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ARTICLE

RETHINKING *BAKER*: A CRITICAL RACE FEMINIST THEORY OF DISABILITY

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INTRODUCTION

> One of the dangers of standing at the intersection […] is the likelihood of being run over.[1]
>
> — Ann duCille

Baker v Canada (Citizenship and Immigration) ("*Baker*")[2] is widely regarded as a leading case in administrative law establishing a new standard for the review of administrative discretion and the duty of procedural fairness.[3] However, many analyses of *Baker* erase the multiple sources of vulnerability that Ms. Mavis Baker, the appellant, faced. Ms. Baker was a Black woman immigrant from Jamaica, living in poverty as a single mother, and suffering from a mental illness. Even though her appeal was successful, her social position was largely absent from the decision of the Supreme Court of Canada ("SCC"). Understanding this case from a Critical Race Feminist perspective demonstrates the ways that even successful litigation can fail to unpack how administrative systems are violent towards people at the margins.

Ms. Baker's case was a challenge to the ruling of an Immigration Officer who denied her Humanitarian and Compassionate considerations ("H&C") application. Ms. Baker

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1 Ann duCille, "The Occult of True Black Womanhood: Critical Demeanor and Black Feminist Studies" (1994) 19 Signs 591 at 593.

2 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (available on CanLII) [*Baker* SCC cited to SCR].

3 See Roger Rowe, "*Baker* Revisited" (2007) 38 J of Black Stud 3; David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 UTLJ 193; Gerald P Heckman, "Unfinished Business: Baker and the Constitutionality of the Leave and Certification Requirements Under the Immigration Act" (2001) 27 Queen's LJ 683; David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2001) 27 Queen's LJ 445; Gerald Heckman & Lorne Sossin, "How do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence" (2005) 50 McGill LJ 193 at 252.

left her four adult children in her home country and entered Canada on a visitor's visa in 1981. While living in Canada, she had four children. After the birth of her final child in 1992, Ms. Baker began suffering from paranoid schizophrenia as a result of post-partum depression. She applied for welfare and underwent treatment as an in-patient at the Queen Street Mental Health Centre in Toronto for approximately one year.[4]

Ms. Baker was without legal status and subject to an outstanding deportation order, which was issued in 1982. She received another deportation order in December 1992 after it was determined that she had worked illegally in Canada and overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residency from outside Canada, based upon H&C considerations, pursuant to section 114(2) of what is now the *Immigration and Refugee Protection Act*.[5] The application included a letter from the Children's Aid Society, and a letter from her mental health professional, Dr. Collins.[6] The documentation provided that although she was still experiencing psychiatric problems, she was making progress. It also stated that her deportation might trigger another bout of mental illness since treatment might not be available in Jamaica.[7]

In 1994, Ms. Baker was denied permanent residency on H&C grounds without explanation in the notice sent to her. Only after persistent requests were the application notes (taken by Officer George Lorenz, and which formed the basis of Chief of Removals Officer Caden's decision) made available to Ms. Baker's publicly funded counsel. Mr. Lorenz's notes, in part, stated that Ms. Baker should be denied state protection from deportation based on the following:

> This case is a catastrophy [*sic*]. It is also an indictment of our 'system' that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND OTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.[8]

Officer Lorenz's notes, written in his capacity as an executive member of the Canadian government, are now renowned as a demonstration of the improper use of discretion and decision-making authority in administrative law and immigration law, with the SCC's decision cited as a leading authority. Mr. Lorenz relied on stereotypes of Black women as hypersexual welfare queens, whose childrearing is in pursuit of greater social

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4 *Baker* SCC, *supra* note 2 at para 5; Sharryn Aiken & Sheena Scott, "Baker v Canada (Minister of Citizenship and Immigration)" (2000) 15 J of Law and Social Policy 211. This case began as a poverty law file taken on by lawyer and community advocate Roger Rowe.

5 *Immigration and Refugee Protection Act*, SC 2001, c 27.

6 *Baker* SCC, *supra* note 2 at para 10.

7 Aiken & Scott, *supra* note 4.

8 *Baker* SCC, *supra* note 2 at para 5 [emphasis in original]. See Appendix A, below, for the entirety of Officer Lorenz's notes, which were reproduced in the SCC ruling.

welfare services, draining the public coffers funded by responsible taxpayers.[9] Ms. Baker's vulnerabilities did not elicit the conditions to demonstrate extraordinary hardship; rather, they helped portray her as an undesirable dependent whose circumstances failed to demonstrate the requisite extraordinary hardship for H&C grounds.

The SCC's ruling that Ms. Baker's rights to procedural and substantive fairness were violated made clear pronouncements on the scope of procedural fairness, the duty to give reasons for dismissing an H&C application, and the requirements of decision makers to consider the best interests of children. Despite a favorable ruling for Ms. Baker, the Court did not engage with the multiple justiciable vulnerabilities that afflicted Ms. Baker. Legal advocates and scholars have enunciated the ways the Court failed to address the role of racism in the immigration system and in the treatment of Ms. Baker.[10] However, to date, almost no studies have examined the ways that Ms. Baker's disability contributed to her second deportation order. The circumstances of Ms. Baker's maltreatment by Canada's immigration system require an analysis of the multiple intersecting sources of vulnerability and the ways in which her life circumstances ("a paranoid schizophrenic […] on welfare"[11]) were used against her.

This essay forwards a Critical Race Feminist theory of disability.[12] Critical Race Feminism ("CRF") illuminates the ways in which anti-discrimination and human rights doctrines and laws impact women of colour. Thus far, the experiences of women of colour with disabilities are largely absent in Critical Race Feminist perspectives. I contend that for women of colour the experience of disability is both compounded by and the result of racist-sexist treatment, a multidimensional experience of subordination that makes their experiences of disability unique. Ableism can be racist and sexist; sexism can be racist and ableist; racism can be ableist and sexist. I advance a theory of disability that is grounded in CRF and centres disability in women of colour's experiences with law and legal systems, experiences beyond the legal imagination. In Part I, I demonstrate the inattention to disability in existing Critical Race Feminist perspectives. I show how anti-discrimination and human rights law remain ill-equipped to confront the contextual and intersecting realities of disabled women of colour. In Part II, I apply a Critical Race Feminist theory of disability to consider the elements of *Baker* that are missing in the SCC judgment. I use Dean Spade's notion of administrative violence to analyze Ms. Baker's treatment and the multiple vulnerabilities that positioned her as an undeserving member of Canadian society and a target for immigration officials.

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9 See Hazel Carby, *Reconstructing Womanhood: The Emergence of the Afro-American Woman* (New York: Oxford University Press, 1987).

10 See, for example, Aiken & Scott, *supra* note 4; Rowe, *supra* note 3.

11 *Baker* SCC, *supra* note 2 at para 5.

12 The Ontario *Human Rights Code*, RSO 1990, c H19, defines disability in section 10(1)(a)-(e) and includes past and present physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect, etc. Mental disorders are explicitly enumerated. The Ontario Human Rights Commission notes that "disability" should be interpreted broadly. They also note that protection for disabled people explicitly includes, among other things, mental illness: "'Disability' should be interpreted in broad terms. It includes both present and past conditions, as well as a subjective component based on perception of disability […] Protection for persons with disabilities explicitly includes mental illness": Ontario Human Rights Commission, *Policy and guidelines on disability and the duty to accommodate*, online: OHRC <http://www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate/2-what-disability>. My theoretical treatment of disability encompasses this legal definition, but also the ways in which disability is socially constructed and reified through lived experience and marginalization.

PART I

A. Disability: The Margins of Critical Race Feminism

> In developing the essential black woman, ultimately the 'unwanted' or 'inferior' is humiliated, forced out of the discourse, or compelled to change to fit within a problematic construct. If she cannot change to fit within the construct, she is abandoned.[13]
>
> — Michele B. Goodwin

CRF accounts for and addresses women of colour's relation to the law. Emerging most solidly in the last 15 years, CRF followed a similar trajectory as Critical Race Theory ("CRT"), which emerged as a departure from Critical Legal Studies ("CLS"). CLS is an intervention into mainstream legal theory that attempts to challenge the status quo of legal academia and assesses how the law and the legal profession can be oriented toward social change.[14] As a legal intervention, CRF considers how race, gender, class, sexuality, and imperialism interact within a system of white male patriarchy and racist oppression to make the experiences of women of colour in law and society distinct.[15] As Adrien Wing writes, "existing legal paradigms have permitted women of color to fall between the cracks, so that they become, literally and figuratively, voiceless and invisible under so-called neutral law or solely race-based or gender-based analyses."[16] CRF rejects contentions in CRT that assume women of colour's experiences are in similitude to those of men of colour. CRF critiques have enunciated intra-racial/intra-gendered distinctions, refusing to advance analyses of race or gender to the exclusion of other bases of discrimination. CRF also rejects the emphasis on gender oppression within a system of patriarchy without examining the role of racism and classism in Feminist Legal Theory. It challenges the imperialism of representing the experiences of white, upper-middle class, and well-educated women as the experiences of all women. Accordingly, CRF is highly critical of feminist claims that there is a universal female experience. Anti-essentialist theorizing unpacks this notion that "a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[17]

CRF has been central to exposing the legal realities for women of colour, unearthing law's limited ability to understand how discrimination and oppression impact their lives. However, few CRF studies have seriously examined the role of disability in women of

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13 Michele Goodwin, "Gender, Race, and Mental Illness: The Case of Wanda Jean Allen" in Adrien Wing, ed, *Critical Race Feminism: A Reader*, 2d ed (New York: New York University Press, 2003) 228 at 232.

14 Adrien Wing, ed, *Critical Race Feminism: A Reader*, 2d ed (New York: New York University Press, 2003); Sherene Razack, Malinda Sharon Smith & Sunera Thobani, eds, *States of Race: Critical Race Feminism for the 21st Century* (Toronto: Between the Lines, 2010). It is important to note that many key writings in Critical Race Feminism that described women of colour's experiences with law pre-date the development of CRF's intellectual canon. Many writings cited here were written in the 1980s and are often cited as CRT works. This overlap is in part due to the fact that women of colour were driving a considerable amount of CRT works and considering women of colour's multiple identities and vulnerabilities. See, for example, Mari Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1992) 14 Women's Rights L Rep 297. For a discussion on the development of CRT see Kimberlé Crenshaw et al, eds, *Critical Race Theory: Key Writings that Formed the Movement* (New York: The New Press, 1995).

15 Angela Onwuachi-Willig, "Foreword: This Bridge Called our Backs: An Introduction to the Future of Critical Race Feminism" (2006) 39 UC Davis L Rev 733; Mary Jo Wiggins, "Foreword: The Future of Intersectionality and Critical Race Feminism" (2000) 11 J Contemp Legal Issues 677.

16 Wing, *supra* note 14 at 2.

17 Angela Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stanford LR 581 at 585.

colour's social and legal disadvantages.[18] CRF scholars Nimala Erevelles and Andrea Minear have pointed out the inattention to disability in their analysis of Patricia Williams' description of the murder of Eleanor Bumpurs in "Spirit Murdering the Messenger: The Discourse of Finger Pointing as the Law's Response to Racism."[19] Ms. Bumpurs was a poor, elderly, overweight, disabled Black woman killed by NYPD police officers. Professor Williams reads this murder as an unambiguous example of "racism as […] an offense so deeply painful and assaultive as to constitute […] 'spirit-murder.'"[20] Erevelles and Minear argue that Williams' failure to discuss disability as central to the circumstances that led to Ms. Bumpurs' fatal shooting is reminiscent of what Angela Harris describes as "nuance theory", in which the presence of disability oppression is only an "intensified example" of Black women's oppression.[21] Their analysis reveals how Ms. Bumpurs' social construction as a "dangerous, obese, irrational, Black woman" contributed to the perception of her being criminally "insane" (i.e. disabled).[22] Her reaction to losing her housing, described as a "murderous rage", is perceived as a disproportionately irrational response to what law enforcement described as a "mere" legal matter.[23] Ms. Bumpurs' death points to an important reality. The racialized and gendered experience of disability can have disastrous consequences for women of colour when they come into contact with legal authorities. Williams' inattention to Ms. Bumpurs' disability in her discussion leaves out a crucial factor that led to the fatal violence inflicted against her.

Michele Goodwin's essay, "Gender, Race and Mental Illness,"[24] is a rare work that centers disability within a Critical Race Feminist framework. Goodwin discusses the case of Wanda Jean Allen, a Black, queer, poor, and intellectually disabled woman who was the first Black woman since 1954 to be executed in the United States and the first Black woman to be executed in the state of Oklahoma since 1903.[25] Allen was convicted of first-degree murder for killing her partner, Gloria Leathers, in 1998. Allen's defense lawyer argued that she shot Leathers in self-defense and was attempting to fend off an attack from Leathers with a rake. The State's case against Allen relied on portraying her as dangerous, a threat to society, immoral, manly, and sexually deviant, using stereotypes of her queered Black woman-ness and her disability to construct an image of an obviously deviant criminal. Goodwin notes that "[n]umerous references were made to the fact that she was the 'aggressor', 'man', or dominant personality in her relationship with Leathers."[26] Goodwin's attention to the complicated web of identities and experiences in Wanda Jean Allen's life that led to her conviction and execution call for a deconstruction of "the essential Black woman" in Black feminist and Critical Race Feminist thinking: the tendency to essentialize a Black woman's experiences by privileging a discussion of race and gender without attendant intersections of class, sexuality, and disability. Her

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18 Meekosha & Shuttleworth contend that intersectionality scholars remain attached to a "conventional mantra of race, gender, sexuality and class" and continue to dismiss groups such as disability and age: Helen Meekosha & Russell Shuttleworth, "What's so 'Critical' About Critical Disability Studies?" (2009) 15:1 Australian J of Human Rights 47 at 62.

19 Patricia Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism" in Adrien K Wing, ed, *Critical Race Feminism: A Class Reader* (New York: New York University Press, 1997) 229; Nimala Erevelles & Andrea Minear, "Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality" (2010) 4:2 J of Literary & Cultural Studies 127.

20 Williams, *supra* note 19 at 230.

21 Harris, *supra* note 17 at 595. Harris applies "nuance theory" to white feminist understandings of Black women's experiences in which black women's oppression is the "ultimate example of how bad things [really] are" for all women, at 596. Also see Erevelles & Minear, *supra* note 19 at 127-28.

22 *Ibid* at 128.

23 *Ibid*.

24 Goodwin, *supra* note 13.

25 *Ibid* at 228.

26 *Ibid* at 233.

work rightly points out the marginalization of Black disabled women (and Black disabled queer women) within CRF perspectives.[27]

Beth Ribet has advanced a theory of disability within a CRT framework that provides a key set of entry points for a CRF perspective of disability. Ribet argues that tactics deployed by people of colour to overcome systemic disadvantage can produce disabilities.[28] She describes one common tactic as hyper-performance: over-performing as a means to rebut the presumption of incompetence or racial deficit.[29] Ribet's work exposes the material and socio-spatial realities of women of colour in workplace and educational settings and the consequences of their disproportionate burdens. Stressors such as micro-aggressions, subtle and overt racial and/or sexual harassment, and earning disparities lead one to adopt a hyper-performing response to defeat these obstacles. These stressors become chronic and compound over time, increasing the likelihood of disablement and creating a sense of shame in one's inability to 'overcome'. Thus, disability is both an outcome of structural marginalization and the cause of continued marginalization when it leads to impoverishment or immobilization.

Despite the limited accounts of race, gender, and disability within CRF perspectives, empirical research suggests that disabled people with multiple barriers face increased vulnerabilities in North America.[30] A recent study examined the proportion of *Americans with Disabilities Act* ("*ADA*")[31] harassment charges with respect to race, gender, age, and disability.[32] The researchers identified a clear interactive effect among the characteristics of disability, race, gender, age, industry, and size of employer as these relate to reports of disability-based harassment. Generally, being female, being older, having a behavioural disability, and racial minority status placed individuals at higher risk of experiencing

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27 Gabriel Arkles' recent work illuminates the violent realities of disability-based violence against queer women of colour and trans people of colour. Queer women of colour and trans people of colour's self-defense against state and police violence inflicted against them often results in their criminalization, or institutionalization under the pretext that they suffer from mental illness. Furthermore, traumatic violence and systemic discrimination contributes to high rates of emotional distress and psychological injury among trans people of colour and queer women of colour. Arkles also notes how queer women of color and trans people of colour have been particularly targeted for various forms of psychiatric abuse, yet have often been denied access to quality, consensual mental health services: Gabriel Arkles, "Gun Control, Mental Illness, and Black Trans and Lesbian Survival" (2013) 44 Southwestern L Rev 855 at 876.

28 Beth Ribet's work builds on Dorothy Roberts and Jennifer Pokempner's work that addresses the role of racialized and gendered poverty in creating new physical, emotional, and socially-embedded disabilities: Beth Ribet, "Surfacing Disability Through a Critical Race Theoretical Paradigm" (2010) 2 Georgetown Journal of Law & Modern Critical Race Perspectives 209. Roberts and Pokempner reveal the overlap between social services related to welfare and disability, noting the fusion of poverty and disability not just relative to poverty as a disabling force, but also to the use of (or invention of) disability diagnoses as a basis to make claims for resources, which, prior to welfare reform, were more rooted in socio-economic status: Dorothy Roberts & Jennifer Pokempner, "Poverty, Welfare Reform, and the Meaning of Disability" (2001) 62 Ohio St LJ 425.

29 Ribet, *supra* note 28.

30 For a thorough discussion of the limited quantitative and empirical studies of women of colour's experience of workplace discrimination and harassment, see Tanya Kateri Hernandez, "A Critical Race Feminist Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box" (2006) UC Davis LR 1235. Hernandez discusses the failure by existing methods that have not taken up an intersectional framework into their quantitative analyses.

31 *Americans with Disabilities Act*, Pub L No 101–336, 104 Stat 327 (1990) (codified as 42 USC § 12101).

32 Linda R Shaw, Fong Chan & Brian T McMahon, "Intersectionality and Disability Harassment: The Interactive Effects of Disability, Race, Age, and Gender" (2012) 55 Rehabilitation Counseling Bulletin 82.

disability harassment.[33] The experience of disabled people who encounter multiple intersecting grounds of discrimination in the workplace was the subject of a 2001 report by the Ontario Human Rights Commission's Policy and Education Branch. The report proposed "an intersectional approach to discrimination" and acknowledged the unique vulnerabilities of complainants with multiple grounds of discrimination.[34] Nevertheless, incorporating intersectional approaches that are meaningful to the lives of disabled women of colour thus far has proven difficult.

B. Intersectionalizing Disability

> Intersectionality reflects a commitment neither to subjects nor to identities per se but, rather, to marking and mapping the production and contingency of both.[35]
>
> — Devon Carbado

Disabled women of colour's experiences of discrimination pose unique challenges to law. The multidimensionality of their subordination is best understood through the lens of intersectionality, a theory introduced by Kimberlé Crenshaw that illuminates the multiple and simultaneous sites of subordination and the limits of feminist, antiracist, and other critical discourses. The theory has provided grounds for scholarly writing on women of colour, queer and trans people of colour, and groups with multiple and simultaneous experiences of oppression and structural marginalization. Crenshaw developed the notion of intersectionality in her early writings, where she focused on the experiences of Black women plaintiffs in race and sex discrimination cases in the United States. She demonstrated the incongruity of Black women's multidimensional experiences within dominant "single-axis" frameworks in anti-discrimination law that forced plaintiffs to prove one ground of discrimination:

> [The] single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be

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33 *Ibid* at 88. Specifically, they write:

> [A] careful examination of the top five harassment charge groups reveals that women older than 35 years from racial and ethnic minority backgrounds with behavior disorders represented three of the five highest harassment groups. The top five harassment groups all represent minorities with disabilities and all work for companies that are either very small or very large, and the top three groups all consist of individuals older than 35 years, but it is the unique combinations of those characteristics along with particular racial category, type of impairment, and type of industry that place them at different likelihoods of having filed a charge of harassment.

Psychological studies have long shown that disability can be the result of daily episodic reactions to racist aggression. Carter & Scheuermann, for instance, discuss race-based traumatic stress as when employees suffer severe, demonstrable emotional or psychological injury due to harassment or discrimination, or what is more commonly known as race-based traumatic stress: Carter & Scheuermann, "Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress" (2012) 12 U Md LJ Race Religion Gender & Class 1 at 3.

34 Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (2001), online: OHRC <http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims>.

35 Devon W Carbado, "Colorblind Intersectionality" (2013) 38 Signs 811 at 815.

> viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.[36]

Crenshaw's analysis of *DeGraffenreid v General Motors*, a workplace discrimination case where Black women unsuccessfully attempted to sue as a class, looks at the Court's unwillingness to acknowledge that 'Black women' were a unified group in the discrimination they experienced.[37] She contends that this is a consideration that Congress, in passing Title VII of the *Civil Rights Act*, perhaps failed to contemplate.[38]

Nitya Duclos applied Crenshaw's analysis to race and sex discrimination cases reported to Canadian human rights tribunals between 1980 and 1989 in an effort to reveal how they responded to discrimination claims brought by women of colour. She found that the reported cases often made it impossible to know if women of colour were involved in disputes. Even when it was clear, the cases were almost invariably treated as if the claimants were "raceless women or genderless racial minorities."[39] She points out that as a complainant departs from the norm of being a cis, white, able-bodied man, it is less likely their complaint will be held to constitute discrimination in law.[40]

Crenshaw foregrounded a central flaw in antidiscrimination law that permeates human rights doctrine, enumerated and analogous grounds analyses, and social movement politics. Women of colour are forced to negate the specificities of their identities at play in their subordination and risk their ability to represent men of colour or white women when claiming discrimination. In the alternative, they must ignore intersectionality in order to state a claim that does not lead to the exclusion of men of colour or white women.[41] As a methodology, intersectionality is a vital tool for understanding a Critical Race Feminist theory of disability. As Crenshaw suggests, Black women and women of colour can experience discrimination in ways that are similar to and different from those experienced by white women, Black men, and men of colour. In a similar vein, women of colour's experiences of disability fundamentally affect their experiences of racism and sexism. It is different from disabled white women's experiences, able-bodied women of colour's experiences, and disabled men of colour's experiences simultaneously. A CRF theory of disability exposes how women of colour experience multiple dimensions of harm, something that more closely resembles their lived experience.[42]

An intersectional approach to disability reveals the problems of analogizing between oppression in both Critical Disability Studies ("CDS") and feminist studies of disability.[43]

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36 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 at 140.

37 *DeGraffenreid v General Motors*, 413 F Supp 142 (available on WL Next Can) (ED Mo 1976).

38 *Civil Rights Act*, Pub L No 88–352, 78 Stat 241 (1964). Title VII of the *Civil Rights Act* prohibits discrimination on the basis of race, color, religion, sex, or national origin. It also prohibits discrimination against an individual because of his or her association with another individual of a particular race, color, religion, sex, or national origin.

39 Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Can J Women & L 25 at 58.

40 *Ibid* at 44.

41 Crenshaw, *supra* note 36 at 148. Crenshaw's discussion specifically refers to Black women in relation to Black men and shows the dilemma created by antidiscrimination doctrine for claimants with multiple grounds of discrimination.

42 Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 Can J Women & L 37 at 59.

43 CDS is a growing theoretical and interdisciplinary framework studying the social, legal, and political influences that impact the lives of disabled people. As Meekosha & Shuttleworth write, CDS "has accompanied a social, political and intellectual re-evaluation of explanatory paradigms used to understand the lived experience of disabled people and potential ways forward for social, political and economic change": Meekosha & Shuttleworth, *supra* note 18 at 49.

Many foundational works in CDS have analyzed disability and race as oppositional or analogous categories. Lennard J. Davis' *Ending Normalcy*, for instance, compares "the disabled figure" to "the body marked as differently pigmented."[44] Often, the relationship between people with disabilities and other minorities is presented in hierarchical terms—an attempt to gain recognition of disabled people as a political minority. The frequent use of "like race" analogies or describing disabled people as "cultural minorities" in disability scholarship antagonizes the interests of disabled people of colour. Theresa Man Ling Lee points out that efforts to describe people with disabilities as a "cultural minority" ignores the simultaneity of disabled and racialized experiences and, moreover, adopts a liberal, multiculturalist strategy to protect group rights based on an abstract, decontextualized, and essentialist understanding of what living while disabled is like.[45]

Analogies that equate ableism with racism obscure the importance of race for the perceived benefit of the group and "take center stage from people of color."[46] In these comparisons, it becomes impossible to think through complex intersections of racism and ableism in the lives of disabled people of colour.[47] A form of "disability essentialism" emerges out of such reasoning, where the experiences, needs, desires, and aims of all disabled people are presumed to be the same. Those with "different" disabled experiences are accommodated only to the extent that their claims do not undermine the movement's foundational arguments.[48]

Disability essentializing is used by feminist disability studies in claiming a unitary experience of gendered disability, a study that removes ontological questions of womanhood from race, class, sexual orientation, and other vulnerabilities. This approach is used by Fiona Sampson in her analysis of the SCC's decision *R v Parrott* ("*Parrott*").[49] Sampson attempts to illuminate the "distinctive experiences of gendered disability discrimination so as to maximize the value of equality rights law for women with disabilities."[50] In *Parrott,* a man was accused of kidnapping and sexually assaulting a thirty-eight-year-old woman with Down's Syndrome from a hospital in St. John's, Newfoundland. The survivor's mental development was equivalent to that of an four-year-old. When the survivor was found, several hours after the kidnapping was reported, her shorts were on backwards, her underwear was hanging out over her shorts, and she was heavily scratched and bruised. The central issue on appeal was whether the Crown was obliged to call the survivor as a witness at the *voir dire* held to determine the admissibility of her out-of-court statements, which the Crown sought to rely on as hearsay evidence. The Court's analysis focused primarily on the necessity and reliability of the hearsay evidence from the survivor, including her answers that the person who hurt her was "[t]he man."[51]

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44 Lennard J Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (London: Verso, 1995) at 80; see extended discussion in Anna Mollow, "'When *Black* Women Start Going on Prozac…': the Politics of Race, Gender, and Emotional Distress in Meri Nana-Ama Danquah's *Willow Weep for Me*" in Lennard J Davis, ed, *The Disability Studies Reader,* 3d ed (New York: Routledge, 2010) 486.

45 Theresa Man Ling Lee, "Multicultural Citizenship: The Case of the Disabled" in Dianne Pothier & Richard Levin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2005) 87 at 88.

46 Trina Grillo & Stephanie Wildman, "Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other Isms)" in Richard Delgado & Jean Stefanic, eds, *Critical White Studies: Looking Behind the Mirror* (Philadelphia: Temple University Press, 1997) 619 at 619.

47 Mollow, *supra* note 44 at 487.

48 *Ibid*.

49 *R v Parrott*, 2001 SCC 3 (available on CanLII) [*Parrott*].

50 Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in Dianne Pothier & Richard Levin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2005) 267 at 267.

51 *Parrott*, *supra* note 49 at para 12.

Sampson rightfully highlights that by siding with the accused, the Court's decision is influenced by problematic misconceptions of disability and a willful ignorance of gendered disability discrimination. However, in articulating that *Parrott* fails to uphold equality rights for women with disabilities, Sampson appropriates "feminist critical race" critiques of sexual assault against women of color.[52] Using Professor Crenshaw's analysis of the good/bad dichotomy in sexual assault law that marginalizes women of colour's experiences, Sampson mentions that "[w]omen with disabilities have also experienced disadvantage as a result of the legitimization of the good/bad victim dichotomy in sexual assault law."[53] She contends:

> The sexual assault of women with disabilities must be understood in terms of the experience of gendered disability, just as violence against women of colour demands an analysis that transcends the limitations of analyses devoid of a race perspective. The sexual assault of a woman with a disability is not the result of a disabled woman's 'additive' status as a woman and as a person with a disability.[54]

This well-intentioned attempt to craft a gendered theory of disability emanating from the awful outcome in *Parrott* is an unfortunate extension of a presumed universal white female subject into a disability analysis. Even as Sampson attempts an intersectional analysis, she re-inscribes an analogous comparison of the 'disabled women' and 'women of colour', a solipsistic erasure of disabled women of colour. Sampson's use of Crenshaw without attention to the contextual factors of her work replicates the problematic understandings that were the basis of the critiques in the first place. Analogizing a gendered experience of disability without contemplating women of colour's experiences with disability imports a unitary experience of disability into feminist thinking.

C. Intersectional Disability and the Limits of Law

> Law by its nature is conservative, and when calls for change that threaten to destabilize existing distributions of material and symbolic power are made, change through law will occur in ways that preserve existing distributions to the greatest extent possible.[55]
>
> — Angela Harris

Intersectional perspectives reveal the ways in which law and legal prohibitions against discrimination are incongruent with the lived experiences of people with multiple vulnerabilities. CRF, CRT and Feminist Legal Theory have pointed out the shortcomings

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52 Sampson, *supra* note 50 at 279.

53 *Ibid* at 280. Sampson cites Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan L Rev 1241 at 1266:

> Feminists have attacked other dominant, essentially patriarchal, conceptions of rape, particularly as represented through law. The early emphasis of rape law on the property-like aspect of women's chastity resulted in less solicitude for rape victims whose chastity had been in some way devalued. Some of the most insidious assumptions were written into the law, including the early common-law notion that a woman alleging rape must be able to show that she resisted to the utmost in order to prove that she was raped rather than seduced. Women themselves were put on trial, as judge and jury scrutinized their lives to determine whether they were innocent victims or women who essentially got what they were asking for. Legal rules thus functioned to legitimize a good woman/bad woman dichotomy in which women who lead sexually autonomous lives were usually least likely to be vindicated if they were raped.

54 Sampson, *supra* note 50 at 279.

55 Angela Harris, "Stonewall to the Suburbs?: Toward a Political Economy of Sexuality" (2006) 14 WM Mary Bill Rts J 1539 at 1540.

of law and the limits of anti-discrimination and human rights doctrine. These doctrines understand discrimination in such limited way that it becomes exceedingly difficult to prove cases of discrimination and human rights claims. As formal equality frameworks, they fail to understand the historically rooted nature of oppression, discrimination, harassment, and the host of social and economic disadvantages that are distributed along systems of oppression.[56]

Alan Freeman argues that anti-discrimination legislation conceptualizes the harm of discrimination through a perpetrator/victim dyad:[57] a perpetrator irrationally hates people on the basis of their race and fires, denies services to, beats, or kills his victim(s) because of this inexplicable animus. Under such a paradigm, discrimination becomes individualized and is only the result of bad individuals who premeditate and carry out discriminatory acts.[58] Relying on the perpetrator perspective also supports the naïve belief that equality is a present reality with no legacies of discrimination. Understanding discrimination through the perpetrator's intention fails to consider the pre-existing vulnerabilities that make certain people more likely to be adversely impacted by discrimination regardless of a perpetrator's intent.

Despite decades of criticism, single-axis frameworks and enumerated and/or analogous grounds analyses remain the prevailing approach to human rights statutes and anti-discrimination law. In Canada, section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") was initially drafted with a finite list of enumerated grounds.[59] The final version qualifies those grounds as "in particular," thereby opening the door for a broader application of section 15 when analogous grounds of discrimination are established.[60] The development of section 15 jurisprudence has been unpredictable and the SCC has itself acknowledged that this provision is the most difficult to apply and yields variable decisions.[61] As Dianne Pothier writes, "[a]lthough there are no specific statutory bars to claims based on multiple and intersecting grounds, the legal mindset has had difficulty with such claims."[62] Similarly, Natasha Kim and Tina Piper argue that since *Andrews v Law Society of British Columbia*[63]—the inaugural section 15 case—the enumerated or analogous grounds approach can be reduced to "a game of categorization", especially when courts must confront multiple and intersecting grounds of discrimination.[64] In *Canada (AG) v Mossop*, for instance, the SCC did not conceive of "family status" as incorporating a same-sex family as an appropriate analogous ground. Instead, the majority of the Court encouraged the plaintiff to ground his claim solely under sexual

56 Dean Spade, "Intersectional Resistance and Law Reform" (2013) 38 Signs 1031 at 1034 [Spade, "Intersectional Resistance"].

57 Alan David Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" in Kimberlé Crenshaw et al, eds, *Critical Race Theory: Key Writings That Formed the Movement* (New York: The New Press, 1995) 29.

58 See Spade, "Intersectional Resistance", *supra* note 56 at 1034.

59 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15.

60 Pothier, *supra* note 42 at 38-39. Also see *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 (available on CanLII) [*Corbière* cited to SCR].

61 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 507 (available on CanLII) [*Law*]. See also Beverly McLachlin, "Equality: The Most Difficult Right" (2001) 14 SCLR (2d) 17.

62 Pothier, *supra* note 42 at 39.

63 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 (available on CanLII) [cited to SCR].

64 Natasha Kim & Tina Piper, "Gosselin v Quebec: Back to the Poorhouse…" (2003) 48 McGill LJ 749 at 771.

orientation.[65] In *Symes v Canada*, the majority refused to accept the idea of inequalities *between* women suffering from different types or levels of disadvantage. Instead, the Court insisted that a claim based on sex required the *same* disadvantage to *all* women equally.[66] Claimants with multiple intersecting harms face an uphill battle and must translate the complexities of the harm they suffer into discrete, protected categories that equality jurisprudence can support.

The narrow and individualized conception of harm, discrimination, harassment, and violence in anti-discrimination and human rights doctrine shapes even successful outcomes. Claimants with 'winnable' cases who have success are celebrated and these victories are touted as watershed moments that will engender widespread social change. However, as Dean Spade points out, in a sense these moments help naturalize the status quo by amplifying one form of legally recognizable and prohibited discrimination.[67] Even when plaintiffs are successful, the core of their mistreatment is often not the subject of the successful judgment; their cases are won on legal technicalities, or courts rule according to procedural matters and ignore the issues of social inequality that were the basis of the case.[68] Law, therefore, does not provide a totalizing remedy for racism, sexism, and/or ableism. It addresses only legally prohibited discrimination—observable and relatively discrete acts of individuals, narrow acts of "objective discrimination."[69]

In Part II of this essay, I return to *Baker*, a case I contend is a paradigmatic example of the multiple intersecting barriers disabled women of colour encounter. Though some have explored issues of race and gender at play in *Baker*, little attention has been placed on the role of disability. I argue that *Baker* is an apt illustration of the inability of courts to recognize how people with intersecting vulnerabilities are targeted and attacked by

65 *Canada (AG) v Mossop*, [1993] 1 SCR 554 (available on CanLII) [cited to SCR]. Writing for the minority in the *Mossop* case, Madam Justice L'Heureux-Dubé remarked, "it is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap or some other combination," at para 152. Justice L'Heureux-Dubé acknowledges the problems of rigid categorization of discrimination: "[C]ategorizing […] discrimination as primarily racially-oriented, or primarily gender-oriented misconceives the reality of discrimination," at para 152. Justice L'Heureux-Dubé reiterated this approach in her dissent in *Egan v Canada*, that grounds of discrimination cannot be reduced to compartments, but overlap: *Egan v Canada*, [1995] 2 SCR 513 (available on CanLII) [cited to SCR]. In *Law*, the SCC recognized that a discrimination claim can present an intersection of grounds that are a synthesis of those listed in section 15 or are analogous to them. Subsequent to *Law*, the SCC applied this analysis to recognize a new analogous ground of discrimination, namely "aboriginality-residence": *Law*, *supra* note 61. In *Corbière* the Court considered a provision of the *Indian Act* which barred band members who live off-reserve from voting in band elections. In establishing the new analogous ground, the Court noted that the group experiencing differential treatment was based on a combination of traits, namely being Aboriginal persons who are band members but living off a reserve. Justice L'Heureux-Dubé's decision also noted the particular adverse impact that the impugned law had on Aboriginal women because of the history of their involuntary loss of Indian status: "Aboriginal women, who can be said to be *doubly disadvantaged* on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society": *Corbière*, *supra* note 60 at para 72 [emphasis added].

66 *Symes v Canada*, [1993] 4 SCR 695 at 769 (available on CanLII).

67 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011) [Spade, *Normal Life*].

68 *Ibid* at 84-85. Spade criticizes how equality- and rights-seeking arguments participate in logics and structures that undergird relations of domination and become sites for the expansion of harmful systems and institutions, because they often reproduce deservingness frameworks. This is especially problematic for women of colour with disabilities, since the purportedly universal subject of rights is actually a very narrow category of persons. The ability to avail oneself of supposedly universal rights is often predicated on one's pre-existing access to whiteness, wealth, citizenship, settler and not-indigenous status, and the ability to conform to body, health, gender, sexuality, and family norms: Spade, "Intersectional Resistance", *supra* note 56 at 1039.

69 Duclos, *supra* note 39 at 29-30.

administrative systems. I apply Spade's notion of administrative violence to understand the violence committed against Ms. Baker by Canada's immigration system and the epistemic violence of legal approaches that privilege procedural questions and ignore the centrality of race, gender, and disability as justiciable issues. Spade's notion of administrative violence is based upon women of colour feminist perspectives and is useful in understanding the ways in which administrative practices perpetrate violence against people at the margins.[70]

PART II

A. Administrative Law and Administrative Violence: Rethinking *Baker*

> Administrative systems […] govern the distribution of life chances.[71]
>
> — Dean Spade

From a CRF perspective, *Baker* was a pivotal legal moment for Canada's highest Court: a Jamaican-born, Black woman, single mother, former domestic worker, living undocumented in Canada for over a decade with a psycho-social disability, successfully appealed her deportation order. Despite the presence of these intersecting vulnerabilities and their interplay with the circumstances that led to her deportation order, however, the arguments advanced on Ms. Baker's behalf and the Court's decision to reverse the deportation order focused on the procedural issues at administrative law and the issue of the rights of the child, leaving the equality concerns in Ms. Baker's request for permanent residency largely untouched. Both the facts of the case presented in the judgment and the engagement of these facts bring to the fore the role of administrative violence in Ms. Baker's experience with Canadian society and the Canadian immigration system as a disabled woman of colour.

Administrative violence is a critical intervention that illuminates the ways in which purportedly neutral state-administered services are actually key vectors for violence. These services are principally concerned with population control and masked as delivery points of public support.[72] Spade describes administrative violence as the "regimes of practices and knowledge that coalesce in conditions and arrangements that affect everyone and that make certain populations highly vulnerable to imprisonment."[73] Spade discusses daily and episodic forms of administrative violence in legislation, immigration policies, health care, and social services that help produce imprisonment, criminalization, and deportation. These social institutions that permit discretionary decision-making are imbued with the "gendered racialization of population control: a criminal modality that prioritizes containment and incarceration over treatment."[74] Seeing the state's institutions as modalities of "population control" departs from individualized discussions of discrimination and maltreatment and centres a systems-based analysis of the harms produced and distributed across racialized, gendered, and/or disabled populations.[75] Spade's writing on administrative violence informs my understanding of Ms. Baker's treatment by the Canadian immigration system and explains the Court's emphasis

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70 Spade's analysis focuses on white trans people and trans people of colour. In applying the concept of administrative violence to *Baker,* I am not attempting to erase the ways in which trans people and trans people of colour face specific forms of violence from the state and other administrative systems. I argue that the concept is illustrative to the set of facts at play in *Baker* and for thinking more closely about the use of one's disability, race, gender, and poverty to justify deportation.

71 Spade, *Normal Life*, *supra* note 67 at 11.

72 Spade, "Intersectional Resistance", *supra* note 56 at 1047.

73 Spade, *Normal Life*, *supra* note 67 at 22.

74 Spade, "Intersectional Resistance", *supra* note 56 at 1035-36.

75 *Ibid*.

on procedural fairness and the standard of review without attending to the equality concerns and *Charter* issues raised.

B. *Baker* at the Lower Courts: Presumed Violent

At the trial division of the Federal Court, Ms. Baker and her counsel raised the following three issues: (1) Officer Lorenz's notes included statements not supported by evidence and that indicated bias; (2) in making the H&C decision, Officer Caden was obliged to treat the interests of Ms. Baker's four Canadian children as a primary factor in his assessment by reason of the *Convention on the Rights of the Child* ("*CRC*"); and (3) because of the doctrine of legitimate expectations, Ms. Baker was entitled, as a procedural matter, to an H&C assessment based on the best interests of the child.[76]

Justice Simpson held that Officer Lorenz's language did not raise a reasonable apprehension of bias, but stated that the views expressed in his notes, while displaying "an anger and frustration with the Canadian immigration law enforcement"[77] were unimportant because they were not those of the ultimate decision-maker, Officer Caden. Justice Simpson denied the relevance of Lorenz's notes by stating that "[n]o blatant error is to be found in the officer's Notes. His expressions of personal opinion were unfortunate, but they do not taint the decision-maker."[78] Justice Simpson certified the claim as a "serious question of general importance" under section 83(1) of the *Immigration Act*:

> Given that the *Immigration Act* does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under section 114(2) of the *Immigration Act*?[79]

In rejecting the applicant's request, Justice Simpson expressed doubt about the evidence Ms. Baker presented from her medical professionals that she would be willing to work to support herself and her four children: "I think it reasonable to conclude that the experts do not expect the Applicant to work."[80] Justice Simpson's claims were made without real substantiation and appeared overly concerned with Ms. Baker's self-sufficiency without referencing or contextualizing Ms. Baker's mental illness—a recognized disability.[81] Justice Simpson also characterized Ms. Baker as violent based on portions of Officer Lorenz's notes that mention that the applicant has the potential for violence. The following summation is telling:

> Officer Lorenz's Notes mention that the Applicant has the potential for violence. Counsel for the Applicant says that, in view of the fact that she was

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76 *Baker* SCC, *supra* note 2 at para 16. The doctrine of legitimate expectations is a British doctrine accepted by the SCC. It provides a procedural fairness guarantee. In *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*, the Court recognized that a general duty of fairness is owed when administrative decisions are being made: *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 SCR 311 (available on CanLII) [cited to SCR]. See also David Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997) 35:1 Osgoode Hall LJ 139. In *Agraira v Canada*, the SCC reiterated the principles of legitimate expectation: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (available on CanLII).

77 *Baker v Canada (Minister of Citizenship and Immigration)* (1995), 101 FTR 110 at para 31 (available on WL Next Can) (FCTD) [*Baker* FCTD].

78 *Ibid* at para 44.

79 *Baker* SCC, *supra* note 2 at para 9.

80 *Baker* FCTD, *supra* note 77 at para 23.

81 See *ibid* at paras 17-24.

> not convicted of assault, this is unfair. I do not agree. No one has suggested that the events underlying the charges did not occur. Accordingly, on this subject, Officer Lorenz's statement is supported by the evidence.[82]

Implicit in the Federal Court's decision is the perpetrator perspective--the willingness to see Officer Lorenz as a well-intentioned individual acting in good faith.[83]

Meanwhile, great lengths are taken to attack Ms. Baker's character, based on stereotypes frequently mapped onto Black females: that they are aggressive, welfare-dependent, hyper-sexual, and violent. Furthermore, rather than naming Ms. Baker's mental illness a disability, it is used as further evidence of her dependency on the state for resources and thus her undesirability as a potential permanent resident. Justice Simpson's willingness to depict Ms. Baker as violent—essentially supporting Officer Lorenz's statements in his notes—deploys racist-sexist-ableist stereotypes to attack Ms. Baker's character. Her portrayal buffered both the rejection of her H&C application and Canadian immigration's control over low-income racialized women.[84]

At the Federal Court of Appeal, Justice Strayer limited the appeal to the question certified by Justice Simpson. He rejected Ms. Baker's request to challenge the constitutional validity of section 83(1) of the *Immigration Act*. Justice Strayer reasoned that an international treaty cannot have legal effect in Canada unless implemented through domestic legislation and that the *CRC* has not been adopted in either federal or provincial legislation.[85] The appeal judgment did not address the attacks on Ms. Baker's character by the trial division judge or the stereotypes in Officer Lorenz's notes.

The case was granted leave to appeal to the SCC in 1999. A number of interveners on behalf of Ms. Baker were certified to raise issues of interest to immigrant communities. The Charter Committee on Poverty Issues raised violations of the *CRC* and sections 7 and 15 of the *Charter*. They were the only intervener to identify and denounce the specific examples of intersecting stereotypes reflected in Lorenz's notes concerning Ms. Baker's identity as a Black woman, single mother, social assistance recipient, psychiatric survivor, and immigrant.[86] The Canadian Council of Churches ("CCC") and the Canadian Foundation for Children, and Youth and the Law focused on the rights of the child. The CCC emphasized the importance of access to an effective remedy for Ms. Baker and her children.[87] The Canadian Foundation for Children, and Youth and the Law argued that section 7 of the *Charter*, guaranteeing the right to security of the person in accordance with the principles of fundamental justice, afforded Ms. Baker's children a constitutionally protected right to psychological and emotional integrity as well as to protection and preservation of their family. Further, the children enjoyed a liberty interest in choosing their place of residence, which was supported by their right to

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82 *Ibid* at para 27.

83 See Freeman, *supra* note 57.

84 Spade, *Normal Life*, *supra* note 67.

85 *Baker v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FCR 127 (available on CanLII) (FCA) [cited to FCR].

86 Aiken & Scott, *supra* note 4 at 221. Aiken & Scott describe the collaborative litigation strategy mapped out by the appellant and the interveners. The Charter Committee's factum argued that international human rights law informs *Charter* rights and can be used to limit administrative discretion. They also argued that the presumption of legislative compliance with international law can be used in statutory interpretation: *Baker* SCC, *supra* note 2 (Factum of the Charter Committee on Poverty Issues at paras 52–53).

87 The Council argued that international human rights instruments, specifically articles 9 and 10 of the *Convention on the Rights of the Child*, grant access to human rights: *Baker* SCC, *supra* note 2 (Factum of the Canadian Council of Churches at para 10; also see paras 20-24).

remain in Canada pursuant to the *Charter's* mobility rights guarantee under section 6.[88] The interveners proceeded on the assumption that a coalition consisting of the African Canadian Legal Clinic, the Congress of Black Women of Canada, and the Jamaican Canadian Association would address the role of anti-Black racism in the case. However, Justice Major denied the coalition's motion for leave to intervene in the case. No disability rights organizations applied to be interveners in the case, despite the fact that Ms. Baker's mental illness was central to the facts and the impugned comments by Officer Lorenz.

C. *Baker* at the SCC: Sweeping Intersectionality Under the Proverbial Rug

The facts in *Baker* provided an opportune moment for the SCC to conceptualize racism, sexism, classism, and ableism as a feature in attitudes among certain personnel in Canada's immigration system. However, the Court did not engage these central aspects of the case, sweeping their possible justiciability under the proverbial rug. Justice L'Heureux-Dubé, writing for the majority, removed these considerations at the outset and focused on questions of procedural fairness and best interests of the child pursuant to the *CRC*:

> Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position.[89]

The Court focused on three sub-issues with respect to procedural fairness in administrative law:[90] (1) whether the participatory rights accorded to both the appellant and her children were consistent with the duty of fairness; (2) whether the failure to provide reasons was consistent with the common law duty of fairness; and (3) whether there was a reasonable apprehension of bias. Justice L'Heureux-Dubé held that there was a denial of the duty of procedural fairness based on the fact that the written reasons of Officer Lorenz used by Officer Caden created a reasonable apprehension of bias.[91] Secondly, the Court held that Officer Caden exercised discretion in an unreasonable manner by failing to seriously consider the interests of Ms. Baker's four Canadian-born children. Justice L'Heureux-Dubé considered the importance of children's rights and best interests established in the *CRC* and other international law instruments ratified by Canada.[92] The Court held that a contextual approach must be used to determine whether an officer's decision was consistent with the requirements of the statute and the values of

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88 Aiken & Scott, *supra* note 4 at 222; *Baker* SCC, *supra* note 2 (Factum of the Canadian Foundation for Children, Youth and the Law *et al* at paras 22-24). Anecdotal accounts suggest that counsel for Ms. Baker was dissuaded from raising the constitutional equality issues by interveners and court observers in the human rights community: Rowe, *supra* note 3.

89 *Baker* SCC, *supra* note 2 at para 11.

90 For a review of procedural fairness in Canadian administrative law see, for example, Roderick A Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: I" (1980) 25 McGill LJ 520; David J Mullan, "Natural Justice and Fairness—Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 McGill LJ 250; Anna C Pratt, "Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act" (1999) 8 Social Legal Stud 199. Justice L'Heureux-Dubé reviewed factors influencing procedural fairness in SCC jurisprudence in *Baker* SCC, *supra* note 2 at paras 21-28.

91 Justice Iacobucci wrote a separate concurring opinion on behalf of himself and Justice Cory arguing that "an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation": *Baker* SCC, *supra* note 2 at para 79.

92 *Convention on the Rights of the Child*, 1577 UNTS 3, Can TS 1992 No 3 (ratified by Canada 13 December 1991).

administrative law. International legal instruments were held to constitute an important part of compassionate or humanitarian considerations.[93]

By privileging procedural questions of administrative law in its decision, the SCC elided the intersections of racism, sexism, ableism, and classist denigration at play in Ms. Baker's appeal.[94] These forces were present not just in Ms. Baker's life in Canada—the fact that she worked as a domestic, for instance—but explicitly in Officer Lorenz's notes. There are two passages where Justice L'Heureux-Dubé acknowledges the structural realities in Ms. Baker's experiences that require "sensitivity."[95]

Regarding immigration decisions, she writes:

> Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.[96]

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93 *Baker* SCC, *supra* note 2 at paras 69-71.

94 For other instances where the SCC has downplayed issues of race in favor of a discussion of procedural questions see *Van de Perre v Edwards*, 2001 SCC 60 (available on CanLII) and *R v RDS*, [1997] 3 SCR 484 (available on CanLII) [cited to SCR]. In *Van de Perre v Edwards*, for instance, the SCC was tasked with deciding a family law custody dispute where the race and racial identity of a mixed-raced Black child played a role. The Court restored the trial judge's decision that awarded custody to Ms. Van de Perre, the child's white mother, on the basis of the faulty standard of review applied by the BC Court of Appeal. In its reversal, the Court failed to identify that the significance of race for biracial Black children is deeply linked to the realities of anti-Black racism in Canada. Echoing the trial judge, the Court suggested that biracial children should be encouraged to positively identify with both racial heritages and that race was but one factor in determining a child's best interests. But in its attempt to address the role of race in best interest consideration, the SCC did not discuss the lived realities that Black and biracial Black male children face. See Lawrence Hill's discussion of the racial implications of the case in "No Negroes Here" in *Black Berry, Sweet Juice: On Being Black and White in Canada* (Toronto: HarperCollins Publisher, 2001) 150. In *R v RDS*, a Black woman judge, Justice Corinne Sparks, a descendant of Africville and a Black Scotian, had one of her rulings challenged for apprehension of bias and for, allegedly, giving supplementary reasons for her judgment after the appeal was filed. The impugned case concerned an African Canadian male youth who was charged with assaulting a peace officer with intent to prevent the lawful arrest of another person and resisting a peace officer engaged in the lawful execution of his duty. Justice Sparks was accused with exhibiting bias despite the fact that her impugned remarks—that police officers are known to overreact in dealing with non-white groups—were supported by data, especially data on police stops of young Black men. A six-justice majority of the SCC held that Justice Sparks did not exhibit a reasonable apprehension of racial bias. Justices L'Heureux-Dubé and McLachlin were emphatic that Judge Sparks' comments were "an entirely appropriate recognition of the facts in evidence in this case and of the context within which the case arose": at para 30. However, three SCC Justices—Major, Lamer, and Sopinka—dissented and Justice Cory came close to dissenting. As Sherene Razack notes, the discomfort with the 'victory' for Judge Sparks stems from the fact that it brought to the surface "the line[…] the line we must not cross […] the line [that] separates those who think race always matters from those who think it only matters, if at all, under highly limited circumstances involving specific individuals": Sherene Razack, "*RDS v Her Majesty the Queen*: A Case About Home" (1998) 9 Const Forum Const 59 at 60. See also April Burey, "No Dichotomies: Reflections on Equality for African Canadians in *R v RDS*" (1998) 21 Dalhousie LJ 199; Reg Graycar, "Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment" (2008) 15 Int'l J Legal Profession 73; Carol A Aylward, "'Take the Long Way Home': *RDS v R* - The Journey" (1998) 47 UNBLJ 249.

95 *Baker* SCC, *supra* note 2 at para 47.

96 *Ibid*.

This analysis is problematic for a number of reasons. First, it does not acknowledge the fraught relationship between the settlers that formed the Canadian state and First Nations people, whose presence in Canada, as a percentage of the population, has been diminished through deliberate efforts at population extermination and cultural genocide. Moreover, it does not differentiate the starkly different experiences of Black immigrants from the Caribbean from, for instance, those of mainly-white immigrants from Europe. Systems of oppression, including the legacy of slavery that has left many Caribbean women dependent on low-wage domestic work in North America as well as the specific barriers put up by Canadian immigration schemes that render them as less desirable immigrants, are not probed by Justice L'Heureux-Dubé's attempt to provide context.[97]

After making this comment, Justice L'Heureux-Dubé continues:

> "[T]hese statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness.[98]

Justice L'Heureux-Dubé rightly identifies Officer Lorenz's ableism in connecting Ms. Baker's mental illness, the fact that she is a domestic worker, and the number of children she has. This demonstrates some sophistication in understanding how disability was used as a pretext to indict other aspects of Ms. Baker's life. However, the learned Justice did not connect her analysis to the simultaneous racism and sexism present in the statements or to the *Charter*, even as an interpretive tool. It is not enough to say that the comments relied on stereotypes if one then does not engage what those stereotypes mean, who they signify, and how they deliver a materially detrimental impact when levelled by an officer vested with administrative authority. Justice L'Heureux-Dubé concludes that there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias because the exercise of the H&C discretion was unreasonable.[99] Ms. Baker won her appeal; however, her solicitor-client costs were not covered as was requested.

In the decade and a half since *Baker* was decided and hailed as a landmark decision in Canadian administrative law, no widespread attempts to address the administrative violence in Canadian immigration policy and the maldistribution of health care and social services have taken place. Roger Rowe, lead counsel for Ms. Baker, has demonstrated the systemic ways in which the Canadian immigration system continues to administer violence against Black women with disabilities.[100] A more recent case garnering Rowe's commentary, *Carmelita Haynes and the Minister of Public Safety and Emergency Preparedness*, follows a similar path as *Baker*.[101] A Black woman from St. Vincent had worked for several years in Canada as a domestic worker and was ordered to be deported. She returned to Canada in an attempt to flee from domestic violence and resumed domestic work in Canada. She suffered from postpartum psychosis after

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97 See Sharryn Aiken's discussion of the experiences of African Caribbean people's history of migration in Canada. Aiken connects a history of slavery and racist immigration policies to contemporary immigration policies and practices: Sharryn J Aiken, "From Slavery to Expulsion: Racism, Canadian Immigration Law, and the Unfulfilled Promise of Modern Constitutionalist" in Vijay Agnew, ed, *Interrogating Race and Racism* (Toronto: University of Toronto Press, 2007) 63. See also Afua Cooper, *The Hanging of Angelique: The Untold Story of Canadian Slavery and the Burning of Old Montreal* (Toronto: HarperCollins, 2006); Robin Winks, ed, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1997); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Halifax: Fernwood Publishing, 1999).

98 *Baker* SCC, *supra* note 2 at para 48.

99 *Ibid* at para 76.

100 Rowe, *supra* note 3.

101 *Carmelita Haynes and the Minister of Public Safety and Emergency Preparedness* [unreported] in Rowe, *supra* note 3 at 343.

the birth of her child in Canada and became schizophrenic, requiring medication not available to her in St. Vincent. She was also the primary caregiver for her two-year-old child and had no criminal record. Immigration officials issued a second deportation order against her, and Canadian immigration authorities then sought to remove her from Canada even though her H&C application was pending. Ms. Haynes appealed to the Federal Court after the removals officer refused her request for a deferral of removal pending final disposition of her H&C application.

The Court denied her request:

> [T]he Court [could not] find that the balance of convenience favours the granting of a stay of removal in her favour over the interests of the Respondent and of the Canadian public in general, notwithstanding that her removal may entail substantial risk of irreparable [harm] for herself and her child.[102]

Systemic injustice in the delivery of administrative services such as immigration proceedings raises concerns about the prospects for reform. Spade is convinced that only transformation of administrative legal approaches will fulfill access to justice needs for marginalized people because institutions formed through gendered racialization cannot be molded into fair and neutral systems. In fact, their presentation as neutral and fair systems only helps conceal the violence they inflict on racialized, gendered, and disabled populations. Administrative systems are designed to extinguish perceived threats in order "to protect and enhance the livelihood of the national population."[103] Since disability is already seen as a legitimate reason for denying an applicant admission to Canada, racialized people with disabilities are especially vulnerable in these structures. They are seen as lacking the ability to be productive in a capitalist economy and quickly assimilate into dominant Canadian culture.[104] Disabled, poor, Black women immigrants who are single mothers like Ms. Baker do not measure up well in how Canada's immigration system deems an applicant worthy for humanitarian and compassionate grounds. Their life struggles and hardships in Canada instead make them the target of administrative violence.

CONCLUSION

This paper has advanced a Critical Race Feminist theory of disability rooted in interdisciplinary scholarship, North American jurisprudence, and anti-discrimination legislation and human rights doctrine. I have identified the limited studies of disability taken up by Critical Race Feminism, as well as appropriation of intersectionality by white feminists that analogize between the experiences of disabled women and women of colour. By centering a racialized and gendered experience of disability in legal scholarship and Supreme Court of Canada jurisprudence, I have shown the legal imagination's inability to understand the contextualized experiences of disabled women of colour. I have revisited the *Baker* decision, a case that is primarily seen as administrative law decision, but which is a profound example of how the intersections of race, gender, poverty, and disability make people the target of administrative violence. Ultimately, this essay seeks to ignite a conversation about intersectionality within anti-discrimination and human rights law, legal theory as well as disability studies, with the experiences of disabled

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102 *Ibid*.

103 Spade, "Intersectional Resistance", *supra* note 56 at 1047.

104 Dianne Pothier & Richard Levin, "Introduction" in Dianne Pothier & Richard Levin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2005) 1 at 17, citing Rose Voyvodic "Into the Wasteland: applying equality principles to medical inadmissibility into Canadian immigration law" (2001) 16 Journal of Law and Social Policy 115. Also see Daiva Stasiulis & Abigail B Bakan, *Negotiating Citizenship: Migrant Women in Canada and The Global System* (Toronto: Palgrave Macmillan, 2003).

women of colour at the forefront. Throughout this project, I have been mindful of the overrepresentation of Black women's epistemologies, the result of my own identity as a Black woman as well as Ms. Baker's Black female identity. My intent has been to open up space for better conceptualization of the intersections of race, gender, and disability using legal perspectives that have interdisciplinary appeal.

APPENDIX A

I refer to a portion of Officer George Lorenz's notes that were the basis of the decision to reject Ms. Baker's H&C application. Below is the entirety of the Officer's notes, which the SCC reproduced in its judgment:

> PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN
>
> Says only two children are in her 'direct custody'. (No info on who has ghe [*sic*] other two).
>
> There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.
>
> Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -
>
> Letter of Aug. '93 from psychiatrist from Ont. Govm't.
>
> Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.
>
> Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.
>
> This case is a catastrophy [*sic*]. It is also an indictment of our 'system' that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.
>
> There is also a potential for violence - see charge of 'assault with a weapon' [Capitalization in original.][105]

105 *Baker* SCC, *supra* note 2 at para 5.