations in the *Compton* case and other similar lawsuits. Part II evaluates the scholarly debate as to whether the current disability laws can and should be used to redress harms to racial minorities that are caused by environmental factors. Part III analyzes the social construction of race and dis/ability in order to demonstrate that disability law must address barriers that affect groups as well as those affecting individuals. Part IV defines and explains our new "intersectional cohorts" approach. It contends that where a substantial percentage of children in a given school district have suffered numerous ACEs, complex trauma, and dis/abilities, there is sufficient evidence to certify a class, to hold the school district liable, and to require broad-based remedies. The Article then briefly concludes.[36]

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34. Intersectionality theory is fundamentally about the ways that social power exercised by categorization differentially impact different social groups. For instance, the social construction of the categories of race, gender, class and so on, leads to oppression by means of racism, sexism, and classism, but also to oppression specific to social locations created by the intersection of the categories. Thinking, where appropriate, of social groups in terms of intersectional cohorts allows new forms of cross-group analysis. Here, that means looking at poor Black and Latinx students of all genders who are located in impoverished and violence-plagued neighborhoods as a cohort that is discrete and cohesive enough to justify class action, even while recognizing that some individuals will need different accommodations.

35. Crenshaw, *supra* note 28, at 1244–45.

36. Although we argue that the court in *Compton* erred in denying the class certification, the desired result might be accomplished by bringing a suit with many named plaintiffs without asking for class certification. Given the large number of plaintiffs, it would be appropriate to initiate a broad-based remedy or even further screening of school children within the same intersectional cohort as the plaintiffs.

I. *MOONLIGHT* AND THE *COMPTON* CASE

This Part uses *Moonlight* to show the stress that young Black male students in violence-prone inner-cities suffer and thereby introduce the claims of the *Compton* plaintiffs. To illustrate this stress, we refer to the scene in *Moonlight* where Chiron is beaten at the direction of the school bully and responds in an explosive manner. We want to pause to laud the film for its portrayal of Chiron, who is hardly a caricature of an angry Black man. He is sensitive even as he grows up in a harsh world where his drug-addicted mother hates him because he is gay and a drug dealer and his girlfriend are his mentors. One of the key scenes in the movie is Chiron's response to the beating.[37]

The scene opens with Chiron's head buried in a sink of ice. He lifts his head to look at his blood-smeared face. At first, he seems to be merely observing what he sees in the mirror; then, his countenance turns grim. The next scene shows Chiron from behind striding purposefully into the school. The kids who see him initially seem to be responding to something in his face. He bursts through two doors. He hesitates momentarily, and his facial expression suggests he is thinking about something. Then his mien becomes grim again, and he bursts through two more doors and into the classroom. He puts down his bag, grabs a chair, and slams it over the bully's head. He looks at the motionless bully and strikes him with a leg of the chair before being dragged away by classmates. When next we see Chiron, he is a muscle-bound drug dealer called "Black" who is years older and soaks his face in ice water to begin his mornings.

If *Moonlight* is telling us something about what it means to be a poor young Black male student suffering from complex trauma, what is it? Chiron points toward the trauma generally experienced by Black and Latinx youth of all genders in inner-cities. Physically, they are more likely to suffer a battery or sexual assault.[38] They are also more likely to suffer vicarious trauma through witnessing violence against friends and family.[39] Environmentally, they are more likely to live in ethnically or racially isolated communities, raising the likelihood of suffering from racial bias in policing, employment,

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37. *See Moonlight – Chiron Loses It ('Becoming Black')*, YOUTUBE (June 28, 2017), https://www.youtube.com/watch?v=fVAbPyJyraQ [https://perma.cc/4LP6-SY6H] (depicting Chiron's transition to "Black").

38. *See* First Amended Complaint, *supra* note 16, at ¶ 16 (asserting that Plaintiff had suffered and witnessed many incidents of serious violence).

39. *See id.* at ¶¶ 16, 28–30 (asserting that the plaintiffs have suffered and witnessed extreme violence).

housing, and other traumas.[40] Such neighborhoods also are often financially impoverished. Combined, racism and poverty raise the risk that children will suffer from problems like food insecurity and toxic hazards.[41] Kids like Chiron, living in communities segregated by race, also feel the psychic pain of living in poverty in a nation of vast wealth.[42] Then they are shunted into ethnically or racially segregated schools that are underfunded, overpoliced, and stereotyped as not producing smart and productive civilians. We thus posit, based on the evidence produced in *Compton* and our analysis below, that this particular intersection of race, gender, place, and poverty is disproportionately a site that produces complex trauma and emotional, mental, and physical disabilities. To understand why, we need to consider how the *Compton* case has played out against the backdrop of federal disability law.

In May 2015, plaintiffs — students and teachers — filed a class action suit against CUSD, the Superintendent, and members of the Compton school board, alleging the defendants had violated Section 504 of the Rehabilitation Act, the Department of Education regulations promulgated under Section 504, and Title II of the Americans with Disabilities Act.[43] The First Amended Complaint details the backgrounds of children living in Compton. They suffer from poverty, racism, incarceration, violence, homophobia, and the threat of deportations.[44] The complaint further alleges that students in poor communities experience complex trauma, which is often compounded by minority status and racism.[45] Specifically, a number of the student-plaintiffs allege that they have suffered from severe ACEs, including witnessing the violent death of friends or family

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40. *See generally* Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2002 (2007) (community economic development implicates environmental justice) (citing Rachel D. Godsil & James S. Freeman, *Jobs, Trees, and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25, 47 (1994)).

41. *See, e.g.*, William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 16 (2012) (contending "[s]egregation concentrates poverty, and concentrated poverty leads to poor health outcomes cradle-to-grave").

42. *See, e.g.*, Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm A Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 422 (2004) (decrying wealth inequality).

43. First Amended Complaint, *supra* note 16, at ¶¶ 6–8.

44. *Id.* at ¶ 12.

45. *Id.*

members, seeing a father hold a gun to a mother's head, sexual assault, losing a parent or close family member to disease or violence, and separation from siblings when placed in foster care, among other trauma-inducing situations.[46]

According to the Complaint, research demonstrates that although children vary in their reactions, those who suffer two or more ACEs are prone to complex trauma, resulting in symptoms that often fit the definition of disability under the federal disability statutes — such as an impairment that substantially limits brain function, and the ability to learn, think, and concentrate, among other major life activities.[47] Professor Dowd's book details the research that supports the Complaint's allegations.[48] For instance, ACEs can cause changes in the neurological system, hyper-sensitivities, and complex trauma.[49] Accepted research-based methods exist to improve the conditions and education of children who suffer complex trauma.[50] These methods include schools' affirmative actions to improve the children's ability to learn and to grant these children meaningful access to education through both whole-school approaches and individualized educational plans (IEPs).[51]

The Complaint further alleges that a failure to adopt these measures harms children and denies them meaningful access to education and that CUSD has not only failed to adopt whole-school measures to ameliorate the children's trauma but has also used disciplinary measures that increased harm to children with complex trauma, denying them meaningful access to an education.[52] Under federal law, all qualified children with disabilities have a right to "meaningful access" to educational opportunities and benefits.[53] The Complaint details very specific allegations about a number of student plaintiffs, the ACEs and complex trauma they have experienced, and CUSD's failure to adopt or modify its measures to accommodate the students.[54] It also alleges that plaintiffs-teachers who witnessed the children's reactions to trauma themselves suffered as a result of

46. *Id.* at ¶¶ 14–16, 23, 28–29, 33.

47. *Id.* at ¶¶ 1–3.

48. *See* DOWD, *supra* note 13, at 100–14.

49. *Id.* at 102–06.

50. First Amended Complaint, *supra* note 16, at ¶¶ 1–7.

51. *Id.* at ¶¶ 5–7; *see supra* note 19 (explaining IEPs).

52. First Amended Complaint, *supra* note 16, at ¶¶ 6–7.

53. *See* Alexander v. Choate, 469 U.S. 287, 301 (1985) (stating that qualified persons with disabilities have the right to "meaningful access to the benefit" offered by the grantee).

54. First Amended Complaint, *supra* note 16, at ¶¶ 14–55.

CUSD's failure to train teachers and to take other measures to ameliorate the children's trauma.[55] The Complaint sought injunctive relief that would require CUSD to engage in teacher training, restorative justice techniques, and other measures to assure its students have meaningful access to education.[56]

The defendants filed a motion to dismiss all counts of the Complaint, which the federal district court denied in a detailed opinion.[57] Rejecting the defendants' arguments, the court concluded that the plaintiffs' complaint set forth a viable cause of action under Section 504 of the Rehabilitation Act,[58] Section 504 of the Department of Education Regulations,[59] and Title II of the Americans with Disabilities Act (ADA).[60] While the court did not conclude that any particular plaintiff had suffered complex trauma and a resulting disability — an issue of fact that would be decided after discovery — the detailed allegations in the complaint were sufficient to withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[61]

While the court agreed that the Complaint stated a valid cause of action, it did not accept the premise that mere exposure to two or more ACEs would automatically cause an individual to suffer complex trauma or disability under the statutes involved. In essence, the court would require a showing that each of the individual plaintiffs who were exposed to ACEs had suffered from complex trauma and consequently fulfill the legal definition of a disability.[62]

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55. *Id.* at ¶¶ 45–47.

56. The definition of "restorative" techniques that the plaintiffs seek is unclear. For an analysis of the different possible meanings of restorative justice, see Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583, 622–32 (2018). It is necessary to define exactly what "restorative practices" the school district will use and how it will use them. *Id.* at 628. The school district must also be aware of differential discipline of minority students despite the presence of restorative techniques. *See id.* at 633–34.

57. *See generally* P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1126, 1130–33 (C.D. Cal. 2015) (describing procedural posture).

58. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973).

59. 34 C.F.R. § 104.32 (1980).

60. P.P. v. Compton Unified Sch. Dist., 135 F. Supp.3d 1126, 1134 (C.D. Cal. 2015). *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–213 (2012). Title II is found at 42 U.S.C. §§ 12131–65.

61. In December 2015, after the court's denial of the motion to dismiss, the plaintiffs filed the First Amended Complaint, which, for all practical purposes, was the same as the original complaint.

62. *Compton Unified Sch. Dist.*, 135 F. Supp.3d at 1134.

Following the court's denial of the motion to dismiss, the parties have been engaged in settlement negotiations.[63] Given the duration and what appears to be the seriousness of these negotiations, the *Compton* case can only improve the educational opportunities (and therefore, the lives) of poor minority children in the school district so long as the parties negotiate to create clear disciplinary and educational standards that would benefit the plaintiffs.[64] Those may include the use of restorative justice techniques, as opposed to traditional methods of discipline, as well as professional development on the effects of trauma and how to support students who have been traumatized. Restorative justice techniques seek to rebuild relationships in the community through means like apologies and restitutionary service rather than punishment.[65] In the event the negotiations break down, the lawsuit will proceed.

Before discussing the case further, we need to address the scholarly debate on whether we can and should use current disability law to address issues of racial and class injustice. The next Part describes the arguments that have arisen over whether disability law can be used as a vehicle to address racial discrimination and answers the question why, with reservations, we think that disability law *should* provide relief to address disability-related issues related to race and class discrimination.

II. THE SCHOLARLY DEBATE

The plaintiffs' claims in *Compton* on behalf of kids like Chiron have sparked a lively debate amongst legal scholars over whether dis/ability can be analogized with race.[66] While she does not specifically study the *Compton* case, Professor Kimani Paul-Emile argues that current disability law frameworks might be useful to further the interests of African Americans.[67] Professor Claire Raj strongly disagrees, on doctrinal grounds, as she believes the *Compton* case fails the current interpretation of the individual causation

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63. *See, e.g.*, Jeremy Loudenback, *Compton Trauma Lawsuit Near Resolution?*, LA SCHOOL REP. (June 9, 2016), http://laschoolreport.com/compton-trauma-lawsuit-near-resolution/ [https://perma.cc/W3MT-WBTB].

64. *See* Nussbaum, *supra* note 56, at 622–34, 639–44 (discussing benefits of restorative justice techniques for students).

65. *See generally id.* (explaining methods).

66. On the scholarly debate, see generally *infra* Part II.A.

67. *See generally* Paul-Emile, *supra* note 31 (arguing that disability frameworks, rather than race law may better deal with race discrimination because disability law requires accommodations to the individual and does not always require a showing of intent).

requirement in the disability statutes.[68] Moreover, Raj is concerned about the stigma of suggesting that being a racial minority is a disability, as that term is currently understood.[69] Finally, Professor Nancy Dowd's important book, *Reimagining Equality: A New Deal for Children of Color*, like Raj's essay, contends that arguing that racial minorities have disabilities might lead to stigma.[70] Dowd adds that, in any event, remedying complex trauma in schools would occur too late to promote developmental equality.[71] She thus advocates for a comprehensive "New Deal for Children" that would provide all children with the social and psychological environment they need to reach their potential before they enter school — from parenting classes to early education and other social services.[72] While we believe that Dowd's solutions are ideal, we question the likelihood of Dowd's proposal and believe current disability law's potential utility in helping the Compton plaintiffs outweighs concerns about stigma.

A. Current Debate

There is substantial commentary on whether the *Compton* approach makes sense as a means to attack poor conditions in schools and create equality. Paul-Emile's award-winning article, *Blackness as Disability*,[73] advocates the use of current disability law, or at least disability law frameworks, to further rights of persons of color. Noting that both race and dis/ability are socially constructed, Paul-Emile explains that race law is tethered to a rigid anti-discrimination framework that ordinarily requires a showing of intentional discrimination in order to prevail.[74] Such an intent requirement is

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68. Raj, *supra* note 31, at 5 (noting that, "[b]y definition, systemic reforms that change the delivery of education for all children are not tied to an individual student's needs, but rather are driven by the group's collective needs. While the group may, in fact, require and benefit from these curricular changes, the FAPE standard — and thus disability rights law — does not compel them") (footnotes omitted). "FAPE" stands for Free and Appropriate Public Education, and is an individual right provided by the disability statutes. *See* 34 C.F.R. § 104.33 (1980).

69. *See* Raj, *supra* note 31, at 6.

70. DOWD, *supra* note 13, at 106.

71. *Id.* at 106, 112.

72. *Id.* at 126–29 (presenting proposal).

73. *See generally* Paul-Emile, *supra* note 31. *See* Simone Somekh, *Professor Kimani Paul-Emile Wins John Hope Franklin Prize*, FORDHAM L. NEWS (June 5, 2019), https://news.law.fordham.edu/blog/2019/06/05/professor-kimani-paul-emile-wins-john-hope-franklin-prize/ [https://perma.cc/SW9K-YZBS] (announcing award for article).

74. *See* Paul-Emile, *supra* note 31, at 296.

difficult to prove and tends not to promote structural change.[75] Moreover, Paul-Emile argues that Black identity, especially when combined with class, creates disadvantages that can be overcome only by using affirmative remedies.[76] Unfortunately, the remedies attached to race law infrequently require an affirmative duty to act, a duty that exists in federal disability civil rights laws.[77]

Paul-Emile's theory is innovative and intriguing and seemingly would support lawsuits against school districts such as CUSD. Importantly, she understands the social construction model of dis/ability, which we explicate in the next Part, and argues that refusing to use current disability law to counter race discrimination and other racial disadvantages because of a feared stigmatizing of people of color is a refusal based in stereotype and stigma of persons with dis/abilities.[78] But Paul-Emile's argument, while thought-provoking, does not take adequate account of the reality of how courts currently interpret disability discrimination law. While she cites the language of the various disability statutes, she admittedly does not investigate the doctrine fully.[79]

Even though the ADA was originally written as a far-reaching statute that would change the lives of persons with disabilities, courts de-radicalized the statute with rigid and narrow interpretations of who met the definition of a person with a disability. As a result, many persons who should have protections under the statute were left out in the cold.[80] In response, Congress passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which explicitly overruled a number of limiting Supreme Court cases and broadened definitions of who is protected under the statute.[81] Unfortunately, however, even under the amended Act, a substantial minority of courts continue to conclude that individuals who appear to have valid claims do not meet the current definition of having a disability.[82]

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75. *Id.*

76. *Id.*

77. *Id.* at 326.

78. *Id.* at 299–300.

79. Paul-Emile states that her essay is "more conceptual than doctrinal" and urges us to use the current disability laws to think about how to approach race. *Id.* at 302.

80. Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years after the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. POV. L. & POL'Y 383, 384–89 (2019).

81. *Id.* at 384, 389–91.

82. *See id.* at 411–12 (arguing that courts are limiting the Act's potential).

Dis/ability law scholar Claire Raj raises practical doctrinal questions in *Disability Law as an Agent of School Reform* and suggests a number of improvements over the *Compton* case model.[83] In a careful explanation of the law — specifically, the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, Department of Education regulations under Section 504, and Title II of the ADA — Raj details the potential weaknesses of the legal arguments in the *Compton* case. While we do not have room here to fully analyze the doctrine or Raj's essay, suffice it to say that Raj's concerns are warranted. Raj explains that *Compton* may be stretching the current disability laws, especially concerning the remedies demanded by the plaintiffs.[84] Generally, she correctly notes, disability laws focus on individual children rather than groups of children.[85] The underlying goal of the *Compton* lawsuit, however, is to engage in overall school reform, without a focus on individuals.[86]

At the doctrinal level, Raj shows that while the "child-find" requirement under the IDEA — the "location and notification" requirement under Section 504 of the Rehabilitation Act's Department of Education regulations — requires schools to assure they have found children in need of special education, there is some ambiguity about the measures schools need to take to identify these children.[87] A requirement that schools in impoverished neighborhoods test all students may or may not be a fair reading of the law, even though Raj concedes that testing in this situation might be useful.[88] The problem is that even if testing of all students is required by the law as interpreted, she argues, doing so may impose a stigma on poor, minority children and communities by linking racial minority status to a perceived deficit.[89]

Even assuming there is a duty to test all students in particular districts, Raj reminds us that the existence of ACEs does not necessarily lead to complex trauma or disability in all students, and the remedies requested by the *Compton* case may go well beyond what the statutes currently would require.[90] The guarantee of a Free and Appropriate Public Education (FAPE) that students are granted

83. Raj, *supra* note 31, at 50–57.
84. *Id.* at 3–6.
85. *Id.*
86. *Id.* at 4–20.
87. *Id.* at 4–5, 17, 30, 31–34.
88. *Id.* at 37.
89. *Id.*
90. *Id.* at 32–36.

under the Department of Education regulations applies to individuals, not groups, and the statutes require individual, not group, accommodation.[91] Moreover, as Raj notes, even when the plaintiffs make an argument that pertains to the group under Section 504 and the ADA, they may not prevail.[92] The reason they might not prevail is that the regulations require schools to make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination based on disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity."[93] While plaintiffs might succeed in proving that such accommodations are necessary to avoid discrimination, the school district will argue that the remedies requested are class-wide, require the expenditure of substantial sums, portend reformation of the entire education program, and therefore "would fundamentally alter the nature of" the schools' educational programs.[94] Such arguments are not frivolous and may succeed given the deference courts often give to schools.[95]

Professor Dowd joins Raj in questioning the use of the ACEs model and the federal disability laws to create reform for children of color for four reasons. First, using current disability law to attempt to ameliorate childhood harms may reinforce stereotypes already attached to Black children like "incapability, lack of intellectual capacity, and dangerousness."[96] Relatedly, the ACEs approach "may tend toward identifying causes in the individual or the individual's family, rather than in structural harm."[97] Moreover, the lawsuit intervenes in children's lives only after they go to school and focuses on improving education rather than preventing the harms due to structural and environmental causes that occur in early childhood.[98]

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91. *Id.* at 16.

92. *See id.* at 38–40.

93. Rothschild v. Grottenthaler, 907 F.2d 286, 293 (2d Cir. 1990); 28 C.F.R. § 35.130(b)(7)(i) (1991). While the plain language of the Section 504 regulations does not include this defense, courts have imposed this limitation on the regulation. *See* Raj, *supra* note 31, at 39.

94. Raj, *supra* note 31, at 39.

95. *See*, *e.g.*, C.D. M.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 630 (1st Cir. 2019) (holding that "courts owe respect and deference to the expert decisions of school officials and state administrative boards" in IDEA cases).

96. DOWD, *supra* note 13, at 106. Dowd is also concerned that there will be a focus on the child and his or her family without a focus on structural causes of harm. *See id.*

97. *Id.*

98. *Id.* at 106.

This contradicts the fact that "early childhood is one of the most critical developmental periods."[99] Finally, the ACEs model was created to measure adverse family events of middle-class (and White-normed) children and does not necessarily effectively measure all harms caused by structural and environmental causes.[100]

Dowd's critiques are particularly incisive, but, we think, surmountable. Dowd's proposed "New Deal for Children" would be ideal, but given the current social reality of the center-right tendency in U.S. voting, her legislative plan may not come to be for a long time.[101] A switch from an extreme right-wing president to an extreme left-wing president is possible, but unlikely. Moreover, the far right has captured the Supreme Court that would have to uphold Dowd's bold proposal. It is thus worthwhile to consider whether existing disability laws provide promise for children injured by the intersection of race, dis/ability, and the environments in which they live. In fact, it might be possible to win a lawsuit pursuant to the "child-find" obligation to require a school district to screen children early on before they are of school age in order to permit the ever-important early intervention, teaching of young children before they reach school.[102]

B. Why Use Dis/ability?

There is no doubt that Raj and Dowd launch significant critiques of using current disability law to improve the lives of children of color, but we think it may be worth reconsidering the value in such a move. We are reluctant to turn to disability law for two reasons. First, the possibility of stigma is real. Second, the current interpretation of the disability statutory frameworks renders the efficacy of a *Compton*-type claim of questionable. While we partially refute those two

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99. *Id.* at 100.

100. *Id.* at 106–07. Professor Dowd notes that subsequent models have been created and tested to include more environmental factors, but she concludes that the model continues to underrepresent the harms caused by racism. *Id.* at 107–10.

101. On the center-right tendency of U.S. voting, see Michael W. McConnell, *Moderation and Coherence in American Democracy*, 99 CAL. L. REV. 373, 378 (2011) ("Essentially, the United States is a center-right country, with a decided lack of extremes."). One could argue this has become a far-right country with a strong left opposition, but with very few moderate or even center-right constituencies. The reinterpretation of disability law that we imagine requires a political shift wherein the left and moderates align against the right.

102. *See* Mark C. Weber, *IDEA Class Actions After* Wal-Mart v. Dukes, 45 U. TOL. L. REV. 471, 489 (2014) (explaining a case in which the court had certified classes of preschool children from ages three to five).

arguments in the remainder of this Part, we will later turn to a reinterpretation of disability law in Parts III and IV for one primary reason — the consensus that existing disability law is meant to remove socially constructed barriers means it *should* be useful for plaintiffs like those in the *Compton* case.

i. Stigma

As noted above, scholars voice concerns about using current disability law to require school reform in poor, racial minority neighborhoods on the grounds that such use would reinforce the stigma that minority students already suffer — that they are inferior to White students intellectually.[103] In fact, Black students and other minority students do suffer from stereotypes and stigma based on the unfounded historical rationalization of racial subordination.[104] Black students are three times as likely to be categorized as intellectually disabled, and one and one-half times as likely to be labeled as learning disabled, compared to their White peers.[105] Latinx, American Indian, and Native Alaskans are also disproportionately represented in special education, especially in states where they represent a substantial portion of the population.[106]

The intellectual rationalizations of slavery and Jim Crow, rooted in White Supremacy and the Eugenics Movement, included the comparison of White and Black skeletons and brains.[107] This legacy is still present in the treatment of Black and Brown students, children of immigrants, and others among the "lower" social classes when it comes to educational opportunity and classification.[108] Segregated special education classes are predominately filled with children from communities that are not dominant racially, ethnically, or linguistically in the U.S.[109] This is particularly true of the special

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103. *See* DOWD, *supra*, note 13, at 106; Raj, *supra* note 31, at 46–47.

104. Subini Ancy Annamma et al., *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability* 10, *in* DISCRIT, *supra* note 6.

105. *Id.* at 11 (citing T. Parrish, *Racial Disparities in the Identification, Funding and Provision of Special Education*, *in* RACIAL INEQUALITY IN SPECIAL EDUCATION (D.J. Losen & Gary Orfield eds., 2002)). For a personal description of a mother's struggle to assure that her Black first-grader would receive equal treatment and not be forced into segregated spaces, see Kathleen M. Collins, *A DisCrit Perspective on the* State of Florida v. George Zimmerman*: Racism, Ableism and Youth Out of Place in Community and School* 183, 196–201, *in* DIS CRIT, *supra* note 6.

106. Annamma et al., *supra* note 104, at 11.

107. *Id.*

108. *Id.*

109. *Id.*

education classifications of Learning Disability, Intellectual Disability (formerly Mental Retardation), and Emotional Disturbance or Behavior Disorders,[110] perhaps the most stigmatized disabilities.

However, in the face of the argument against using existing disability law in education cases because of potential stigma, we have serious concerns. To argue that Black children will be stigmatized by a claim that they suffer from one or more dis/abilities caused by their environments is, in our view, to argue that children with dis/abilities are inferior and that classifying racial minority children as having dis/abilities would create a double badge of inferiority. Neither race nor dis/ability should create stigma. Further, if structural factors like implicitly biased social institutions are causing dis/ability, we especially want to avoid assigning its effects to other, individual, causes.

Shifting the lens to consider the argument from a different perspective may illuminate our position. Assuming the law regarding race discrimination afforded greater protections and opportunity for school reform, would we be comfortable with the argument that children with dis/abilities who are members of non-dominant racial classes should not use race discrimination law to their benefit because doing so would call attention to their race and would further stigmatize them? In other words, by claiming dis/ability is stigmatizing, are we re-stigmatizing persons with dis/abilities? This is a tricky question because the history of viewing dis/ability as inferior, and the tendency to segregate children with dis/abilities — as well as the history of finding that racial minority children have dis/abilities — tends to legitimize the stigma critique. Certainly, those using the stigma argument to resist the use of current disability law are using it out of concern for how society has constructed dis/abilities, not out of the belief that persons with dis/abilities are inferior.[111] Still, when it

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110. *Id.*

111. In *Toward Unity in School Reform: What DisCrit Contributes to Multicultural and Inclusive Education*, Susan Baglieri, using the comparison to Cheryl Harris' *Whiteness as Property*, argues that schooling is property and that "[t]he discourse of school reform centers on inequalities and opportunity gaps to acquire schooling, as a form of property through meritocracy." Susan Baglieri, *Toward Unity in School Reform: What DisCrit Contributes to Multicultural and Inclusive Education* 169, *in* DISCRIT, *supra* note 6. Instead of this neoliberal, capitalist approach to schooling, which she believes focuses on "at risk" children and reifies the racist and ableist constructions, Baglieri proposes that we: (1) "resist the meritocratic practice of schooling and normative assessment structure;" (2) "reconceptualize curriculum as being in service to communities, rather than in service to individuals or the economy;" and (3) "support community-based control of the economies built up around disability and disaster capitalism." *Id.* at 177–79.

comes to the stigma argument, we contend scholars should resist accepting the idea that having a dis/ability or being a racial minority is stigmatizing.[112] We think one best avoids this potential stigma by using a reinterpretation of disability law whenever it can assist students with issues that are linked by both race and dis/ability.

This leaves us with the conclusion that the benefits of our dis/ability approach outweigh the potential for stigma. We do worry about the current shunting of Black and/or Latinx kids into special education classes. But the problem of complex trauma leading to educational differences in what students need is quite significant in the violence-plagued inner-city communities we are discussing. We hope that a group-based approach can respond to these students' needs by changing things for everyone. Today's disability doctrine might not go far enough in recognizing group harms without stigmatizing individuals, but we believe that it could do so.

ii. Doctrinal Disability Law or a Dis/ability Framework?

We also have concerns about whether the federal disability laws, as currently interpreted, will be useful in achieving school reform. The judge's denial of the defendants' motion to dismiss in the *Compton* case suggests a belief that CUSD should have responded to the "child-find" rules by testing children in the school district — members of this particular group of students may be suffering dis/ability from complex trauma that requires accommodation in their education. Otherwise, presumably, the judge would have dismissed the substantive claim as not "plausible."[113] The failure to certify the class has led to protracted settlement negotiations that may conceivably result in improved programs for poor children attending school in CUSD. But, given how courts generally interpret disability law

112. One question is whether one should avoid linking race and dis/ability not because dis/ability should be stigmatized, but because, in reality, it is stigmatized. One could argue that we should attempt to disrupt the negative meaning of dis/ability but not link race to it because doing so may make things worse for racial minorities. We recognize this is an important question, but the use of disability law can be beneficial to kids like those in Compton. Hence, we decline to promote the stigma by refusing to use existing disability law to correct problems that are linked by both race and dis/ability.

113. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) (requiring that the court regard the allegations in the complaint as plausible in order to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (same).

narrowly, as demonstrated by Raj, we would not wish to rely merely on the disability law as it is often interpreted today.[114]

While specific disability laws, as currently interpreted, may ultimately prove ineffective, certain frameworks created by those disability laws may be useful in serving as models for new legislation or judicial interpretations that would address the intersection of poverty and race and their effects on children. Congress or state legislatures could rely on Section 504 of the Rehabilitation Act and the ADA, with significant changes in interpretation, to create statutes that would enhance the rights of poor minority children. That said, given the Congress's inability to pass progressive legislation today, it may be more effective to rely on the disability laws as written and to argue that courts interpret them more broadly.[115] Furthermore, current state disability laws could provide further redress: either because the laws themselves are written more progressively than the federal laws or the state courts interpret them progressively.[116]

We acknowledge that the ADA, Section 504 of the Rehabilitation Act, and IDEA emphasize the individuality of the plaintiff but we also see potential in the principles behind those rules. The underlying reason for a focus on individuals makes sense: historically, persons with dis/abilities have been judged as a group as "handicapped" or "incapacitated." Especially when speaking of a child's ability to perform in school or an adult's ability to work at a particular job, the ability of the person to engage in major life activities would be relevant to the accommodations needed. Historically, a group rather than an individual determination fostered stereotypes about the inability of individual persons to do anything that "normal" people can do. For this reason, those writing the ADA and other disability laws were careful to require the individual determination of whether someone has a disability and, if so, what accommodations or modifications to programs are necessary to allow that individual to successfully perform a job, use the state program, or get an adequate education.[117] The individual determination also allows for finetuning

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114. *See supra* notes 83–94 (relating Raj's critique of *Compton* case).

115. *See* McConnell, *supra* note 101, at 378 (arguing that the U.S. electorate is not progressive).

116. *See, e.g.*, Green v. California, 165 P.3d 118, 125 (2007) (noting that the California legislature intended its disability law in some instances to provide more protections than federal law).

117. *See* Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 50–52 (2000) (explaining that stereotypes of what it means to be "disabled" harms individuals with disabilities who seek to avoid isolation).

of the offered service and permits the environment to be as inclusive as possible. The individual determination of "disability" may make it very difficult to categorize people with dis/abilities into groups. Nonetheless, we cannot forget that IDEA and other disability laws resulted from a number of class actions, and we should offer appropriate broad-based remedies to school-based issues of children with disabilities.[118]

Moreover, Professor Mark Weber would likely disagree with Raj's limited characterization of the doctrinal law. Although his essay does not address using disability law to redress racial discrimination and trauma and was published before *Compton* was filed, Weber examined the use of class action litigation to remedy violations of the IDEA statute.[119] He argues compellingly that *Wal-Mart Stores, Inc. v. Dukes*,[120] a Title VII sex discrimination case that overturned the lower court's class certification, is not the death-knell to class action lawsuits brought under IDEA. There is, Weber notes, a significant difference between the negative requirements of Title VII of the 1964 Civil Rights Act — not to discriminate illegally — and the affirmative requirements of the IDEA. Professor Weber highlights the affirmative obligations imposed by IDEA on school districts:

> [They] must identify, evaluate, create appropriate programs, make placements in integrated settings with adequate related services, review the programs, etc. These are all affirmative obligations, and not doing any one or more of them will similarly affect all children for whom the defendant fails to meet the obligation.[121]

The most prominent example of affirmative obligations in current disability law is the "child-find" requirement of the IDEA (which is similar to the "child-find" requirement in the Section 504 regulations, a violation of which is alleged by the plaintiffs in *Compton*).[122] In essence, the "child-find" creates an affirmative duty for the school district to seek out children within the district who have disabilities and to assure that each child has a free and appropriate public

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118. We thank Mark Weber for reminding us of this fact. Weber, *supra* note 102, at 472–77(explaining the history of IDEA).

119. *Id.*

120. 564 U.S. 338 (2011) (holding that the lower court erred in granting the 1.5 million plaintiffs' motion to certify the class in a gender discrimination case under Title VII).

121. Weber, *supra* note 101, at 494.

122. 20 U.S.C. § 1412(a)(3)(A) (2004) ("child-find").

education.[123] The remedy in an IDEA class action could be to strike down certain policies and practices that create barriers to the rights of children with dis/abilities. In *Compton*, one such policy could be its exclusive use of traditional disciplinary methods even though they are proven to harm children suffering from complex trauma. Another is a policy to use certain teaching techniques inappropriate for children who suffer from complex trauma. Alternatively, the remedy under an IDEA class action could be to affirmatively require school districts to find children with dis/abilities and provide appropriate remedies.

At a minimum, then, under the "child-find" requirement in the Section 504 regulations, the *Compton* judge's failure to certify a class seems inappropriate. Certainly, this is the case where there is expert evidence that ACEs cause children to suffer emotional, mental, and physical disabilities that affect their ability to learn and to control themselves in a disciplinary environment. This argument is even stronger given the evidence in *Compton* that scientists know how to improve the outcomes for these children through specific teaching, counseling, and disciplinary techniques. It is thus likely there is a class of "disabled" students that the district must find.[124]

Once the screening takes place, the "child-find" requirement under the IDEA should reveal that a large percentage of children in CUSD suffer from disabilities related to ACEs and complex trauma leading to dis/abilities or risk of dis/abilities that can be ameliorated. Once CUSD has this information, it has an obligation to modify its practices and procedures — teaching methodologies, teacher education and training, and disciplinary systems — to assure that all children have an appropriate education.[125]

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123. 20 U.S.C. § 1401(9) (2012) (free, appropriate public education and related services); *see also* 20 U.S.C. § 1401(26) (related services); 20 U.S.C. § 1412(a)(1) (free, appropriate public education).

124. We are arguing that one way to find that class is to ask whether there is a discrete and cohesive intersectional cohort of students with shared experiences of and responses to ACEs.

125. Alternatively, plaintiffs could sue under the various disability statutes, and upon proof that the named plaintiffs suffered complex trauma and disabilities, the court should order screening (testing) as a remedy. *See, e.g.*, Complaint at 128, D.R. v. Mich. Dep't Educ., 2016 WL 6080952 (E.D. Mich. Oct. 18, 2016) (2:16-cv-13694-AJT-APP) (alleging that schools should test all children for lead contamination and accommodate the children's disabilities once it is determined that children have unhealthy lead levels that affect mental functioning). The court in the Flint lead case denied the defendant's motion to dismiss for failure to exhaust administrative remedies and denied the defendants' motion for a stay pending appeal of the denial of the motion to dismiss. *See* D.R. v. Michigan Dep't Educ., 2017 WL 5010773, *1 (E.D. Mich. Nov. 2. 2017). Once the screening is complete, the school's obligation to modify policies and practices to accommodate its students would arise under the

Current disability law's focus on individuals may have been overstated. The purpose of its individual focus is to avoid stereotypes — protecting persons with dis/abilities, not hindering the redressability of their injuries as a class. As Part III discusses, the statutes assume a social construction model rather than a medical model of biological difference.[126] If the logic of the social construction model were taken seriously, cases like *Compton* would be successful, as such interpretations would emphasize tearing down structural barriers to learning by children with dis/abilities. Moreover, there are already precedents in disability and Title VII law to guide the way.[127] To explain further our approach to the scholarly debate over whether disability law can be used successfully to prevent and remedy racial inequalities, the next Part of this Article explains social construction theory.

III. SOCIAL CONSTRUCTION THEORY AND DIS/ABILITIES

In this Part, we take up the challenge of comparing race and dis/ability by considering social construction theory. The argument for a social constructionist view of race begins with acknowledging that race is nothing more than a social construct. Scientists agree that race has no biological meaning; skin color and other physical factors that we identify with different racial groups do not connote

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ADA and Section 504 of the Rehabilitation Act if the testing demonstrates that a substantial percentage of children are victims of complex trauma and its resulting disabilities. The appropriate modifications would depend on the expert testimony relating to what types of teacher training, curricular changes, and changes to restorative justice techniques are most effective in that environment.

126. We admit, however, that the social construction model of existing disability law is somewhat incomplete, and portions of the disability laws seem to contradict one another in that some portions seem to rely on the medical model while others seem to recognize the social model. In fact, the different models are apparent in the definition of disability under the ADA. That statute states:

> The term "disability" means, with respect to an individual–
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).

42 U.S.C. § 12102 (1990). Sections A and B speak of a physical or mental impairment, which seems to point toward the medical model. Section C, however, focuses on whether others consider the individual to have an impairment, which seems clearly to be consistent with the social model. Moreover, other sections of the statute or regulations requiring reasonable accommodations to an individual's disability and modifications to policies or practices recognize that social barriers are dis/abling. *See, e.g.*, 42 U.S.C. § 12112 (1990); 28 C.F.R. § 35.130 (7)(i); (8) (1991).

127. *See infra* note 193 (discussing cases).

biologically significant differences.[128] In fact, some modern genetic researchers have called for the elimination of race as a category because it is a weak proxy for the study of genetic diversity.[129] As a scientific matter, then, there is no such thing as race. Race is just the social meaning associated with discernible patterns in physical appearance.[130]

By saying that race is a social construct, we mean that society creates racial categories and imbues them with meanings, which often change across place and time.[131] For example, a century ago, people in the United States spoke of Jews, the Irish, and Southern Italians as belonging to races other than White, whereas today we conceive of these groups as White.[132] In the United States an infinitesimal amount of black "blood" was sufficient to categorize a person as Black.[133] In other societies, such as Brazil, people who have different proportions of Black ancestry are considered to constitute different races.[134] In essence, communities create race, a category that reflects status, acceptance (or non-acceptance), and societal privilege (or lack of privilege). Professors of Ethnic Studies and Sociology Michael Omi and Howard Winant thus defined racial formation theory: race's meanings are formed in specific cultural moments, not found in

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128. Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 6, 2016), https://www.scientificamerican.com/essay/race-is-a-social-construct-scientists-argue/ [https://perma.cc/S593-9AZR].

129. *Id.*; *see also* Michael Yudell et al., *Taking Race Out of Human Genetics*, 351 SCI. 564, 364–65 (2016).

130. See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 55 (1986) (defining race).

131. *See, e.g.*, IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xiii (1996) (declaring, "race is highly contingent, specific to times, places, and situations"). The definitive statement on the value of socially constructing whiteness for Whites is Cheryl Harris's *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

132. The fact that race is a social construction can be observed from the debate on this point. While major experts have written about how these groups have "become white" eventually in the United States, the question about whether this is true seems to depend on the definition of "becoming white." *See, e.g.*, KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); DAVID ROEDIGER, THE WAGES OF WHITENESS (1991). If it is a racial classification, it is false; but if it demonstrates status in the community, these groups do "become White." *See* Phillip Q. Yang & Kavitha Koshy, *The "Becoming White" Thesis Revisited*, 8 J. PUB. & PROF. PSYCH. 1, 3 (2016). In either event, both those who pose and oppose the "becoming White" theory agree that race is socially constructed. *See id.* at 2.

133. OMI & WINANT, *supra* note 130, at 53.

134. *See* ANTHONY MARX, MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL 66–68, 74 (1998) (comparing racial formation in the United States, Brazil, and South Africa).

nature.[135] Law is an especially significant way in which the meanings of race have been formed in the United States.[136]

Although race is not real biologically, it is real socially. As one of us has previously declared, "[t]hose stereotypes are materially consequential in that they influence the distribution of social goods."[137] Ignoring race is not an option because it is built into the structures of society, and it affects the daily lives of all people. For instance, certain racial and ethnic accents, names, and skin tones often trigger biased behaviors in this country.[138]

Dis/ability, too, is a social construction. Historically, people thought of dis/ability under the medical model.[139] Dis/ability was something in a person's physical or mental structure. The social model of dis/ability explains that impairments or differences, although material, become dis/abilities because of limitations imposed by society.[140] According to Professor Samuel Bagenstos, dis/ability rights advocates believe that a dis/ability "results from the interaction

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135. OMI & WINANT, *supra* note 130, at 59–61.

136. *See id.* at 57–69 (centering law in defining racial formation).

137. *See* Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side*, 86 DENV. U. L. REV. 633, 643 (2009).

138. *See e.g.*, Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2295 (2017) ("Those same traits [speaking Spanish or speaking English with a Latinx accent] are then associated with qualities like being uneducated, dirty, and prone to violence."); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005) (considering bias against individuals with names that connote non-white ethnicity on resumes); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000) (highlighting ongoing colorism). Some people argue the law should be colorblind while ignoring the crippling effects of racial categories in our history and today. *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF INEQUALITY IN AMERICA (5th ed. 2017) ("Shielded by color blindness, whites can express resentment towards minorities; criticize their morality, values, and work ethic; and even claim to be the victims of 'reverse racism.'"). A denial of dis/ability, impairment, or difference (whatever the label and cause) shares a similar omission, as it may deny the historical paternalistic policies directed at persons with different abilities and would make current modifications of policies and practices and removals of barriers more difficult. While society may ultimately reach colorblind and ability-blind views and practices, it is necessary in the meantime to correct the problems of the past (and the present) to consider both color and impairment in shaping remedies that work to overcome those problems.

139. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 6, 18 (2009).

140. *See* DISABILITY NOTTINGHAMSHIRE, *The Social Model vs. the Medical Model of Disability*, http://www.disabilitynottinghamshire.org.uk/about/social-model-vs-medical-model-of-disability/ [https://perma.cc/2G7E-E7AZ] (last visited Jan. 27, 2020).

between some physical or mental characteristic labeled an 'impairment' and the contingent societal decisions that have made physical and social structures inaccessible to people with that condition."[141] For example, a person who uses a wheelchair who is fully capable of working can be limited by the building in which she works because it has no ramp.[142] Likewise, someone with a history of mental illness may be denied the break time he needs to accommodate his difference at the workplace, and therefore end up on the unemployment rolls. An employer might also refuse to hire someone who has HIV out of an irrational fear they will spread AIDS or miss work because of illness.[143] This is the "disabling" of the "disabled."[144]

Dis/ability rights advocates believe that society has a responsibility to eliminate barriers that create difficulty for persons with physical or mental impairments.[145] This position discourages society from seeing persons with dis/abilities as pitiable, "charity cases," and encourages the elimination of barriers our society has created for persons with impairments or differences.[146] Some advocates argue there is no dividing line between persons with dis/abilities and those without, but merely a range of abilities. Professor Bagenstos explains that this view holds that "the law should treat disability as a universal trait, one we all possess in one way or another."[147] Conversely, other dis/ability advocates argue that if we do not recognize impairments that, combined with the environment, cause dis/abilities, we cannot remedy through the law the lack of access to social goods that persons with impairments suffer.[148] Although we tend to agree that people are on

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141. BAGENSTOS, *supra* note 139, at 6. For a nuanced argument about the relationship between social construction and embodiment in dis/abilities theory, see generally Tobin Siebers, *Disability and the Theory of Complex Embodiment — For Identity Politics in a New Register*, *in* THE DISABILITY STUDIES READER (5th ed. 2016) (suggesting directions for a dis/abilities theory that is grounded in social construction theory, embodiment theory, and analysis of identities).

142. *Id.* at 7.

143. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (concluding that a woman with asymptomatic HIV had a disability under Title III of the ADA).

144. *See* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 232 (1993) (discussing the "girling" of the "girl").

145. BAGENSTOS, *supra* note 139, at 7.

146. *Id.*; *see also* Rebecca Atkinson, *Viewpoint: Is It Time to Stop Using the Term "Disability"?*, BBC NEWS (Sept. 30, 2015), https://www.bbc.com/news/blogs-ouch-34385738 [https://perma.cc/DYV3-DGTZ] (discussing preferred terminology for "disability").

147. BAGENSTOS, *supra* note 139, at 8.

148. *Id.*

a series of continuums of abilities, the nature and social impact of which can change over time, we believe that antidiscrimination law is necessary to break down barriers that persons with dis/abilities face. Therefore, it is necessary to consider how physical and mental impairments, perceived or real, combine with our environments to create barriers that the law can remedy.

There is one goal that unifies the dis/ability community: the desire to avoid the historic paternalistic medicalization of dis/ability and treatment by parents, medical professionals, and bureaucrats that deprived persons with dis/abilities of freedom and control over their own lives.[149] The dis/ability rights movement, which spurred the passage of the Americans with Disabilities Act, is a diverse community with "different life experiences, different material needs, and different ideological perspectives."[150] It includes those with very differing dis/abilities, known and unknown, who have various beliefs about how much assimilation they would like, or even if they want to be recognized as having a dis/ability at all.[151] Yet persons with dis/abilities agree that they should have the freedom to make their own choices. The ADA was an attempt to enable persons in the dis/abled community to gain freedom and control by granting access to the workplace and public accommodations in privately-owned businesses (such as restaurants, hotels, and professional offices), as well as to public institutions and environments (like schools, courts, parks, and even jails).[152]

Where there is a relevant intersectional cohort, existing disability law, understood in light of the social construction model of dis/ability, is capable of incorporating group based theories.[153] The language of the statutes, the case law, and scholarly publications have already acknowledged this fact.[154] Once one recognizes that society dis/ables

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149. *Id.* at 4.

150. *Id.* at 3.

151. *Id.* at 3–4.

152. *See* Pa. Dep't. of Corr. v. Yeskey, 524 U.S. 206, 210 (1998) (concluding that Title II applies to state prisons); LAURA ROTHSTEIN & ANN C. MCGINLEY, DISABILITY LAW, CASES, MATERIALS, PROBLEMS 11–13 (6th ed. 2017).

153. To be clear, we do not think this is a case of "either/or" (individual or group). We want to expand the ability to certify a class based on a sufficiently discrete and cohesive intersectional cohort without removing existing disability law's capacity to accommodate individuals in appropriate cases.

154. Bradley Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347 (2011) (concluding that not only dis/ability but also impairments are socially constructed); McGowan, *supra* note 117, at 53–63, 112–29 (2000) (arguing that large portions of the ADA recognize that disability is socially constructed such as the reasonable accommodations requirement and the fact that one who is "regarded as" having a

people, one can understand that dis/abling social barriers often operate upon social groups. Lack of wheelchair access affects the group of people who do not walk steps as a whole, refusal to accommodate mental illness affects the group of people with mental health conditions, and having HIV is associated with a particular social group. If society constructs dis/ability, it can surely act upon whole social groups. What remains to be seen is how to identify the relevant socially dis/abled group in a class action and how this affects the critique of the *Compton* case's denial of class certification.

IV. WHY THE *COMPTON* STUDENTS SHOULD GET CLASS STATUS AS "PERSONS WITH DISABILITIES"

The *Compton* case is a good example of how dis/ability is socially constructed, including when it intersects with social positions such as race and social locations such as the inner-city.[155] Our intersectional cohort theory, which we expound in this Part, demonstrates that individuals with similar identities, environments, and experiences often suffer similar results. Consistent with current disability law, the *Compton* court could have recognized these facts instead of initially denying the class certification and refusing the temporary injunction's broad remedy.

A. Intersectionality Theory and Cohorts

We find it helpful to focus on young Black male students in inner-city neighborhoods as an example of intersectional cohort theory. We are aware that this is a fraught enterprise. Social construction theory says there is no fixed meaning of characteristics like youth, race, and gender except as they are socially defined in specific social contexts.[156] Anti-essentialism theory, which also emerges from poststructuralism, says we should not assume there is an essence to identities such as being young, black, or male.[157] As criminologists

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disability actually is defined as having a disability); *cf.* Adam M. Samaha, *What Good Is the Social Model of Disability?* 74 U. CHI. L. REV. 1251, 1251–54 (2000) (recognizing the social construction theory of dis/ability but arguing that it is not useful).

155. *See supra* note 3 (defining and distinguishing social position and social location).

156. *See supra* Part III (discussing social construction theory).

157. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (defining gender essentialism as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience").

Kathryn Henne and Emily Troshynski recently put it, "attempts to distinguish 'Blackness' or 'womanhood'…inevitably construct identities in essentialist ways."[158] Prime examples of the need for anti-essentialism are the ways White women's experiences have stood in for all women and Black men's experiences have represented all Blacks in the feminist and antiracist movements.[159] Intersectionality theory takes this insight in another direction by trying to figure out the ways in which identities are more complex than their essentialized versions.[160] In this Section, we explore the implication of intersectionality theory when it is applied to intersectionally-defined, discrete, and cohesive groups.[161]

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158. Kathryn Henne & Emily I. Troshynski, *Intersectional Criminologies for the Contemporary Moment: Crucial Questions of Power, Praxis, and Criminological Control*, 27 CRITICAL CRIMINOLOGY 55, 58 (2019).

159. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140; *see also* Carbado & Harris, *supra* note 27, at 2201 (2019) (summarizing Crenshaw's views on anti-essentialism).

160. Carbado & Harris say:

> Intersectionality is not an argument against essentialism per se. Nor is intersectionality com- mitted to anti-essentialism per se. Our view is that judging a particular analysis to be essentialist does not settle normative questions; rather, the important consideration is whether the deployment of essentialism is justified empirically and normatively in a particular context.

See Carbado & Harris, *supra* note 27, at 2204. We agree if we define "essentialism" to be a neutral term describing how persons of certain characteristics can represent a group with similar characteristics and experiences (Black women, Black children living in inner city neighborhoods, etc.). But of course, we understand Carbado and Harris as not approving of the type of essentialism (all women's experiences can be represented by White women's experiences) that Crenshaw spoke against. *See id.* (distinguishing anti-essentialism and intersectionality theory). While intersectionality theory might not be *per se* anti-essentialist, we think a sensible application of intersectionality theory presumes that some essentialist moves are illegitimate but others, like that embodied by intersectional cohort theory, are legitimate.

161. Collins identifies a number of assumptions that are prevalent in intersectionality scholarship. She says that one or more of these assumptions is always present, though some may be absent, and the configuration varies. Collins, *supra* note 29, at 14. Here is a summary of her list:

- "Race, class, gender, sexuality, age, ability, nation, ethnicity, and similar categories . . . are best understood in relational terms . . . ";
- Categories of identity create power relations — racism, sexism, classism, and related prejudices — that are interrelated;
- The power relations influence social formations that are organized around unequal distribution of material relations and social experiences;
- Social formations are "historically contingent and cross-culturally specific," varying across times and places;
- Individuals differentially positioned "within intersecting systems of power" develop "different points of view on their own and others' experiences . . . ";

Intersectionality theory is a set[162] of insights stemming from the critique of the "single-axis framework" for thinking about identities.[163] The single-axis framework generalizes the experiences of racial or gender subordination, for example, by assuming that if an employer does not discriminate against all Blacks or all Whites, it cannot be discriminating against Black women. That assumption is false, as (mostly White male) employers may feel solidarity with their Black male peers and White female peers, but hold negative stereotypes about Black women.[164] Sociologist Kathy Davis adds that intersectionality theorists should investigate the "interaction[s] between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in terms of power."[165]

Broadly speaking, we are interested in the relationship between individual identity formation and social structures.[166] By identity formation, we mean the processes of development of an internal sense of self-identity and performance of one's identity in order to negotiate against others' attributions of identity to the individual.

- Social formations of inequality "are fundamentally unjust," thus sparking "engagements that uphold or contest the status quo."

Id. Collins also identifies six themes in the topics of intersectional analyses. *See id.* at 11–13 (thematizing current work).

162. We agree with legal anthropologist Khiara Bridges's persuasive argument that there is not, and should not be, one true intersectionality methodology. *See* BRIDGES, *supra* note 29, at 247 ("Indeed, crafting the theory in a way that limits its capacity may be ill-advised."); *accord* Devon Carbado, *Colorblind Intersectionality*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 811, 841 (2013) (suggesting scholars "push the theoretical boundaries of intersectionality rather than disciplining and policing them").

163. Crenshaw, *supra* note 159, at 140.

164. *See id.* at 141–50 (describing cases failing to recognize uniqueness of discrimination against Black women).

165. Davis, *supra* note 29, at 68.

166. *See id.* at 14 (declaring that people develop "different points of view on their own . . . experiences," highly influenced by "their subject position within intersecting systems of power"). Note, as well, that intersectionality theory is born out of a modified poststructuralist model of identity as socially constructed. *See* Patricia Hill Collins, *"What's Going On?": Black Feminist Thought and the Politics of Postmodernism*, *in* WORKING IN THE RUINS: FEMINIST POSTSTRUCTURALIST THEORY AND METHODS IN EDUCATION 28, 35 (Elizabeth A. St. Pierre & Wanda S. Pillow eds., 2000) (arguing poststructuralist interrogation of linguistic oppositions is valuable to intersectionality theory). However, Crenshaw soundly dismissed "vulgar constructionism," which suggests that race has no appropriate role in understanding peoples' experiences or behaviors. *See* Crenshaw, *supra* note 28, at 1296–98 (challenging courts' use of constructionism to thwart political progress by racial minorities).

Defining this three-part summary of the processes of identity formation will help show how the concept of intersectional cohorts bridges the gap between micro- and macro-levels of analysis.

When considering the *Compton* case, the relationship between identity formation and social structure plays out as follows. First, the intersection of categories of identity affects people's senses of self. That is significant here because being at a particular intersection of race, gender, class, age, and geography affects the *Compton* plaintiffs' subjective experiences of their complex trauma and their schooling. Second, the intersection of categories of identity creates unique attributed identities, or stereotypes about the meanings of a person's identities.[167] We should thus expect the *Compton* plaintiffs to be treated similarly by society — through group-based discrimination — in terms of the racial, gender, class, and geographic discrimination that contributes to their complex trauma. Third, people "negotiate" between their self-identities and attributed identities by "performing" their identities in ways meant to get society to treat them the way they want to be treated. However, society is complex; social systems themselves, such as the family, housing, and criminal justice, can intersect in ways that exacerbate subordination.[168] Here, the Compton school system's failure to address the students' complex trauma exacerbates the complex trauma that the housing system

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167. *See* Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 883 n.162 (2006) ("Identity performance theory relies on distinctions between the components of self-identity and attributed identity on the one hand and the process of identity negotiation on the other."); *see also* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1264–65, 1268 (analyzing relationship between sense of self, stereotypes, and identity performance); *cf.* Collins, *supra* note 29, at 14 ("Individuals and groups differentially placed within intersecting systems of power have different points of view on . . . others' experiences" that are highly influenced by "their social locations within power relations.").

168. This is "systems intersectionality." *See* Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1427 (2012) ("These intersections are constituted by a variety of social forces that situate women of color within contexts structured by various social hierarchies and that render them disproportionally available to certain punitive policies and discretionary judgments that dynamically reproduce these hierarchies."); Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1491 (2012) ("The analysis of the roles black mothers play in both the prison and foster care systems reveals that these systems intersect with each other to jointly perpetuate unjust hierarchies of race, class, and gender."); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1544 (2012) (illustrating how policing and housing systems are entwined).

(segregation), legal system (overpolicing of poor, young, racial minorities in urban areas), and other social systems create for Compton students.[169] The similarities in these students' senses of self, attributed identities, and environmental influences make them a discrete and cohesive intersectional cohort based on the common societal treatment they receive.[170]

The above understanding of the relationship between identity formation and social structure allows us to define an intersectional cohort as a cluster of people who share similar experiences, self-identities, attributed identities, and identity performances to the extent that it is appropriate to think of them as a discrete and cohesive group in relation to a particular issue. In Crenshaw's analysis of employment discrimination cases, Black women were an appropriate intersectional cohort to consider because they were similarly discriminated against by means of the same type of reasoning. Whether caused by explicit or implicit factors, the employers (who are generally White men) favored both Black men and White women over Black women. This is because the employers share maleness with Black men and whiteness with White women.[171] From the courts' points of view, there could not be discrimination against individual Black women based on race or sex because the employers had hired or retained Black men and White women.[172] Understanding Black women as a relevant intersectional cohort explained the discrimination at hand. Only then could we see that Black women's intersecting race-gender identities made them vulnerable to a specific form of discrimination that was still a group based claim.

Considering who constitutes the relevant intersectional cohort in a situation assists with one of intersectionality theory's most vexing questions: how specific to be about individuals' identities. We could specify every characteristic of every individual in every context — as in noting that Chiron is a skinny, dark-skinned, Black, gay male high school student living in inner-city Miami who is poor and has a drug-addicted mother — or we could just specify some of the larger factors at play that he shares with a discrete and cohesive group: racism, being an inner-city resident, and classism. Our argument that we can

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169. *See supra* note 168 and accompanying text (discussing systems intersectionality).

170. *See* supra note 8 (defining "discrete" and "cohesive vis a vis intersectional cohorts).

171. *See* Crenshaw, *supra* note 159, at 148 (making this argument).

172. *See id.*

identify relevant intersectional cohorts builds upon Collins's insight that there is a meso-level in between the micro-level of individuals and the macro-level of society-wide structures, in which discrete, cohesive social groups share similar qualities and experiences.[173]

The micro-level is that of the intersectionally-defined individual.[174] The processes of identity formation are appropriate concerns of analysis at the micro level. The problem with analyzing only at that level is that it "can make addressing more large-scale questions using generalized criteria impossible."[175] Sometimes we need to identify a pattern of discrimination based on race, gender, class, and so on, and that can be hard to do if one must specify every micro-level difference among individuals.

Next, the macro-level is the level of the social structure writ large. Whereas individual decisions about the meaning of someone's gender, race, class, and so on occur at the micro-level of identity formation, societal power relations around identities of gender, race, class, and so on occur at the macro-level of society.[176] White supremacist norms (broadly speaking, racism), hegemonic masculinities (broadly speaking, patriarchy), and discourses about "makers" and "takers" (broadly speaking, classism), are examples of macro-level phenomena.[177] Accordingly, "the analysis of the structural positioning of large groups is, above all, grounded in the macro level."[178] The concern at this level is "to be able to detect relevancies and correlations."[179] To understand a problem like the complex trauma caused to poor Black and/or Latinx students in inner cities, then, we need to be able to detect patterns in ACEs and their causation of trauma.

Finally, the meso-level is the in-between level of identities, such as that of organizations, institutions, and communities.[180] Meso-level organizations and institutions include families, churches, and political

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173. *See* PATRICIA HILL COLLINS, FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE 226–27 (1998) (distinguishing levels of sociological analysis). Collins acknowledges that "all of these levels work together recursively." *Id.* at 227 (distinguishing levels of sociological analysis).

174. *See* Winker & Degele, *supra* note 32, at 52–53 (identifying levels of analysis).

175. *Id.* at 53.

176. *See id.* at 55 (describing "sociostructural level").

177. *See id.* (connecting gender, class, and race to heteronormativism, classism, and racism)

178. *Id.* at 53.

179. *Id.* at 57.

180. *See id.* at 52–53 (distinguishing levels of society and discussing Patricia Hill Collins's "matrix of domination").

groups,[181] while meso-level communities include discrete and cohesive social groups.[182] Collins's example of meso level identity is Black women in the Jim Crow South. These women were "outsiders-within," who had to work in domestic service jobs that threatened their dignity and sexual autonomy.[183] That is, they were clearly demarcated as socially marginalized but were forced to work in close quarters with Whites. This subjected them to verbal abuse and sexual assault, so they developed networks to pass on information about how to deal with their status.[184] At bus stops, in churches, and in homes, they defined ways to be working Black women, creating a discrete and cohesive social group at the meso-level.[185] Their example of shared qualities, experiences, and responses seems to apply to all intersectionally-defined cohorts with sufficient discreteness and cohesiveness.

Our middle-ground method avoids the problems of reducing the analysis to the characteristics of each individual and of over-generalizing by essentializing characteristics such as race or gender. As German sociologists Gabriele Winker and Nina Degele put it:

> [I]t is advisable to divide the areas of subject matter . . . into groups or types. The types . . . resemble each other more than others in terms of particular features . . . [and] must exhibit the highest possible internal homogeneity and, on the other hand, be characterized by a sufficient level of external heterogeneity when compared to each other.[186]

In fact, scholars already identify intersectional cohorts when they describe their subjects on more than just the basis of a single-axis of identity, but not in such a specific way that it approaches the vanishing point of purely individual analysis.

We thus propose a new focus for intersectional theory: consideration of the impact of relevant discrete and cohesive meso-level groups, intersectional cohorts, on social and legal analysis. We assert that intersectionality has always been a cohort theory. It has always wondered whether social groups were being described sufficiently specifically under, for instance, employment discrimination law, without making the claim that everybody should

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181. *See* COLLINS, *supra* note 173, at 6–7 (identifying spaces where Black women forged collective ideas).

182. *See supra* note 8.

183. *See id.* at 5 (defining term).

184. *See id.* at 6–7.

185. *See id.* at 226–27 (distinguishing levels of society).

186. Winker & Degele, *supra* note 32, at 60 (internal quotation omitted).

have a suit based on their particular set of identity characteristics. We call for evaluating whether a potential intersectional cohort includes people sharing similar experiences, self-identities, attributed identities, and identity performances making them a discrete and a cohesive group with respect to a particular context and on a specific issue. Although Professor Crenshaw and those following her implicitly recognized that intersectionality theory required the application of some essentialism (i.e. the effect of discrimination on Black women), what is new here is the open admission that some form of *justifiable* essentialism is necessary and a method for determining what is the relevant level of specificity needed to make the claim justifiable.

With this approach in mind, poor Black and Latinx students of all genders in high-crime inner-city neighborhoods strike us as relevant intersectional cohorts. In fact, the social science data demonstrates that this group forms a cohort that suffers disproportionately from disabilities caused by complex trauma. Students like those in *Compton* are a discrete group because their shared characteristics and unique experiences make them a coherent set of individuals that is different from many other social groups. The students are cohesive and sufficiently homogenous in that they share identity characteristics and similar experiences along a number of axes. There are many shared ways of being an inner-city racial minority student, including dress, musical taste, and responses to interpersonal conflict (such as various forms of "cool poses").[187] The *Compton* students are also united as a group or cohort because they are subject to racism, classism, violence, and so on, in ways that are not true of inner-city White students or suburban Black students.[188]

Understanding the *Compton* plaintiffs as an intersectional cohort helps reveal that they have a group-based theory of the case: this particular environment causes complex trauma and emotional, mental, and physical disabilities to particular types of people *as a group*. The meso-level intersectional cohort is defined by being (1) Black and/or Latinx, (2) schoolchildren, (3) who live in violence-torn communities, (4) in the inner-city. If members of the cohort are suffering complex trauma, they are being subjected to it *because* they are members of this specific group. That is so because of the

187. *See* VICTOR RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS xiv (2011) (discussing identities of young inner-city Black and Latinx males).

188. *Cf.* Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1104–05 (2008) (showing race mattered even when class held constant when White communities wanted to expand).

structural racism that leads to poverty-stricken inner-city violence-torn neighborhoods like those in Compton and because of the interpersonal racism that members of these communities often experience as group-based harms.

B. Why the Concept of Intersectional Cohorts Requires a Remedy in *Compton*

The form that complex trauma takes in students — like those in the *Compton* suit — is specific to subgroups based on their particular experiences as members of cohorts defined by shared combinations of race, gender, class, dis/ability, sexual orientation, religion, age, geography, and other significant identities. In reality, if not in law, it is the intersection of racism, poverty, and an inner-city environment that does most of the work in creating complex (and racialized) trauma for Compton's students. This intersectional cohort is particularly subject to ACEs and complex trauma that impacts the type of schooling they need.

We acknowledge that existing disability statutes are built on the assumption that every individual will prove their disability, but we contend that such an understanding of the disability statutes is incomplete.[189] Accepting the constructivist model of dis/ability, as the majority of scholars and many legislators do,[190] requires thinking about dis/ability as resulting from socially-constructed barriers.[191]

In this view, societal norms can disable individuals. The statutory regime of disability law should see eliminating those barriers as its prime directive.[192] Such an interpretation would allow a class action under disability law in situations where societal and environmental factors are dis/abling a relevant intersectional cohort. The members of the relevant intersectional cohort — the group against which

189. *See supra* Part II.B.ii (discussing statutory regime).

190. *See, e.g.*, Deborah Kaplan, *The Definition of Disability* (2000), http://contracabal.info/cc-com/PDF/The%20Definition%20of%20Disability.pdf [https://perma.cc/9W2D-EX9P] (noting that important parts of the ADA, for example, are based on the notion of social construct, among them, defining disability as including persons who are perceived to be impaired or disabled, and the reasonable accommodation requirement); Areheart, *supra* note 154, at 348–49 (noting that many scholars see disability as a social construct and arguing that impairment itself may be socially constructed); McGowan, *supra* note 117, at 53–63, 112–20 (arguing that a good portion of the ADA includes provisions that recognize that disability is a social construct).

191. *See supra* Part III (analyzing social construction thesis).

192. *See supra* notes 139–47 (identifying statutory goal of removing barriers).

society throws up barriers — would be (rebuttably) presumed to be legitimate members of the class.

Under our approach, defendants may argue in the remedial phase of the case that particular individuals have not suffered from the barriers to learning existing in the defendants' school district, but they could not say there should be no class certification solely on the theory that every individual will respond differently to the barriers.[193] Such an argument would be a truism: individuals necessarily *could* respond differently. But once we recognize that an intersectional cohort has similar experiences and some shared responses, it makes sense to presume that members of the cohort are similarly affected until such time as the defendant can prove otherwise as to specific individuals.

Children like Chiron often fall behind in school because of societally created barriers, and when these children suffer from disabilities as a result of these barriers, disability law needs to recognize that the only way to remedy this harm is to create class remedies. Here, the very detailed allegations in the *Compton* case as well as the evidence presented at the hearing on the plaintiffs' motions for class certification and injunctive relief make it clear that a significant percentage of children in the school district suffer ACEs and complex trauma, and that complex trauma had lead to difficulties in a large percentage of children's learning and responding to school discipline.[194] At the pre-trial stages, a court should be able to certify a

193. This is consistent with the holding in *United States v. Denver*, 943 F. Supp. 1304 (D. Colo. 1996), an ADA pattern and practice case where the court held that it is not necessary to demonstrate that each member of the class has been victimized by the defendant's policy in the liability stage of a disability pattern or practice case. *Denver* is consistent with Supreme Court jurisprudence in Title VII. In a pattern or practices race discrimination case under Title VII, the plaintiffs may show a pattern or practice by demonstrating a statistical imbalance combined with anecdotal evidence of race discrimination in the workplace. Once that showing is met, the employer is known to engage in a pattern or practice of race discrimination. At that point, the defendant has lost but has the right to prove that individual members of the class would not have been hired or promoted absent race discrimination. Thus, it is only in this remedial stage of the litigation when the individual's suffering from race discrimination arises, and at this point, because the plaintiff has already proved that the employer engages in race discrimination as a practice, it is the employer's burden to prove that individual members of the class did not suffer based on race discrimination. *See* Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324, 336–42, 360–62 (1977). This is the model that should be used for the cohort cases.

194. First Amended Complaint, *supra* note 16, at ¶ 73–122; P.P. v. Compton Unified Sch. Dist., 2015 WL 5752770, at *6 (Sept. 29, 2015) (noting that the expert affidavits aver that nearly 25% of students in the district have suffered multiple ACEs and/or complex trauma).

class if sufficient allegations and preliminary evidence of damage to a significant portion of the relevant intersectional cohort exist, combined with affidavits demonstrating that a significant portion of the children in the district suffer ACEs and complex trauma.[195]

Since the ADA already contemplates both pattern and practice disparate impact lawsuits[196] brought by groups, there is no reason not to recognize the *Compton* class.[197] At its core, disability law requires schools to modify policies and practices that create barriers to

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195. Fed. R. Civ. P. 23(a) requires that all class actions have: (a) a sufficiently numerous group ("numerosity"); (b) common questions of law and fact affecting the group ("commonality"); (c) with the named plaintiff(s)' bringing claims typical of the class ("typicality"); and (d) the named plaintiff(s)' being an "adequate" representative of the class ("adequacy"). FED. R. CIV. P. 23(a). Beyond this basic requirement, Rule 23(b) sets forth three types of class actions. A Rule 23(b)(3) damages class action is problematic for this type of case because it requires that common questions of law or fact predominate over individual questions and that a class action be superior to individual adjudication of damage claims. This seems like such a situation, where the individuals in the class experience, as a group, important contributors to their complex trauma, including racism and the effects of urbaphobia (such as over-policing). However, both a Rule 23(b)(1) "prejudice" class action (a shorthand name because this type of action seeks to avoid prejudicing the defendant due to inconsistent decisions involving class members) or a Rule 23(b)(2) injunctive class action, particularly the latter, appear apt vehicles for adjudicating this type of claim. Rule 23(b)(2), for example, permits class actions where "the party opposing the class has acted or refused to act on grounds that generally apply to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *See* BROOKE D. COLEMAN ET AL., LEARNING CIVIL PROCEDURE 410–20 (3d ed. 2018). Plaintiffs' theory of the case is that the School District has failed to take reasonable measures to reduce the dis/abling effects of ACEs trauma for the class members and that this requires court intervention via injunction to require defendants to improve the school environment. Although there is ample division among courts regarding class actions, this use of the class action — to require the defendants to act to provide a safer environment — seems appropriate. Courts have used class action injunctive power to administer prisons, medical institutions, schools (including complex and controversial desegregation and busing plans), police departments, and other organizations or workforces. There is no reason to think courts less capable of improving the trauma-producing environment of Compton. *See generally* Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). In addition, partial class action may proceed regarding liability only or the court may order the class divided into sub-classes for more efficient administration or to focus on particular facilities and policies affecting particular members of the class.

196. *See* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 879–901 (2006) (noting the decline of disparate impact class actions in disability employment discrimination cases and arguing for a theory of pan-disability in which even though individuals with certain dis/abilities might see themselves as heterogeneous, a class action should lie when others define them as within the same category).

197. *See* Alexander v. Choate, 469 U.S. 287 (1985) (allowing disparate impact suits); *see supra* note 19 (discussing class actions in disability law cases).

children with disabilities who attend or wish to attend their school unless the school can prove that such modifications would cause a fundamental alteration of their school programs.[198] In the *Compton* case, barriers such as teaching and disciplinary procedures could be modified to grant children meaningful access to education. At least in the liability phase of a lawsuit, where the plaintiffs request class certification and support it with credible expert evidence, the courts should adopt a rebuttable presumption that children belonging to particular intersectional cohorts based on race, experience, and environment have suffered complex trauma and a disability that falls under the statute. This is especially appropriate once the plaintiffs have alleged and offered evidence that the science supports a finding of widespread dis/ability among children facing the circumstances at hand. Later in the remedial phase of the litigation, the defendants may attempt to rebut the presumption as to individual students.[199]

The constructivist model contradicts the preference for an individual injury in the current interpretations of the federal statutes. Social construction is already understood to affect cohorts, not individuals. Even when we consider intersectionality, which is a must even when we are generalizing, sub-groups such as poor, young transgender Chicano women constitute a discrete and cohesive group with many shared experiences. As a matter of discrimination based on attributed identities, discriminatory social norms at the intersection of class, age, queerness, ethnicity, and gender treat the sub-group the same and affect the entire cohort. Likewise, if a positive or negative social environment affects ability, it will affect cohorts as well as individuals. This group effect is especially likely when the social environment includes group-based discrimination on bases such as race, class, and geography. Hence, when the complaint alleges the types of conditions existing in Compton, harm suffered by various plaintiffs, and science supporting the causal link between the environment and harm, requiring proof that every member of the purported class suffers a disability contradicts the underlying reality of how these disabilities arise. The fact that the statute permits class actions and both pattern or practice and disparate impact lawsuits demonstrates the legitimacy of recognizing that disabilities can and do affect intersectional cohorts. Additionally, the statutory contradiction should be resolved in favor of allowing individual plaintiffs to prove disability by showing their social cohort is dis/abled.

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198. *See supra* notes 19, 118–25 and accompanying text (explaining the law).
199. *See supra* notes 19, 193 (explaining this requirement).

Showing that an intersectional cohort is dis/abled by social barriers should establish individual disability under the law when two important factors are present. First, there should be empirical proof, likely in the form of statistics, that a cohort is being disabled by social norms in a particular environment. In the *Compton* case, to be a Black and/or Latinx kid of any gender living in a poor, high-crime neighborhood does seem connected to the complex trauma that environment often spawns. The very detailed *Compton* First Amended Complaint and the expert affidavits supporting the plaintiffs' motion for a preliminary injunction and class certification would satisfy that requirement. Second, that cohort should be narrowly enough defined in terms of being discrete and cohesive that we are confident that membership in the cohort makes it likely the individual also suffers the disability. The *Compton* intersectional cohort is sufficiently discrete because it is not fungible with arguably similarly challenged groups, such as poor White rural students. Moreover, it is sufficiently cohesive because it shares identity characteristics, attributed identities, and common responses to societal treatment. Since intersectional cohorts are dis/abled by societal barriers — for example, socially created trauma from racism and poverty that creates the very impairments that affect the major life activities of reading, remembering, and learning — this Article's proposal to treat intersectional cohorts as a class comports with the underlying reality of the social construction of dis/ability.

Calling for recognizing cohorts in disability law will generate criticism, but we think it is necessary to effectuate the law's overall goal of removing social barriers. Certainly, there is a tension between the idea of recognizing that social barriers dis/able people as a cohort and recognizing the dignity interests in treating people as individuals. But the overall purpose of the federal disability statutes is to address barriers established by social policies. Those barriers could be physical, as in the lack of a ramp; temporal, as in the use of fixed-time tests; policy-based, as in the use of curricular measures that do not further the learning process; or even attitudinal, as in a decision to segregate certain children with dis/abilities from others in school classes and programs because of fear or distaste.

Where structures of inner-city poverty and violence combine with racial discrimination, disability law ought to remedy those barriers, when they culminate in dis/abilities, as well. We thus argue the federal disability statutes *must* be interpreted to recognize that complex trauma affects cohorts as well as individuals. Accordingly, the *Compton* students' and other similar class actions should be certified because the putative class's status — poor, Black and Latinx

inner-city youth in schools where the students suffer a large percentage of ACEs and the resultant complex trauma — establishes a high likelihood they suffer similar disabilities from the complex trauma that is alleged in the complaint.

Some might object that disability law requires individual analysis, but the *Compton* court's denial of the motion to dismiss the substantive claim of group-based harm already implies the appropriateness of certifying a class based on that group status. In situations where the dis/ability is broadly shared and arises from group harm, however, the individualistic approach fails to adequately address the harms, their structural causes, and the proper remedies. It is true that the individual approach can be important to protect the rights of children with individual dis/abilities in schools. While we emphasize the implications of the social construction approach, we recognize that allowing individuals to avoid social barriers based on stereotypes about groups was and continues to be important. Sometimes, distinguishing individuals from their intersectional cohorts will allow the fashioning of a better remedy. However, at least where the remedy would be group-based, and would not harm non-group members, there is no reason to make every putative class member prove the disability individually. That is, to certify a class under these circumstances, one should only need to show that a substantial portion of the group has a common experience and a common response. Here, the remedies sought are school-wide changes in the delivery of curriculum and discipline, as well as testing to identify further dis/ability-based needs for individual students.

Our contribution to dis/ability studies and critical race theory scholarship is to point out that individuals' experiences of trauma and dis/ability are intertwined with their meso-level group-based identities and that the courts should remedy this problem. When an intersectional cohort establishes that it suffers group-targeted harms that lead to dis/abilities, that should be deemed to establish the likelihood that individuals from the particular intersectional cohort suffer that dis/ability. To say the individual is part of the intersectional cohort suffering group-based harm is to say that the individual is a member of a class that should be certified.

If the *Compton* court had seriously considered the way the plaintiffs' shared experiences of trauma make them an intersectional cohort, it might have understood that the individuals in the cohort already were likely to experience complex trauma and resulting disabilities. We thus draw a conclusion about the *Compton* case — that establishing the likelihood that a social group will suffer a "disability" from a particular intersection of identities and

experiences should establish the likelihood that members of that intersectional cohort are disabled, so long as the science supports the conclusion. We also draw a conclusion about intersectionality theory: that understanding intersectional *cohorts* helps us better analyze the shared nature of the trauma experienced by poor Black and/or Latinx inner-city students.

CONCLUSION

In *Moonlight*, Chiron achieves a kind of redemption, but at a heavy cost and with no thanks to his schooling.[200] While preventing complex trauma and its concomitant injuries should definitely be the goal of innovative approaches like the New Deal for Children of Color recommended by Professor Dowd's book, we argue that the complete social transformation recommended by Dowd is unlikely to occur in the near future.[201] We go against the scholarly grain and see concrete ways that current disability law could be interpreted to aid the intersectional cohort of poor Black and Latinx students in violence-torn inner-city communities. Consequently, we offer a strong social constructionist theory of dis/ability and the concept of intersectional cohorts as a means to modify procedures and practices in schools where these cohorts exist. Existing disability law *should* allow class actions in cases like *Compton* and permit courts to enter mandatory injunctions requiring schools to modify their procedures to help ameliorate the harm suffered by students. This Article shows why what ought to be is not as untenable as the *Compton* court suggests.

Yet this Article's larger contribution is to intervene in the literature of intersectionality theory by creating the concept of intersectional cohorts. Whereas intersectionality theory has been about exploring the uniqueness of experiences of particular overlapping identities in distinct social contexts, our theory helps identify the relevant level of specificity for that analysis. Scholars should look at the processes of identity formation and the cultural context and identify relevant intersectional cohorts. Whether considering dis/abilities, race, gender, class, and so on, evaluating who might be part of a discrete and cohesive intersectional cohort in a given social location can help us make new forms of argument. As

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200. Spoiler alert: the story does end with the potential for progress as Chiron is able to express his emotions to a former high school classmate.

201. *See supra* note 101 and accompanying text (arguing that Dowd's plan is unlikely).

Nancy Dowd's call for a new deal for children of color reminds us, kids like Chiron need and deserve this extension of intersectional analysis.