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STOPPING THE SPREAD: CRITICAL DISABILITY THEORY TREATMENT OF THE ATTACK ON DISPARATE IMPACT DISCRIMINATION CLAIMS

*Sara Sam-Njogu**[1]

During a surge in the COVID pandemic, the Perkiomen Valley School District moved from mandatory masking to optional masking. This prevented some medically vulnerable children with conditions like asthma from safely attending school due to their increased risk of serious infection, prompting the children's parents to bring suit on their behalf. The court found that while the optional policy was neutral on its face, it should nevertheless be enjoined because it prevented the students from having meaningful access to their education. This disproportionate impact on students with disabilities[2] *was a violation of the Americans with Disabilities Act.*

To reach this result, the Perkiomen *court applied the disparate impact theory of discrimination. All but one circuit have held that disparate impact claims are cognizable under Section 504 of the Rehabilitation Act and Title II of the ADA; the Sixth Circuit, however, set itself apart in 2019, creating a split by holding that only intentional discrimination is prohibited. The intentional discrimination framework would not have reached the school's facially neutral masking policy.*

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* Candidate for J.D., Western New England University School of Law, 2024; B.A., St. Lawrence University, 2002. I would like to extend my deep gratitude to Professor Harris Freeman for his mentorship and guidance during the writing of this Note. I would also like to thank the staff of the *Western New England Law Review* for their assistance in the production process. Finally, I would like to thank my husband, daughters, and extended family for their support and encouragement.

1. Consistent with the demand of the Critical Disability Theory discipline, this author acknowledges her own privilege as a person with mind and body characteristics that are typically accounted for by society. In this Note, she seeks to engage with disability by centering the methods of CDT scholars and the stories of the children in the *Perkiomen* case. *See* Octavian E. Robinson, *Moving Toward Disability Justice*, 37 DISABILITY STUD. Q., no. 3, Summer 2017.

2. This Note adopts person-first language as recommended by the National Institutes of Health, though some people may prefer identity-first language. Shannon Wooldridge, *Writing Respectfully: Person-First and Identity-First Language*, NAT'L INSTITUTES OF HEALTH (Apr. 12, 2023), https://www.nih.gov/about-nih/what-we-do/science-health-public-trust/perspectives/writing-respectfully-person-first-identity-first-language [https://perma.cc/5AC8-37NV].

While just one circuit has denied Section 504 or Title II disparate impact claims, the implications of that decision extend beyond the Sixth Circuit as more district courts rely on its ruling, joining the broader attack on disparate-impact-based civil rights discrimination claims.

This Note argues that the Sixth Circuit's narrow interpretation of these important disability laws is wrong. By applying several tenets of Critical Disability Theory, it highlights the ways that, by failing to consider the lived experiences of people with common impairments, society can unintentionally contribute to exclusion. Further, it examines the burdens that some courts claim make cases of disparate impact too costly to remedy, weighing the alleged burdens against the fundamental human rights, such as access to public schools, that these remedies protect. In this way, it provides future litigants with a new argument to protect the right to a remedy for disability discrimination using the disparate impact framework.

While the case and argument in this Note are set in the context of a school during the COVID pandemic, their relevance extends beyond that to the many public programs and services covered under Title II and Section 504.

INTRODUCTION

The COVID-19 pandemic shed new light on the role that disability plays in the lives of many Americans.[3] It also raised important questions about how society and the law conceive of collective responsibility for the inclusivity of public spaces and programs for people with disabilities. One manifestation of these questions was the significant debate regarding government-imposed mask mandates, with those for or against masking largely falling along political lines.[4] Often, this debate played out on the stage of our nation's schools, with parents on both sides of the issue filing lawsuits in an attempt to either ban mask mandates or require universal

3. *See* NAT'L COUNCIL ON DISABILITY, *The Impact of COVID-19 on People with Disabilities*, (Oct. 29, 2021), https://ncd.gov/progressreport/2021/2021-progress-report [https://perma.cc/TF2L-CRDC] (discussing that studies of COVID's impact on people with disabilities uncovered how decades-old state and federal data collection practices had failed to previously capture negative impacts on people with disabilities in their access to healthcare, education, employment, and other critical services).

4. Lauren Aratani, *How Did Face Masks Become a Political Issue in America?*, THE GUARDIAN (June 29, 2020, 5:00PM), https://www.theguardian.com/world/2020/jun/29/face-masks-us-politics-coronavirus [https://perma.cc/SW77-MHS4].

masking.[5] One such lawsuit in Pennsylvania challenged a school board's decision to transition from a universal masking policy to an optional one during a major surge in COVID infections.[6]

The Perkiomen Valley School District had announced a plan to move from a mandatory masking policy to an optional masking policy, prompting the parents of several medically vulnerable children to seek an injunction to block the new policy from taking effect.[7] These parents claimed that this new policy would prevent their children from safely attending school.[8] They brought this claim under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504), using the disparate impact framework of discrimination[9]—where a facially neutral policy causes disproportionate harm to a protected group.[10] The court discussed the fact that all but one circuit have held that disparate impact claims are cognizable under these laws.[11] The Sixth Circuit is the exception, setting itself apart in the 2019 case *Doe v. BlueCross BlueShield of Tennessee* by holding that only intentional discrimination is prohibited.[12] The *Perkiomen* court ultimately followed Third Circuit precedent and the majority of circuits by finding that disparate impact claims are allowed and enjoined the optional masking policy.[13]

This was the correct result. The ADA and Section 504 were designed to remedy discrimination against people with disabilities, regardless of whether that discrimination stems from intentional animus or from a failure to understand the adverse implications of a seemingly neutral policy on disabled individuals.[14] Notably, in *Perkiomen*—and many other disability cases—only the disparate impact theory would have reached the harmful policy in question because nothing in the school's conduct seemed to intentionally target the children with disabilities. Should the Sixth Circuit's view of disparate impact claims take hold, a large share of

5. Katie Reilly, *School Masking Mandates Are Going to Court. Here's Why the Issue is So Complicated*, TIME (Oct. 1, 2021, 9:40 AM), https://time.com/6103134/parents-fight-school-mask-mandates/ [https://perma.cc/6MHL-258A].

6. Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022), *vacating as moot*, No. 22-cv-287, 2022 U.S. Dist. LEXIS 44246 (E.D. Pa. Mar. 14, 2022).

7. *Id*. at 678–79.

8. *Id*. at 679.

9. *Id*.

10. *Disparate Impact*, BLACK'S LAW DICTIONARY (11th ed. 2019).

11. *Perkiomen*, 585 F. Supp. 3d at 687–88.

12. Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235 (6th Cir. 2019).

13. *Perkiomen*, 585 F. Supp. 3d at 706.

14. *See, e.g.*, Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1442 (2015) (citing H.R. REP. NO. 101-485, pt. 2, at 84 (1990)) (discussing how Congress incorporated the Supreme Court's interpretation of Section 504 in *Alexander v. Choate*, 469 U.S. 287 (1985) that disparate impact claims were permissible when it enacted the ADA just a few years later).

discrimination against disabled individuals would be without remedy under these laws, which cover not just schools but healthcare, courts, transportation, voting, and a variety of other critical public spheres.[15] In short, without the disparate impact framework, many of the barriers that exclude people with disabilities would be allowed to persist.[16]

The Sixth Circuit's holding joins a broader, decades-long attack on the use of the disparate impact framework to remedy civil rights claims.[17] Furthermore, other courts within and outside of the Sixth Circuit are relying on its holding that disparate impact claims cannot stand under Title II and Section 504.[18] The spread of this narrow interpretation of such fundamental anti-discrimination laws threatens the rights of people with disabilities to remedy much of the harm that they face due to "thoughtlessness and indifference," which could rarely be characterized as intentional.[19] This spread must stop.

This Note argues that disparate impact theory holds an important place within the reach of anti-discrimination lawsuits brought under Title II of the ADA[20] and Section 504.[21] It illustrates why the Sixth Circuit's reasoning is wrong by exposing the results that holding would deliver for children with disabilities when applied in the context of a school during the COVID pandemic. Further, this Note uses the tenets of Critical Disability Theory (CDT) to strengthen the argument for future plaintiffs seeking to remedy disparate impact discrimination in schools and other vital public programs and services.

The argument is presented in four parts. Part I describes the two theories of discrimination—intentional discrimination and disparate impact—as well as the broader attack on the disparate impact framework in civil rights law and its connection to the Sixth Circuit's *BlueCross* holding. Two common arguments focused on intent and undue burdens have been used to narrow the focus of discrimination laws to reach only

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15. *Guide to Disability Rights Laws*, U.S. DEP'T OF JUST., CIV. RTS. DIV., https://www.ada.gov/resources/disability-rights-guide/ [https://perma.cc/B3FK-WRUS].

16. *See, e.g.*, Weber, *supra* note 14, at 1440 (quoting *Choate* that discrimination against people with disabilities is "most often the product, not of invidious animus, but rather of thoughtlessness—of benign neglect" which would be "difficult if not impossible to reach" if the Act were interpreted as preventing only intentional discrimination).

17. *See infra* Part I subpart A.

18. *See infra* Part I subpart B, note 92.

19. *Choate*, 469 U.S. at 295.

20. Title II of the Americans with Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

21. Section 504 of the Rehabilitation Act provides in relevant part that no otherwise qualified individual with a disability "shall, solely by reason of [their] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

instances of intentional conduct.[22] In its only case to consider the issue, the Supreme Court left the question of disparate impact in disability law open to the circuit courts' interpretation.[23] The circuits have subsequently split on the issue, with the Sixth Circuit being the only one to foreclose all discrimination claims based upon disparate impact.[24] In reaching this result, the Sixth Circuit employed familiar intent and burden arguments imported from other civil rights jurisprudence.

Part II of this Note presents the facts of the *Perkiomen* case—a helpful paradigm in which to consider the merits of the disparate impact framework of discrimination under Title II and Section 504. While the *Perkiomen* court ultimately reached the right result, the reasoning underpinning this holding could be strengthened by applying CDT.

Part III describes CDT as a methodology to examine social and political power structures and policies.[25] CDT's proponents seek equality and justice for people with disabilities, and focus not on "bodily or mental impairments but the social norms that define particular attributes as impairments" and the social environments that perpetuate discrimination.[26] They pursue this empowerment and equality through economic, political, and social change.[27] Part III describes three tenets of CDT, which are of specific relevance in challenging the Sixth Circuit's unduly narrow view of disability law. These include (1) adopting the biopsychosocial model of disability, (2) confronting difference and critiquing ableism, and (3) valuing solidarity and responsibility for others over neoliberal individualism.[28]

Part IV is an argument presented in two subparts. First, the Sixth Circuit's reasoning is critiqued by applying it to the paradigm of the COVID masking debate to expose the reasoning's inadequacies. A ruling that would permit "separate but equal" schooling for a subset of students cannot be right, a principle that has been widely acknowledged since

22. *See, e.g.*, Justin D. Cummins & Beth Belle Isle, *Toward Systemic Equality: Reinvigorating a Progressive Application of the Disparate Impact Doctrine*, 43 MITCHELL HAMLINE L. REV. 102, 110–11, 119 (2017).

23. *Choate*, 469 U.S. at 299 (stating that the court would "assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped").

24. *See, e.g.*, Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995) (holding that the ADA's reach extended beyond just those instances of discrimination that were "intentional," "deliberate," or "overt"); Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235 (6th Cir. 2019) (holding that disparate impact claims were not cognizable under the ADA).

25. Melinda C. Hall, *Critical Disability Theory*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 23, 2019), https://plato.stanford.edu/entries/disability-critical/ [https://perma.cc/7FAU-U2CJ].

26. *Id.*

27. David L. Hosking, *Critical Disability Theory*, LANCASTER UNIV. (Sept. 2–4, 2008), https://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf [https://perma.cc/G6E8-JPGE].

28. *See infra* Part III.

Brown v. Board of Education.[29] Second, the lens of CDT is used to strengthen the case for the disparate impact framework. This illustrates how the school's conduct contributed to the students' exclusion and how the alleged "societal burdens" of remedying such conduct should be balanced against the weighty price that the excluded children would be forced to pay. This analysis provides a novel argument for future plaintiffs fighting to remedy the discrimination that so often results from societal indifference and the failure to consider the lived experiences of people with disabilities.

I. THE DISPARATE IMPACT DEBATE HAS SPREAD FROM OTHER CIVIL RIGHTS DISCRIMINATION CONTEXTS INTO THE REALM OF DISABILITY LAW

Many civil rights laws prohibit two forms of discrimination.[30] The first is intentional discrimination, or disparate treatment, which means acting purposely or with animus toward a protected group.[31] When a policy or practice explicitly uses a factor like an individual's race, color, religion, sex, national origin, or disability to treat that individual unequally, the policy is intentionally discriminatory.[32] An example of this would be an employer who refuses to hire women, or only hires women to fill certain positions in the organization.[33] Prohibiting this overt form of discrimination is not controversial.[34]

The second form of discrimination involves practices that are facially neutral—they do not expressly refer to any protected class—but nevertheless place a disproportionate burden on individuals from some protected class, thus creating a disparate impact.[35] A classic example of disparate impact is an employer using a standardized test that disqualifies a disproportionate share of applicants from a protected class, but which has no "business necessity" or predictive value of those applicants' future performance.[36] While prohibiting this form of discrimination was initially

29. 347 U.S. 483 (1954).

30. *See, e.g.*, Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1109, 1140 (2019).

31. *See, e.g.*, Weber, *supra* note 14, at 1422–23.

32. *See, e.g.*, Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 526 (1991).

33. *Know Your Rights At Work*, EQUAL RTS. ADVOCS, https://www.equalrights.org/issue/economic-workplace-equality/discrimination-at-work/ [https://perma.cc/7WY3-HB3V].

34. *See, e.g.*, Braceras, *supra* note 30, at 1141 (characterizing the disparate treatment model as having "broad consensus" given its effort to "eliminate purposeful discrimination").

35. Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J.C. & U.L. 547, 547 (2007).

36. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

embraced by many, scholars have noted that it eventually became the focus of much political and legal attention and attack.[37]

Subpart A of this section provides background on the intent- and burden-based arguments that have been used to challenge the disparate impact framework in other civil rights contexts, like race discrimination. Subpart B discusses the Sixth Circuit's *BlueCross* holding, highlighting the throughline that extends from these earlier arguments and spreads into the disability discrimination context.

A. *Attack From the Executive and Judicial Branches Has Narrowed Disparate Impact's Potential to Fight Discrimination by Requiring Intent and Characterizing Remedies as Societal Burdens*

The disparate impact theory of discrimination was first acknowledged by the Supreme Court in the 1971 case *Griggs v. Duke Power Co.*, where a company's high school diploma and intelligence test requirements had the effect of excluding a disproportionate number of Black applicants without being significantly related to job performance.[38] Since that time, disparate impact has been an important tool to remedy hidden discrimination, sometimes a result of structural factors or implicit bias, which need not be intentional to create harmful barriers to equality.[39]

While *Griggs* was decided under Title VII of the Civil Rights Act of 1964,[40] agencies and courts began interpreting other statutes to also prohibit disparate impacts, such as Title VI of the Civil Rights Act of 1964, the Fair Housing Act of 1968, and the Age Discrimination in Employment Act of 1967.[41]

However, in the 1980s, the political and judicial climate changed substantially.[42] With a backdrop of growing societal concern over affirmative action and "reverse discrimination,"[43] the Reagan Administration undertook a focused campaign against the disparate impact framework.[44] The Reagan Department of Justice published a

37. Cummins & Isle, *supra* note 22, at 110; *See also* Braceras, *supra* note 30, at 1141.

38. *Griggs*, 401 U.S. at 424.

39. *See* Cummins & Isle, *supra* note 22, at 107, 114–15.

40. Title VI of the Civil Rights Act of 1964 states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. § 2000d.

41. Cummins & Isle, *supra* note 22, at 107; *but see* Braceras, *supra* note 30, at 1142 (discussing how the Supreme Court in *Washington v. Davis* held that the disparate impact theory could not provide a "universal standard of discrimination," though courts and legislatures could adopt the theory for certain situations).

42. Cummins & Isle, *supra* note 22, at 110.

43. *See, e.g.*, William B. Reynolds, *The Reagan Administration's Civil Rights Policy: The Challenge for the Future*, 42 VAND. L. REV. 993 (1989).

44. Cummins & Isle, *supra* note 22, at 110.

report to the Attorney General criticizing the lack of an intent requirement for discrimination claims.[45] It also set its sights on influencing the judiciary.[46] With the appointment of three right-leaning justices, Reagan significantly altered the composition of the Supreme Court and set the stage for the judicial weakening of disparate impact that followed.[47]

Arguably, because the premise behind disparate impact was not clearly articulated in *Griggs*, this avenue to proving discrimination was left more vulnerable to such attacks.[48] Two lines of reasoning repeatedly arose in challenges to disparate impact, both of which were eventually relied upon by the *BlueCross* holding: (1) that the only cognizable claims were those based on intentional discrimination,[49] and (2) remedying claims of disparate impact would place too high a burden on society.[50]

1. Requiring Intent

One key argument used to challenge the disparate impact theory of discrimination is that it is problematic to permit a finding of discrimination when the intent to discriminate has not been established.[51] At the heart of this line of reasoning is the premise that *intentional* discrimination is the only legitimate grounds on which to base a legal action.[52] In other words, to find discrimination, there must be a "bad actor" responsible for it. This is the narrowest possible way to interpret a claim for discrimination.[53] Under this interpretation of the doctrine, the facially neutral policy that creates the disparate impact is only wrongful if it is evidence of an underlying desire to discriminate against the protected group.[54] However, if the government or employer can provide an "innocent" explanation for the use of the policy, it should be allowed to stand, despite its discriminatory effects.[55]

This position often claims that barriers to equality have already been eliminated, and thus, to continue considering race or gender is to perpetuate the very classifications that civil rights laws sought to remove.[56] Some have even argued that providing remedies for disparate

45. *Id*. at 110–11.

46. *See* Reynolds, *supra* note 43, at 998.

47. Cummins & Isle, *supra* note 22, at 111.

48. Theodore Y. Blumoff & Harold S. Lewis Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 30–31 (1990).

49. *See* Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235 (6th Cir. 2019).

50. *See id*. at 243.

51. *See, e.g*., Roger Clegg, *The Bad Law of "Disparate Impact*," 2000 PUB. INT. 79, 86.

52. *See, e.g*., *id*.; *see also* Cummins & Isle, *supra* note 22, at 110–11.

53. Perry, *supra* note 32, at 527.

54. *Id*.

55. *Id*. at 529.

56. *See, e.g*., Reynolds, *supra* note 43, at 1001; *see also*, Blumoff & Lewis, *supra* note 48, at 77 (quoting Morton J. Horwitz, *The Jurisprudence of Brown and Dilemmas of Liberalism*,

impact would increase and institutionalize discrimination against the majority.[57]

Criticism of this cabined interpretation of the law points out that it unduly restricts the types of discriminatory practices that are remediable.[58] As one scholar notes, "the idea that all conduct is benign, except that which is consciously intended to harm, contradicts much of what we know of the dynamics of prejudice and discrimination."[59] Simply put, the status quo often has bias "baked in."

For example, the state of Washington had been systemically underpaying female workers.[60] The state relied on the market value of various jobs in setting the salaries.[61] This resulted in twenty percent less compensation for jobs held predominantly by women versus those held predominantly by men.[62] The state had even conducted a study showing that the various job categories had comparable worth, yet the pay disparity was not addressed.[63] Despite presenting evidence of the state's study as well as historical sex-based wage discrimination and segregation in the marketplace, the plaintiffs' discrimination claims were unsuccessful.[64] Using the narrow view of discrimination described above, the Ninth Circuit found that the state did not have a discriminatory motive when it knowingly undercompensated women.[65] In this way, structural forces can clearly put a finger on the scale, distorting the outcome of a seemingly neutral practice regardless of the particular actor's intent.

2. Rejecting the Societal Burden of Remedying Disparate Impacts

Another argument employed against the disparate impact framework is the claim that remedying such policies or programs places an undue

14 HARV. C.R.-C.L.L. REV. 599, 609 (1979), stating that disparate impact theory "challenges the market's premise that 'individual opportunity has little relation to class or group background'").

57. Clegg, *supra* note 51, at 86.

58. Perry, *supra* note 32, at 530.

59. *Id*. *See also* Blumoff & Lewis, *supra* note 48, at 14 (stating that "inherent bias in testing is a demonstrable fact," for example, "some tests implicitly measure majoritarian cultural values in a way that, by definition, operate to the detriment of minorities.").

60. *See* Perry, *supra* note 32, at 528–29 (discussing Am. Fed'n of State, Cnty., and Mun. Employees, AFL-CIO v. Washington, 770 F.2d 1401 (9th Cir. 1985)).

61. *Washington*, 770. F.2d at 1403.

62. *Id*.

63. *Id*.

64. *Id*. at 1408.

65. *See* Perry, *supra* note 32, at 529.

burden on society.[66] These burdens have been described in terms of both liberty and economics.[67]

First, addressing disparate impacts has been considered an intrusion on the liberty rights of employers,[68] who ought to have freedom from governmental interference when conducting their business.[69] Second, some suggest that disparate impact claims require "perfectly good selection devices" to be discarded—and cases to be litigated—at economic expense to employers without a sufficient benefit or justification.[70] Courts have also cautioned that addressing disparate impacts "could lead to a wholly unwieldy administrative and adjudicative burden"[71] given the number of policies that create a disparate impact on some protected group.

Wards Cove Packing Co. v. Atonio reflected the Supreme Court's adoption of these burden-based arguments, essentially weighing the efficiency of addressing racially disparate impacts in the employment context.[72] As one scholarly critique bluntly framed it, the Court's opinion reflected the political and economic judgment of the majority that "true equality of opportunity [was] simply not important enough" to justify the burden on employers and other defendants.[73]

B. *The Sixth Circuit Splits with the Rest in* Doe v. BlueCross BlueShield of Tennessee *by Interpreting Section 504 and Title II as Allowing Unintentional Discrimination Against People with Disabilities*

The above arguments employing intent-and burden-based reasoning connect those earlier efforts to narrow disparate impact in other bodies of law with the Sixth Circuit's more recent holding in *BlueCross*.[74] Given this connection, it is fair to categorize the Sixth Circuit's approach to disability discrimination as a spreading of the broader attack on disparate impact theory.

The Supreme Court has not decided whether disparate impact claims can be brought under the two federal statutes that ban disability

66. *See, e.g.*, Clegg, *supra* note 51, at 85–86 (discussing examples of economic costs like litigation as well as liberty-based social costs like judicial involvement in a business's decision making).

67. *See id*.

68. *See, e.g.*, Blumoff & Lewis, *supra* note 48, at 6.

69. Clegg, *supra* note 51, at 85 (describing a court's ruling that an employer should discontinue use of a selection device as a decision from "a judge or jury who knows much less about a business than [the employer does].").

70. *Id*. at 86.

71. Alexander v. Choate, 469 U.S. 287, 298 (1985).

72. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

73. Cummins & Isle, *supra* note 22, at 119.

74. Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235, 241. (6th Cir. 2019).

discrimination in schools and other public services: Section 504[75] and Title II of the ADA.[76] *Alexander v. Choate*, the only Supreme Court case to consider the issue, seemed generally accepting of disparate impact claims in the disability context, and ultimately "assume[d] without deciding" that at least some conduct causing a disparate impact upon people with disabilities would be reached by the statutes.[77] Justice Marshall's oft-cited opinion in *Choate* recognized that Congress's intent in passing the legislation was to address discrimination against people with disabilities, which was "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[78] In other words, the Court recognized that if the Act were interpreted to "proscribe only conduct fueled by a discriminatory intent," the majority of the offending conduct would be impossible to reach.[79] However, by failing to squarely decide the issue, the Court left the question up to the circuits to interpret.

All of the circuits deciding the issue—with one exception—have held in line with *Choate*'s assumption that these laws prohibit more than just intentional discrimination and have allowed disparate impact claims.[80] In 2019, the Sixth Circuit set itself apart from the rest.

In *Doe v. BlueCross BlueShield of Tennessee*, an HIV-positive plaintiff brought suit against his health care insurance plan because of its policy that certain specialty medications must be obtained only from specialty pharmacies or online rather than from local pharmacies to receive in-network pricing.[81] He argued that procuring his medicine at the local pharmacy had the benefit of interacting with his local pharmacist, who knew his medical history and could monitor for any potentially harmful drug interactions.[82] Doing so also eliminated the privacy and heat-damage concerns raised by having the medicine delivered to his

75. 29 U.S.C. § 794.

76. 42 U.S.C. § 12132.

77. Alexander v. Choate, 469 U.S. 287, 299 (1985).

78. *Id*. at 295.

79. *Id*. at 296–97.

80. Brief for The Arc of the United States and the American Association of People with Disabilities, et al. as Amici Curiae Supporting Respondent at 24-25; CVS Pharmacy, Inc., v. Doe, (2021) (No-20-1374) (citing Ruskai v. Pistole, 775 F.3d 61 (1st Cir. 2014); Disabled in Action v. Bd. of Elections, 752 F.3d 189 (2d Cir. 2014); Nathanson v. Med. Coll. of PA., 926 F.2d 1368 (3d Cir. 1991); Nat'l Fed'n of the Blind, Inc. v. Lamone, 813 F.3d 494 (4th Cir. 2016); Prewitt v. U.S. Postal Serv., 662 F.2d 292 (5th Cir. 1981); Washington v. Indiana High Sch. Athletic Ass'n, Inc., 181 F.3d 840 (7th Cir. 1999); Durand v. Fairview Health Servs., 902 F.3d 836 (8th Cir. 2018); Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981); United States v. Bd. of Trs., 908 F.2d 740 (11th Cir. 1990); Am. Council of the Blind v. Paulson, 525 F.3d 1256 (D.C. Cir. 2008)).

81. Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235, 237–38. (6th Cir. 2019).

82. *Id*. at 238.

home.[83] Doe would pay thousands of dollars more for his medication if he failed to follow BlueCross's policy.[84] Because the policy was facially neutral, Doe could not claim that BlueCross intentionally discriminated against individuals with disabilities.[85] Therefore, his only avenue was to claim that the policy caused a disparate impact.[86]

The court could have sided with BlueCross by determining that the policy did not amount to the disparate impact that Doe alleged because it similarly impacted many people *without* documented disabilities under the ADA.[87] Many specialty medications were subject to the policy, including those taken by people without disabilities, such as medication for allergic rhinitis, commonly known as a runny nose.[88] Therefore, because Doe's disparate impact claim would arguably fail, the court did not need to assess the cognizability of disparate impact claims overall in order to side with BlueCross.[89] Instead, the court used the opening left by *Choate* to hold that disparate impact claims are never allowed under Section 504 in the first place, foreclosing the consideration of *any* discrimination claims that do not show proof of intent.[90]

The court's reasoning did not emerge from thin air. Instead, the Sixth Circuit employed the two familiar arguments against disparate impact described previously: a requirement of intent and a rejection of societal burdens.[91]

First, the court read the text of Section 504 to mean that intent to discriminate was required.[92] By bootstrapping itself to an interpretation of Title VI,[93] the textual argument concluded that Section 504's prohibition on discrimination "solely by reason of" an individual's disability refers specifically to the actor's *intent*.[94] This would mean that actions that cause disproportionate harm but are taken for nondiscriminatory reasons are allowed.[95]

Second, the court's policy rationale focused on burdens and efficiency.[96] Given the high number of "neutral . . . policies [that]

83. *Id*.

84. *Id*.

85. *Id*. at 241.

86. *Id*. at 240.

87. *Id*. at 243 (stating that the list of specialty medications "treats the disabled and non-disabled alike, removing any possibility that BlueCross targeted individuals with disabilities").

88. *Id*. at 241.

89. *Id*.

90. *Id*.

91. *See supra* Part I subpart A.

92. *BlueCross BlueShield of Tenn*., 926 F.3d at 242.

93. *Id*. at 241–42 (citing Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001)).

94. *Id*. at 241–42.

95. *Id*.

96. *Id*. at 242–43.

disparately affect the disabled," the court reasoned that permitting disparate impact claims would create an "unwieldy" burden and amount to pursuing the legislation's purposes "at all costs."[97]

At first blush, this may seem to be a lone precedent, posing little risk to the otherwise unanimous circuit holdings protecting people with disabilities from barriers to access and equality, even if they arise unintentionally.[98] However, the effects of this decision have spread; courts within and beyond the binding precedent of the Sixth Circuit use this decision to chip away at the ability of rightful plaintiffs with disabilities to address discriminatory practices and policies.[99] Part IV of this Note illustrates why the Sixth Circuit's view of disparate impact is

97. *Id*. (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646 (1990)).

98. Ruskai v. Pistole, 775 F.3d 61, 78 (1st Cir. 2014) (holding that disparate impact can apply when a person is denied meaningful access to a government program or benefit); Disabled in Action v. Bd. of Elections, 752 F.3d 189, 198–99 (2d Cir. 2014) (holding that voters with impairments to motion and vision were discriminated against due to failure of the Board of Elections to provide accessible polling sites); Nathanson v. Med. Coll. of PA., 926 F.2d 1368, 1383 (3d Cir. 1991) (holding that a medical school must provide reasonable accommodations to a student with neck and back injuries if she is otherwise qualified for the program); Nat'l Fed'n of the Blind, Inc. v. Lamone, 813 F.3d 494, 506–07 (4th Cir. 2016) (holding that Maryland must provide meaningful access to absentee voting for blind voters via reasonable modifications); Prewitt v. U.S. Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981) (holding that an employer must provide reasonable accommodations that overcome a "surmountable barrier" for an otherwise qualified man with limited mobility in his arm); Washington v. Indiana High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 846–47 (7th Cir. 1999) (discussing disparate impact as cognizable claim under Title II and Section 504); Durand v. Fairview Health Servs., 902 F.3d 836, 842–43 (8th Cir. 2018) (discussing the meaningful access standard in the context of hearing-impaired patients and parents in a hospital setting); Mark H. v. Lemahieu, 513 F.3d 922, 936–37 (9th Cir. 2008) (discussing disparate impact and meaningful access in the context of students with autism in public schools); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1384–85 (10th Cir. 1981) (holding that no proof of intent was required for an otherwise qualified medical resident with multiple sclerosis to succeed on his discrimination claim against a medical residency program); United States v. Bd. of Trs., 908 F.2d 740, 752 (11th Cir. 1990) (holding that a university could not deny auxiliary aids to students simply because they did not qualify for financial aid); Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1274 (D.C. Cir. 2008) (affirming a grant of summary judgment which found the U.S. Treasury Department violated Section 504 by failing to design currency readily distinguishable by the visually impaired).

99. *See, e.g*., Forsyth v. Univ. of Ala. Bd. of Trs., 2020 U.S. Dist. LEXIS 103573 (N.D. Ala. 2020) (holding that a clinically depressed plaintiff could not bring a disparate impact claim against employer who terminated him); A.S. v. Shelby Cnty. Bd. of Educ., 2019 U.S. Dist. LEXIS 241550 (W.D. Tenn. 2020) (holding that a student in a wheelchair must prove intentional discrimination to prevail in her suit where her high school repeatedly failed to provide access to classrooms and activities); Nicholas v. Fulton Cnty. Sch. Dist., 2022 U.S. Dist. LEXIS 111601 (N.D. Ga. 2022) (holding teachers, who were parents of children with disabilities, could not bring disparate impact claim against the school who demanded they contractually relinquish children's rights to special education and accommodations in order to bring them to school during COVID remote schooling); *see also* Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729 (11th Cir. 2021) (Lee, J., dissenting) (arguing that the court should follow *BlueCross* to hold that blind college students could not bring a disparate impact claim challenging the college's failure to provide accessible texts and technology to facilitate completion of math coursework).

wrongly applied to the disability context by illustrating its implications in the paradigm of the COVID pandemic.[100]

II. THE COVID PANDEMIC AND PERKIOMEN VALLEY SCHOOL DISTRICT

In contrast to the Sixth Circuit's view, the court in *Perkiomen* reached the right result under Section 504 and Title II by allowing the plaintiffs' disparate impact claims.[101] The facts underlying the case are presented here to lay out a useful paradigm within which to critique the Sixth Circuit's narrow interpretation of disability law.[102]

In early 2020, Americans and the rest of the global community began facing a pandemic caused by the novel coronavirus, COVID-19.[103] Early efforts to mitigate its spread focused on social distancing, with governments issuing stay-at-home orders and mandating the closure of many businesses and public services like schools.[104] Where contact with essential outside services was necessary, facemasks were recommended by the Centers for Disease Control and typically required by state or local governments to prevent the transmission of the airborne virus.[105] Although data was limited at the beginning of the pandemic, masks were eventually shown to be effective at reducing the spread of the virus.[106] Nevertheless, mask mandates became a political hot button. While the political left was generally more concerned about the dangers of the pandemic, many on the right feared that mask mandates were government

100. *See infra* Part IV.

101. Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022), *vacating as moot*, No. 22-cv-287, 2022 U.S. Dist. LEXIS 44246 (E.D. Pa. Mar. 14, 2022).

102. *See infra* Part IV.

103. *Coronavirus: Timeline*, U.S. DEP'T OF DEF., https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/Timeline/ [https://perma.cc/H9G3-V442].

104. *See, e.g.*, Bill Chappell, *Coronavirus: U.S. Urges Americans to Home-School; The WHO Says: 'Test, Test, Test,'* NPR (Mar. 16, 2020, 12:04 PM), https://www.npr.org/sections/health-shots/2020/03/16/816428320/coronavirus-u-s-enters-quarantine-life-as-many-schools-and-businesses-close [https://perma.cc/G3EN-U6TX].

105. *See, e.g.*, Lawrence O. Gostin, Glenn Cohen & Jeffrey P. Koplan, *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, JAMA NETWORK (Aug. 10, 2020), https://jamanetwork.com/journals/jama/fullarticle/2769440 [https://perma.cc/3LND-XEPT].

106. Leo H. Kahane, *Politicizing the Mask: Political, Economic and Demographic Factors Affecting Mask Wearing Behavior in the USA*, 47 E. ECON. J. 163, 164 (2021)(citing C. Raina MacIntyre & Abrar A. Chughtai, *A Rapid Systematic Review of the Efficacy of Face Masks and Respirators Against Coronaviruses and Other Respiratory Transmissible Viruses for the Community, Healthcare Workers and Sick Patients*, INT. J. NURSING STUDIES 108 (2020); Renyi Zhang, Yixin Li, Annie L. Zhang, Yuan Wang, & Mario J. Molina, *Identifying Airborne Transmission as the Dominant Route for the Spread of COVID-19*, 117 PROCEEDINGS OF NAT'L ACAD. SCI. 26 (2020)).

overreach at the expense of personal freedom.[107] Consequently, compliance with mask-wearing fell heavily along partisan lines.[108]

Eventually, as infection rates began to drop and vaccines became available, critical services that had been operating remotely reopened.[109] The closure of schools was particularly challenging for young children and their families,[110] making a return to in-person schooling a huge priority.[111] To achieve this in the safest way possible, many school districts implemented mandatory masking policies.[112] In some cases, governors responded with bans on these masking policies.[113] This brought the public debate about masking to the stage of our nation's schools, and resulted in many lawsuits, either seeking to require or prohibit masks.[114]

One such conflict arose in the Perkiomen Valley School District in Eastern Pennsylvania.[115] In January 2022, during a period of high infection rates, the Perkiomen School Board voted to move from a mandatory masking policy to an optional one.[116] The parents of several medically vulnerable children sued to enjoin the policy from going into effect and to return to mandatory masking. They argued that the optional masking policy discriminated against their children with disabilities in violation of the ADA and Section 504.[117] Because the masking policy was facially neutral, the plaintiffs' claimed that optional masking would have a disparate impact on these children.[118]

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107. *Id*. at 165–67.

108. *Id*.

109. *See Reopening Plans and Mask Mandates for All 50 States*, N.Y. TIMES (July 1, 2021) https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html [https://perma.cc/6RTF-SLF2].

110. Megan Kuhfeld, Jim Soland, Karyn Lewis & Emily Morton, *The Pandemic Has Had Devastating Impacts on Learning*. *What Will It Take to Help Students Catch Up?*, BROOKINGS (Mar 3, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/03/03/the-pandemic-has-had-devastating-impacts-on-learning-what-will-it-take-to-help-students-catch-up/ [https://perma.cc/D623-X4A4].

111. Susan Dynarski & Rachel Glennerster, *The Lasting Harm of COVID School Closures*, PROJECT SYNDICATE (Mar. 3, 2022), https://www.project-syndicate.org/commentary/covid19-school-closures-damage-and-solutions-by-susan-dynarski-and-rachel-glennerster-2022-03?barrier=accesspaylog [https://perma.cc/PN6H-RDV8].

112. Evie Blad, *Four States to End School Mask Rules*. *Will Others Follow?*, EDUCATIONWEEK (Feb. 8, 2022), https://www.edweek.org/policy-politics/three-governors-to-end-school-mask-rules-will-others-follow/2022/02 [https://perma.cc/LA4Z-6UDH].

113. *Id*.

114. Reilly, *supra* note 5.

115. Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022), *vacating as moot*, No. 22-cv-287, 2022 U.S. Dist. LEXIS 44246 (E.D. Pa. Mar. 14, 2022).

116. *Id*. at 678.

117. *Id*. at 679. The children's documented disabilities included asthma, a vocal cord dysfunction that required daily breathing exercises and treatment from the school nurse, chronic bronchitis and pneumonia, and one child was on immunosuppressant medications. *Id*. at 691.

118. *Id*. at 687.

Under the optional masking policy, the children and their families would be forced "to choose between two segregated settings:" either to send the children to in-person school attendance behind "plexiglass barriers" away from the rest of their peers, or to resort to complete segregation and remote schooling at home.[119] Segregation is discrimination in violation of the law, which requires that students be provided the most integrated setting appropriate.[120] Therefore, both of these results were unacceptable because a reasonable modification—mandatory masking—would have allowed the students to regain access to the schools.[121]

To rule on the requested injunction against the optional masking policy, the court first needed to resolve the question of whether or not disparate impact claims were cognizable.[122] The school urged the court to follow the Sixth Circuit's *BlueCross* holding and find that disparate impact claims were not allowed under the statutes.[123] Doing so would have put the school's facially neutral policy beyond the reach of the applicable disability laws.[124] However, the court chose to follow precedent from the Third Circuit, which was in line with the Supreme Court's dicta in *Choate*, finding that the ADA and Section 504 permitted disparate impact claims.[125]

Then, in addressing the merits, the court found that the optional masking policy put the Child-Plaintiffs at such a heightened health risk that they no longer had "meaningful access" to their education.[126] The court also found that a reasonable modification was readily available—reverting to the mandatory masking policy the school had followed for five months.[127] Doing so would not alter the essential nature of the program or impose an undue burden.[128] On this basis, the court held that the policy was likely to be found on the merits to constitute disparate impact discrimination, and granted an injunction.[129] The mandatory masking policy was thus reinstated.[130]

119. *Id*. at 697.
120. *Id*. at 695–96.
121. *Id*. at 694–95.
122. *Id*. at 687.
123. *Id*. (citing Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235 (6th Cir. 2019)).
124. *Id*.
125. *Id*. at 687–88 (citing Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995)).
126. *Id*. at 694.
127. *Id*. at 698–99.
128. *Id*. at 694–95.
129. *Id*. at 706.
130. *Id*.

III. CRITICAL DISABILITY THEORY

While the *Perkiomen* holding represents the majority view that disparate impact claims should be within the reach of Section 504 and Title II, the tenets of Critical Disability Theory arguably provide even stronger support for this argument. Articulating the reasoning through a CDT lens bolsters the argument for future plaintiffs facing the potential headwinds created by the *BlueCross* holding.

Critical Legal Studies (CLS) emerged in the late 1970s as a method to examine society's power structures.[131] It rejects the liberal conception of the law as objective, and works instead to show how the law reflects subjective value choices that tend to serve the interests of those in power.[132] Viewing laws through the lens of critical theory has contributed meaningful advances to understanding society and protecting those groups that the laws historically have not.[133] For example, feminists have used critical theory to articulate and successfully prosecute employers for the hostile work environments experienced by many women that traditional approaches to discrimination law had not found cognizable.[134]

CDT is the latest area of identity jurisprudence to evolve from this common base. It arose to address the law's inadequate recognition of disability discrimination's role in our society's private and public institutions.[135] CDT is a lens to expose our "social values, institutional priorities, and political will,"[136] and a methodology through which to drive social change and seek substantive equality and justice.[137] The field draws attention to the need for social participation[138] at a time when the promise of the ADA to bring equal opportunity for persons with disabilities has yet to be fulfilled.[139]

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131. Hosking, *supra* note 27, at 3–4.

132. *Id*.; *see also* Helen Meekosha & Russell Shuttleworth, *What's So Critical About Critical Disability Studies?*, 15 AUSTL. J. HUM. RTS. 47, 53 (2009).

133. *See, e.g*., Ramona L. Paetzold, *Why Incorporate Disability Studies into Teaching Discrimination Law*, 27 J. LEGAL STUD. EDUC. 61, 63 (2010).

134. *Id*.

135. Hosking, *supra* note 27, at 5. While CDT recognizes the intersectionality of disability with other social identities like race and gender, this Note focuses on tenets that specifically address disability given the focus of its project to address interpretation of a disability-focused statute. *Id*.

136. RICHARD FRANCIS DEVLIN & DIANNE POTHIER, CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND LAW, 9 (2011).

137. Hall, *supra* note 25.

138. Meekosha & Shuttleworth, *supra* note 132, at 53, 66.

139. People with disabilities still have worse outcomes in the educational market, are more likely to be poor, are less likely to participate in the labor market, and continue to lack accessible transportation and technology, despite the public perception that the ADA had solved many of these issues and no further intervention is needed. Julie Avril Minich, *Enabling Whom? Critical Disability Studies Now*, LATERAL, Spring 2016.

Three fundamental tenets relevant to this Note's argument that have emerged from the work of CDT scholars are: (1) adopting the biopsychosocial model of disability,[140] (2) confronting difference[141] and critiquing ableism,[142] and (3) valuing solidarity and responsibility for others over neoliberal individualism.[143]

A. *The Biopsychosocial Model of Disability*

CDT views disability as arising from the synthesis of two opposing views: the medical model and the social model.[144] The prevailing view of disability for much of the twentieth century was the medical model.[145] This model considers disability as an unfortunate burden that should be prevented or treated, and one that is located within the individual.[146] It presents the challenges that accompany a person's impairment as an objective and inevitable consequence of the impairment itself.[147] For instance, the medical model considers it a foregone conclusion that a wheelchair user would be unable to access certain buildings that must be entered by staircase.[148] It might consider the most appropriate solution to be something the individual can do to prevent or "remedy" their impairment, like use prosthetics.[149]

In contrast, the social model of disability ascribes to the view that no impairment is, in and of itself, disabling.[150] Instead, disability arises through interactions with a social environment—physical structures, policies, and attitudes—that fails to take that impairment, or difference from the human statistical norm, into account.[151]

One example that illustrates this principle is a community on Martha's Vineyard that, for generations, used sign language everywhere, amongst the deaf as well as the hearing.[152] The medical model would

140. Hosking, *supra* note 27, at 7.

141. DEVLIN & POTHIER, *supra* note 136, at 12.

142. Robinson, *supra* note 1.

143. *See, e.g.*, Dan Goodley, Rebecca Lawthorn, Kirsty Liddiard & Katherine Runswick-Cole, *Provocations for Critical Disability Studies*, 34 DISABILITY & SOCIETY 972, 985 (2019).

144. Hosking, *supra* note 27, at 7.

145. *Id*. at 6.

146. DEVLIN & POTHIER, *supra* note 136, at 9–10.

147. Hosking, *supra* note 27, at 6–7.

148. *Social Model vs. Medical Model of Disability*, DISABILITY NOTTINGHAMSHIRE, https://www.disabilitynottinghamshire.org.uk/index.php/about/social-model-vs-medical-model-of-disability/ [https://perma.cc/53YC-EATH].

149. *Id*.

150. Hosking, *supra* note 27, at 7.

151. *Id*.

152. Madeline Bilis, *Throwback Thursday: When Martha's Vineyard Had its Own Sign Language*, BOS. MAG. (Jul. 21, 2016, 8:00 AM), https://www.bostonmagazine.com/news/2016/07/21/marthas-vineyard-sign-language/ [https://perma.cc/NBC4-KEYX].

assume that deaf people face large barriers to communicating in mixed social settings, but the social model perspective suggests that deafness is not disabling at all if the social environment takes deafness into account.[153]

CDT synthesizes these two models into the "biopsychosocial model," viewing disability as resulting from the complex combination of the mental or physical difference itself, the individual's response to that difference, and the social environment.[154]

B. *Confronting Difference and Critiquing Ableism*

Critical theory "challenges the assumption that difference[s] can be ignored."[155] As scholars Devlin and Pothier put it, "[s]ubstantive equality necessitates taking difference into account in order to both identify the systemic nature of inequality and pursue solutions tailored to the goals of full inclusion and participation."[156]

Recognizing human difference inevitably calls out ableism, which is defined as "the discrimination of and social prejudice against people with disabilities based on the belief that typical abilities are superior."[157] Ableism in its most intentional form can result in overt practices like eugenics or segregating students with disabilities into separate classrooms or schools; however, it can also take form in everyday occurrences like choosing an inaccessible venue for an event or unintentionally talking down to a person with a disability.[158] In this way, ableism is sometimes the result of implicit, structural bias that lurks beneath many facially neutral policies or practices.[159]

Simply treating everyone the same—thereby abiding ableist norms that ignore difference—is inadequate if one's goals are truly to provide access for all.[160] It can be nearly impossible to deliver this substantive equality without first recognizing difference and the ways that ableism is often embedded in how we have always built or done things.[161] CDT

153. *See, e.g.*, *Social Model of Disability*, SCOPE https://www.scope.org.uk/about-us/social-model-of-disability/ [https://perma.cc/VL2S-6T9G]; s*ee also* H-Dirksen Bauman, Scott Simser, & Gael Hannan, *Beyond Ableism and Audism: Achieving Human Rights for Deaf and Hard of Hearing Citizens*, CAN. HEARING SOC'Y (July 2013), at 6, https://www.chs.ca/sites/default/files/uploads/beyond_ableism_and_audism_2013july.pdf [https://perma.cc/K77W-DNHT].

154. Hosking, *supra* note 27, at 7.

155. DEVLIN & POTHIER, *supra* note 136, at 12.

156. *Id*.

157. Ashley Eisenmenger, *Ableism 101*, ACCESS LIVING (Dec. 12, 2019), https://www.accessliving.org/newsroom/blog/ableism-101/ [https://perma.cc/3MV6-DPWH].

158. *Id*.

159. *See* Keith Payne, Laura Niemi & John M. Doris, *How to Think About 'Implicit Bias'*, SCI. AM.: BEHAV. (Mar. 27, 2018), https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/ [https://perma.cc/Z42X-M8UC].

160. DEVLIN & POTHIER, *supra* note 136, at 12.

161. *Id*.

"welcomes the inevitability of difference and conceives of equality within a framework of diversity."[162]

C. *Valuing Solidarity and Responsibility for Others*

A key part of the debate around disability law is the costs, both economic and administrative, of making modifications or accommodations to an existing environment or practice to make it more inclusive.[163] How one views these costs is heavily influenced by whether they ascribe to the charity model or the human rights model of social responsibility.[164]

The prevailing charity model views accommodations as being redistributive.[165] It builds from the traditional medical model's assumption[166] that disability is an inevitable disadvantage suffered by an individual.[167] In this traditional view, the primary responsibility for that disability lies with the individual with the impairment.[168] Once the disadvantage has been "privatized" in this way, it justifies a restrictive or passive engagement by the broader society in its resolution.[169]

This also makes any potential modifications to account for various impairments vulnerable to claims of budgetary restraint.[170] Importantly, along with society's view of accommodations as a "charity" that society extends to some at great shared cost,[171] studies have shown that people are generally hostile toward helping others to perform at improved levels.[172] This makes the charity model a double-edged sword—society rationalizes the provision of less-than-equal access because the problem originates in the individual; however, when it *does* provide a modification to account for disability, the recipient is then resented.

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162. Hosking, *supra* note 27, at 11.

163. Marcia H. Rioux & Frazer Valentine, *Does Theory Matter? Exploring the Nexus Between Disability, Human Rights, and Public Policy*, *in* CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND LAW, 47, 48-49 (Dianne Pothier & Richard Devlin eds., 2006).

164. *See* DEVLIN & POTHIER, *supra* note 136, at 11.

165. *See* Daniel Putnam, David Wasserman, Jeffrey Blustein, & Adrienne Asch, *Disability and Justice*, STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/entries/disability-justice/ [https://perma.cc/P5YN-ZSPH].

166. *See* discussion *supra* Part III subpart A.

167. Rioux & Valentine, *supra* note 163, at 50–51.

168. DEVLIN & POTHIER, *supra* note 136, at 12.

169. Rioux & Valentine, *supra* note 163, at 51.

170. DEVLIN & POTHIER, *supra* note 136, at 11.

171. While the cost of various accommodation and modifications can vary, one study of workplace accommodations found them to cost an average of just $45. Paetzold, *supra* note 133, at 70 n.31 (citing Peter David Blank, *Transcending Title I of the Americans With Disabilities Act: A Report on Sears, Roebuck and Co*., 20 MENTAL & PHYSICAL DISABILITY L. REP. 278 (1996)).

172. Paetzold, *supra* note 133, at 70.

In contrast, CDT ascribes to the human rights model, which seeks equality of citizenship and full participation in social and economic life for people with disabilities.[173] This view follows from the social model of disability. Therefore, it sees disability as "a consequence of how society is organized and the relationship of the individual to society at large."[174] Once one understands disability as partially stemming from socially created barriers, the "responsibility and accountability shifts to the larger community" that creates and maintains those environments.[175]

CDT rejects the charity model's notion that accommodations should be viewed as redistribution or compensation for the alleged deficits of people with disabilities.[176] An example of this shift in perspective comes from feminist scholars, who point out that many workplaces were historically designed for men.[177] As such, the expense of constructing additional restrooms or nursing stations did not "compensate" women for their deficiencies—it accommodated differences that society previously ignored because a woman's place was assumed to be "in the home."[178] To the extent that this was an additional cost over and above the status quo, that is only because the status quo was not delivering substantive equality in the first place. Employers had anchored the baseline understanding of cost to an artificially low amount—in this case, building one set of restrooms instead of two.

Despite the above illustration of how existing policies and environments may be inequitable, the current law provides public entities shown to discriminate against people with disabilities a reasonableness defense.[179] If the modification that would otherwise be required to account for the plaintiff's disability would alter the essential nature of the program or impose an undue burden, it is considered unreasonable and will not be required.[180] The nature of the "undue burden" and "reasonable" language clearly speaks to an efficiency rationale for allowing discrimination to continue. The human rights view is fundamentally opposed to this type of accounting.[181] As Devlin and Pothier argue:

> [I]f one thinks in cost-benefit terms, there is always likely to be a significant segment of our community whose costs can be argued to outweigh the benefits they produce. But is this an appropriate way for

173. Rioux & Valentine, *supra* note 163, at 54.

174. *Id*. at 52.

175. DEVLIN & POTHIER, *supra* note 136, at 12.

176. Putnam et al., *supra* note 165.

177. *Id*.

178. *Id*.

179. *See*, *e.g*., Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 694–695 (E.D. Pa.), *vacated as moot,* No. 22-cv-287 2022 U.S. Dist. LEXIS 44246 (E.D. Pa. Mar. 14, 2022).

180. *Id*. (citing Helen L. v. DiDario, 46 F.3d 325, 337 (3d Cir. 1995)).

181. DEVLIN & POTHIER, *supra* note 136, at 18.

> us to value each other? Efficiency and productivity are irretrievably ableist discourses that can only condemn (some) persons with disabilities to a presumptive inferior status.[182]

While inclusion of a reasonableness standard was almost certainly required in order to secure the passage of disability legislation, CDT would argue that the determination of what "burdens" are unacceptable be read very narrowly when juxtaposed with the critical human rights that those expenditures would help to secure.[183]

IV. A CRITICAL DISABILITY ARGUMENT SUPPORTING DISPARATE IMPACT CLAIMS UNDER TITLE II AND SECTION 504

The *Perkiomen* children's meaningful access to their education would not have been possible under the Sixth Circuit's reading of Title II and Section 504.[184] The disparate impact framework was essential to achieving justice for those children. Because these laws apply to such fundamental public services as schools, healthcare, and policing, the artificially narrow interpretation in *BlueCross* should not stand. CDT provides several important arguments to articulate why the Sixth Circuit's ruling was incorrect. In this Part, the Sixth Circuit's two lines of reasoning requiring intent, as explored in Subpart A, and limiting burdens on society, as explored in Subpart B, are critiqued through the lens of CDT.

First, Subpart A differentiates disability legislation from other areas of civil rights jurisprudence, like race, to highlight why the Sixth Circuit's holding drew an inappropriate throughline from prior race-based cases when it considered disability in *BlueCross*. It then discusses the biopsychosocial model of disability in the COVID context, illustrating how the change in the school masking policy was a major contributor to the exclusion of the child-plaintiffs, making their conditions, like asthma, more disabling. Finally, it argues that, because physical spaces and policies can exacerbate the exclusion of people with differences from the statistical human norm, in part because society is inherently ableist and routinely fails to consider such differences, inadvertent disparate impacts

182. *Id*.

183. *Id*.

184. This Note applies the Sixth Circuit's holding in *BlueCross* to the COVID masking policy facts from the *Perkiomen* case. While similar cases reached the Sixth Circuit during the COVID pandemic, none addressed the merits as to whether or not Title II and Section 504 allowed disparate impact claims. *See* R.K. v. Lee, 53 F.4th 995 (6th Cir. 2022) (holding that child-plaintiffs with medical disabilities lacked sufficient standing to challenge Tennessee's law prohibiting schools from requiring masking because plaintiffs' claims lacked both injury in fact and traceability to the defendants, Governor Lee and Commissioner of Education Schwinn); *see also* G.S. v. Lee, No. 21-5915, 2021 WL 5411218 (6th Cir. Nov. 19, 2021) (denying the stay of a preliminary injunction granted by the district court, where child-plaintiffs with medical disabilities had sufficiently challenged Tennessee's order prohibiting schools from requiring universal masking as a reasonable accommodation under Title II and Section 504).

should be addressable under disability laws like Title II and Section 504. Intent to discriminate should not be required in order for courts to address such exclusion.

Subpart B argues that the Sixth Circuit incorrectly assumed that all modifications to remedy disparate impact would create societal burdens too costly to entertain. First, the argument reframes the exclusion of people with disabilities from schools and other public spheres; this is a weighty human rights violation for which society has collective responsibility, rather than a more modest harm that could reasonably be accepted due to efficiency concerns. It then undertakes a deeper analysis of the actual burdens claimed in the school masking context to show how heavily the instant case weighs in favor of providing the *Perkiomen* children their requested remedy and restoring their safe access to school. Because each claim of disparate impact discrimination will require different modifications and resulting "burdens," some of which clearly favor providing a remedy to the excluded plaintiffs, the law should not foreclose such cases from being argued.

Finally, Subpart C articulates why this argument has ongoing relevance despite the end of the COVID pandemic, and how the lessons learned during this period can guide policymakers during a future emergency.

A. *The Text of Section 504 Should Be Read Broadly Enough to Prohibit Disparate Impacts, Not Just Intentional Discrimination*

The Sixth Circuit first addressed whether disparate impact claims were permissible under the text of the Section 504, which prohibits discrimination "solely by reason of" one's disability.[185] It held that the language used did not bar actions taken for "nondiscriminatory reasons," even if those actions caused disproportionate harm.[186] Disparate impact claims were not allowed.[187] This reasoning relied upon decisions in other areas of civil rights law like Title VI, where courts had previously required Congress to use words like "otherwise adversely affect," which the court believed focus more on "the consequences of an action" than on "the actor's intent."[188]

Basing the interpretation of these disability laws on that of similar language in other civil rights contexts like race may be tempting, but it will ultimately frustrate Congress's intended purpose.[189] Race-based civil

185. Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235, 241–42 (6th Cir. 2019).

186. *Id*.

187. *Id*. at 242.

188. *Id*.

189. *See* Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 432–34 (1984).

rights legislation was passed to address the long history of overt racism and segregation in this country.[190] Disability legislation is different, and decidedly focused on unintentional discrimination.[191]

In *Choate*, the Court discussed Congress's rationale for passing Section 504 as addressing the country's "shameful oversights" that have caused people with disabilities to live "shunted aside, hidden, and ignored."[192] Further, it recognized that, in order to fulfill that purpose, Section 504 would need to be read as forbidding at least *some* unintentional discrimination. This is because some of the central aims of the legislation were to achieve things like removing architectural barriers, which have never been understood as intentionally constructed to keep out the disabled.[193] Instead, the purpose was to correct the discrimination caused by the "apathetic attitudes," *not* the "affirmative animus," of society in failing to take various impairments into account in designing public spaces and programs.[194]

In short, disability legislation was about the outcomes, but race legislation was about the actor. For this reason, courts should not use the arguments derived from the interpretation of other civil rights laws when interpreting disability law.

Nonetheless, the Sixth Circuit drew a parallel between the two statutes and forbid the consideration of any disparate impact claims under Section 504 and Title II.[195] In the *Perkiomen* school setting, the Sixth Circuit would reason that because the children were impacted by a facially neutral masking policy, their exclusion from school was unintentional and therefore not prohibited by law. For the Sixth Circuit to act, the children would need to show intentional discrimination by the school.[196]

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190. *See The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. OF CONG., https://www.loc.gov/exhibits/civil-rights-act/epilogue.html [https://perma.cc/KH7C-DLS6].

191. *See generally* Weber, *supra* note 14.

192. Alexander v. Choate, 469 U.S. 287, 295–96 (1985) (quoting 117 CONG. REC. 45974 (1971) (statement of Rep. Vanik)).

193. *Id*. at 296–97.

194. *Id*. at 296.

195. D*oe v*. *BlueCross BlueShield of Tenn*., 926 F.3d 235, 242 (6th Cir. 2019).

196. *Id*. at 242–43. Some disability discrimination can be remedied by providing the plaintiff with a reasonable accommodation that provides meaningful access to the program or service. *State and Local Governments*, ADA.GOV: U.S. DEP'T OF JUST., CIV. RTS. DIV., https://www.ada.gov/topics/title-ii/ [https://perma.cc/8ZR5-UXTN]. However, such accommodations generally cover exceptions to the broad rule specifically for the person with a disability, such as a museum with a no-food policy allowing a person with diabetes to bring in food that helps them regulate their blood sugar. *Id*. The *Perkiomen* case was different, however, because there was no individual accommodation that would have made the environment safely accessible for the medically vulnerable students; a reversion to universal masking for *all* students—not just for the impacted plaintiffs—was necessary and so the plaintiffs needed to challenge the entire policy under a theory of disparate impact.

1. CDT's Biopsychosocial Model Posits that the Masking Policy Was Part of a Social Environment that Contributed to the Children's Disability

Critical disability theorists would argue that an interpretation of the law that results in segregated schooling for children with medical impairments is flawed.[197] It is built upon inadequate reasoning that fails to consider how the social environment contributes to the experience of disability.

CDT's biopsychosocial model contends that disability results, not just from the individual impairment one may have, but also from the failure of society to account for that impairment when designing public spaces and policies.[198] In *Perkiomen*, the children had impairments ranging from asthma to vocal cord dysfunction.[199] These children safely attended school under the universal masking policy during the COVID pandemic. Their various impairments did not change during the pandemic. The only thing that changed was that the school chose to transition from a universal masking policy that did not exclude them from meaningful school access to an optional policy that *would* exclude them.[200]

Therefore, the impairments alone did not necessitate the children's exclusion from the school. Instead, the social environment, of which the masking policy was a part, played a disabling role and magnified the disability experienced by the children. The school contributed to the disability when it failed to account for how the policy change might exclude some children. The policy was a part of the disability. It is impermissible to ignore or dismiss the ways in which the school's policy contributed to, or even proximately caused, the children's exclusion from the classroom, especially when it had just been shown that another, more inclusive policy—universal masking—was feasible.

CDT considers adoption of the new policy to be part and parcel of an ableist society that subconsciously favors strength and ability, and fails to consider variations from the statistical norm.[201] Difference should not simply be ignored so that society can claim to treat everyone equally. While it is true that most children who have endured a COVID infection

197. *See generally* Paetzold, *supra* note 133 (discussing the goal of social inclusion); DEVLIN & POTHIER, *supra* note 136 (criticizing exclusion of people with disabilities).

198. *See supra* Part III subpart A.

199. *Perkiomen*, 585 F. Supp. 3d at 691.

200. *Id*. at 693–94 (stating that "the optional masking policy . . . prevents the Child-Plaintiffs from 'meaningfully accessing' the benefits of in-person education at this time because they cannot attend school alongside their unmasked peers without incurring a real risk of serious illness or worse.").

201. *See supra* Part III subpart B.

have fared quite well,[202] there were children affected by the policy who would likely face much more serious consequences—perhaps up to 20% of the student population at Perkiomen Schools.[203] Yet the school, being reflective of a broader society that does not routinely consider these differences, chose to implement the inadequate optional masking policy while ignoring these impairments. Further, once aware of the disproportionate impact on medically vulnerable students, the school chose to fight the reversion to universal masking rather than taking the children's medical differences into account. In this way, and without intentionally trying to exclude anyone, the school contributed to the children's experienced disability.

Because disability is made up not just of the individual's impairment but also the challenges that an indifferent social environment contributes, the masking policy that would have forced the *Perkiomen* children's exclusion from school should fall within the reach of disability law. But for the proposed change to an optional masking policy, the children would have had continuing safe access to integrated schooling despite their medical impairments. In short, the school caused the students' impairments to be more disabling with its indifferent masking policy, and the school should have the responsibility to fix it, regardless of whether the exclusion was intentional.

B. *Balancing Equal Access with Consideration of the Resulting Burdens Should Not Foreclose All Disparate Impact Claims*

The Sixth Circuit's second reason for reading disparate impact claims out of Section 504 and Title II was a policy argument based on efficiency and limiting societal burdens.[204] Because there are so many neutral policies that disparately affect people with disabilities, including some which may be well-intentioned methods for helping those with disabilities, the court reasoned that using disparate impact theory would lead to an "unwieldy administrative and adjudicative burden."[205] Essentially, the court found that social efficiency justified allowing disparate impacts upon people with disabilities in their access to public programs and services.

As an initial matter, the court exaggerated the potential burden by including not just discriminatory policies, but all policies, even those that

202. *See* Aaron Milstone, *COVID in Babies and Kids: Symptoms and Prevention*, JOHNS HOPKINS MED. (June 22, 2022), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-in-babies-and-children [https://perma.cc/PLH8-NPRC] (stating that "[g]enerally, COVID-19 symptoms in kids and babies are milder than those in adults, and some infected children may not have any signs of being sick at all").

203. Complaint at 4, *Perkiomen* 585 F. Supp. 3d 668.

204. Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235, 242–43 (6th Cir. 2019).

205. *Id*. at 242 (quoting Alexander v. Choate, 469 U.S. 287, 298 (1985)).

bestow a "well-intentioned" benefit on individuals with impairments.[206] Those policies would not beget discrimination lawsuits because the purpose of disability laws is to address policies that have a *negative* impact and exclude one from meaningful access, not those that might ease one's challenges. Nonetheless, the court was correct in acknowledging what Congress already had when it enacted the law: that there are many facially neutral policies and practices that ultimately discriminate against people with disabilities. Indeed, that is precisely why the disparate impact framework is so important.

As placed in the school setting, the Sixth Circuit's reasoning would make the *Perkiomen* children unable to successfully challenge the optional masking policy in the first place because addressing such issues places too high a burden on society.[207] Typically, such burdens have fallen within the categories of financial and liberty burdens.[208] However, this approach of ruling out all disparate impact claims from the start means that courts cannot actually examine the alleged harms to people with disabilities or the resulting burdens on society in any particular case. For the *Perkiomen* students, it means that under the Sixth Circuit's rule, courts would never critically consider whether reverting back to mandatory masking actually placed an unwieldy burden on the school community; courts would never consider whether, instead, the costs were justified because they were relatively small and enabled the children to safely return to a fundamental facet of their lives: the classroom.

1. CDT Values Social Responsibility Over Concerns for Efficiency

CDT challenges the notion that efficiency is ever a valid reason to allow discrimination to persist. However, given disability law's call for "reasonableness" in the modifications provided,[209] critical theorists would call for the factfinder to recognize the weight of the human rights interests at stake for plaintiffs with disabilities and call for an appropriately expansive view of what burdens would be reasonable when protecting those rights.

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206. *Id*. (stating that "[b]ecause many neutral (and well-intentioned) policies disparately affect the disabled—the point of such laws most often is to ease the burden of having a disability—the proposed use of [disparate impact] theory under § 504 could lead to a wholly unwieldly administrative and adjudicative burden.") (internal quotation marks omitted).

207. *See id*. at 243 (stating that the statute "leaves no room" to prohibit disparate impacts because "no legislation pursues its purposes at all costs.") (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646 (1990)).

208. *See supra* Part I subpart A, note 66.

209. Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 694–695 (E.D. Pa.), *vacated as moot,* No. 22-cv-287 2022 U.S. Dist. LEXIS 44246 (E.D. Pa. Mar. 14, 2022) (citing Alexander v. Choate, 469 U.S. 287, 301 (1985) and Helen L. v. DiDario, 46 F.3d 327, 337 (1995)).

CDT adopts a human rights view of disability rather than a charity view.[210] Unlike charity, which is something society can choose to give but is inherently optional, human rights are a bare minimum—a baseline below which a person's experience of society should not fall.[211] This means full access to the social and economic spheres enjoyed by all. It means children must have access to school.

The *Perkiomen* children would no longer have access to in-person schooling under the proposed optional masking policy. This would result in a serious limitation on their equal participation in society, especially given the emerging understanding of how big a disadvantage remote learning was in comparison to in-person schooling.[212] This "separate but equal" treatment that the law has condemned harkens back to times when students with disabilities were intentionally segregated into their own schools, a practice that in some unfortunate cases has persisted to present day.[213] The Sixth Circuit's holding assumed that providing a legal remedy for this type of discrimination would impose societal burdens too costly to even entertain, so it foreclosed any possibility of making a disparate impact claim.[214]

CDT requires that governments and courts not place social efficiency above basic human rights. Our society has the responsibility to share the cost of making public services inclusive of those with disabilities.[215] This is akin to the earlier example of old office buildings being retrofitted to add nursing stations and bathrooms for women where previously only bathrooms for men had been constructed.[216] More cost does not mean unnecessary cost—we had simply set the bar too low in the past.

Far from having a single rare condition that the school could not reasonably account for, the *Perkiomen* students had multiple different impairments that all necessitated a universal masking policy.[217] It is not

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210. *See supra* Part III subpart C.

211. *See Human Rights*, UNITED NATIONS https://www.un.org/en/global-issues/human-rights (listing the right to education as a human right to which all people are entitled).

212. Cara Goodwin, *The Benefits of In-Person School vs. Remote Learning*, PSYCH. TODAY (Aug. 20, 2021), https://www.psychologytoday.com/us/blog/parenting-translator/202108/the-benefits-in-person-school-vs-remote-learning [https://perma.cc/T8GV-WZD2].

213. Timothy Pratt, *The Separate, Unequal Education of Students with Special Needs*, THE HECHINGER REP. (Mar. 21, 2017), https://hechingerreport.org/georgia-program-children-disabilities-separate-unequal-education/ [https://perma.cc/Q3NS-NXWM].

214. *See* Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235, 243 (6th Cir. 2019).

215. *See supra* Part III subpart C.

216. *See supra* Part III subpart C.

217. Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 690–91 (E.D. Pa.), *vacated as moot*, No. 22-cv-287 2022 U.S. Dist. LEXIS 44246 (E.D. Pa. Mar. 14, 2022) (stating that the Child-Plaintiffs with asthma, vocal cord dysfunction, chronic bronchitis, and taking immunosuppressant medications had medical teams who found that "universal masking [was] 'essential' to their safe in-person schooling.").

unreasonable for the school to take these conditions, some as ubiquitous as asthma, into account.

Inherent in the Sixth Circuit's social efficiency argument is an assumption that all people are independent and responsible for themselves; no one is entitled to a modification from the status quo.[218] CDT argues that this assumption is flawed. In reality, people are quite interdependent. In the school paradigm, all of the community has contributed in some form to the existence and operation of the school through tax contributions.[219] Because people need to pool resources to fund these critical public services, they have the collective responsibility to make them meet the fundamental needs of people with varied abilities and differences from the statistical norm. Whatever modifications or accommodations may be required to give individuals with disabilities access to critical facets of their citizenship like schools, these costs are society's collective responsibility and not a nicety that it may choose to bestow at its discretion.

2. To the Extent That Efficiency or Balancing Analysis Is Required, Courts Should Fully Weight the Human Rights at Stake When People with Disabilities Are Excluded, and Critically Examine the Supposed Burdens

To be sure, despite CDT's position that efficiency should never justify discrimination, the law *does* currently impose a reasonableness requirement when assessing the requested modification or accommodation.[220] Modifications cannot be required if they necessitate a major change to the nature of the public service or program or impose an undue hardship.[221] The Sixth Circuit was concerned with the burden that addressing disparate impact would place on society, implicitly suggesting that the prohibition of this type of discrimination was not important enough to justify the cost in doing so.[222] To the extent that some form of cost-benefit analysis must enter the picture, CDT requires a full weighting of the human rights at stake on one side, and a critical inquiry into the burdens being claimed on the other.

First, CDT requires the discrimination at issue to be fully appreciated for the human rights violation that it is, and to judge the requested modification and its resulting costs in that light.[223] In *Perkiomen*, this

218. Paetzold, *supra* note 133, at 77.

219. *See, e.g.*, Jennifer Park, *School Finance*, EDUC. WEEK https://www.edweek.org/policy-politics/school-finance/2007/12 [https://perma.cc/4MQD-QVF4] (discussing the various types of taxes that contribute to the funding of school budgets).

220. *Perkiomen*, 585 F. Supp. 3d at 694–95.

221. *Id*.

222. Doe v. BlueCross BlueShield of Tenn., 926 F.3d 235, 243 (6th Cir. 2019).

223. *See supra* Part III subpart C.

would have meant the segregation of students with certain disabilities from the public school setting, a weighty loss for those children as discussed above.

Then, to consider the efficiency of such a result, it must be balanced against the burdens at play in providing a remedy. In the context of the school masking setting, the likely burdens at play can be categorized as financial, liberty-based, and psychological burdens.

a. *Addressing the masking policy was not financially costly*

First, the economic costs of remedying the mask policy were relatively minor. They amounted to the brief civil litigation required to get a preliminary injunction and whatever minimal costs the school might have incurred in reverting back to the universal masking policy it had been following for the past five months.[224] At the same time, the school arguably *avoided* the even higher costs of having to provide an alternative in the form of remote schooling for the children who would have been excluded from in-person schooling under the optional masking policy. The plaintiffs' proposed solution to this problem—universal masking—was neither a major change to the essential nature of the school nor a costly burden.

In fact, financial costs related to litigation in disparate impact cases can be minimized in the future with a more uniform interpretation of the relevant disability laws.[225] If all circuits were to uniformly interpret Title II and Section 504 to prohibit disparate impacts, schools and other public services similarly situated to Perkiomen Schools might proactively monitor the disparate impact their policies create. Further, where a disproportionate burden is inadvertently created for people with disabilities, bringing it to the attention of the school might result in voluntary modifications and resolution without the need to resort to the legal system. Therefore, from a financial perspective, prohibiting

224. The *Perkiomen* court found that "it would be difficult for Defendants to persuasively contend that serious administrative difficulties would attend their implementation of the [mandatory masking] policy, because they already [had] five months of experience with universal indoor masking . . . ." *Perkiomen*, 585 F. Supp. 3d at 698. *See also* Mark Lieberman, *Schools Are Scrambling to Find Effective and Affordable Masks*, EDUC. WEEK (Jan. 21, 2022), https://www.edweek.org/leadership/schools-are-scrambling-to-find-effective-and-affordable-masks/2022/01 [https://perma.cc/4MQD-QVF4] (stating that some schools required students and staff to purchase their own face masks, while others purchased disposable masks at prices ranging from 4 to 10 cents apiece, or reusable masks ranging from 30 cents to 1 dollar, though the procurement process could be time-consuming).

225. Clear prohibition of disparate impact discrimination will result in better voluntary compliance by actors like schools, which means the costs of litigation need not be incurred at all in those cases in order for society to receive the benefit of reduced discrimination. *See* Hart, *supra* note 35, at 555 (discussing the importance of voluntary compliance in remedying discrimination and incentivizing employers to avoid future discrimination).

disparate impact actually weighs *in favor* of providing plaintiffs a remedy in some cases.

b. *Liberty interests are important but not unlimited*

Second, many Americans claimed that mandatory masking was an undue burden on the liberty of students who would have preferred to go without a mask, a government infringement on personal liberty.[226] This argument echoed similar objections that were raised when seat belt and helmet laws were being introduced decades ago.[227]

The key issue is that while personal liberty is important, it is not unlimited. Seat belt and helmet laws have been supported as appropriate safety measures for government regulation, despite the fact that they somewhat impinge on a person's freedom to choose what to wear for protection.[228] This is because states have the constitutional authority to protect public safety under exercise of their police powers.[229] Masks are even more appropriate for government regulation as a public-safety measure because, unlike seat belts which primarily protect the wearer, masks are also helpful in protecting others.[230]

Asking a subset of the school children—those with asthma and other impairments discussed in *Perkiomen*—to forfeit in-person schooling to keep others from facing reasonable constraints on liberty is wrong. Masking is a public-safety measure well-within the reach of the state's power.[231] It causes significantly less harm to those forced to mask against their preference than the alternative, which forces impermissible, completely segregated remote schooling upon children with certain relatively common disabilities.

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226. Christine Hauser, *In Fights Over Face Masks, Echoes of the American Seat Belt Wars*, N. Y. TIMES (Oct. 16, 2020), https://www.nytimes.com/2020/10/15/us/seatbelt-laws-history-masks-covid.html [https://perma.cc/2UBD-Y7V7].

227. *Id*.

228. *See, e.g*., James J. Fazzalaro, *Constitutionality of the Mandatory Seat Belt Use Law, Connecticut General Assembly Research Report*, CONN. GEN. ASSEMBLY (Oct. 9, 1998), https://www.cga.ct.gov/PS98/rpt/olr/htm/98-R-1198.htm [https://perma.cc/9DKF-CV27].

229. *Id*.

230. *See, e.g*., Hauser, *supra* note 226; *see also* Jeremy Howard, et al., *An Evidence Review of Face Masks Against COVID-19*, PNAS, Jan. 11, 2021, at 1.

231. Megan McKenzie, *Pandemic, Public Health, and the Police Power: A Quick Sketch of Why States Can Require Wearing Masks in Public*, ABOVE THE L. (June 29, 2020, 12:46 PM), https://abovethelaw.com/2020/06/pandemic-public-health-and-the-police-power-a-quick-sketch-of-why-states-can-require-wearing-masks-in-public/ [https://perma.cc/HBC8-WL6B] (discussing how mandatory smallpox vaccinations, which were more of an imposition than mandatory masking, were found to be a valid exercise of state police power over public health in Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905)).

c. *Studies have not shown general physical or psychological harms of masking, but individuals could receive exceptions for legitimate claims*

Finally, some parents claimed that masking made it harder to breathe, slowed their children's development, and caused anxiety.[232] Researchers have been investigating such claims, but thus far, there has been no evidence of this harm in the student population at large.[233] In fact, researchers have said that the much more significant psychological harm to children came at the beginning of the pandemic, where rates of anxiety and depression spiked due to the isolation inherent in remote schooling.[234] Masks, therefore, were one of the key vehicles through which children were able to return to school and *reduce* their COVID-related psychological harms.[235]

That said, in some cases, individual impairments may have legitimately made masking more challenging for certain students.[236] Many doctors believed that the list of impairments that would make it hard to breathe while masked would be quite short because "even people with respiratory illness . . . [could] probably safely wear" some type of face covering.[237] However, people with sensory processing disorders, behavioral challenges, or facial deformities incompatible with masking would be eligible for an exception to the requirement.[238] Therefore, no one with a legitimate claim of physical or psychological challenge would be bound to masking, eliminating the danger that universal masking policies could result in the hypothesized harm. Notably, then, the right to an exemption from a mandatory masking policy is a protection afforded by the very types of disability laws at issue in this case. Strengthening—

232. Amy McKeever, *Do Masks Really Harm Kids? Here's What the Science Says*, NAT'L GEOGRAPHIC (Feb. 17, 2022), https://www.nationalgeographic.com/science/article/do-masks-really-harm-kids-heres-what-the-science-says [https://perma.cc/Q24B-A2SW].

233. For those children with documented reasons like anxiety, trouble breathing with a mask, or other challenges, mask exemptions were typically available from a doctor. Doron Dorfman & Mical Raz, *Mask Exemptions During the COVID-19 Pandemic – A New Frontier for Clinicians*, JAMA NETWORK (July 10, 2020), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2768376 [https://perma.cc/8RDA-K7EA].

234. McKeever, *supra* note 232.

235. *Id*.

236. Claire Gillespie, *Can You Be Medically Exempt from Wearing a Face Mask?*, HEALTH (June 5, 2022), https://www.health.com/condition/infectious-diseases/coronavirus/can-you-be-medically-exempt-from-wearing-a-face-mask [https://perma.cc/ZKF2-RC36].

237. *Id*.

238. *Id*. In the Perkiomen Valley School District, "[s]tudents could request an exemption from universal masking by providing 'evidence of a medical condition or mental health issue from a certified medical professional indicating the detrimental effects of wearing masks,' or based on a disability accommodation." Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 676 (E.D. Pa.), *vacated as moot*, No. 22-cv-287 2022 U.S. Dist. LEXIS 44246 (E.D. Pa. Mar. 14, 2022).

not opposing—the protections of the ADA is the best path to adequately protecting the physical and mental health of those who truly cannot wear face masks.

In summary, cost-benefit balancing of mandatory masking weighs heavily on the side of giving students with disabilities a remedy by prohibiting disparate impacts. Here, the benefit of protecting integrated schooling is a fundamental human right. The burden the Sixth Circuit conceptualized was slight in comparison, whether articulated through financial, liberty, or health parameters.

This does not mean that every claim of disparate impact discrimination will so starkly weigh in favor of plaintiffs with disabilities. However, it does mean that, as cases like *Perkiomen* display, the law should allow such claims to be argued. This may be the only avenue through which to protect access to critical public spheres like schools. The Sixth Circuit's interpretation of Title II and Section 504, which forecloses any possibility of providing a remedy for such discrimination, is wrong.

C. *This Argument Has Broad Applicability to Disability Discrimination Claims Despite the End of the COVID Pandemic*

The COVID pandemic is no longer a global health emergency.[239] However, this Note's argument, which centers a lawsuit related to the pandemic, has applicability beyond the setting of a school during COVID. While the school masking debate provides a familiar and helpful paradigm within which to consider the issue of disparate impacts upon persons with disabilities, the relevant laws—Title II of the ADA and Section 504 of the Rehabilitation Act—protect access to a variety of public programs and services outside of the COVID context. For example, Title II has been invoked to protect access to courthouses for those with mobility impairments,[240] to require reasonable accommodations by police for arrestees with different types of disabilities,[241] and to push for improved public safety and infrastructure.[242] The *Perkiomen* case provides an

239. *WHO Chief Declares End to COVID-19 as a Global Health Emergency*, UN NEWS (May 5, 2023), https://news.un.org/en/story/2023/05/1136367 [https://perma.cc/XHF6-WV8V].

240. *See* Tennessee v. Lane, 541 U.S. 509, 527 (2004) (discussing the 1983 Civil Rights Commission Report before Congress that found "76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities.").

241. *See, e.g.*, Gorman v. Bartch, 152 F.3d 907, 912–13 (8th Cir. 1998) (discussing the claim of a paraplegic arrestee who was injured in a police van not equipped with wheelchair restraints); *see also* Lewis v. Truitt, 960 F. Supp. 175 (S.D. Ind. 1997) (discussing a deaf plaintiff arrested when police officers misunderstood his failure to answer questions as resisting law enforcement).

242. *See, e.g.*, Am. Council of the Blind of Metro. Chicago v. City of Chicago, 589 F. Supp. 3d 904 (E.D. Ill. 2022) (challenging the city's inadequate efforts to make intersections safely accessible to visually impaired pedestrians).

illustrative example of why prohibiting disparate impacts in access to all of these critical spheres should be within the reach of disability law.

In the inevitable event of a new public emergency, school boards and other policymakers should consider the lessons learned during the COVID pandemic. The experience of disability is not a monolith, which means it will be nearly impossible for a policymaker to immediately make urgent policy decisions that consider all the potential ramifications for those with a wide variety of differences from the statistical human norm.[243] That does not make disability justice an impossible task. Instead, it requires policymakers to recognize their inherent inability to anticipate how a new policy might create unintended disparate impacts upon certain groups, and to welcome an iterative process that opens itself up to feedback when change is needed to protect access for all.[244]

CONCLUSION

The attack on the disparate impact framework of discrimination has spread from the jurisprudence of other civil rights contexts, like race, into the arena of disability rights. If Section 504 and the ADA are to live up to Congress's intent and prohibit harmful but often unintentional forms of discrimination, this spread must stop. When the Sixth Circuit's narrow reading of disability law is applied to the situation of COVID masking in public schools, many children with common and varied medical disabilities lose their access to school. This result cannot be right, and CDT helps to articulate why.

CDT provides a useful lens to expose the ways that our society has sometimes failed to account for human differences, and has justified the resulting exclusion through problematic intent and burden arguments. By recognizing the experience of disability as originating not just from individual human differences, but also from society's failure to account for these differences, CDT shifts the responsibility from the individual to the public to build more inclusive spaces and practices. Where the law must step in to protect the inclusion of people with disabilities, it should be read as broadly as possible. This means that Section 504 and Title II should permit not just intentional discrimination claims, but also disparate impact claims. Any evaluation of the reasonableness of a requested modification should recognize that while such a modification may impose a resulting "burden," not all burdens are equal, and

243. *See, e.g.*, Ayanna Pressley & Rebecca Cokley, *There is No Justice that Neglects Disability*, STANFORD SOC. INNOVATION REV. (Winter 2022), https://ssir.org/articles/entry/there_is_no_justice_that_neglects_disability [https://perma.cc/9SUD-8CQN].

244. *See Iterative Process Definition: 5 Benefits of an Iterative Process* MASTERCLASS, https://www.masterclass.com/articles/iterative-process (Nov. 1, 2022).

whatever the cost of the remedy, fundamental human rights and equality of citizenship demand that change.