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## Racial Valuation of Diseases

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### ABSTRACT

Scholars have paid inadequate attention to how racial valuation influences what actors prioritize or deem worthwhile. Today, racial valuation of diseases informs the stark global health inequities seen worldwide. As a concept, racial valuation refers to how racialized societies assign differing values to an individual or group based on their racial designation and the position within the social hierarchy that their racial categorization implies. It helps to explain how laws, institutions, and society—informed by ideas about race—distribute material conditions in health, which perpetuate and reinforce existing hierarchies.

This Article develops a theoretical framework for racial valuation and examines how the historical and scientific construction of race influenced the emergence of racial valuation norms. The framework of racial valuation postulates that explicit and implicit pseudoscientific distinctions that devalue the worth of Black, Indigenous, and other people of color have persisted, diffused, and morphed over time. Racial valuation is woefully undertheorized, and its applicability has been underexplored in the literature. This Article fills this gap by developing a theoretical framework for racial valuation and applying it to the racialization of the novel coronavirus. This framework captures how racial valuation reflects racialized beliefs from slavery, colonialism, and neocolonialism, which persist today and have influenced the racial valuation of diseases. Significant legal and institutional reform is necessary to shift how people, society, and laws respond to diseases depending upon the racial populations most impacted.

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## INTRODUCTION

The former president of the United States consistently used geographic references for the coronavirus disease (COVID-19)<sup>1</sup> to play on anxieties of the racialized other, the foreigner and their diseases.<sup>2</sup> Before the pandemic, Trump reportedly complained that Haitians “all have AIDS” when discussing extending temporary immigration protections for immigrants from Haiti, El Salvador, Liberia, and other countries.<sup>3</sup> The racialization of diseases informing these comments is evident as he reportedly expressed preference for taking in immigrants from European countries like Norway.<sup>4</sup> Similarly, when H1N1—a novel influenza virus—emerged in 2009 in the United States,<sup>5</sup> some were quick to try to identify a foreign source. For instance, a few commentators blamed Mexican immigrants and undocumented people for bringing the virus across the border.<sup>6</sup> Notably, when mad cow disease spread from the United Kingdom to the United States, it did not generate a similar racist or ethnic backlash.<sup>7</sup> The disease was not racially mapped on to the United Kingdom, which is evident from the name which stigmatized British beef and not British people.

This exemplifies the racialization of diseases, which attaches racial meaning to illnesses based on the racial groups that tend to be socially associated with a given disease. The consistent practice of othering people of color as disease-

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1. See generally *Coronavirus (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/index.html> [https://perma.cc/A8WS-VS9F].
  2. See, e.g., E. Tendayi Achiume, *States Should Take Action Against COVID-19-Related Expressions of Xenophobia, Says UN Expert*, U.N. HUM. RTS. (Mar. 23, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25739&LangID=E> [https://perma.cc/H5GU-NVZT].
  3. See Julie Hirschfeld Davis, Sheryl Gay Stolberg & Thomas Kaplan, *Trump Alarms Lawmakers With Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html> [https://perma.cc/YZA4-CTYR].
  4. *Id.*
  5. See generally *2009 H1N1 Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [https://perma.cc/F3MS-NASG].
  6. Monica Schoch-Spana, Nidhi Bouri, Kunal J. Rambhia & Ann Norwood, *Stigma, Health Disparities, and the 2009 H1N1 Influenza Pandemic: How to Protect Latino Farmworkers in Future Health Emergencies*, 8 BIOSECURITY & BIOTERRORISM 243, 247 (2010).
  7. See, e.g., Eleanor Cummins, *The New Coronavirus Is Not an Excuse to Be Racist*, VERGE (Feb. 4, 2020), <https://www.theverge.com/2020/2/4/21121358/coronavirus-racism-social-media-east-asian-chinese-xenophobia> [https://perma.cc/BX9B-GP2C]; Peter Washer, *Representations of Mad Cow Disease*, 62 SOC. SCI. & MED. 457, 458–59 (2006) (citing to American press coverage which blamed the disease on excessive beef consumption in British culture).

ridden by nature—even though disease carrying microorganisms do not differentiate amongst their victims based on race, nationality, ethnicity, or other categories—persists throughout history. This Article connects the racialization of COVID-19 to past narratives premised on diseased and inferior racialized bodies.

The process of racialization attaches meaning to people based on observable features and renders race as a social category of group association and identity.<sup>8</sup> This Article understands race as the socially constructed and contingent system of meaning that is attached to aspects of physical characteristics and ancestry.<sup>9</sup> Accordingly, the racialization process involves “the extension of racial meaning to a previously racially unclassified relationship, social practice or group.”<sup>10</sup> Those placed in racial positions “do not occupy those positions because they are of X or Y race, but because X or Y has been socially” constructed as defining characteristics of race—usually through inherited traits such as skin tone, hair color, and texture.<sup>11</sup> Racialized social systems historically allocated different economic, political, social, and other rewards to groups along racial lines.<sup>12</sup> Through racialization, race became a normatively loaded social signifier.

The racialization of diseases harkens back to how Black, Indigenous, and other people of color were generally pathologized in medical theory, practice, and popular culture for spreading diseases. While microorganisms do not discriminate, institutions, laws, policies, individuals, and other actors do. For example, the Chinese Exclusion Act, an immigration law passed in 1882, prevented Chinese laborers from immigrating to the United States in part based on biases and stereotypes that they were more likely to carry cholera and smallpox.<sup>13</sup> A century later, the United States government ran a detention camp in Guantanamo Bay, Cuba from 1991 to 1993 and detained 310 Haitians with HIV/AIDS without regard to their refugee and asylum rights.<sup>14</sup> While all of those detained had credible claims of political persecution, they were all barred from

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8. See Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 471 (1997).
  9. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, at xxi, 10 (10th anniversary ed. 2006); see also MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 111 (3d ed. 2015) (defining race).
  10. OMI & WINANT, *supra* note 9, at 111.
  11. Bonilla-Silva, *supra* note 8, at 472.
  12. *Id.* at 474.
  13. Salonee Bhaman, Rachel Kuo, Matilda Sabal, Vivian Shaw & Tiffany Diane Tso, *Histories: Public Health & Xenophobic Racism*, in *ASIAN AMERICAN FEMINIST ANTIBODIES* 5 (Salonee Bhaman et al. eds., 2020), [https://static1.squarespace.com/static/59f87d66914e6b2a2c51b657/t/5e7bbeef7811c16d3a8768eb/1585168132614/AAFCZine3\\_Ca reintheTimeofCoronavirus.pdf](https://static1.squarespace.com/static/59f87d66914e6b2a2c51b657/t/5e7bbeef7811c16d3a8768eb/1585168132614/AAFCZine3_Ca reintheTimeofCoronavirus.pdf) [<https://perma.cc/A2GS-WUTW>].
  14. Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187, 187 (1998).

entering the United States to seek asylum.<sup>15</sup> In discussing inaction to address the Haitian refugee crisis, Harold Koh noted that—unlike Cuban or Russian refugees who enjoyed substantial legislative support—Black and poor Haitians with HIV/AIDS were not regarded with the same level of concern or worth.<sup>16</sup>

Historically, race was constructed as immutable and biologically-based, rather than recognized as the imposition of a legal and social regime of racial hierarchy.<sup>17</sup> This racial hierarchy was shaped in part by the project of scientific racism.<sup>18</sup> Scientific racism was used to justify, propose, and project scientific findings and theories which facilitated and reinforced the enactment of racist social policies.<sup>19</sup> Scientific racism was intertwined with the civilizing mission of European imperial expansion. As Europeans encountered different societies and peoples, they created race as a biological or natural occurrence and came up with a racial categorization system for the human species.<sup>20</sup> The degraded status between the colonizer and the colonized permeated and shaped all relations.<sup>21</sup> Since colonized peoples could not have the ability to reason or to exist as something more transcendent,<sup>22</sup> this helped to justify the subjugation of Black, Indigenous, and other people of color. The scientific community reduced Black, Indigenous, and other people of color to their bodies, which facilitated their dehumanization.<sup>23</sup> For example, Europeans frequently brought individuals from colonized territories to their cities to appear as part of live exhibits in zoos, people shows, and circuses. Empire supplied a convenient space “for the elaboration of racial difference as a fixed biological reality.”<sup>24</sup>

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15. Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391, 2397 (1994).

16. *Id.* at 2413.

17. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1737 (1993) (arguing that White identity and whiteness are sources of privilege and protection, which confer tangible and economically valuable benefits).

18. Scientific racism refers to the scientific and biomedical endeavor to support and explain variance between human groups as innate and involving a qualitative racial hierarchy. For further discussion on scientific racism see generally ELAZAR BARKAN, *THE RETREAT OF SCIENTIFIC RACISM* (1992); SAUL DUBOW, *SCIENTIFIC RACISM IN MODERN SOUTH AFRICA* (1995).

19. See Rutledge M. Dennis, *Social Darwinism, Scientific Racism, and the Metaphysics of Race*, 64 J. NEGRO EDUC. 243 (1995).

20. See, e.g., Matthew Clair & Jeffrey S. Denis, *Sociology of Racism*, in 19 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 857 (James D. Wright ed., 2d ed. 2015).

21. JOHN HOBERMAN, *BLACK & BLUE: THE ORIGINS AND CONSEQUENCES OF MEDICAL RACISM* 149 (2012).

22. ACHILLE MBEMBE, *ON THE POSTCOLONY* 187 (A.M. Berrett et al. trans., Univ. of Cal. Press 2001) (2000).

23. HOBERMAN, *supra* note 21, at 27.

24. Harriet Deacon, *Racism and Medical Science in South Africa’s Cape Colony in the Mid-to Late Nineteenth Century*, 15 OSIRIS 190, 194 (2000).

The United Nations released a series of statements on race in the 1950s and 60s that recognized the unity of humankind, biologically and otherwise, and sought to discredit much of the scientific racism project.<sup>25</sup> More recent statements from scientists have also clearly delinked the connection between race and biology.<sup>26</sup> For instance, one commentator noted that “[p]ooling people in race silos is akin to zoologists grouping raccoons, tigers and okapis on the basis that they are all stripey.”<sup>27</sup> Much effort has been made toward acknowledging that common observable markers “exist on a continuum, not as discrete [racial] categories.”<sup>28</sup> Moreover, the scientific community has made strides in recognizing that “the use and significance of these markers varies across time, place, and even within the same individual.”<sup>29</sup> Advances in science brought on by the completion of the Human Genome Project, amongst others, has led to the increasing consensus that race does not exist as a biological category and that genetic variation is far greater within racialized groups.<sup>30</sup> Significantly, the countless studies that demonstrate severe racial disparities in diagnoses, treatments, and health outcomes,<sup>31</sup> must be understood as reflecting the influence of systemic racism and other social determinants of health as opposed to innate or supposedly natural differences among racial groups.

This Article develops the framework of racial valuation, which postulates that explicit and implicit pseudoscientific distinctions that devalue the worth of Black, Indigenous, and other people of color have persisted, diffused, and morphed over time. In sociological literature, racial valuation has been defined as the value placed on individuals or groups “based on cognitive biases and stereotypes that relate directly to their racial status and the position within the

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25. See, e.g., UNESCO, *Statement on Race*, in FOUR STATEMENTS ON THE RACE QUESTION 30, 33–34 (1969); see also Declaration on Race and Racial Prejudice, U.N.E.S.C.O. Res. 3/1.1/2, Rec. of the Gen. Conf., 20th Sess., art. 1 (Nov. 27, 1978) (noting that “[a]ll human beings belong to a single species and are descended from a common stock”).
  26. See, e.g., Editorial, *Genes, Drugs and Race*, 29 NATURE GENETICS 239, 239 (2001) (noting that “there is no biological basis for ‘race’”).
  27. Editorial, *Illuminating BiDiL*, 23 NATURE BIOTECHNOLOGY 903, 903 (2005).
  28. See Clair & Denis, *supra* note 20, at 857.
  29. *Id.*
  30. *Id.*
  31. See Sherman A. James, *The Strangest of All Encounters: Racial and Ethnic Discrimination in US Health Care*, 33 CADERNOS DE SAÚDE PÚBLICA, supp. 1, 2017 (Braz.) (discussing inequities in the U.S. health system); see generally DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011); INST. OF MED., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (Brian D. Smedley et al. eds., 2003); M. Norman Oliver, Meredith A. Goodwin, Robin S. Gotler, Patrice M. Gregory & Kurt C. Stange, *Time Use in Clinical Encounters: Are African-American Patients Treated Differently?*, 10 J. NAT’L MED. ASS’N 380 (2001).

social hierarchy that this status implies.”<sup>32</sup> Racial valuation is developed herein to refer to the structural, hierarchical, and socially consequential valuation of racial groups. This Article clarifies the concept of racial valuation as encompassing the perceived sum of the moral importance or inherent value of a person or group based on race. This valuation often manifests as a spectrum of devaluation for people of color against a White baseline. Unpacking the concept of valuation is productive because the result of racialized valuations involves both material, symbolic, and dignitary harms.

Yet, racial valuation as a theory is both woefully undertheorized, and its applicability has been underexplored in the legal literature. Scholars often refer to racial valuation in passing with little to no elaboration in legal scholarship.<sup>33</sup> This Article articulates the theoretical underpinnings of racial valuation and clarifies its contours and mechanisms. The framework of racial valuation is helpful because it decenters the individual and the overtly prejudicial, which assists in revealing structural practices, laws, and policies that subtly, indirectly, or fluidly facilitate racial subordination globally. Racial valuation is also useful because it helps to explain how laws, institutions, and societies distribute material conditions in health informed by ideas about race, that perpetuate and reinforce existing hierarchies.

Critical race theory (CRT) and Third World Approaches to International Law (TWAIL) traditions greatly inform this piece. While CRT foregrounds race as the critical lens, TWAIL scholarship typically foregrounds the history and development of international law and highlights the colonial legacy inherent in it. Lamentably, in public international law scholarship, critical race as an analytical lens is at times given short shrift. Combining TWAIL and CRT practices enables a focus on both continuities and breaks. In CRT, racial subordination is continuous historically, with breaks that do not fundamentally alter the extant racial hierarchy. Similarly, in TWAIL scholarship, the “Third World” or the “Global South” refers to a group of states, which are politically, economically, and

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32. Leslie R. Hinkson, *The Right Profile? An Examination of Race-Based Pharmacological Treatment of Hypertension*, 1 SOCIO. RACE & ETHNICITY 255, 259 (2015).

33. See, e.g., Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 803 (2016) (discussing racial valuations in criminal cases); Mary De Ming Fan, Comment, *The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery*, 27 YALE J. INT'L L. 395, 413 (2002) (noting that the usage of the term “white slavery” . . . suggested a racial valuation for flesh commodities that were the object of sexual desire, reflecting social mores regarding which races were appropriate objects for sexual coupling”); Sharmila Rudrappa, *Cyber-Coolies and Techno-Braceros: Race and Commodification of Indian Information Technology Guest Workers in the United States*, 44 U.S.F. L. REV. 353, 361 (2009) (“Social rules of interaction, habits, racial valuation, and gendered expectations shape the employer-worker relationship.”).

culturally diverse, but are simultaneously united in their common history of colonialism and continued subordination. Even after the fall of colonialism, the Third World remains a political reality because of the continuing effects of imperialism and neocolonialism despite formal grants of independence. Under both traditions, while formal and de jure equality are reflected in much of the legal architecture, substantive and material equality remain elusive. Under both schools of thought, inequality morphed and shaped into different forms economic and otherwise, but the extant hierarchy remains undisturbed. In TWAIL literature, the “First World” or the “Global North” refers to the group of states which continue to dominate global politics, law, and economics. Both fields of scholarship demonstrate a sincere concern for subordinated groups with CRT focusing on domestic laws that entrench racial hierarchy and antiracism efforts, while TWAIL prioritizes the decolonization of North–South relationships embedded in international law. By drawing on both CRT and TWAIL practices, this Article along with the others in this Issue sharpen the interrelatedness of the two fields.

This Article is organized as follows: Part I develops the theoretical framework of racial valuation. It analyzes the historical and scientific construction of race and how this influenced the development of the racialization of diseases. The development of racial valuation helps our understanding of racial hierarchy and how societies sustain hierarchies of subordination in myriad areas. Part II examines some of the theoretical, legal, and policy implications of racial valuation for COVID-19. The Article ultimately illuminates how individuals, societies, and laws respond differently to diseases depending on which racial populations are impacted. It concludes that significant legal and institutional reform is needed to shift how people, societies, and laws respond to diseases depending upon the racial populations most impacted.

## I. THEORIZING RACIAL VALUATION

The concept of racial valuation is mentioned in diverse areas of literature without much explanation.<sup>34</sup> In legal scholarship, racial valuation is often used in

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34. See, e.g., DIETRICH ORLOW, *THE NAZI PARTY 1919–1945*, at 403 (2010) (noting that the Nazi party “reserved to itself the right to determine the living conditions of the German people by applying its standards of relative racial valuation to individual families”); Eric William Rose, *The Charleston “School of Slavery”: Race, Religion, and Community in the Capital of Southern Civilization* 108–09 (2014) (Ph.D. dissertation, University of South Carolina) (on file with the University of South Carolina) <https://scholarcommons.sc.edu/etd/2763> [<https://perma.cc/8WER-9CJZ>] (noting that “the racial valuation inherent in the emerging narrative of southern institutions” meant that Methodists “valued the loss of a few dozen



reference to differing economic valuations informed by race.<sup>35</sup> Scholars have relied on racial valuation to account for how Black-owned real property appreciates at lower rates than comparable property owned by White people and thus becomes less valuable than it would be if the owners were White.<sup>36</sup> Some legal scholars have also observed that racial valuation influences outcomes in tort injury cases, wherein plaintiffs of color have had their injuries valued by civil juries at a lower level than White plaintiffs who have suffered similar injuries.<sup>37</sup> Certain legal commentators have instead relied on racial valuation to discuss noneconomic concepts. For example, Angela Davis has commented on the influence of unconscious racial valuations informing criminal convictions,<sup>38</sup> and Kimberly Mutcherson has noted how racial valuation likely influences adoption decisions.<sup>39</sup> These examples illustrate the need for a more comprehensive treatment of racial valuation in the legal literature.

Racial valuation speaks to the relative worth, utility, or importance assigned to race in social systems. Cheryl Harris's discussion of racialized privilege through

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'intelligent, active, progressive young [white] men' in 1834 more than the secession of 4300 black congregants and class leaders in 1817" (quoting Francis A. Mood)); EDGAR H. WEBSTER, CHUMS AND BROTHERS: AN INTERPRETATION OF A SOCIAL GROUP OF OUR AMERICAN CITIZENRY WHO ARE IN THE FIRST AND LAST ANALYSIS "JUST FOLKS" 45 (1920) ("Your racial valuation prior to the [U.S. Civil] [W]ar was 1,000,000 out of your total number of 3,000,000 in the matter of state representation in national interests. Today, your racial valuation is man for man."); J. L. Kesler, *The Negro in Relation to Our Public Agencies and Institutions*, 4 Q. BULL.: STATE BD. OF CHARITIES & CORR. S.C. 18, 23 (1918) ("[S]ocial separateness by general agreement presents no implication of either racial valuation or indignity.").

35. See, e.g., Phyliss Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 65 (1998) ("The real estate and lending industries continued to use racial valuation and deny African Americans loans to purchase property.").
36. See, e.g., Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIA. L. REV. 1051, 1053 (1998); see also MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 172 (10th anniversary ed. 2006) (noting that "differential access to mortgage and housing markets and the racial valuation of neighborhoods result[s] in enormous asset discrepancies").
37. See generally AUDREY CHIN & MARK A. PETERSON, *RAND CORP., DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* (1985); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99 (2005); Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325 (2018).
38. Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 207–08 (2007) (noting that in criminal cases "although the strength of the evidence and the likelihood of conviction are facially race-neutral factors, they may be influenced by initial, unconscious racial valuations").
39. Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 208–09 (2013) (noting that the idea of racial valuation becomes substantially more complicated by the fact that the "messages about what is valued in the racial hierarchy are different when it is being Black, Asian, or Latino that one prizes").

the concept of whiteness as property is instructive.<sup>40</sup> Harris details how whiteness was built in the United States on both the right to exclude and racial subjugation.<sup>41</sup> Whiteness then came to signify not only race alone, but race plus privilege.<sup>42</sup> Racial valuation focuses on racialized systems of hierarchy wherein societal structures are organized in part by the positioning of actors in racial categories. This generated new forms of human association with concrete consequences and accompanying racially-based status and utility valuations. Through societal processes of racialization, individuals, institutions, laws, and societies embed, reflect, and incorporate racial valuation norms in current practice. The result is a system of mutually constitutive and reinforcing relationships where racial valuation shapes the way individuals, institutions, societies, and laws perceive the worth of people of color as well as how people of color value ourselves.

Racial valuation reflects the sum of the intrinsic value placed on an individual or group because of race in racialized societies. By way of illustration, the philosopher Stephen Kershnar argues that racial and ethnic groups differ in their per capita intrinsic moral value.<sup>43</sup> Kershnar contends that, other things being equal, intrinsic moral value is proportional to intelligence, that Whites and Asians have greater per capita levels of intelligence than Black people and as such the former have more per capita intrinsic moral value than the latter.<sup>44</sup> There is nothing inherent in the socially assigned valuation of any racial group that necessitates valuation at one end of the spectrum as opposed to another. Kershnar's arguments are influenced by years of indoctrination that have privileged and centered whiteness.<sup>45</sup> Although the hierarchy underlying racial valuation is ultimately false, it nonetheless plays a significant role in structuring worth, utility, and symbolic importance, as well as the distribution of material privileges in racialized societies. Racial valuation violates justice at the most fundamental level because it demonstrates that institutions, individuals, and societies have a "morally inappropriate disposition" toward the worth of people of color.<sup>46</sup>

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40. See Harris, *supra* note 17, at 1731–37.

41. See *id.* at 1721, 1726, 1737 (arguing that White identity confers tangible and valuable benefits).

42. *Id.* at 1738.

43. Stephen Kershnar, *Intrinsic Moral Value and Racial Differences*, 14 PUB. AFFS. Q. 205, 205 (2000).

44. *Id.* at 205–06.

45. That the author elevates Asians simply relies on "model minority" tropes and does not detract from the larger White supremacist project of denigrating Black people.

46. Christopher J. Lebron, *Race, Power, History, and Justice in America* 12 (June 2009) (Ph.D. dissertation, Massachusetts Institute of Technology) (on file with Massachusetts Institute of Technology), <http://dspace.mit.edu/handle/1721.1/7582> [<https://perma.cc/2LXB-7LQ7>] (noting that racial inequality and racial valuation is fundamentally a problem of justice).

Yet, what work does racial valuation do that is not already done by concepts like the “racial empathy gap?” Social scientists describe the racial empathy gap as what occurs when people show an ingroup bias in empathy that restricts it to close others, which may not extend to outgroups.<sup>47</sup> The racial empathy gap is witnessed in how fast considerable funds can be mobilized in the aftermath of disasters depending on which racial populations are impacted. For example, the dearth of similar levels of empathy and mobilizing of funding have left people in Flint, Michigan without safe and clean drinking water<sup>48</sup> and Puerto Ricans with massive infrastructure and reconstruction needs after Hurricane Maria.<sup>49</sup> The racial empathy gap is also glaringly exemplified in the recent opioid crisis in the United States. While drug addiction has always required public health-centered interventions, such a response was not launched to assist Native American communities, which have similar rates of opioid overdose mortality as Whites, nor was it formulated in response to past and current drug epidemics in Black communities in the United States.<sup>50</sup> Instead, a punitive model that centered criminal law and incarceration was deemed the appropriate public response.<sup>51</sup> Now that the drug addict has a public face that is more closely associated with White interests, the opioid epidemic is primarily viewed as a health issue with alternatives to incarceration centered as the appropriate response. In these examples, racial valuation functions as a causal factor, while the racial empathy gap is symptomatic. In this way, systemic racial valuation influences who obtains empathy, care, and concern.

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47. See generally Jennifer N. Gutsell & Michael Inzlicht, *Intergroup Differences in the Sharing of Emotive States: Neural Evidence of an Empathy Gap*, 7 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 596 (2012) (discussing their findings that indicate an ingroup bias in empathy).

48. See generally Terressa A. Benz, *Toxic Cities: Neoliberalism and Environmental Racism in Flint and Detroit Michigan*, 45 CRITICAL SOCIO. 49 (2019) (discussing how the water crisis in Flint is the result of decades of “neoliberal colorblind policymaking”).

49. See generally Charley E. Willison, Phillip M. Singer, Melissa S. Creary & Scott L. Greer, *Quantifying Inequities in US Federal Response to Hurricane Disaster in Texas and Florida Compared With Puerto Rico*, BMJ GLOB. HEALTH, Feb. 2019, at 1 (finding that the federal government responded much more robustly in the aftermath of hurricanes in Texas and Florida than to Hurricane Maria in Puerto Rico). The authors note that the discrepancy in the federal government’s responses was not explained by variation in the storms’ severity or need after landfall. *Id.* at 4.

50. See generally Sonia Mendoza, Alexandra E. Hatcher & Helena Hansen, *Race, Stigma, and Addiction*, in THE STIGMA OF ADDICTION 131 (Jonathan D. Avery & Joseph J. Avery eds., 2019) (arguing that racialization is evident in the response to opioid abuse and dependence among White people, which has led to heretofore unseen levels of caring for individuals with opioid use disorders).

51. *Id.* at 135.

Similarly, one might question the need for racial valuation when there has been so much conceptual work done on racism. Yet, there is a problematic tendency to consider racism as a mental quirk.<sup>52</sup> Racism as psychological centers the individual and individual attitudes, which obscures the role of racial stratification and racialized social systems based on valuation. Racism as psychological also pathologizes and creates individual caricatures, which enables social actors to distinguish themselves as nonracist from the archetypal bigot. Given the increasing societal consensus that racism violates norms, there are strong negative associations attached to being publicly labeled as an individual or institution that is “racist.” Thus, use of the term racism often degenerates into strong claims and counterclaims which often deflect attention from the original issue.

Additionally, there is a problematic tendency to view racism as an ideology<sup>53</sup>—as “the dogma that one ethnic group is condemned by [n]ature to hereditary inferiority and another group is destined to hereditary superiority.”<sup>54</sup> Racism as ideology tends to obscure social structures and stratification based on valuation. Racism conceived as baseless ideology<sup>55</sup> persists today despite much effort to develop the concept of institutional racism to shift attention to macrostructural processes that facilitate racial subordination.

Institutional racism seeks to turn the focus to the particular and general instances of racial discrimination, inequality, exploitation, and domination that exist in organizational or institutional contexts.<sup>56</sup> It draws attention to practices that maintain White hegemonic power and dominance. Institutional racism is not a concept that is removed from society’s functions, but rather has a structural foundation within racialized societies.<sup>57</sup> Yet, the dominant and conventional view of racism is one that tends to level racism down to prejudice, which is manifested as overt hatred and discrimination toward disfavored groups.<sup>58</sup> Racism as

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52. FRANTZ FANON, *TOWARD THE AFRICAN REVOLUTION* 38 (Haakon Chevalier trans., Grove Press 1969) (1964).

53. See, e.g., Jean Hiernaux, *Biological Aspects of the Racial Question*, in *FOUR STATEMENTS ON THE RACE QUESTION*, *supra* note 25, at 9 (noting that “those who show racial discrimination justify their attitude by ideas and illustrations taken from biology,” informed by the “belief that there are innate value differences between human groups” and the “representation of the hereditary characteristics of the members of these groups in the form of stereotypes”).

54. RUTH BENEDICT, *RACE: SCIENCE AND POLITICS* 98 (Univ. of Ga. Press 2019) (1940).

55. See, e.g., RICHARD T. SCHAEFER, *RACIAL AND ETHNIC GROUPS* 16 (4th ed. 1990) (defining racism as a “doctrine of racial supremacy, that one race is superior”).

56. Clair & Denis, *supra* note 20, at 860–61.

57. See Bonilla-Silva, *supra* note 8, at 469.

58. *Id.* at 466 (noting that this “conceptual framework, with minor modifications, prevails in the social sciences”).

prejudice leads to superficial discussions about race that center on whether individual actors are racists.<sup>59</sup> Individual prejudice and discrimination, however, are symptomatic of larger structural racial subordination.<sup>60</sup> Because the term racism has become so strongly associated with individual psychology, ideology, and prejudice—and unmoored from the structural foundation of a racialized social system—the framework of racial valuation is especially useful and helps to build on the important work done on institutional racism. Moreover, it is important to bear in mind that institutional and systemic racism did not emerge in a vacuum. Instead, institutionalized racism and racial subordination are informed, influenced, and sustained by racial valuations about the material and symbolic worth of different racial groups.

Additionally, racial valuation as a framework helps to shift the focus from an absence of discrimination and inequities, to whether there are intentional structures and supports to attain and maintain racially just outcomes through preemptive and preventive practices and procedures. Because racial valuation draws attention to judgments about the worth of individuals and groups based on race, it has the advantage of being free of the associational baggage inherent with narrow conceptualizations of racism. For example, by drawing attention to societal structures, racial valuation does not require the explicit or overt deployment of norms based on cognitive biases or stereotypes. Further, beliefs about the inherent worth of different races can permeate unspoken or subconscious levels. While racial valuation norms that are based on implicit or explicit cognitive biases can be observed at the micro or interpersonal level, the framework does not require that an actor have knowledge that their words or deeds are informed by these norms. Nor does it require that an actor's conscious objective be to invoke racial valuation norms based on biases. Accordingly, racial valuation does not turn on whether one knows what is in the "hearts or minds" of specific actors. Instead, actors can manifest racial valuation norms through explicit and implicit actions and inactions. At the macro or systemic level, it is irrelevant whether the actor, lawmaker, or policymaker intends for their actions, laws, or policies to further racial subordination and hierarchy.

Consequently, racial valuation does not require invidious discrimination or prejudice based on stereotypes or cognitive biases to function. Instead, it privileges the impact and effects of laws, policies, and actions that result in further entrenching racial status and hierarchy even where such action is unintentional.

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59. See Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 27 (2019) (noting that the "concept contains an aspect of animus").

60. See Ashley (Woody) Doane, *What Is Racism? Racial Discourse and Racial Politics*, 32 CRITICAL SOCIO. 255, 268 (2006).

Notably, the international framework for combatting discrimination is more expansive than United States equal protection jurisprudence, which primarily focuses on purposive discrimination. International human rights law, though by no means a panacea, explicitly allows claims based on disparate impact by allowing discrimination claims based on effect. The racial valuation framework is compatible with aspects of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>61</sup> For instance, the CERD regime broadly defines racial discrimination to encompass “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise . . . of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>62</sup> Under CERD, state parties are supposed to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”<sup>63</sup> Similarly, racial valuation is concerned with the consequences of racialized hierarchies; as such, the consideration of both the purpose or effect of racial discrimination under the CERD regime is very useful.

Examining the effects of the racialized international order<sup>64</sup> reveals the differences in life chances and outcomes depending on one’s racial status in social systems.<sup>65</sup> The framework of racial valuation draws attention to this valuation in racialized societies, wherein the race placed in the position of superiority generally tends to have better political, economic, and social prospects than the race placed in a position of subordination. For example, Saidiya Hartman has argued that there is an “afterlife of slavery” witnessed in “skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment.”<sup>66</sup> Similarly, the continuing effects of systemic racial valuation are readily illustrated

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61. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195 [hereinafter CERD].

62. *Id.* art. 1.

63. *Id.* art. 2(1) (c).

64. See E. Tendayi Achiume, *Putting Racial Equality Onto the Global Human Rights Agenda*, 28 SUR INT’L J. ON HUM. RTS. 141, 144 (2018) (“Racial discrimination and racial subordination were institutionalized even within the global order as represented by the United Nations.”). It was not until 1966 that United Nations member states signed a treaty to combat racism. See CERD, *supra* note 61.

65. See, e.g., Mendoza et al., *supra* note 50 (providing an example of how the racialized international order is manifested in the United States).

66. SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* 6 (2007).

in how Black lives continue to be devalued globally<sup>67</sup>—from the Marikana massacre, when the South African government defended White property interests by ordering the killing in broad daylight of thirty-four Black mine workers demanding decent wages,<sup>68</sup> to the tendency to blame unarmed Black victims of police killings for their own deaths in the United States.<sup>69</sup> The effects of racial valuation and hierarchy continue to denigrate and devalue the lives of Black, Indigenous, and other people of color.

#### A. Historical Construction of Race & the Development of Racial Valuation

The current historical and social construction of racial valuation emerged because of European capitalists' practice of differentiating and exaggerating "regional, subcultural, and dialectical difference amongst peoples into 'racial' ones."<sup>70</sup> European capitalists deemed Black, Indigenous, and other people of color as racially inferior and subjected these groups to domination and exploitation. Cedric Robinson's work on racial capitalism<sup>71</sup> explains how race became the

67. *Id.* (noting that Black life continues to be "imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago").

68. See generally Annel Helena Pieterse, *After Marikana: The Temporalities of Betrayal*, in SOUTH AFRICAN WRITING IN TRANSITION 55 (Rita Barnard & Andrew van der Vlies eds., 2019) (juxtaposing the police brutality during the apartheid era with the violence of the South African State Police Service during the Marikana massacre).

69. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 449 (2018) (discussing how "police have been central to the agenda of racial capitalism and the devaluation of Black life"). This tendency was recently evidenced in George Floyd's preliminary autopsy, which blamed his underlying health conditions for his death despite an officer kneeling on his neck for eight minutes and four seconds. See Ann Crawford-Roberts et al., *George Floyd's Autopsy and the Structural Gaslighting of America*, SCI. AM. (June 6, 2020), <https://blogs.scientificamerican.com/voices/george-floyds-autopsy-and-the-structural-gaslighting-of-america> [<https://perma.cc/JVT3-RPT8>] (discussing George Floyd's initial autopsy report and how "when Black people are killed by police, their character and even their anatomy is turned into justification for their killer's exoneration" (emphasis omitted)); see also Adeel Hassan, *Minneapolis to Pay \$20 Million to Family of Police Shooting Victim*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/us/minneapolis-police-shooting.html?smid=tw-nytnational&smtyp=cur> [<https://perma.cc/VX6G-54FY>] (noting that the unusually large settlement for the police-involved killing of a White woman further illuminates the difference between the valuation of White and Black victims of police violence).

70. CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 26 (1983).

71. Robinson's use of racial capitalism better captures capitalism's historical development as a system of racial hierarchy than some other efforts. Compare *id.*, with Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013) (conceptualizing racial capitalism as a process of deriving social and economic value from the racial identity of another and exchanging this in the market).

primary “rationalization for the domination, exploitation, and/or extermination of non-‘Europeans.’”<sup>72</sup> The concept of racial capitalism is critical to theorizing racial valuation because it helps explain the historical development of geographically localized racial stratification systems. Racial capitalism helps to unsettle the seemingly coincidental nature of the relationship between race, capitalism, slave labor, and colonization.<sup>73</sup> From the thirteenth to the sixteenth century, slave labor was a part of European agrarian production that was nonracialized.<sup>74</sup> Over time, Europeans replaced indentured servants with Black African slaves.<sup>75</sup> As capitalism replaced feudalism, slavery was not curtailed; it was simply relocated.<sup>76</sup> The “fiction of a dumb beast of burden fit only for slavery” was a useful tool for racial capitalism’s development.<sup>77</sup>

As Ruth Gilmore states, capitalism requires inequality and racial hierarchy helped to enshrine it.<sup>78</sup> Under racial capitalism, Black people were objectified into property based on purported inferiority.<sup>79</sup> This was witnessed in the policies of Queen Isabella of Spain, who partially exempted Indigenous groups, but not Black Africans, from slavery.<sup>80</sup> During the transatlantic slave trade, the exploitation of labor from Black Africans facilitated manufacturing and industrial capitalism by generating new markets in which the accumulation of capital could be reinvested to further industrial and commercial production.<sup>81</sup> After the legal termination of slavery, unpaid or underpaid labor—from Black people in Africa and the descendants of slaves in the Caribbean and the Americas—helped to further racial subordination.

This Article analogizes racial capitalism as a car fueled by racial valuation. The social construction of race required the creation of the category of other, which

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72. ROBINSON, *supra* note 70, at 27.

73. *Id.* at 110–11.

74. *Id.* at 12.

75. *Id.* at 16.

76. *Id.* at 12, 17.

77. *Id.* at 81; *see also* Dennis, *supra* note 19, at 246 (“Much of the American literature on the inferiority of African people did not emerge until the 1840s and 1850s, when the institution of slavery was being attacked in the North and when most industrial countries had either abolished the practice or were in the process of doing so.”).

78. *See* Antipode Foundation, *Geographies of Racial Capitalism With Ruth Wilson Gilmore*, at 01:36, YOUTUBE (June 1, 2020), <https://antipodeonline.org/geographies-of-racial-capitalism> (“Capitalism requires inequality, and racism enshrines it.”).

79. Stephen W. Appel, “*Outstanding Individuals Do Not Arise From Ancestrally Poor Stock*”: *Racial Science and the Education of Black South Africans*, 58 J. NEGRO EDUC. 544, 547 (1989) (“Derogatory associations of Blackness developed during the era of the African slave trade in which the notion that skin color indicated one’s ‘natural’ superiority or inferiority was widely accepted by Whites.”).

80. LESLIE B. ROUT JR., *THE AFRICAN EXPERIENCE IN SPANISH AMERICA* 22 (1976).

81. ROBINSON, *supra* note 70, at 113.



concomitantly necessitated the formation of a category of same, and the associated racial valuations of inferior and superior.<sup>82</sup> Thus, if Indigenous people were purportedly savages, then Europeans were civilized; and if Blacks were supposedly the natural candidates for slavery, then Whites were inherently free subjects. For example, in Brazil, Whites were explicitly “perceived as virtuous and industrious,” while Black people “were perceived as idle and unfit for free labor.”<sup>83</sup>

The colonial project also influenced the development of racial valuation. Under colonialism, race was a key element of social stratification between the colonized and the colonizer. Colonialism further entrenched a relationship of exploitation marked by cultural, political, racial, and social domination of most of the world.<sup>84</sup> Some theorists even suggested that Black people had been holding their lands in trust for White people as part of a divine plan, and that the superior race was ready to take its inheritance through colonialism.<sup>85</sup> Colonial powers distributed work globally in this burgeoning system along racial lines.<sup>86</sup> For instance, Black people were exploited as “peasants, as tenant farmers, as migrant laborers, as day laborers, as domestic servants, and as wage labor[ers].”<sup>87</sup> Since Black Africans were considered inherently lazy, forced labor and subjugation were really an opportunity for redemption and upliftment.<sup>88</sup> For example, in the colony of South West Africa, some members of the White population debating the usage of corporal punishment described the Herero and Nama populations as follows:

From time immemorial our natives have been used to laziness, brutality and stupidity. The dirtier they are, the more they feel at ease. Any white men who have lived among natives find it almost impossible to regard them as human beings at all in any European sense. They need centuries of training as human beings; with endless patience, strictness and justice.<sup>89</sup>

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- 82. Cf. Felipe Dias, *Racial Articulation and Labor in the 19th Century Brazil*, 13 COMPAR. SOCIO. 445, 471 (2014) (describing how “othering” was associated with devaluation and inferiority in nineteenth century Brazil).
  - 83. See *id.* at 469 (discussing how “the devaluation of blackness existed in all spheres of social life, including with regard to work and security”).
  - 84. See Anibal Quijano, *Coloniality and Modernity/Rationality*, 21 CULTURAL STUD. 168 (2007).
  - 85. See SVEN LINDQVIST, “Exterminate All the Brutes,” in *THE DEAD DO NOT DIE* 1, 143 (Joan Tate & Sarah Death trans., 2014) (noting the “irreclaimable savages” retreating under European expansion (emphasis omitted) (quoting Frederick Farrar)).
  - 86. Quijano, *supra* note 84, at 171.
  - 87. ROBINSON, *supra* note 70, at 120.
  - 88. DAVID OLUSOGA & CASPER W. ERICHSEN, *THE KAISER’S HOLOCAUST: GERMANY’S FORGOTTEN GENOCIDE AND THE COLONIAL ROOTS OF NAZISM* 161 (2010).
  - 89. Klaus Dierks, *Chronology of Namibian History: 1900*, NAMIB. LIBR. DR. KLAUS DIERKS, <https://www.klausdierks.com/Chronology/57.htm> [<https://perma.cc/EAP8-SJY5>].

Colonialism entrenched racialized social stratification by positioning White Europeans at the top and Natives at the bottom. Colonial status meant that non-Europeans had been identified and classified as a racially inferior subject—primitive, savage, and uncivilized.<sup>90</sup> As Eduardo Bonilla-Silva aptly observes, “[a]fter racial categories were used to organize social relations in [colonial societies] . . . race became an independent element of the operation of [these] social system[s].”<sup>91</sup> Following the process of racialization, dynamics in these societies at all levels were informed by racial valuation norms.

Colonial authorities more intensely stratified racialized social systems in places where several groups coexisted, and ascribed different values socially to various racial markers. What and who counts as Black or White in these racialized social systems became contested.<sup>92</sup> Race functioned not only to create a hierarchy and presumed superiority over Black, Indigenous, and other people of color, but also to create a hierarchy within the concept of whiteness, which facilitated the myth of Aryan or Nordic superiority.<sup>93</sup> Additionally, racialized societies in some Western nations treated people of Jewish and Irish descent as distinct racial groups, which only later became assimilated into whiteness.<sup>94</sup> Racialized societies constructed blackness as a monolith, masking the heterogeneity and richness of diverse peoples into one. In the United States, an anonymous piece published in *Putnam Monthly* reflects blackness as synonymous with absence:

They have invented no writing; not even the rude picture-writing of the lowest tribes. They have no gods and no heroes; no epic poem and no legend, not even simple traditions. There never existed among them an organized government; there never ruled a hierarchy or an established church . . . They have never known the arts; they are ignorant even of agriculture . . . The few evidences of splendor or civilization are all borrowed from Europe; where there is a religion or creed, it is that of the foreigners; all knowledge, all custom, all progress has come to them from abroad.<sup>95</sup>

This depiction of Black Africans as one without history, civilization, culture, or religion exemplifies the devaluation of Black people as a nominally human group. Absent a culture to speak of, Black Africans were clearly unequal and inferior by nature and required domination and subjugation.<sup>96</sup> The construction

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90. HOBBERMAN, *supra* note 21, at 149.

91. Bonilla-Silva, *supra* note 8, at 473.

92. *Id.* at 472.

93. See ROBINSON, *supra* note 70, at 27.

94. See Bonilla-Silva, *supra* note 8, at 472.

95. *Uncle Tom at Home*, 8 PUTNAM'S MONTHLY MAG. 1, 4–5 (1856).

96. Quijano, *supra* note 84, at 174.

of blackness as a negative and as a function of being non-White or non-European aided in the dehumanization of Black people and the development of a system of racial valuation.<sup>97</sup>

The subordinate status assigned to those categorized as Black meant that people with darker skin tones struggled to avoid classification as Black and vice versa. While the meaning of the racial categories as well as the position of a racialized group in a given society was context dependent, such categorization was concomitantly rendered imperative because of the relative worth assigned to different racial groups in the social system based on one's proximity to whiteness. Under the system of racial valuation, perceived value increases as one approaches whiteness and decreases the further one goes away from whiteness. For example, in South Africa, colonials imported Indian laborers and granted them status distinctions that positioned this group as an intermediary category with more privileges than Black South Africans. Additionally, European colonial authorities drew social distinctions in the colonies which placed those of European and Native parentage into a separate and intermediate racial category. In the colony of Rhodesia, those of mixed parentage tended to identify more with White Europeans as opposed to Black Africans who were viewed as inferior.<sup>98</sup> This was informed by the superior material privileges granted to the former group.<sup>99</sup>

Society's possessive investment in the construction of whiteness and the system of racial valuation did not end with the post-World War II order.<sup>100</sup> The end of slavery and the global struggle against colonialism challenged but did not completely upend the extant distribution of power and resources along racial lines.<sup>101</sup> Indeed, for many Indigenous populations, the fight against settler colonialism and occupation endures and is not a distant memory. Similarly, Black Americans and other historically subordinated groups continue to experience

97. See generally Dayna Bowen Matthew, *On Charlottesville*, 105 VA. L. REV. 269, 283–91 (2019) (discussing dehumanization).

98. Floyd Dotson & Lillian Dotson, *Indians and Coloureds in Rhodesia and Nyasaland*, 5 RACE 61, 69 (1963).

99. Robert E. Washington, *Brown Racism and the Formation of a World System of Racial Stratification*, 4 INT'L J. POL. CULTURE & SOC'Y 209, 213 (1990).

100. See generally George Lipsitz, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (20th anniversary ed. 2018) (arguing that whiteness has a cash value that accounts for advantages that come to individuals from various avenues including intergenerational transfers of inherited wealth which facilitate the unjust enrichment and transfer of wealth from past discrimination to succeeding generations of White people). George Lipsitz contends that possessive investment in whiteness is responsible for the racialized hierarchies evidenced in the United States and that White Americans are encouraged to invest in whiteness and remain faithful to an identity that provides them with structured advantages. See *id.*

101. Quijano, *supra* note 84, at 171.

patterns of domination within formally decolonized territories. Consequently, even after many peoples in the Americas, Asia, and Africa formally defeated European colonialism as an explicit political order, racialized societies preserved—through transformation—the conditions, modes of exploitation, and racially stratified systems that predominated under colonialism and imperialism.<sup>102</sup>

Moreover, negative associations and valuations become internalized even within racialized people of color. For instance, because proximity to whiteness through lighter skin came with more social privileges, the deeper and darker one's complexion is, the less importance is attached to one's humanity.<sup>103</sup> Intragroup skin tone hierarchy is a significant stratification in the multilayered system of racial valuation. For example, in Brazil, the stigma associated with dark skin resulted in an eighteenth-century Indigenous chief being "officially degraded for marrying a Black woman."<sup>104</sup> The psychological effects upon people with darker skin tones of a desire for whitening continue to have deleterious effects.<sup>105</sup> The negative connotations of worth that accompany dark skin persist throughout much of the contemporary world. For example, in many parts of Africa, Asia, and Latin America, "skin-bleaching is a common practice" as people aspire to attain a higher racial valuation through lighter skin and the social and economic privileges that accompany that status.<sup>106</sup> Thus, racial valuation in valorizing whiteness also influenced the growth of colorism wherein subordinated groups internalized European aesthetic standards of value and worth.<sup>107</sup> This vividly illustrates how racialized societies continue to preserve racial valuation norms based on cognitive biases, stereotypes, and status.

102. Cf. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (discussing the concept of preservation-through-transformation, which provides a framework for thinking about the evolution of racial status law during the Reconstruction era).

103. See, e.g., Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV. 409, 455 ("Despite the absence of antiblack miscegenation laws, the ideologies regarding reverence for light skin and the racial valuation of individuals continue to inform contemporary marriage choices.").

104. PHILIP MASON, RACE RELATIONS 120–21 (1970).

105. See, e.g., MICHAEL BANTON, RACE RELATIONS 280 (1967); see also Robert Westley, *Lat Crit Theory and the Problematics of Internal/External Oppression: A Comparison of Forms of Oppression and InterGroup/IntraGroup Solidarity*, 53 U. MIA. L. REV. 761, 762 (1999) (noting that racial valuation restrains the Latinx community from fully reclaiming and embracing its African and Indigenous elements).

106. Margaret L. Hunter, *Buying Racial Capital: Skin-Bleaching and Cosmetic Surgery in a Globalized World*, 4 J. PAN AFR. STUD., no. 4, 2011, at 142, 143.

107. See generally Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000) (discussing how colorism can function as a form of race-based discrimination against dark-skinned but not light-skinned Black people).

The argument developed thus far may be perceived as potentially reifying or totalizing race in ways that downplay other factors. However, “[h]istorically, the racialization of social systems did not [mean] the exclusion of other forms of oppression” in social formations also structured by class, gender, ethnicity, sexual orientation, national origin, religion, disability, and other areas.<sup>108</sup> Utilizing the concept of intersectionality helps to complicate superficial understandings of race that seek to remove it from people’s lived experiences in multiple crosscutting categories.<sup>109</sup> Intersectionality specifically addresses the manner in which discriminatory actions, laws, policies, and systems overlap to “create layers of inequality that structures” the relative status of those positioned at “intersecting axes.”<sup>110</sup> Taking an intersectional approach means that it is imprudent to consider one aspect of identity as isolated or divisible from others; instead, they intersect and intertwine to create complex systems of oppression and realities. Further, the idea of “controlling for” a variable like race ignores the reasons a group may be over or underrepresented in certain categories of control variables.<sup>111</sup> Accordingly, the framework of racial valuation does not myopically seek to prevent considering the influence of other factors contributing to subordination and inequities.

In essence, the historical construction of race is fundamentally intertwined with the development of racial valuation. The system of racial valuation historically involved highly political actions associated with conquest, colonization, enslavement, peonage, indentured servitude, imperialism, and, more recently, relationships defined by neocolonialism and globalization.<sup>112</sup> As Robert Washington notes, the “overt ideological expressions” of White racial superiority that have undergirded the Western imperialist project and racial stratification systems in the past tend “to assume a more covert form” today.<sup>113</sup>

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108. Bonilla-Silva, *supra* note 8, at 470.

109. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (coining the term “intersectionality” to help explain the oppression of African American women).

110. U.N. Div. for the Advancement of Women et al., *Gender and Racial Discrimination: Report of the Expert Group Meeting*, U.N. (Nov. 24, 2000), <https://www.un.org/womenwatch/daw/csw/genrac/report.htm> [<https://perma.cc/LX78-Z656>].

111. See Bonilla-Silva, *supra* note 8, at 471.

112. Neocolonialism is a system where the dominant groups of countries further their social, class, racial, and associated interests without imposing direct rule. See, e.g., Quijano, *supra* note 84, at 168 (discussing colonialism as a “relation of direct, political, social and cultural domination . . . over the conquered of all continents,” and contrasting it with Western imperialism, which the author describes as “an association of social interests between the dominant groups . . . of countries with unequally articulated power, rather than an imposition from the outside”).

113. Washington, *supra* note 99, at 211 (discussing cultural processes of hegemony).

The demands of political correctness largely require that actors remove explicit discussions about the racial inferiority or superiority of racial groups from polite society.<sup>114</sup> Yet neocolonial relationships, globalization, and other processes of societal hegemony have similar consequences of supporting structures of racial subordination.<sup>115</sup> Thus, what had previously been achieved historically through direct colonial rule, was continued through globalization and the more amorphous transnational diffusion of racial valuation norms. Accordingly, comparatively racially homogenous regions of the world also evidence norms today reflecting cognitive biases, stereotype, and status based on racial valuations, even though they were not subject to European colonization.<sup>116</sup> The widespread dissemination and striking consistency in racial valuation norms globally “manifest[s] in positive valuations of whiteness and negative valuations of blackness.”<sup>117</sup> These persistent associations were informed and reinforced by the scientific racism project.

#### **B. Scientific Construction of Race & the Development of Racial Valuation**

The framework of racial valuation clarifies how norms—based on status, stereotype, and bias about the ill-health of people of color—have crystallized, ossified, spread globally, and passed down generationally over time. The construction of racial valuation was shaped by the project of scientific racism, which imbued race with “objective,” “scientific” significance that legitimized beliefs of White racial superiority.<sup>118</sup> Scientific racism occurs when formal medical arguments are fashioned to explain racial difference in treatment or care.<sup>119</sup>

The medical establishment deployed scientific racism to prove the “natural” hierarchy of the races and fueled many theories to support this hierarchy.<sup>120</sup> A radical theory of racial difference is polygenesis, which posits that “people of African descent ha[ve] a separate origin from [White people] and, therefore,

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114. See HOBERMAN, *supra* note 21, at 63.

115. See, e.g., Washington, *supra* note 99, at 211.

116. See *id.* at 219–20 (discussing the homogenization of globalization which valorizes all things Western as “modern” and not “racial,” as well as how the neocolonial manifestation of these coded racial valuations “often exists independent” of contacts with Black people).

117. *Id.* at 220.

118. Quijano, *supra* note 84, at 168.

119. See Deacon, *supra* note 24, at 200. Scientific racism creates justifications for racist medical practice. *Id.* Racist medical practice incorporates elements of popular racism in theory and in practice that does not purport to be rooted in science. *Id.* at 193.

120. See ROBINSON, *supra* note 70, at 76.

constitute[] a distinct species.”<sup>121</sup> Likewise, Social Darwinists believed that Anglo-Saxons were superior in myriad ways over non-Anglo-Saxon people, especially biologically.<sup>122</sup> Social Darwinists used high mortality rates and susceptibility to new diseases introduced by colonists to confirm their theories of the innate weakness of other racial groups.<sup>123</sup> Social Darwinists also believed that the races were at different stages of evolution—at one end of the spectrum were the survivors of the earliest historic inhabitants, “the Bushmen [San]” in Southern Africa, and “at the highest extreme of civilization” were the Nordic Whites.<sup>124</sup> A number of studies reflect this evolutionary thinking of Black people as less evolved.<sup>125</sup> For instance, in 1939, the flagship journal in psychiatry in the United States published an article that compared Black people with apes.<sup>126</sup>

Scientific racism also influenced the eugenics movement. Eugenics posits that intelligence and other traits are genetically determined,<sup>127</sup> and, as such, limiting reproduction amongst those deemed undesirable is necessary for the betterment of society.<sup>128</sup> Positive eugenics involves theories, policies, and laws that promote marriage and reproduction between those considered to have “desirable qualities,” and negative eugenics involves preventing those with “unwanted hereditary failings” from reproducing.<sup>129</sup> A key principle underlying both schools of thought is that society should reject the ill-considered notion of equality among human beings.<sup>130</sup> The combined effect of these theories was to construct a racial hierarchy system that valued different racial groups according to their proximity to whiteness.

121. Martin Summers, “*Suitable Care of the African When Afflicted With Insanity*”: Race, Madness, and Social Order in Comparative Perspective, 84 BULL. HIST. MED. 58, 67 (2010); see also HOBBERMAN, *supra* note 21, at 54 (discussing the polygenist doctrine of separate creations).

122. RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 172–73 (Beacon Press 1992) (1944).

123. OLUSOGA & ERICHSEN, *supra* note 88, at 72–73.

124. Appel, *supra* note 79, at 552 (alteration in original) (quoting J. E. Duerden).

125. E.g., R. W. Alles, *A Comparative Study of the Negro and the White Pelvis*, 24 J. MICH. ST. MED. SOC’Y 194, 197 (1925) (“[T]he female negro pelvis is similar in many respects to the pelvis of the female gorilla . . .”).

126. Lauretta Bender, *Behavior Problems in Negro Children*, 2 PSYCHIATRY 213, 217 (1939) (claiming that “in the negro there are characteristics approaching the apes with a greater variability of form and structure”).

127. See, e.g., Francis Galton, *Hereditary Talent and Character*, 12 MACMILLAN’S, 1865, at 157, 321 (arguing for breeding for intelligence by selecting persons with that character trait and compelling marriage within that segment of society for generations such that the offspring would be born with the desired qualities); see also FRANCIS GALTON, *HEREDITARY GENIUS* (2d ed. 1892).

128. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 59 (2d ed. 2017) (discussing the eugenics movement).

129. CHLOE CAMPBELL, *RACE AND EMPIRE: EUGENICS IN COLONIAL KENYA* 13 (2007).

130. See Dennis, *supra* note 19, at 246.

The medicalization of racism also meant that anatomical differences were emblematic of perceived innate Black pathology. While some fields focused on internal systems to verify this myth, some comparative anatomists and anthropologists sought to account for differences based on anatomy.<sup>131</sup> Theorists like Vacher de Lapouge hypothesized that a key racial marker was the cephalic index.<sup>132</sup> This was used to “divide the European population into different races based on the shape of their heads,” which corresponded with “a range of socially desirable characteristics.”<sup>133</sup> Under this typology, Aryans tended to be “long-headed, blond, blue-eyed, creative, strong, and natural leaders,” while “Brachies,” as he termed them, were purportedly round-headed, dark-skinned, timid, and “natural followers who did not have the imagination necessary to create and lead.”<sup>134</sup> In this way, many anthropologists helped to “construct[] race as a legitimate biological category” in the nineteenth and twentieth centuries,<sup>135</sup> which facilitated the development of racial valuation. The intentionality of these actors is immaterial under the framework of racial valuation because whether they consciously acted to further racial subordination or inadvertently did so is irrelevant given the impact.

Indeed, race scientists implicitly or explicitly constructed racial inferiority that furthered the cause of slavery and continued subordination after emancipation.<sup>136</sup> Some doctors even provided rationales justifying chattel slavery on physiological grounds, since Black skin was “much thicker” and “physical pain never provokes” people of African descent.<sup>137</sup> Others argued that Black people were “healthier, happier and more prolific than in their native Africa” and would not succumb to suffering and death as “white men would” under the “hot, damp, close, suffocating atmosphere” of the plantation.<sup>138</sup> Black children were also stereotyped as hearty in ways that were consonant with life on a plantation.<sup>139</sup>

131. Appel, *supra* note 79, at 547 (discussing how comparative anatomists answered “questions about human similarity and difference in terms of skin color and racial anatomy”).

132. John P. Jackson Jr. & Nadine M. Weidman, *The Origins of Scientific Racism*, 50 J. BLACKS IN HIGHER EDUC. 66, 71 (2005/2006).

133. *Id.*

134. *Id.*

135. Clarence C. Gravlee & Elizabeth Sweet, *Race, Ethnicity, and Racism in Medical Anthropology, 1977–2002*, 22 MED. ANTHROPOLOGY Q. 27, 28 (2008).

136. See W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA 39 (1935).

137. James Hunt, *On the Negro's Place in Nature*, in 1 MEMOIRS READ BEFORE THE ANTHROPOLOGICAL SOCIETY OF LONDON 1, 20, 23 n.\* (1865).

138. Samuel Cartwright, *Dr. Cartwright on the Caucasians and the Africans*, 25 DE BOW'S REV. 45, 49 (1858).

139. See, e.g., Ales Hrdlicka, *Physical Differences Between White and Colored Children*, 11 AM. ANTHROPOLOGIST 347, 347–49 (1898) (discussing how the body of the Black child was of



Racialized societies explicitly tied the perceived health of Black people to their racial valuation in the marketplace. For example, the *Journal of the American Medical Association* in 1909 wrote that “[i]n former times they lived a healthy out-door life . . . . In the last half-century, however, they have left their open-air life and gravitated into the cities, without any one to overlook their physical well-being.”<sup>140</sup> Myths mixed with folklore influenced scientific assessments about the physical hardiness of Black people, which served the ends of slavery; but after emancipation, Black health was apparently ruined. Racialized societies often juxtaposed the healthy slave against those whose health had supposedly deteriorated with freedom.<sup>141</sup>

The scientific construction of the mental feebleness of Black people conveniently made us impervious to the subhuman working conditions demanded by slavery and colonialism. European colonists perceived Black Africans as less complex and primarily focused on immediate survival.<sup>142</sup> For example, a South African doctor noted that “the Native is hopelessly deficient in logical processes, and that his energy is [so] wholly absorbed in merely bodily functions, that there is stunted mental development.”<sup>143</sup> Race scientists speculated that Black people were incapable of experiencing emotions such as “fear, loss, anticipation, and regret, as well as the psychological turmoil” that accompany these sentiments.<sup>144</sup> Some reconciled these two positions as follows:

On the one hand, blacks had underdeveloped nervous systems, and the more they came into contact with civilization the greater their propensity to become mentally disturbed. On the other hand, the lack of civilizational advancement was a major factor that predisposed people of African descent to insanity. As long as they existed within a primitive environment or were controlled by a more civilized race, blacks would benefit from, metaphorically speaking, a natural immunity to mental illness.<sup>145</sup>

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greater height and weight when compared to White children and “show[ed] less adipose tissue and greater muscular development”).

140. *The National Negro Antituberculosis League*, 52 JAMA 969, 969 (1909).

141. HOBBERMAN, *supra* note 21, at 122.

142. *Id.* at 66.

143. P. W. Laidler, *The Relationship of the Native to South Africa's Health*, 6 S. AFR. MED. J. (n.s.) 617, 618 (1932).

144. Summers, *supra* note 121, at 68; *see also* JONATHAN SADOWSKY, *IMPERIAL BEDLAM: INSTITUTIONS OF MADNESS IN COLONIAL SOUTHWEST NIGERIA* 68 (1999) (noting that “judgments about psychopathology are inextricable from the political culture of colonialism”); Daniel H. Tuke, *Does Civilization Favour the Generation of Mental Disease?*, 4 ASYLUM J. MENTAL SCI. 94, 97 (1857) (discussing how civilization necessitated “the overtaking of the emotions, as well as, and sometimes independently of, the intellect[.]”).

145. Summers, *supra* note 121, at 70.

Many within the scientific community were instrumental in constructing and reifying racial valuation norms reflecting stereotypes about the mental fitness of Black people.<sup>146</sup> The neurologist Samuel Cartwright contended that Black people had proportionally bigger nerves leading from their brains than White people, which explained the latter's supposed mental superiority.<sup>147</sup> Some argued that Black people responded better to physical therapy than psychological therapy because of their supposedly less developed mental abilities.<sup>148</sup> Further, J.C. Carothers, a colonial psychiatrist in Kenya, claimed that Black Africans' brains were underdeveloped compared with those of Europeans.<sup>149</sup> The discredited field of phrenology furthered racial hierarchies through the belief that by measuring and examining the external shape of an individual's skull one could determine the mental abilities and characteristics of entire races.<sup>150</sup> This rationale is reflected in a study which found that "[q]uantitatively the inferiority amounts to 14.8 per cent: qualitatively the cells of the new brain compared with those of the average normal European, show defect and deficiency."<sup>151</sup>

The prevailing wisdom of the time can be summarized as follows: "the scientific position is this—that science is interested in the African only in order to discover what the causes of African backwardness are, and if it is possible to discover better means of raising the African out of that backwardness than we now employ."<sup>152</sup> Explicit scientific racism of this variety is receding.<sup>153</sup> Racial valuation norms reflecting bias, status, or stereotype, however, are still reflected in medical and scientific practice and research as a result of many years of social

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146. See JULIAN HERMAN LEWIS, *THE BIOLOGY OF THE NEGRO* 277 (1942) ("Most of the literature on the intelligence of Negroes and their psychological traits has the attributes that it is strongly biased and is based on faulty technics of observation. For this reason it is not possible or desirable to review or to appraise what has been written."); see also John E. Lind, *Phylogenetic Elements in the Psychoses of the Negro*, 4 *PSYCHOANALYTIC REV.* 303, 304–05 (1917) (discussing how the "simple dream life," "easy reversion to savagery when deprived of the restraining influence of whites" and the "sway of superstition" amongst Black people in the United States influenced the "psychoses of the American Negro"); William Dosite Postell, *Mental Health Among the Slave Population on Southern Plantations*, 110 *AM. J. PSYCHIATRY* 52, 54 (1953) (discussing how the "inaccurate reporting of the 'insane and idiots' among the southern Negro may have been due partly to the failure of the overseers to report such afflictions because of their poor concept as to whom to class as insane"); Summers, *supra* note 121, at 75 (discussing the racialization of insanity).

147. Samuel Cartwright, *Diseases and Peculiarities of the Negro Race*, 11 *DE BOW'S REV.* 64, 65 (1851).

148. Deacon, *supra* note 24, at 200.

149. Summers, *supra* note 121, at 74.

150. OLUSOGA & ERICHSEN, *supra* note 88, at 96.

151. CAMPBELL, *supra* note 129, at 7 (quoting H. L. Gordon).

152. *Id.* at 123 (quoting H. L. Gordon).

153. HOBBERMAN, *supra* note 21, at 54. *But cf. id.* at 57 (discussing Charles Krauthammer's incorrect determination in 1988 that "crack babies" were part of a biological underclass whose "biological inferiority is stamped at birth").

conditioning that continue to influence behavior.<sup>154</sup> Notably, a White physician in the United States in 2019 detailed how implicit biases led her to do more for a White patient than for a patient of color, caused her to objectify a Black patient or connect more deeply with a patient who looked like her, and to sit farther back than usual from a Black patient in her hospital bed.<sup>155</sup> The non-intentionality of the physician's behavior does not render the material, symbolic, and dignitary harms suffered by her patients any less acute.

Racial valuation norms legitimated by scientific racism also continue to percolate directly through socialization processes in larger society. Indeed, a survey of 222 White medical students and residents in 2016 showed that half endorsed at least one myth regarding physiological differences between Black and White people, including that Black people's nerve endings are less sensitive and that Black skin is thicker than White skin.<sup>156</sup> Moreover, poll results in the United States in the 1980s reflected a belief in the genetic inferiority of Black people by almost a quarter of White adult respondents.<sup>157</sup> Additionally, in 2014, Nicholas Wade, a reporter for the *New York Times*, published a book filled with scientific racism that purported to summarize the recent research in population genetics and explain cultural differences between European, Asian, and African peoples.<sup>158</sup>

Further, the burgeoning field of pharmacogenomics, which focuses on personalized medicines, attaches scientific legitimacy to racial difference. The field has blossomed with some pharmaceutical companies developing new drugs to reap commercial benefits. For instance, despite the drug BiDil having no known race specific health benefits, the United States approved a patent for it to treat heart failure in African Americans.<sup>159</sup> The recent increase of race in biotechnology patents may signal a return to "highly problematic understandings of race as genetic."<sup>160</sup> While pharmaceutical companies may be primarily

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154. *Id.* at 58. For further discussion, see generally ANGELA SAINI, *SUPERIOR: THE RETURN OF RACE SCIENCE* (2019) (discussing the reemergence of scientific research into racial differences and the persistent thread of belief in biological racial differences in the world of science).

155. See, e.g., Deborah Cohan, *Racist Like Me—A Call to Self-Reflection and Action for White Physicians*, 380 *NEW ENG. J. MED.* 805, 806 (2019).

156. Kelly M. Hoffman, Sophie Trawalter, Jordan R. Axt & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 *PROC. NAT'L ACAD. SCI. U.S.* 4296, 4298–99 (2016), <https://www.pnas.org/content/pnas/113/16/4296.full.pdf> [<https://perma.cc/AQ6U-GK47>].

157. KEN AULETTA, *THE UNDERCLASS* 31 (1982).

158. NICHOLAS WADE, *A TROUBLESOME INHERITANCE: GENES, RACE AND HUMAN HISTORY* (2014) (developing the author's thesis that there is a genetic basis for race).

159. Johnathan Kahn, *Race-ing Patents/Patenting Race: An Emerging Political Geography of Intellectual Property in Biotechnology*, 92 *IOWA L. REV.* 353, 363–64 (2007).

160. *Id.* at 416.

motivated by finding ways to protect a drug or extend their market share, race-specific patents, though seemingly benign, serve to reify race in ways that undermine important developments in conceptualizing race.<sup>161</sup> The personalized medicine trend may revive scientific racism by prioritizing gene therapy instead of addressing structural factors that contribute to disease.<sup>162</sup> Notably, many in the public health community have recognized racial inequality as a social determinant of health.<sup>163</sup> Yet, some scientists insist today that race is a valid basis for determining risk for certain diseases instead of recognizing how racialized inequality produces risk factors, not race itself.<sup>164</sup>

Thus, despite considerable progress toward the delegitimizing of scientific racism, the racial valuation of diseases continues to percolate through socialization processes that have morphed and diffused these norms globally. In myriad ways, the scientific community's actions enabled norms that devalued and dehumanized Black, Indigenous, and other people of color to be promulgated, tested, and reproduced worldwide with lasting effects today. One of the lasting harms is the tendency to associate people of color with different illnesses—the racialization of diseases.

## II. THEORETICAL, LEGAL, & POLICY IMPLICATIONS

There are countless theoretical, legal, and policy implications of racial valuation. Indeed, racialized notions regarding which lives are disposable and which are to be valued is made manifest from systemic police violence against subordinated groups, to historic and ongoing medical experimentation on Black

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161. See generally *id.*

162. See Andrea Patterson, *Germs and Jim Crow: The Impact of Microbiology on Public Health Policies in Progressive Era American South*, 42 J. HIST. BIOLOGY 529, 555–56 (2009).

163. More than 83,000 Black people die annually in the United States who would not otherwise die, if the death rates were equal. David Satcher, George E. Fryer Jr., Jessica McCann, Adewale Troutman, Steven H. Woolf & George Rust, *What if We Were Equal? A Comparison of the Black-White Mortality Gap in 1960 and 2000*, 24 HEALTH AFFS. 459, 459 (2005). In Brazil, the infant mortality rate is significantly higher for Afro-Brazilians than it is for Whites. See PAN AM. HEALTH ORG., EQUITY IN HEALTH: FROM AN ETHNIC PERSPECTIVE 111 (2001) (noting, for example, that “in Bahia, with a high percentage of population of African ancestry, the infant mortality rate is 51.00, while in the southern states, where the population is predominantly European in origin, the figure drops by one-half or even more: São Paulo, 24.63, or Rio Grande do Sul, 24.63”).

164. E.g., Neil Risch, Esteban Burchard, Elad Ziv & Hua Tang, *Categorization of Humans in Biomedical Research: Genes, Race and Disease*, GENOME BIOLOGY 1 (July 1, 2002), <https://genomebiology.biomedcentral.com/track/pdf/10.1186/gb-2002-3-7-comment2007> [<https://perma.cc/JD69-2SCF>]; Hua Tang et al., *Genetic Structure, Self-Identified Race/Ethnicity, and Confounding in Case-Control Association Studies*, 76 AM. J. HUM. GENETICS 268 (2005).

and other people of color, to inequitable COVID-19 vaccine access.<sup>165</sup> The framework of racial valuation also helps to clarify the emergence of the global health regime as the early efforts at global health cooperation by European powers were premised on containing racialized threats of disease contagion from colonized peoples.<sup>166</sup> Racialized fears of the other and their diseases continue to shape what international actors prioritize on the global health agenda; these underlying currents are also evident in migration law and policy.<sup>167</sup> This Part briefly uses the COVID-19 pandemic as an entry point to begin exploring the implications of the racialization of diseases.<sup>168</sup>

#### A. Racialization of Diseases

The COVID-19 pandemic has surfaced what was always latently there, the racialization of diseases. For example, when the smallpox epidemic occurred in San Francisco in 1876, officials referred to the city's Chinatown as a "laboratory of infection."<sup>169</sup> In the late 1800s, a commentator remarked that "a great deal of nonsense has been written about the vigorous health of the savage."<sup>170</sup> One theory even held that the alleged feebleness of Black people would eventually lead to the group's demise.<sup>171</sup> Moreover, a 1915 article in the *Southern Medical Journal* stated that Black people were "a hive of dangerous germs, perhaps . . . the great[est] disease-spreader among the other subspecies of Homo Sapiens."<sup>172</sup> Black people in the United States were considered a "notoriously syphilis-soaked race,"<sup>173</sup> while White people purportedly suffered from polio because of their complex and delicate bodies. Similarly, in South Africa during the 1890s, a doctor attributed the spread of leprosy "almost entirely" to Black groups, especially the "Bushmen."<sup>174</sup> Because leprosy was perceived to be a "[B]lack disease," harsh measures were enacted that allowed for compulsory segregation of all lepers due to fears that the

165. For further discussion see generally Matiangai Sirleaf, *Disposable Lives: COVID-19, Vaccines & the Uprising*, 121 COLUMBIA L. REV. FOR. 1 (forthcoming 2021) (on file with author).

166. For further discussion see generally Matiangai Sirleaf, *Entry Denied: COVID-19, Race, Migration & Global Health*, 2 FRONT. IN HUM. DYNAM. 599157 (2020).

167. *Id.*

168. I explore these areas in more depth in forthcoming projects.

169. NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN 1 (2001) (quoting John Meares).

170. W. WINWOOD READE, SAVAGE AFRICA 412 (1864).

171. HOBERMAN, *supra* note 21, at 25.

172. Robert Wilson, Jr., *Some Medical Aspects of the Negro*, 8 S. MED. J. 3, 3 (1915) (emphasis omitted) (quoting Harry Johnston).

173. JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT 27 (rev. ed. 1993).

174. Deacon, *supra* note 24, at 204 (citing S. P. IMPEY, A HANDBOOK ON LEPROSY 7 (1896)).

disease was spreading and affecting Whites.<sup>175</sup> While many Black lepers were detained on Robben Island, White lepers were allowed to remain quarantined at home.<sup>176</sup>

Racial valuation as a framework aids in revealing how some diseases have been effectively racialized and coded over time. This was witnessed with the 2014 to 2016 Ebola epidemic in West Africa. Racialized fears of contagion in the United States manifested with children of African immigrants in Dallas taunted as “Ebola kids”<sup>177</sup> and two students from Rwanda (2600 miles from West Africa) sent home from a New Jersey elementary school for twenty-one days.<sup>178</sup> Additionally, a Texas college sent letters to prospective students from Nigeria informing them that they were no longer accepting applications from countries with “confirmed Ebola cases,”<sup>179</sup> despite the World Health Organization (WHO) declaring Nigeria “Ebola-free.”<sup>180</sup> A middle school even placed a principal on paid administrative leave for a week for attending a funeral in Zambia (2770 miles from West Africa), despite it also having no cases of Ebola.<sup>181</sup> The Ebola epidemic resuscitated historical images of Black African bodies as uncontrollable and disease-ridden and sparked racialized fears. This transformed Ebola from a regional disease in Africa, to one that concerned countries in the Global North. Consequently, the Ebola epidemic in West Africa was converted from an unfortunate situation in a neglected region to a significant public health emergency of international concern.<sup>182</sup>

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175. *Id.* at 204.

176. *Id.* at 205–06.

177. Jon Herskovitz, *In Dallas, African Immigrants Worry about Backlash from Ebola Case*, REUTERS, (Oct. 4, 2014), <https://www.reuters.com/article/us-health-ebola-usa-immigrants/in-dallas-african-immigrants-worry-about-backlash-from-ebola-case-idUSKCN0HU00120141005> [<https://perma.cc/WUA3-4GPF>].

178. Lindsay Abrams, *Parents Freak Out Over Ebola, Keep Rwandan Children from Starting Elementary School*, SALON (Oct. 20, 2014, 9:26 PM), [https://www.salon.com/2014/10/20/parents\\_freak\\_out\\_overEbola\\_keep\\_rwandan\\_children\\_from\\_starting\\_elementary\\_school](https://www.salon.com/2014/10/20/parents_freak_out_overEbola_keep_rwandan_children_from_starting_elementary_school) [<https://perma.cc/WP2D-XM62>].

179. Abby Olheiser, *Navarro College in Texas Apologizes After Rejecting Nigerian Applicants Over Ebola Fears*, WASH. POST, (Oct. 2014, 2:00 PM), <https://www.washingtonpost.com/news/to-your-health/wp/2014/10/15/navarro-college-in-texas-apologizes-after-rejecting-nigerian-applicants-over-ebola-fears/> [<https://perma.cc/S8GR-FB3P>].

180. Press Release, WHO Africa, WHO Declares Nigeria Ebola-Free (Oct. 20, 2014), <https://www.afro.who.int/news/who-declares-nigeria-ebola-free> [<https://perma.cc/WC3B-WUAF>].

181. Anthony Zurcher, *Ebola, Race and Fear*, BBC NEWS (Oct. 21, 2014), <https://www.bbc.com/news/blogs-echochambers-29714657> [<https://perma.cc/HL7S-X6DY>].

182. See WHO, Ebola Outbreak in West Africa Declared a Public Health Emergency of International Concern, WHO Regional Office for Europe (2014), <http://www.euro.who.int/en/health-topics/emergencies/ebola-outbreak-2014> [<https://perma.cc/JG44-HC8W>]. For further discussion, see Sirleaf, *Entry Denied*, *supra* note 166, at

Similarly, the Zika epidemic of 2016 was racialized. The New York City Department of Health conducted aerial spraying of pesticides in Manhattan, but only above 155th Street.<sup>183</sup> The zip codes sprayed included the Washington Heights and Inwood neighborhoods.<sup>184</sup> The mosquitos carrying the Zika virus were apparently only flying, biting and infecting people where the highest concentration of Latinx residents live in Manhattan. Residents of these neighborhoods did not take kindly to fumigating their neighborhoods and not the neighborhoods located below 155th Street. Nothing medically makes one race more vulnerable to Zika than another, yet the disease was racialized as “Latinx.” The spraying of neighborhoods above 155th Street in Manhattan implied that spraying Latinx people was an effective means of containing the Zika virus.

Similarly, the COVID-19 pandemic has resuscitated xenophobic and racist beliefs that associate Asians as a threat to the Western world with a newspaper in France publishing a story on its front page with the title, “Yellow Alert.”<sup>185</sup> Those of Asian descent have been subject to physical attacks from London to New York<sup>186</sup> and individuals that present as Asian are being racially profiled and discriminated against.<sup>187</sup> The racialization and mapping of the disease onto certain countries and their progeny by former U.S. government officials even prevented the G7 from adopting a statement on the pandemic.<sup>188</sup> From smallpox to COVID-19, this section demonstrates how the racialization of diseases persists.

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4–5 (discussing how the WHO’s slow stance towards the disease changed when it became apparent that Ebola might touch and concern Western countries).

183. Press Release, New York City Dep’t of Health and Mental Hygiene, Health Department to Spray Pesticide from Trucks for Fifth Time in 2016 to Reduce Risk of Zika and West Nile Viruses (Aug. 15, 2016), <https://www1.nyc.gov/assets/doh/downloads/pdf/wnv/wnv-notice-20160817.pdf> [<https://perma.cc/AGH4-MURQ>].

184. *Id.*

185. *Coronavirus Chinois: Alerte Jaune*, COURRIER PICARD 24 (Jan. 26, 2020). See also *À Propos de Notre une du 26 Janvier*, COURRIER PICARD (Jan. 26, 2020), <https://www.courrier-picard.fr/id64729/article/2020-01-26/propos-de-notre-une-du-26-janvier> [<https://perma.cc/DD87-Q4LB>].

186. See, e.g., Zing Tsjeng, *It’s Time we Stopped Downplaying the UK’s Anti-Asian Racism*, HARPERS BAZAAR (Mar. 18, 2021), <https://www.harpersbazaar.com/uk/culture/culture-news/a35692226/its-time-we-stopped-downplaying-the-uks-anti-asian-racism> [<https://perma.cc/RL9A-XEXR>]; Alexandra E. Petri & Daniel E. Slotnik, *Attacks on Asian-Americans in New York Stoke Fear, Anxiety and Anger*, N.Y. TIMES (Apr. 4, 2021), <https://www.nytimes.com/2021/02/26/nyregion/asian-hate-crimes-attacks-ny.html> [<https://perma.cc/AXG9-NEDJ>].

187. Jasmine Aguilera, *Xenophobia ‘Is A Pre-Existing Condition.’ How Harmful Stereotypes and Racism are Spreading Around the Coronavirus*, TIME (Feb. 3, 2020), <https://time.com/5775716/xenophobia-racism-stereotypes-coronavirus> [<https://perma.cc/N6UR-PBR7>].

188. John Hudson & Souad Mekhennet, *G-7 Failed to Agree on Statement after U.S. Insisted on Calling Coronavirus Outbreak ‘Wuhan Virus’*, WASH. POST. (Mar. 25, 2020), <https://www.washingtonpost.com/national-security/g-7-failed-to-agree-on-statement-after->

## B. Racialization of Diseases as Scapegoat

The racialization of diseases functions to obscure the underlying structural causes of health inequities and render a given disease's association with a subordinated group as natural. The devastating impact that COVID-19,<sup>189</sup> has had on Black and brown<sup>190</sup> communities in the United States is illustrative. Tragically, Black Americans constitute 12.5 percent of the U.S. population, yet account for 22.4 percent of COVID-19 deaths.<sup>191</sup> The failure to protect historically subordinated groups has meant that Black people in the United States are dying at approximately 1.5 times the rate of White people from COVID-19.<sup>192</sup>

There is nothing innate in Black people that makes us more susceptible to COVID-19, nor is there a gene that accounts for the exceedingly high rates of Black death to this disease compared to other groups. Several commentators have attempted to account for these glaring health disparities by pointing to comorbidities<sup>193</sup> or preexisting health conditions like hypertension, diabetes, obesity, and the higher prevalence of cardiovascular disease among Black people, which can make for greater and more severe complications with COVID-19.<sup>194</sup> They turn to these comorbidities to explain why, if Black people contract COVID-19, they are more likely to die as a result. But as Dorothy Roberts has eloquently explained, "It is implausible that one race of people evolved to have a genetic predisposition to heart failure, hypertension, infant mortality, diabetes and

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us-insisted-on-calling-coronavirus-outbreak-wuhan-virus/2020/03/25/f2bc7a02-6ed3-11ea-96a0-df4c5d9284af\_story.html [https://perma.cc/LLS4-4JLX].

189. Jazmyn T. Moore, Jessica N. Ricaldi, Charles E. Rose, Jennifer Fuld, Monica Parise, Gloria J. Kang, Anne K. Driscoll, Tina Norris, Nana Wilson, Gabriel Rainisch, Eduardo Valverde, Vladislav Beresovsky, Christine Agnew Brune, Nadia L. Oussaye, Dale A. Rose, Laura E. Adams, Sindoos Awel, Julie Villanueva, Dana Meaney-Delman & Margaret A. Honein, *Disparities in Incidence of COVID-19 Among Underrepresented Racial/Ethnic Groups in Counties Identified as Hotspots During June 5–18, 2020–22 States, February–June 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1122, 1123 (2020) ("A high percentage of cases in hotspot counties are among persons of color.").
190. The author uses the lower case for "brown" because the term captures a wide range of groups—Latinx, Indigenous, Asian, Middle Eastern, and others, such that meaning can be unclear. This Article has a more specific description throughout where needed.
191. ELISE GOULD & VALERIE WILSON, ECON. POL'Y INST., BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY 18 fig.D (2020).
192. *The COVID Racial Data Tracker: The COVID Tracking Project*, ATLANTIC, <https://covidtracking.com/race> [https://perma.cc/J43D-D4E9] (last visited Feb. 16, 2021).
193. See generally Jose M. Valderas, Barbara Starfield, Bonnie Sibbald, Chris Salisbury & Martin Roland, *Defining Comorbidity: Implications for Understanding Health and Health Services*, 7 ANNALS FAM. MED. 357 (2009) (defining comorbidity).
194. Clyde W. Yancy, *COVID-19 and African Americans*, 323 JAMA 1891, 1891 (2020).



asthma. There is no evolutionary theory that can explain why African ancestry would be genetically prone to practically every major common illness.”<sup>195</sup>

Attempts to locate a race-based genetic predisposition to COVID-19 play on well-worn tropes and norms passed down from generations of scientific racism. For example, following emancipation in the United States, a common argument posited that the poor health of Black people indicated their “inherent biological weakness,”<sup>196</sup> as opposed to the social conditions they were made to endure.<sup>197</sup> Scientific studies were actually conducted to substantiate these erroneous beliefs. In the United States, a study aimed at confirming Black fragility focused on their perceived deficient lung capacity, which purportedly contributed to high death rates from tuberculosis.<sup>198</sup> Yet, instead of Black people having bad genes or bodily constitutions, it is the way society has been historically—and continues to be—organized that is deadly.<sup>199</sup>

The effort to discount these social conditions has a long progeny. For example, several physicians and psychiatrists explicitly linked the increase in the incidence of diseases, such as tuberculosis and syphilis, amongst Black people as additional evidence that freedom from slavery had a harmful effect.<sup>200</sup> Yet, numerous studies on various social determinants of health have revealed why Black people and other people of color present as less healthy.<sup>201</sup> One salient factor is evidenced in the ongoing residential and geographical de facto

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195. Dorothy E. Roberts, *What's Wrong With Race-Based Medicine?: Genes, Drugs, and Health Disparities*, 12 MINN. J.L. SCI. & TECH. 1, 15 (2011).

196. See Christopher Crenner, *Race and Laboratory Norms: The Critical Insights of Julian Herman Lewis* (1891–1989), 105 ISIS 477, 479 (2014).

197. See, e.g., W. E. BURGHARDT DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* 148 (1899) (arguing that health disparities were unsurprising given the general social deprivation of Black people); C. V. ROMAN, *AMERICAN CIVILIZATION AND THE NEGRO: THE AFRO-AMERICAN IN RELATION TO NATIONAL PROGRESS* 335 (1916) (noting that “[i]mmunity and susceptibility are both products of environment that affect humanity individually and not racially” (emphasis omitted)).

198. FREDERICK L. HOFFMAN, *RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO* 170–71 (1896); see also Lundy Braun, *Spirometry, Measurement, and Race in the Nineteenth Century*, 60 J. HIST. MED. & ALLIED SCI. 135 (2005) (discussing the racialization of lung capacity).

199. Khiara M. Bridges, *The Many Ways Institutional Racism Kills Black People*, TIME (June 11, 2020, 6:31 AM), <https://time.com/5851864/institutional-racism-america> [<https://perma.cc/62LV-U9XZ>].

200. Summers, *supra* note 121, at 71.

201. See, e.g., HOBBERMAN, *supra* note 21, at 41 (noting that hundreds of peer reviewed studies have documented racially disparate outcomes in diagnoses and treatment); *id.* at 34–35 (discussing racial disparities in the diagnoses and treatment of heart disease and early-stage lung cancer); see also David R. Williams & Chiquita Collins, *U.S. Socioeconomic and Racial Differences in Health: Patterns and Explanations*, 21 ANN. REV. SOCIO. 349 (1995).

segregation in the United States that conditions the lived realities of Black people.<sup>202</sup> Scholars have observed that:

The communities where many black people reside are in poor areas characterized by high housing density, high crime rates, and poor access to healthy foods. Low socioeconomic status alone is a risk factor for total mortality independent of any other risk factors. These social determinants of health must be considered in a complex equation, including known cardiovascular risk factors, which puts under-represented minorities who live in at-risk communities at greater risk for disease, not just for cardiovascular diseases but now for COVID-19 mortality.<sup>203</sup>

In other words, where and how Black people live adversely impacts our health outcomes and susceptibility to COVID-19. Black people are also more likely to live in communities experiencing outbreaks.<sup>204</sup> Additional structural factors ensure that Black people are “more likely to encounter those things that we know compromise health—like inaccessible or biased health care providers, inadequate schools and education systems, unemployment, hazardous jobs, unsafe housing, and violent, polluted communities.”<sup>205</sup>

Another historical trend that has resurfaced is the tendency to pathologize Black and brown culture for a disease’s prevalence. For instance, during the leprosy outbreak in South Africa referenced above, “medical theory” and popular imagination blamed the “pathogenic” nature of Black “culture” for the spread of the disease.<sup>206</sup> Centuries later, public appeals to personal responsibility to correct for a perceived lazy or backward culture were embedded in the United States Surgeon General’s remarks to communities of color that they are not “helpless” in the fight against COVID-19.<sup>207</sup> In commentary aimed at emphasizing the importance of social distancing, the Surgeon General said:

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202. See Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1242 (2005) (discussing the racial valuation of neighborhoods leading to significant economic inequalities). See generally Amy J. Schulz, David R. Williams, Barbara A. Israel & Lora Bex Lempert, *Racial and Spatial Relations as Fundamental Determinants of Health in Detroit*, 80 MILBANK Q. 677 (2002).

203. Yancy, *supra* note 194, at 1891.

204. GOULD & WILSON, *supra* note 191, at 4.

205. Bridges, *supra* note 199.

206. Deacon, *supra* note 24, at 204 (citing *Leprosy Notification*, S. AFR. MED. J., July 1898, at 63, 63).

207. Zeeshan Aleem, *The Problem With the Surgeon General’s Controversial Coronavirus Advice to Americans of Color*, VOX (Apr. 11, 2020, 12:30 PM), <https://www.vox.com/2020/4/11/21217428/surgeon-general-jerome-adams-big-mama-coronavirus> [https://perma.cc/9NK8-A73D].

Avoid alcohol, tobacco, and drugs. And call your friends and family. Check in on your mother; she wants to hear from you right now. And speaking of mothers, we need you to do this, if not for yourself, then for your abuela. Do it for your granddaddy. Do it for your Big Mama. Do it for your Pop-Pop. We need you to understand—especially in communities of color, we need you to step up and help stop the spread so that we can protect those who are most vulnerable.<sup>208</sup>

This commentary and related policies severely discount how systemic racism accounts for the disparate health outcomes witnessed with COVID-19.<sup>209</sup> The focus on personal responsibility and a supposedly “toxic culture” ignores the structural realities that condition the lived realities of communities of color, which makes strategies based on working from home untenable for many.

Those with higher incomes are more able to follow social distancing guidelines, while working class and lower-income individuals are not. Stay-at-home orders presume the privilege and ability to maintain social distancing. This may be impossible to achieve where people are living in crowded dwellings, in densely populated areas, and must rely on public transportation to get around, all of which heightens the risk of exposure. Moreover, “essential workers” are disproportionately poor people of color. For example, Black workers are about one in nine workers overall in the United States, yet they make up about one in six of all frontline-industry workers.<sup>210</sup> Essential personnel tend to face more risks for keeping societies functioning during the pandemic because they work in public-facing jobs, such as transportation, sanitation, and retail, including grocery, convenience, and drug stores. Black workers are less likely than White workers to have minimal structural protections like paid sick days or adequate health insurance.<sup>211</sup> In addition to health insecurity, Black people in the United States are also facing greater economic insecurity during the pandemic, as they register higher unemployment rates than Whites at every level of education.<sup>212</sup> Returning to the concept of racial capitalism is instructive here because it helps illuminate how being usable and being a thing of importance is a functional relationship between dominant and subordinated groups.<sup>213</sup>

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208. *Id.*

209. *See, e.g.,* HOBBERMAN, *supra* note 21, at 132 (discussing how doctors may “administer, overprescribe, underprescribe, or withhold drug therapy to or from one racial population” based on racial folklore (emphasis omitted)).

210. GOULD & WILSON, *supra* note 191, at 4.

211. *Id.* at 6.

212. *Id.* at 5.

213. *See* MBEMBE, *supra* note 22, at 187.

### C. Racialization of Diseases & Racial Hierarchy

COVID-19 has also exposed the underlying racial hierarchy in the United States and elsewhere. The COVID-19 pandemic is not the great universal leveler that some thought it might be, as it has not affected everyone equally. Four months into the pandemic in the United States, the devastating racially disproportionate impact of COVID-19 was evident: in Chicago greater than 50 percent of COVID-19 cases and almost 70 percent of COVID-19 deaths involved Black people, although Black people constitute only 30 percent of the population in Chicago.<sup>214</sup> In Louisiana, 70.5 percent of COVID-19 deaths occurred among Black people, who account for only 32.2 percent of the state's population.<sup>215</sup> In Michigan, 33 percent of COVID-19 cases and 40 percent of deaths occurred among Black people, who represent only 14 percent of the state's population.<sup>216</sup> Similarly, in New York, stark racial disparities in the COVID-19 mortality rate were registered, with the rate for Black people amounting to 92.3 deaths per 100,000 people, while the rate for White people was less than half of that at 45.2 deaths per 100,000 people.<sup>217</sup>

As COVID-19 increasingly became racialized as Black or brown in the United States, the disease registered less and less as requiring an empathetic and corrective response for some. Anti-lockdown protests surfaced in the United States to enforce the racial valuation of diseases. The anti-lockdown protests—though occurring in disparate places in the United States—carried similar themes, and the demonstrators were overwhelmingly White and united in their vitriol about COVID-19 mitigation strategies.

The public health laws passed to combat COVID-19 were an affront to and an imposition on their liberty to consume, and an infringement on their entitlements to White privilege. The clear racial valuation undergirding the protests was based on an explicit or implicit judgment of whose lives were worth risking during the pandemic. Again, Cheryl Harris's work is instructive here. Since whiteness "was the characteristic, the attribute, the property of free human beings,"<sup>218</sup> then the lockdown measures threatened the very essence of identity, freedom, and autonomy for some subsets of White people in the United States.

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214. Yancy, *supra* note 199.

215. *Id.*

216. *Id.*

217. Khiara M. Bridges, *The Many Ways Institutional Racism Kills Black People*, TIME (June 10, 2020), <https://time.com/5851864/institutional-racism-america> [<https://perma.cc/62LV-U9XZ>].

218. Harris, *supra* note 17, at 1721.

Racial valuation and racial hierarchy are to be enforced. Lockdown measures are a clear violation of that order because they dared to suggest that harm to the lives of those not regarded as White should in any way control the obligations, movements, presence, and liberties of those that are considered White. Thus, it was not uncommon to see some at the anti-lockdown protests heavily armed with guns, some with Confederate paraphernalia, nooses, or swastikas as clear symbols of what the appropriate racial valuation and hierarchy should be in their country. Failing to understand the role of racial valuation and hierarchy would otherwise leave one befuddled about the connection the protestors made between COVID-19 social distancing laws and measures and symbols of white supremacy. Rebecca Bradley, a Supreme Court justice in Wisconsin, even compared the state's stay-at-home order to Japanese internment during World War II.<sup>219</sup> Analogizing and conflating a discriminatory policy targeting a subordinated group to a general public health measure reeks of privilege. It is also telling as it reveals the implicit assumption of some that lockdown measures are attacks on racial status.

The racial valuation of COVID-19 and the determination that Black and brown lives are worth less is also made evident in the rush to lift COVID-19 public health measures. At the time of publishing, the national death toll is well over 568,000.<sup>220</sup> The country has registered over thirty million cases.<sup>221</sup> Yet, many areas seek a return to the status quo although rates of infection are not yet under control, and vaccines have not yet been widely administered or equitably distributed. Notably, the Trump administration's calls to prematurely open things up or to attempt to achieve herd immunity by letting the disease spread through most of population<sup>222</sup> in the United States cannot be separated from the knowledge that

219. Devan Cole, *Wisconsin Supreme Court Justice Invokes Internment of Japanese-Americans in Debate Over State's Stay-at-Home Order*, CNN (May 5, 2020, 6:28 PM), <https://www.cnn.com/2020/05/05/politics/wisconsin-supreme-court-coronavirus-hearing-japanese-american-internment/index.html> [https://perma.cc/48A3-6FWF].

220. COVID-19 Dashboard By the Center for Systems Science and Engineering (CSSE), JOHN HOPKINS UNIV. & MED. CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/map.html> [https://perma.cc/9LVQ-H4CW] (select "Global Map" from the header menu).

221. *Id.*

222. See Yasmeen Abutaleb & Josh Dawsey, *New Trump Pandemic Adviser Pushes Controversial 'Herd Immunity' Strategy, Worrying Public Health Officials*, WASH POST (Aug. 31, 2020), [https://www.washingtonpost.com/politics/trump-coronavirus-scott-atlas-herd-immunity/2020/08/30/925e68fe-e93b-11ea-970a-64c73a1c2392\\_story.html](https://www.washingtonpost.com/politics/trump-coronavirus-scott-atlas-herd-immunity/2020/08/30/925e68fe-e93b-11ea-970a-64c73a1c2392_story.html) [https://perma.cc/AG78-UNQU] (discussing the White House's consideration of embracing a controversial "herd immunity" strategy to combat the pandemic). For further discussion on herd immunity see generally Lea Skak Filtenborg Frederiksen et al., *The Long Road Toward COVID-19 Herd Immunity: Vaccine Platform Technologies and Mass Immunization Strategies*, 11 FRONTIERS IMMUNOLOGY 1817 (2020) (discussing how herd immunity by mass vaccination and not through an infection pathway has been a very successful strategy for preventing the spread of many infectious diseases).

those most detrimentally impacted belong to racial groups that the protestors and policymakers did not themselves belong to. It seems the implicit calculus is that since the suffering and vulnerability associated with racial health inequities is historically normalized, why should COVID-19 be treated any differently and require such extraordinary measures? Thus, the racialization of COVID-19 in some countries may mean that the disease is discounted in part due to the historic and continuing devaluation of the lives of Black, Indigenous, and other people of color.

### CONCLUSION

This Article develops the concept of racial valuation, which refers to the hierarchical and socially consequential valuation of racial groups. It demonstrates how the historical projects of slavery, colonialism, neocolonialism, globalization, and scientific racism have influenced the development of racial valuation as a norm and system. Medical racism legitimized, constructed, and fortified race, racial status, and hierarchy with the veneer of neutral and objective scientific truth. Processes of socialization and racialization then promulgated these norms throughout the world. This created a system of racial valuation with a symbolic and material effect which devalues the lives of Black, Indigenous, and other people of color. Racial valuation is a useful framework for numerous law and policy areas because it contributes to our understanding of racial hierarchy and how racialized societies sustain hierarchies of subordination. The framework is useful in not only describing how we got to the current moment but also in understanding the dynamic nature of norm creation and transformation.

Moreover, racial valuation, as applied to diseases, helps to contextualize public response to diseases. Historically, as diseases become racialized in ways that seem marginal to the dominant group, less and less urgency about the public health crisis exists domestically and internationally. Thus, where there is perceived interest convergence between White interests and the interests of Black, Indigenous, or other people of color for a given disease, societal, legal, and institutional responses aimed at disease eradication or prevention are more likely to proliferate.<sup>223</sup> When there is minimal to no perceived interest, convergence with White interests for a given disease, however, societal, legal, and institutional responses aimed at disease eradication or prevention will be comparatively weaker and face significant resistance. Racial valuation helps to reveal how race shapes

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223. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (discussing interest convergence).

societal understandings of diseases and responses to diseases. Notably, the framework developed here is one of probability, not one of absolutes. Accordingly, the racial valuation of diseases does not mean that public health interventions only occur when there is perceived interest convergence. Instead, the framework indicates a cyclical process of diseases constructing race and race constructing responses to diseases.

Further, while racial valuation helps illuminate how race influences what gets prioritized as well as how public health interventions can be racially coded, this Article does not pretend that race is the only relevant causal factor. For instance, some of the reactions to the COVID-19 pandemic reveal callous ageism that seeks to downplay the necessity of robust public health responses to the COVID-19 pandemic by casting the elderly and their lives as expendable compared to the youthful who are presumed more likely to survive.<sup>224</sup> Kimberlé Crenshaw's work on intersectionality is key here to understanding how different identities overlap to further subordination. Taking an intersectional approach requires that one not engage in the futile attempt to disprove the relevance of other variables compared to race, given the impossibility of severing race from other influences in the real world.

Thus, it seems clear that racial valuation is at least a substantial factor in producing the racialized responses to COVID-19. The theoretical framework of racial valuation is especially useful for rendering race visible in global and public health. It reveals how race—and the valuations attached to the racial populations affected by a given disease—influences assessments of when it is in the common interest of institutions, laws, and societies to act nationally and globally. Failing to see or engage with race renders the role of whiteness invisible. Using race as a tool of analysis reveals that when there is a disparate racial impact on people of color of a given disease, these diseases are more likely to be perceived as inevitable and become discounted because of the devaluation of the lives of people of color.

As Martin Luther King Jr. once remarked, “of all the forms of inequality, injustice in health is the most shocking and the most inhuman.”<sup>225</sup> Significant legal

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224. See generally Sarah Fraser et al., *Ageism and COVID-19: What Does Our Society's Response Say About Us?*, 49 AGE & AGEING 692, 692 (2020) (discussing the “ageism that has emerged during the COVID-19 pandemic,” how “older people are misrepresented and undervalued in the current public discourse surrounding the pandemic,” as well as the “initial perception of the public was that the virus was really an older adult problem”).

225. Charlene Galarneau, *Getting King's Words Right*, 29 J. HEALTH CARE FOR POOR & UNDERSERVED 5, 5 (2018) (quoting Martin Luther King Jr.'s statement at a press conference on March 25, 1996, before his speech at the second convention of the Medical Committee for Human Rights in Chicago). King spoke on the healthcare disparities that disproportionately affect people of color and lower income populations in the United States. See *id.* at 6.

and institutional reform is needed to shift how people, societies, and laws respond to diseases depending upon the racial populations most impacted. To fully address a problem, one must be able to identify it. Instead, a collective “racial aphasia” persists.<sup>226</sup> By unearthing the constitutive role of race, racial valuation assists in properly conceptualizing racial health inequities, which is necessary to fully address them.

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226. Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 558 (2000) (describing Americans as suffering from “racial aphasia,” an inability to acknowledge aspects of this country’s racial past).