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Making Me Ill: Environmental Racism and Justice as Disability

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ARTICLE

MAKING ME ILL: ENVIRONMENTAL RACISM AND JUSTICE AS DISABILITY

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Civil rights legal scholars and practitioners have lamented the constraints of the largely intent-based legal framework required to challenge racial discrimination and injustice. As a result, they have sought alternative methods that seemingly require less overt proof of discrimination and are more equipped to address structural harm. One of these proposed solutions involves the use of the Americans with Disabilities Act (ADA)—due to its affirmative mandate to address discrimination by reasonable modification or accommodation—and the framing of issues of racial injustice in terms of disability or the deprivation of medical rights. Environmental justice, an area in which issues of both race and disability are salient and affect one another, is one such context in which advocates have tried to use the ADA to challenge broader structural harm. This Article analyzes cases in which practitioners have used the ADA to challenge issues of environmental injustice to examine the purported utility of the ADA, and disability and medicalization framing, more generally, in addressing structural racism and injustice. Specifically, I discuss the attempted use of the ADA

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to stop the construction of a petrochemical plant in "Cancer Alley," Louisiana and to challenge mold on behalf of public housing residents in New York City.

The use of the ADA to challenge environmental injustice has clear legal and social justice narrative benefits that explain its appeal, including the required inclusion of people with disabilities in environmental justice campaigns that disproportionately impact them, but from which they are often left out—except for as examples of the negative consequences of harm. However, the promise of these legal theories has not been adequately tested to proffer the ADA as a true alternative to race-based civil rights laws, and there are many suggestions that it is not. Furthermore, the use of disability as both narrative harm and legal strategy in environmental justice campaigns raises important considerations for racism and ableism as interrelated institutional harms. Therefore, any attempt to expand the disability frame in this direction requires an understanding of racism that does not exclude or otherwise undervalue ableism and vice versa. Otherwise, we risk perpetuating the same problems.

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INTRODUCTION

Like people of color and low-income people—both groups which many people with disabilities[1] also comprise—disabled people[2] are also disproportionately exposed to environmental harm.[3] Yet, the overexposure—or even exposure—of people with disabilities to environmental toxins has not necessarily been the driving force behind the exploration of the use of the ADA or the disability frame in environmental justice causes.[4] Civil rights attorneys and scholars, including environmental justice advocates, frustrated by the intent-based legal framework required to challenge racial discrimination under the Equal Protection Clause and the limitations of litigation under Title VI of the Civil Rights Act of 1964 have begun to seek

1 This Article defines "disability" as it is defined in the Americans with Disabilities Act ("ADA"), as a "physical or mental impairment that substantially limits one or more major life activities . . . a record of such an impairment; or . . . being regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1). Additionally, although I recognize that not everyone who is chronically ill identifies as disabled and vice versa, I am including chronic illness in my definition of "disability."

2 There is not uniform agreement within the disability community about whether it is best to use person-first language (that leads with the person in a description rather than with their disability, e.g., "person with a disability") or identity-first language (that leads with the person's disability, e.g., "disabled person") in order to destigmatize the notion of disability and claim it as a valid aspect of someone's identity). *See* Jevon Okundaye, *Ask a Self-Advocate: The Pros and Cons of Person-First and Identity-First Language*, MASS. ADVOCATES FOR CHILDREN (Apr. 23, 2021), https://www.massadvocates.org/news/ask-a-self-advocate-the-pros-and-cons-of-person-first-and-identity-first-language [https://perma.cc/L8NE-7LY8] (identifying different aspects of the debate between person-first and identity-first language). As a disabled person, who often describes myself as such, I vacillate between both forms in this Article.

3 Jayajit Chakraborty, *Unequal Proximity to Environmental Pollution: An Intersectional Analysis of People with Disabilities in Harris County, Texas*, 72 PRO. GEOGRAPHER 521, 522, 531 (2020). This Article specifically focuses on environmental harm as it disproportionately impacts communities of color and the resulting efforts led by people of color to address that.

4 *See infra* Part II, III (discussing the difficulty challenging environmental injustice under race-based laws and the consideration of the ADA as a potential alternative).

other methods to address structural harm.[5] One of the suggested alternatives has been the use of the ADA and the framing of issues of injustice, such as racism, in terms of disability or the deprivation of medical rights.[6] Both advocates and scholars contend that the ADA's affirmative requirement to address discrimination through reasonable modification or accommodation offers a potentially more promising method for addressing structural harm.[7]

This Article analyzes the use of disability as both narrative device and legal measure in environmental justice causes to examine the contention that the ADA or a medicalization framing of the denial of such rights[8] are more suitable vehicles for challenging systemic racism and oppression. It does so with an eye toward the connection between environmental justice and public health and the existing critique of the framing of disability as the unwanted result of environmental injustice.[9] Rather than prescribe a certain amount of ADA or disability usage in future environmental justice efforts, the goal of this Article is to interrogate the implications of the disability frame in an area in which both issues of race and disability are present and inform one another.

Part I provides a history of environmental justice as a field of advocacy led by people of color that focuses on the racially disproportionate impact of environmental harm. It also explains the environmental justice movement's emphasis on the effect of environmental toxins on health outcomes in communities of color.[10] Part II discusses the difficulty of challenging environmental racism under racial discrimination laws and the resulting exploration of disability and medicalization framing, more generally, as a potential alternative.[11] Part III analyzes environmental justice cases filed under the ADA, and considers whether the ADA's affirmative mandate to

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5 *See infra* Section II.A (discussing the difficulty challenging environmental injustice under civil rights race-focused laws).

6 *See infra* Part II, III (discussing the potential incorporation of the concept of "vulnerability" into environmental justice work and the attempted use of the ADA to challenge environmental injustice).

7 *See infra* Part III, IV (discussing the use of the ADA in environmental justice cases as a potential alternative and noting legal scholarship that champions the ADA to address racism and injustice).

8 I define "medicalization framing" as a school of legal thought "promot[ing] the civil rights of health," which emphasizes the "physical consequences of subordination" in order "to leverage new types of evidence to demonstrate civil rights harms and violations." *See* Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1170 (2020) (citing Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020)). For the purposes of this Article, I will use the term "medicalization" synonymously with the "disability frame."

9 *See infra* Section I.B; *see also* Catherine Jampel, *Intersections of Disability Justice, Racial Justice, and Environmental Justice*, ENV'T SOCIO., 2018, at 6 ("Fear of disability as difference, . . . does not belong in an intersectional [environmental justice].").

10 *See infra* Part I.

11 *See infra* Part II.

address discrimination via reasonable modification or accommodation is effective in challenging structural racism. This Part specifically discusses the attempted use of the ADA to stop the construction of a petrochemical plant in "Cancer Alley," Louisiana and to challenge the widespread mold in New York City public housing.[12] Part IV examines the implications of the use of disability to simultaneously highlight and combat environmental injustice and as a response to the limitations of civil rights and racial discrimination laws.[13] I conclude that the use of disability as both narrative harm and legal strategy in environmental justice campaigns illustrates important concerns about ableism[14], racism, and the limitations of the law to advance the rights of marginalized groups.[15]

The use of the ADA to challenge environmental injustice offers important potential legal benefits, namely the required inclusion of people with disabilities in environmental justice efforts they are disproportionately affected by but from which they are often excluded—except for as anecdotal examples of harm. It also provides an opportunity to illustrate and address the racial and health effects of environmental harm in ways neither traditional environmental nor civil rights laws currently allow. However, while it may to offer some promise, the ADA has not been sufficiently tested as a legal tool to challenge structural racism in a markedly different way from racial antidiscrimination laws. There are also many indications that it is not a true alternative and that it has potential pitfalls of its own, including the required manifestation or proof of a disability within the meaning of the ADA.

The use of the ADA to challenge environmental injustice also risks putting people without exact proximity or relationship to the disabled identity or experience in control of a narrative about disability. This can perpetuate misconceptions about disability, which may have compounded effects on disabled people of color that have not been sufficiently considered. Therefore, any expansion of the ADA or disability frame to address racial injustice must adequately address and account for the effects of ableism, especially as disability intersects with other marginalized identities, such as race. Not doing so risks perpetuating the structural harm that advocates seek to eradicate.

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12 *See infra* Part III.

13 *See infra* Part IV.

14 Ableism is a "system that places value on people's bodies and minds based on societally constructed ideas of normality, intelligence, excellence, desirability, and productivity." Talila A. Lewis, *January 2021 Working Definition of Ableism*, TL'S BLOG (Jan. 1, 2021), https://www.talilalewis.com/blog/january-2021-working-definition-of-ableism [https://perma.cc/3222-YW6E]. Ableism is also rooted in anti-Blackness and colonialism. *Id.* A person does not have to be disabled to experience ableism. *Id.*

15 *See infra* Part V.

I. ENVIRONMENTAL JUSTICE AS A FIELD OF ADVOCACY

This Part defines environmental justice as a field of advocacy that focuses on the disproportionate racial impact of environmental harm. First, it explores the history and origins of environmental justice, including the organizing efforts of communities of color to challenge environmental hazards in their neighborhoods. Then, it discusses the groups and issue areas central to environmental justice work and the integral relationship between environmental justice and public health.

A. *History and Origins*

Environmental justice is a framework and practice that examines and challenges the "inequitable distribution of environmental protection[.]"[16] It poses the ethical, political, and social questions of "who gets what, why, and how much" when it comes to pollution, sanitation, and other forms of environmental harm and degradation.[17] In 1982, ten-year-old Kimberly Burwell was among dozens of Warren County, North Carolina residents protesting the imminent dumping of 40,000 cubic yards of toxic polychlorinated-biphenyl (PCB)-laden soil into a state-created landfill.[18] "I don't want them to put that stuff here," Kimberly cried, as state troopers moved her onto a prison bus.[19] "I'm scared. I'm scared I might catch cancer."[20] Henry Brooker, another resident who already had cancer, expressed similar concerns about the risk of the disease's spread in the community if the soil was disposed of there.[21]

Kimberly's mother, Dollie Burwell, was one of the leaders of Warren County Citizens Concerned About PCBs (Warren County Citizens), a

16 Carita Shanklin, *Pathfinder: Environmental Justice*, 24 ECOLOGY L.Q. 333, 337 (1997).

17 *See* Robert D. Bullard, *Environmental Justice in the 21st Century: Race Still Matters*, 49 PHYLON, nos. 3-4, 2001, at 153-54.

18 Bob Drogin, *Over Protests, a Landfill Is Born*, PHILA. INQUIRER, Sept. 16, 1982, at A02.

19 *Id.*

20 *Id.* Some feedback I received on previous drafts of this article included discomfort with including an illness like cancer in my discussion about disability, given this Article's critique of the use of the disability frame. However, cancer is a disability under the ADA. *See, e.g.*, Angell v. Fairmount Fire Prot. Dist., 907 F. Supp. 2d 1242, 1250-51 (D. Colo. 2012), *aff'd*, 550 F. App'x 596 (10th Cir. 2013) ("Based upon the [American with Disabilities Amendments Act] and the [Equal Employment Opportunity Commission's] post-enactment regulations, several courts have held that a Plaintiff's cancer is a disability for purposes of the ADAAA, even when the cancer is in remission."). As such, I include it in my overall discussion of disability in this Article. This Article is not an attempt to find fault with anyone for being afraid of or not wanting to get cancer or any other disability. It is also not a judgment or criticism of anyone's individual feelings about their disability. Rather, it is an analysis of how disability is used to highlight the importance of environmental racism. Finally, I do not intend to conflate or otherwise compare the unique experiences associated with the range of various disabilities.

21 Mark Davis, *Protestors Oppose PCB Landfill*, CHARLOTTE NEWS, Sept. 13, 1982, at 3A.

community group that formed in opposition to the creation of the landfill.[22] Burwell believed the neighborhood supported the group's resistance efforts so wholeheartedly in part because they thought that "once the PCBs were put in Warren County that people would immediately start dying from cancer."[23] She estimated that hundreds of people attended community meetings to plan a response.[24]

Warren County had the highest percentage of Black residents in the state of North Carolina,[25] and community members believed that the state had ultimately chosen to put the contaminated soil in their neighborhood because they were Black, low-income, and lacked traditional political power and representation.[26] Although it was not the first battle chronologically, Warren County's opposition to the PCB landfill is often credited as the start of the environmental justice movement.[27]

The impetus for the Warren County PCB protests, and ultimately what came to be known as the environmental justice movement, was a trucking company's attempt to avoid the cost of proper disposal of illegal PCBs by spraying oil laced with the chemical along 210 miles of the North Carolina roadside.[28] The illegal dumping—which resulted in the conviction and imprisonment of three of the perpetrators—was the largest PCB spill in the history of the United States.[29] It left North Carolina and the United States Environmental Protection Agency (EPA) with the task of deciding how to clean it up.[30]

The state ultimately chose to make a landfill for the contaminated soil out of a soybean field in the predominantly Black, low-income, and politically unconnected Warren County.[31] Despite the county's failure to meet the EPA's

22 *See* Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE U. ENV'T L.J. 9, 12-13 (2007) (discussing Burwell's role in political advocacy in response to the landfill in Warren County).

23 *Id.* at 12.

24 *Id.* at 15.

25 *Id.* at 14.

26 *See id.* at 15-16 ("'We know why they picked us," the Reverend Luther Brown later told the Washington Post. 'It's because it's a poor county—poor politically, poor in health, poor in education and because its [sic] mostly Black . . . .'").

27 *See* Bullard, *supra* note 17, at 151 ("The environmental justice movement has come a long way since its humble beginning in Warren County . . . ."); *see also* Burwell & Cole, *supra* note 22, at 10 (describing the perception of Warren County as "the spark that lit the Environmental Justice Movement").

28 Burwell & Cole, *supra* note 22, at 11.

29 *Id.*

30 *Id.*

31 *Id.* at 11, 14-15; Drogin, *supra* note 18.

standards for the disposal of toxic waste, the state chose Warren County from a list of more than one hundred sites across thirteen counties.[32]

This scenario illustrates the racial and sociopolitical issues environmental justice seeks to address. Civil rights leader and former political prisoner, Ben Chavis, coined the term "environmental racism" to describe his experience in Warren County.[33] Environmental racism is defined as "any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color."[34]

The Warren County Citizens met, marched, and placed themselves in the paths of the trucks headed to the landfill.[35] They got arrested in an attempt to stop the delivery of poisonous soil they feared would make them sick.[36] Although they did not stop the creation of the landfill, they garnered nationwide media attention and support.[37] Their resistance led to both a Congressional report on the disproportionate placement of toxic landfills in Black communities in the South and, later, to a groundbreaking study by the United Church of Christ, *Toxic Wastes and Race*, which documents the increased likelihood that toxic waste facilities are located in Black communities nationwide.[38] The Warren County Citizens' activism brought the disparate impact of environmental policies, the power of community organizing, and the long-term impacts of environmental racism to the forefront. Furthermore, their fight highlights the inextricable connections between environmental racism and the inequitable reach of public health.

B. *Environmental Justice and Public Health*

As Warren County's fight illustrates, environmental justice organizing often challenges the siting of health hazards like waste facilities and landfills.[39] Communities and housing developments were also built on or surrounded by toxic waste dumps or other contaminants in places like Love Canal, New York and Times Beach, Missouri.[40] While traditional environmental advocacy is sometimes viewed or characterized as concerns

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32 Burwell & Cole, *supra* note 22, at 11-12, 14.

33 *Id.* at 23-24.

34 Bullard, *supra* note 17, at 160.

35 Burwell & Cole, *supra* note 22, at 21-23.

36 *Id.* at 13, 21.

37 *See id.* at 21-23, 27-28 (relaying that although there were many reporters present to witness the confrontation, the state still "largely completed disposal of the contaminated soil").

38 Burwell & Cole, *supra* note 22, at 10, 37-38; *see also* Bullard, *supra* note 17, at 150-51 (discussing the national political engagement that followed the Warren County Citizens' protest).

39 LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 22 (2001).

40 *Id.*

about or fondness for the wilderness and nature,[41] public health and the preservation of the environment have always been inextricably linked. Public health refers to what society does as a collective "to assure the conditions in which people can be healthy," and environmental law is a subset of public health law.[42] Modern environmental law is rooted in late nineteenth century goals of preservation of the American wild framed in part around the desire to protect the public from the negative health impacts associated with increased industrialization and the dense populations of growing cities.[43] Scholars and environmental justice advocates Luke Cole and Sheila Foster describe the history of the environmental justice movement in terms of several related "tributaries" that feed into a river, including the antitoxics movement, the civil rights movement, and the limitations of traditional environmentalism.[44] First, the antitoxics movement helps explain how the environmental justice movement worked to change the priorities and perception of environmental advocacy from the protection and appreciation of nature to the impact of the environment on public health.[45]

The trend of communities being built on or surrounded by toxic waste facilities led to the important shift from the traditional environmental focus on the preservation of nature to the environmental justice's movement's focus on "land use, social impact, [and] human health."[46]

In an effort to address these concerns, the antitoxics movement developed strategies for pollution reduction and prevention that became central to environmental justice and later to national policy.[47]

The threat of environmental racism to the public health is arguably the crux of the environmental justice movement.[48] In 1991, the First National People of Color Environmental Leadership Summit convened.[49] An important event in the history of the environmental justice movement, it explicitly expanded the movement's focus beyond toxics to include public

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41 *See, e.g.*, *id.* at 28-29.

42 Jessica L. Roberts, *Health Law As Disability Rights Law*, 97 MINN. L. REV. 1963, 1974 (2013).("Public health law has many branches, such as environmental law . . . ."); *see also* Barry S. Levy, *Twenty-First Century Challenges for Law and Public Health*, 32 IND. L. REV. 1149, 1150 (1999) (listing environmental law as one of the eight areas of public health law).

43 Pamela A. Campos, *Disability Panic and Environmental Advocacy*, NAT. RES. & ENV'T, Fall 2021, at 41, 42 ("As public hygiene efforts developed, so did efforts to conserve and preserve public lands.").

44 COLE & FOSTER, *supra* note 39, at 20-32.

45 *Id.* at 22-24.

46 *Id.*

47 *Id.* (citing ANDREW SZASZ, ECOPOPULISM: TOXIC WASTE AND THE MOVEMENT FOR ENVIRONMENTAL JUSTICE 40 (1994)).

48 *See, e.g.*, Bullard *supra* note 17, at 154.

49 *Id.* at 152.

health.[50] Furthermore, in 1994, President Clinton signed Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," during a national health symposium.[51] Thus, the environmental justice movement explicitly connected issues of race and public health by emphasizing the impact of environmental policies on health outcomes in communities of color.

II. THE LIMITATIONS OF THE CIVIL RIGHTS LEGAL STRATEGY IN ENVIRONMENTAL JUSTICE CASES

Although the antitoxics movement "tributary" helped focus the environmental justice movement on health outcomes in communities of color, the beginning of the environmental justice movement in the 1970s also coincided with the end of the mainstream Civil Rights Movement.[52] Additionally, the environmental justice movement's focus on the impact of environmental racism initially facilitated a natural convergence between environmental justice and race-based civil rights strategies.[53] In light of studies revealing the racially discriminatory siting of waste facilities nationwide, environmental justice advocates were especially eager to challenge environmental racism under laws prohibiting racial discrimination, such as the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964.[54] The relationship between environmental justice and civil rights may also have formed out of practical necessity, because white-led environmental organizations did not reflect the concerns of communities of color in their staffing or advocacy agendas.[55] Thus, civil rights

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50 *Id.*

51 *Id.*

52 *See* COLE & FOSTER, *supra* note 39, at 20 (describing the civil rights movement of the "1950s, 1960s, and 1970s" as a significant contributor to the rise of the environmental justice movement).

53 *See, e.g.*, Veronica Eady, *Warren County and the Birth of A Movement: The Troubled Marriage Between Environmentalism and Civil Rights*, 1 GOLDEN GATE U. ENV'T L.J. 41, 43 (2007) ("The environmental justice movement has been inextricably tied to the civil rights movement since the day of protests at Warren County . . . . The very term 'environmental racism' brought into the fold people oppressed because of the color of their skin."); Meagan Elizabeth Tolentino Garland, *Addressing Environmental Justice in Criminal Sentencing Process: Are Environmental Justice Communities "Vulnerable Victims" Under 3a1.1(b)(1) of the Federal Sentencing Guidelines in the Post United States v. Booker Era?*, 12 ALB. L. ENV'T OUTLOOK J. 1, 9 (2007) ("The [environmental justice] movement . . . is deeply rooted in, and follows a similar ideology to that which was followed during the Civil Rights Movement.").

54 Garland, *supra* note 53, at 14-15.

55 Eady, *supra* note 53, at 41-42 (discussing letters by environmental justice advocates complaining of racist hiring practices and questioning certain organizations' commitment to environmental justice).

lawyers often took up the cause of environmental justice on behalf of communities of color.[56]

A. *The Challenge of Racial Discrimination Claims*

This Part outlines the difficulty of applying racial discrimination litigation strategies in the environmental justice context. First, it explains the challenges associated with the requirement to prove discriminatory intent. Then, it discusses the restrictions on disparate impact lawsuits.

1. Intentional Discrimination

The fusion of racial discrimination claims into environmental justice advocacy did not go as smoothly as advocates might have envisioned. Legal requirements to show discriminatory intent proved to be extremely difficult to navigate. For example, in 1971, *Harrisburg Coalition Against Ruining the Environment v. Volpe*, credited as the first environmental justice lawsuit, challenged the construction of an interstate highway through a park in a predominantly Black neighborhood under the Fourteenth Amendment and the Civil Rights Act of 1964.[57] The complaint was dismissed based on insufficient evidence of the defendants' discriminatory motives.[58]

In 1977, the Supreme Court clarified the requirements to prove racially discriminatory purpose or intent to demonstrate a violation of the Equal Protection Clause in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[59] The Court held that the relevant factors in determining a discriminatory purpose include whether the challenged action has a disparate impact on one race or another; the history of a challenged action or decision, including the series of events leading up to it, especially if they help to explain the deciding official's motives; and the legislative or administrative history, including statements by decisionmakers, as noted in meeting minutes or reports.[60] The decision crystallized the already difficult task of proving discriminatory intent.

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56 *Id.* at 42.

57 330 F. Supp. 918, 921 (M.D. Pa. 1971), *supplemented by*, 381 F. Supp. 893 (M.D. Pa. 1974), *supplemented by*, 65 F.R.D. 608 (M.D. Pa. 1974); *see also* Adam Swartz, *Environment Justice: A Survey of the Ailments of Environmental Racism*, 2 HOW. SCROLL 35, 43 (1993) ("Environmental equity jurisprudence begins with [*Harrisburg Coalition*].").

58 *Harrisburg Coalition*, 330 F. Supp. at 926-27; Swartz, *supra* note 57, at 43 ("[T]he first environmental justice decision turned upon proof of the defendant's improper purposes.").

59 429 U.S. 252, 265 (1977).

60 *Vill. of Arlington Heights*, 429 U.S. at 266-68. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court established

In the wake of *Arlington Heights*, a Black community in Houston challenged the Texas Department of Health's (TDH) decision to grant a permit to construct a waste facility in their neighborhood under the Equal Protection Clause in *Bean v. Southwestern Waste Management Corp.*[61] *Bean* was the first lawsuit to challenge the siting of a waste facility under civil rights law.[62] But the district court rejected plaintiffs' claims based on the failure to prove intentional race discrimination as *Arlington Heights* required.[63]

The plaintiffs advanced two theories of racial discrimination: first, that TDH's approval of the permit represented a pattern or practice of discriminatory placement of waste facilities and second, that TDH's approval of the permit, in light of the history of the discriminatory placement of waste facilities and the events concerning the application for that waste facility, was discriminatory.[64] With respect to plaintiffs' first theory of discrimination, the court stated that the appropriate inquiry was the "minority population of the areas" on the dates on which TDH-approved waste sites opened .[65] The court found that "[o]f all the solid waste sites opened in the target area, 46.2 to 50% were located in census tracts with less than 25% minority population at the time they opened."[66]

Although plaintiffs included data for waste sites approved in the target area where the minority population was seventy percent at the date on which the waste sites opened, those sites were approved by the Texas Department of Water Resources (TDWR), not the TDH. Plaintiffs did not name TDWR as a defendant because that agency did not issue the permit for the challenged waste facility.[67] While the court acknowledged that evidence of TDWR's history of discriminatory waste facility placement might be relevant to the question of whether the defendant TDH had knowledge of its fellow municipal agency's history of discrimination, it declined to hold TDH responsible for TDWR's historical policies or practices.[68] Rather, the court

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> five ways to prove that a government decision was motivated by a discriminatory purpose: (i) the disparate impact of the law, (ii) a history of official governmental racism, (iii) the sequence of events leading to the decision, (iv) departures from normal decision making procedures, and (v) legislative or administrative history, such as statements and minutes. The first factor—disparate impact—is rarely sufficient alone to prove disparate intent.

Swartz, *supra* note 57, at 44.

61 482 F. Supp. 673, 674-75 (S.D. Tex. 1979); *see also* Swartz, *supra* note 57, at 45.

62 Bullard, *supra* note 17, at 151.

63 *Bean*, 482 F. Supp. at 677.

64 *Id.* at 677-78.

65 *Id.* at 677.

66 *Id.*

67 *Id.* at 676.

68 *Id.*

concluded that the "available statistical data, both city-wide and in the target area" did not demonstrate a pattern or practice of discrimination.[69]

The court also found plaintiffs' second theory of discrimination to be unpersuasive.[70] The plaintiffs alleged that TDH's approval of the permit was discriminatory in the context of the historical placement of waste facilities and the events surrounding the permit application.[71] The court noted that the plaintiffs offered three sets of data in support of their theory: (1) both of the two solid waste sites the City of Houston used were located in the target area; (2) the target area, which was 70% people of color, contained 15% of Houston's solid waste sites but only 6.9% of its population; and (3) only 17.1% of the City's solid waste sites were located in neighborhoods where 53.3% of white residents lived.[72]

The court held that while plaintiffs may have proven that TDH's decision to grant the permit was "both unfortunate and insensitive[,]" they did not establish by a substantial likelihood that the decision was motivated by racial discrimination as *Arlington Heights* requires.[73] Thus, the combination of being required to prove intent to discriminate and the extreme difficulty of producing sufficient evidence to meet the *Arlington Heights* factors effectively dooms Equal Protection challenges in the environmental justice context.[74]

2. Disparate Impact

In recognition of the difficulty of proving intentional race discrimination, Robert Bullard, the expert and statistician in *Bean*, who is widely known as the "Father of Environmental Justice,"[75] proffered disparate impact as the appropriate alternative standard for an environmental justice framework because it "shifts the burden of proof to polluters/dischargers who do harm, discriminate, or who do not give equal protection to racial and ethnic

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69 *Id.* at 677-78.

70 *Id.* at 678.

71 *Id.*

72 *Id.*

73 *Id.* at 680.

74 *See* Swartz, *supra* note 57, at 43 (discussing the difficulty for plaintiffs of proving both discriminatory effects and intent); *see also* E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cty. Plan. & Zoning Comm'n, 706 F. Supp. 880, 881, 884, 887 (M.D. Ga.), *aff'd*, 888 F.2d 1573 (11th Cir. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989) (holding that Black residents could not prove intentional discrimination because there was insufficient evidence that approving a landfill in a particular census tract was motivated by racial discrimination).

75 DR. ROBERT BULLARD FATHER OF ENVIRONMENTAL JUSTICE, https://drrobertbullard.com [https://perma.cc/3MEQ-WLX8]; *see also* Linda McKeever Bullard & Luke Cole, *A Pioneer in Environmental Justice Lawyering: A Conversation with Linda McKeever Bullard*, RACE, POVERTY, & ENV'T, Fall 1994/Winter 1995, at 17, 18 (describing the expertise that Robert Bullard would provide in arguing a "pattern and practice" of locating landfills in Black neighborhoods).

minorities, and other 'protected' classes" and "would allow disparate impact and statistical weight, as opposed to 'intent,' to infer discrimination."[76] However, despite advocates' hopes, disparate impact litigation did not ultimately provide lasting relief from the burden of proving intentional discrimination.

In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, residents brought a disparate impact lawsuit under Title VI of the Civil Rights Act of 1964,[77] alleging that the state agency's grant of a permit to an air polluting cement processing facility in a predominantly Black and Latinx community was racially discriminatory.[78] The plaintiffs also alleged that members of their community had disproportionate rates of asthma and other respiratory conditions.[79]

The court addressed two issues: first, whether the criteria and methods the state agency used to evaluate the air permit applications without considering the health and environmental circumstances of the community the facility would be located in violated Title VI and secondly, whether the agency's decision to issue the air permits in that community constituted disparate impact based on race.[80] To establish a prima facie disparate impact case, a plaintiff must show, by a preponderance of the evidence, that the disputed action has a disproportionately adverse impact on one race in comparison to another.[81] Once the plaintiff establishes disparate impact, the burden shifts to the defendant to articulate a "legitimate, non-discriminatory reason" for the action.[82] Finally, if the defendant provides such a reason, the burden shifts back to the plaintiff to prove that the defendant either failed to consider an equally effective but less discriminatory alternative or that the defendant's stated reason is a pretext for racial discrimination.[83] After considering the health of the community, including disproportionately high rates of cancer, and evaluating outreach in the neighborhood before the permit was issued, the court found that the plaintiffs established a prima facie disparate impact racial discrimination case.[84]

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76 Bullard, *supra* note 17, at 154.

77 See 42 U.S.C. § 2000d, which 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."

78 S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 145 F. Supp. 2d 446, 450-51 (D.N.J.), *amended by*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001).

79 *Id.* at 451.

80 *Id.*

81 *Id.* at 483.

82 *Id.*

83 *Id.*

84 *Id.* at 452, 455-56, 461.

However, disparate impact was not ultimately the saving grace for racial discrimination claims. Shortly after the decision in *South Camden*, the Supreme Court in *Alexander v. Sandoval* held that there was no private right of action to bring disparate impact claims under Title VI of the Civil Rights Act of 1964.[85] After *Sandoval*, the only remaining option to challenge racism in environmental justice was to file an administrative complaint alleging disparate impact.[86] Title VI advocates lament the lack of strong enforcement of such complaints.[87] Frustrated by the difficulties of proving legal claims of racial discrimination, civil rights scholars and practitioners have ventured to find new methods of addressing structural racism and harm.[88]

B. *Vulnerability Theory and the Road to Disability as a Potential Alternative*

In recognition of the limits of equal protection-based jurisprudence, Professor Martha Fineman proposes an alternative approach rooted in the vulnerability of humanity.[89] Fineman argues that antidiscrimination law is rooted in a model of equality that focuses on "sameness of treatment" and does little to "resist or upset persistent forms of subordination and domination" due to a presumption that all humans are naturally free and

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85 Alexander v. Sandoval, 532 U.S. 275, 291-92 (2001); *see also* Eady, *supra* note 53, at 45 ("*Alexander v. Sandoval* effectively shut the doors to civil rights cases under Title VI of the federal Civil Rights Act of 1964 absent proof of intent."); 42 U.S.C. § 2000d (codifying disparate impact claims only if lodged via administrative, rather than civil, complaints). The court in *South Camden* noted that plaintiffs' claims hinged on the theory that a private right of action was implied under Title VI, a strategy which could be foreclosed depending on the result in *Sandoval, which* was then pending before the Supreme Court. *S. Camden Citizens in Action*, 145 F. Supp. 2d 446 at 473.

86 Eady, *supra* note 53, at 45.

87 *See* Marianne Engelman Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PA. J.L. & SOC. CHANGE 281, 295 (2019) (discussing the limitations of the EPA's civil rights compliance, with problems that included inadequate adjudication of Title VI complaints).

88 *Arlington Heights* and the near-impossibility of proving intentional race discrimination was a blow to environmental justice cases throughout the 1970s and 80s, and *Sandoval*'s elimination of a private right of action to enforce Title VI disparate impact cases in 2001 forced environmental justice advocates who wanted to bring civil rights-based claims to completely regroup. *See* Lisa S. Core, Alexander v. Sandoval*: Why A Supreme Court Case About Driver's Licenses Matters to Environmental Justice Advocates*, 30 B.C. ENV'T AFF. L. REV. 191, 225 (2002) ("*Sandoval* forced environmental justice advocates and plaintiffs—including the parties in the Camden cement case—to rethink their litigation strategies."); *see also* Sheila R. Foster, *Vulnerability, Equality, & Environmental Justice: The Potential & Limits of Law*, *in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 137 (Ryan Holifield, Jayajit Chakraborty, & Gordon Walker eds., 2017); Kimani Paul-Emile, *Blackness as Disability*, 106 GEO. L.J. 293, 312-19 (2018); Konnoth, *supra* note 8, at 1168; Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 798-800 (2020).

89 Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2-3 (2008).

"endowed with the same unalienable rights."[90] She also notes the lack of protection afforded to groups that are not subject to heightened scrutiny, like people with disabilities.[91] As a result, Professor Fineman suggests a plan to protect the vulnerable instead.[92]

She defines vulnerability as a "universal, inevitable, enduring aspect of the human condition" and argues that because everyone experiences vulnerability for different reasons at different times, the state, which in the American legal system typically prides itself on restraint and abstention that limits its responsiveness to inequality, would be forced to step in to protect the vulnerable.[93] This is a "post-identity" approach, that focuses on the benefits certain groups received based on "privilege and favor conferred on limited segments of the population by the state and broader society through their institutions[,]" rather than on membership in a specifically defined group.[94]

Notably, despite acknowledging the traditional definition of "vulnerable," as well as its association with "victimhood, deprivation, dependency, or pathology" and its use in public health discourse, Fineman aims to strip the term of these connotations in favor of emphasizing its universality.[95] She contends that vulnerability "freed from its . . . negative associations is powerful" and thus shapes the state's duty to provide more support than the equal protection model.[96] However, despite Fineman's desire to rid the word "vulnerability" of its usual connotations, the theoretical framework she posits, with its emphasis on the ineffectiveness of treating different people with inevitably varying levels of need for support the same, is reminiscent of a disability-based framework.[97]

While Professor Fineman emphasizes the purported universality and destigmatization of vulnerability, Professor Sheila Foster regrounds the term in the public health analysis characteristic of the environmental justice movement. Much like the constraints of the traditional environmentalism

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90 *Id.* at 2.

91 *Id.*

92 *Id.* at 8-9.

93 *Id.* at 5, 8, 10.

94 *Id.* at 1.

95 *Id.* at 8-9.

96 *Id.* at 9.

97 *See, e.g.*, Dr. Angélica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 2021 WIS. L. REV. 269-70, 273 n.16 (2021) (citing Martha Fineman's vulnerability theory in a critique of the medical model of disability); *see also* Andrew Gerst & Tara Schwitzman-Gerst, *Disabling Inequity: How the Social Model of Disability Resists Barriers to Social Security Disability Benefits*, 44 N.Y.U. REV. L. & SOC. CHANGE 145, 150 (2020) ("The medical model frames disability as an individual defect, or deficit, in need of diagnosis, treatment, and remediation.").

"tributary" that led to the environmental justice movement,[98] Foster argues that environmental regulation has not adequately addressed environmental justice concerns because it does not account for the characteristics and needs of groups that have different levels of susceptibility to environmental harm.[99] Thus, Foster refines Fineman's argument by highlighting that while the instance of vulnerability may be universal, the nature and extent of that vulnerability are not. Building on Fineman's work in her own proposed solution to the limits of antidiscrimination law, Foster argues that a focus on vulnerability rather than antidiscrimination can provide a way to combat structural inequality in a so-called post-racial world that is reluctant to acknowledge the persistence of discrimination and inequality.[100]

While acknowledging that some environmental laws consider vulnerable or "sensitive populations," including people with "asthma, emphysema, or other conditions," when determining acceptable risks of pollution exposure, Foster calls for "legal and administrative structures" to include "vulnerability metric[s] into their harm assessments."[101] She argues that vulnerability analysis has "the potential to provide the missing conceptual and practical link between equality norms and environmental regulation."[102] The history of the environmental justice movement, with its emphasis on the health impacts of hazardous substances and sites placed in communities of color,[103] suggests why disability is arguably the next logical step to providing the "conceptual and practical link" that measures the vulnerable populations both subject to and resulting from environmental harm.

III. THE ADA AS AN ANSWER TO THE LIMITATIONS OF TRADITIONAL ANTIDISCRIMINATION LAWS

Like other laws intended to protect and advance the rights of marginalized groups, the ADA is a civil rights law rooted in antidiscrimination that aims to prevent subordination based on protected or specific traits.[104] However, the ADA differs from many civil rights laws because it requires what others

98 *See* COLE & FOSTER, *supra* note 39, at 28-30 (discussing how traditional environmentalists relied on legal and scientific strategies based on environmental laws, rather than focusing on environmental justice issues).

99 Foster, *supra* note 88, at 140.

100 *Id.* at 144.

101 *Id.* at 146.

102 *Id.* at 142.

103 COLE & FOSTER, *supra* note 39, at 22; *see also* Charles Lee, *Warren County's Legacy for the Quest to Eliminate Health Disparities*, 1 GOLDEN GATE U. ENV'T L.J. 53, 57-58 (2007).

104 Roberts, *supra* note 42, at 1975.

have deemed "positive differential treatment."[105] State and local governments and places of public accommodation, covered by Titles II and III of the ADA, respectively, require "reasonable modifications in policies, practices, or procedures . . . unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[106] Similarly, Title I of the ADA, which prohibits discrimination in employment, requires employers to provide reasonable accommodations, unless doing so would pose an undue hardship.[107]

While disabled people and disability rights advocates know that its implementation has not been ideal,[108] the reasonable accommodation requirement is thought to have revolutionized antidiscrimination law by creating an "affirmative obligation" for entities to take steps *not* to discriminate.[109] Unlike equal protection discrimination claims, courts have found that Title II of the ADA does not require proof of intentional discrimination,[110] and many scholars view the ADA as providing an unprecedented level of protection for a "discrete and insular minority."[111] Thus, with the door to challenging environmental racism through actual race

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105 Roberts, *supra* note 42, at 1975; *see also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 14 (1996) (likening the reasonable accommodation requirement to affirmative action); Michael S. Heyl, *Circumventing Environmental Policy: Does the Americans with Disabilities Act Provide Protection Where Environmental Statutes Don't?*, 18 J. CONTEMP. HEALTH L. & POL'Y 323, 330 (2001) ("Of particular relevance to an ADA cause of action is that Title II requires public entities to make reasonable accommodations to their policies, practices, and procedures where it is necessary to avoid discrimination on the basis of a disability.").

106 28 C.F.R. § 35.130(b)(7)(i); *see also* Mark C. Weber, *Program Access Under Disability Discrimination Law*, 71 SYRACUSE L. REV. 765, 770 (2021) (stating the Title II standard); 42 U.S.C. § 12182 (explaining that failure to provide reasonable modification constitutes discrimination in public accommodations unless it's demonstrated that such modifications would "fundamentally alter" the nature of the goods or services offered); Roberts, *supra* note 42, at 2001 (explaining the Title III standard). Moving forward, I will refer to the mandate as the "reasonable accommodation" requirement for uniformity purposes unless I am discussing it in the context of a specific ADA title or case.

107 Weber, *supra* note 106, at 770 (stating the Title I standard).

108 *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 23-24 (2004) ("[The reasonable accommodation] requirement, after all, is thought to be the ADA's great innovation, a tool that goes beyond a mere nondiscrimination rule to demand the alteration of societal structures that, however unintentionally, stand in the way of opportunities for people with disabilities.").

109 Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 35 (2000).

110 *See* Heyl, *supra* note 105, at 329.

111 *See, e.g.*, McGowan, *supra* note 109, at 31, 35 (describing the ADA as "much stronger medicine than Title VII's general, vague, and negative" language); Paul-Emile, *supra* note 88, at 325-26 ("Moreover unlike . . . disparate impact claims, plaintiffs . . . need not amass statistical evidence to show that the defendant's seemingly neutral policy or practice disadvantaged one group relative to another. Rather the plaintiff need only show that the defendant's policy or practice disadvantaged a qualified individual with a disability.").

discrimination claims effectively closed, some practitioners began to evaluate the use of disability laws to challenge environmental injustice.[112]

This Part explores the application of the ADA in environmental justice cases. First, the Article examines litigation to stop the construction of a petrochemical plant in "Cancer Alley," Louisiana in *Lewis v. Foster* before discussing a lawsuit to combat mold in public housing in New York City in *Baez v. New York City Housing Authority*.

A. *Filing* Lewis v. Foster

In 1996, Shintech, Inc. proposed the construction of a new polyvinyl chloride (PVC) plant in the predominantly Black and low-income community of Convent, Louisiana, in St. James Parish.[113] The parish, which spans from Baton Rouge to New Orleans, was already home to more than 150 petrochemical plants and refineries.[114] Residents nicknamed the area "Cancer Alley" after noticing the number of people dying from various forms of cancer, and the proposed plant was expected to emit approximately three million tons of pollutants per year, all of which were carcinogens.[115]

Barbara Olshansky, the attorney who developed and filed *Foster*, was then an attorney at the Center for Constitutional Rights (CCR).[116] Olshansky recalled traveling to Louisiana after Ron Daniels, then-executive director of CCR, got a call asking CCR to meet with environmental justice advocates in Convent, where it was not safe to cook with or drink the water and "all of the people [there] were so ill."[117] The community members had been part of an ongoing EPA complaint for several years,[118] but because they were approaching the statute of limitations for a civil rights lawsuit, they were looking for alternative legal options to stop the plant's construction.[119]

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112 *See, e.g.*, Alina Das, *The Asthma Crisis in Low-Income Communities of Color: Using the Law as a Tool for Promoting Public Health*, 31 N.Y.U. REV. L. & SOC. CHANGE 273, 275 (2007) (identifying disability rights as one of four areas of law that "hold the most promise" for challenging conditions that exacerbate asthma in communities of color).

113 *See* Oliver A. Houck, *Shintech: Environmental Justice at Ground Zero*, 31 GEO. ENV'T L. REV. 455, 459-60 (2019) ("St. James was [already] a vulnerable place to live."); *see also* Idna G. Castellón, *Cancer Alley and the Fight Against Environmental Racism*, 32 VILL. ENV'T L.J. 15, 37 (2021) ("The controversy started when Shintech was trying to build a PVC plant in Convent, Louisiana. Like most areas in Cancer Alley, Convent was a mostly poor, African American community.").

114 Castellón, *supra* note 113, at 15.

115 *Id.* at 15, 37.

116 Zoom Interview with Barbara Olshansky, Independent Consultant, Ctr. for Const. Rsch. (June 9, 2022).

117 *Id.*

118 *Id.*; *see also* Associated Press, *Rights Leaders Fight EPA Permit*, DAILY REV., Aug. 27, 1997, at 6 (discussing the EPA complaint's role in the Shintech plant fight).

119 Zoom Interview with Barbara Olshansky, *supra* note 116.

Discussing the options she considered before deciding on a litigation strategy, Olshansky explained that the EPA controls Clean Air Act (CAA) enforcement unless it grants the state authority to run its own program.[120] If a state runs its own CAA program, it must first have a state implementation plan (SIP) that shows that several pollutants are below a certain level before the state can grant their own permits.[121] Olshansky knew that she did not have time to obtain and review Louisiana's SIP for nonattainment in order to challenge the state's issuance of a permit to Shintech under the CAA.[122] She also wanted to make sure the state knew that people were sick, and that granting Shintech the permit "was going to take life years away from people."[123] Olshansky had only previously litigated one ADA case, and she worried about potentially creating bad precedent under the ADA, but the people of Convent were also clear that they did not want to lose the opportunity to file a civil rights case.[124] Therefore, because Olshansky did not have time to develop and file a Clean Air Act case before the statute of limitations ran out and she felt the ADA fit the conditions under which the people of Convent were already living because she knew people "had been sick for a long time and were really ill[,]" she decided to use the ADA.[125]

At the time the case was filed in 1998, the ADA had only been enacted eight years prior, and Olshansky knew of only one case using it to challenge environmental injustice, a case in which someone with asthma had challenged the practice of leaf burning.[126] Her decision to use the ADA was not a popular one. She recounted other legal advocates questioning whether she knew what she was doing, with some advocates in the community not wanting to "embarrass" Louisiana with a civil rights lawsuit alleging the state discriminated against people with disabilities.[127] Although she included Equal Protection claims in the complaint,[128] Olshansky herself wondered whether she was "laying a non-racial blanket on top of a fundamentally racial problem" by using the ADA.[129]

In the case CCR ultimately filed, *Lewis v. Foster*, Convent, Louisiana residents with chronic asthma and other conditions brought a class action

120 *Id.*; *see also SIP Requirements in the Clean Air Act*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/air-quality-implementation-plans/sip-requirements-clean-air-act [https://perma.cc/9EPG-EPGN].

121 Zoom Interview with Barbara Olshansky, *supra* note 116.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 Zoom Interview with Barbara Olshansky, *supra* note 116.

127 Zoom Interview with Barbara Olshansky, *supra* note 116.

128 *See* Complaint at ¶ 58, Lewis v. Foster, No. 2:98-cv-01563 (E.D. La. May 26, 1998).

129 Zoom Interview with Barbara Olshansky, *supra* note 116.

lawsuit against the Louisiana Department of Environmental Quality (LDEQ) on behalf of themselves and others who lived, worked, or were otherwise present in Convent with chronic or severe asthma, lung cancer, respiratory or other terminal illnesses under the ADA and Section 504 of the Rehabilitation Act of 1973. Section 504 of the Rehabilitation Act prohibits agencies that receive federal funding from discriminating against people with disabilities.[130] The lawsuit sought to enjoin LDEQ from issuing the permit to Shintech to construct the chemical plant on the grounds that the plaintiffs had "suffer[ed] significant health effects due to the cumulative air emissions from the numerous petrochemical facilities located in their community."[131]

Relying on Title II of the ADA's prohibition against discrimination in the provision of state and local governments' programs, services, or activities,[132] plaintiffs alleged defendants' plan to grant a permit to Shintech would "greatly adversely [affect] their health" and that they were being "denied participation in . . . the benefits of the services, programs, or activities" of their parish and state because defendants "failed to protect [them]" and "exacerbated [their] condition[s]."[133] Several plaintiffs alleged that they had to miss time at school or could not go out into the community because of their conditions and existing air emissions.[134] One plaintiff went into full respiratory arrest and collapsed while driving after being caught in a cloud of benzene.[135]

The claims in *Foster* were not ultimately litigated because Shintech withdrew its proposal after two years of community opposition,[136] and the case was dismissed as moot.[137] However, defendants filed a motion to dismiss prior to Shintech's withdrawal.[138] Illustrating advocates' need for an alternative to traditional race discrimination claims, the defendants challenged plaintiffs' Equal Protection claims in their motion to dismiss, contending that "[n]either gender nor race [was] at issue" in the case

130 Complaint, *supra* note 128, at ¶¶ 1, 8, 9, 10, 11, 12, 13, 14, 19; *see also* 29 U.S.C. § 794 ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his 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 . . . .").

131 Complaint, *supra* note 128, at ¶ 1.

132 *See* 42 U.S.C. § 12132 ("[N]o 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 . . . .").

133 Complaint, *supra* note 128, at ¶ 1.

134 *Id.* at ¶ 9.

135 Houck, *supra* note 113, at 460-61.

136 *See* Castellón, *supra* note 113, at 24.

137 Docket at No. 24, Lewis v. Foster, No. 2:98-cv-01563 (E.D. La. May 26, 1998) (denying defendant's motion to dismiss as moot due to plaintiffs' motion to dismiss without prejudice).

138 *See* Memorandum in Support of Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment, *Foster*, No. 2:98-cv-01563 (E.D. La. August 18, 1999).

concerning its decision about whether to grant a permit to construct a facility that would exacerbate environmental pollution and harm in the majority Black community.[139] Their remaining arguments assist in the analysis of whether or not the ADA is a valid alternative to racial discrimination claims.

First, the state contended that plaintiffs were not "qualified individuals with a disability" because asthma was not a disability under the ADA.[140] Defendants argued that in order to survive summary judgment, the burden was on the plaintiffs to establish the existence of an impairment that substantially limits a major life activity.[141] The state asserted that none of the plaintiffs alleged that they could not work, and the fact that plaintiffs took daily medicine to control their asthma symptoms suggests that they were not substantially impaired in the major life activity of breathing.[142] Further, although minor plaintiffs alleged they were unable to play outside while chemicals were being released, defendants claimed that "this allegation alone does not establish a disability . . . ."[143] The defendants' arguments show that the ADA is not free of difficult proof requirements.

People with disabilities regularly face skepticism concerning whether they are actually disabled or "disabled enough" for the relief they seek.[144] Such questions often require verification from medical providers.[145] Additionally, the question of whether asthma is a disability under the ADA is still not settled federal law.[146] Thus, while ADA claims may not require the same proof

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139 *Id.* at 18; *see also* Castellón, *supra* note 113, at 16 ("Most of Cancer Alley's residents are impoverished African Americans who live near, or next to, petrochemical plants.").

140 Memorandum in Support of Motion to Dismiss, *supra* note 138, at 13.

141 *Id.*

142 *Id.*; *see, e.g.*, Ellis v. Georgetown Univ. Hosp., 723 F. Supp. 2d 42, 49-50 (D.D.C. 2010) (holding that a plaintiff with asthma was not disabled within the meaning of the ADA because her asthma was "well controlled by medication" such that it could not be found to substantially limit the major life activity of breathing); *see also id.* at 49 (explaining that if an impairment's impact can be negated by changing that individual's work environment that impairment does not "substantially limit" a major life activity).

143 Memorandum in Support of Motion to Dismiss, *supra* note 138, at 14.

144 *See, e.g.*, Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 L. & SOC'Y REV. 1051, 1057 (2019) (discussing how disabled people have historically been viewed as "faking" and how this stereotype has persisted).

145 *See, e.g.*, Dorfman, *supra* note 144, at 1079 ("People with disabilities often need to prove their disabilities daily, not only to health professionals or judges but also to ordinary people.").

146 *See* Lochridge v. City of Winston-Salem, 388 F. Supp. 2d 618, 626 (M.D.N.C. 2005) (holding that plaintiff with asthma was not disabled within the meaning of the ADA and that the determination of whether a person is disabled is "an individualized inquiry"); *see also* Faircloth v. Duke Univ., 267 F. Supp. 2d 470, 473 (M.D.N.C. 2003) ("[A]lthough a court may easily conclude that a plaintiff's asthma is not a disability in a particular case, the determination of whether it constitutes a disability or not is necessarily made on a case-by-case basis based on facts presented to the Court.").

of intent to discriminate that race discrimination claims do,[147] tying reasonable accommodations to proof of membership in the protected class may be an obstacle because disability is not an automatic, legally recognized trait.

Next, the defendants in *Foster* argued that they did not discriminate against plaintiffs "by reason of their disability."[148] The state cited Title I employment discrimination cases in response to the plaintiffs' Title II claim asserting that "[a]n essential element of a cause of action under the ADA or the Rehabilitation Act is that the defendant knew of the plaintiff's disability and discriminated against the plaintiff solely for that reason."[149] Although the State arguably read an impermissible intent requirement into the statute,[150] the argument raises an important issue: at this stage, it is unclear whether a government entity's decision to subject people with disabilities to environmental conditions that exacerbate their health conditions constitutes a denial of the programs, services, or activities within the meaning of the ADA, regardless of whether the government is aware of these health conditions. Though there has not been a conclusive answer on this question, courts have suggested that the answer could be yes.

Two years before *Foster* was filed—in the one previously filed ADA environmental "leaf burning" case that Olshansky likely remembered[151]—*Heather K. v. City of Mallard, Iowa*,[152] a child with serious respiratory and cardiac conditions filed suit for injunctive relief under the ADA and Rehabilitation Act requiring the City of Mallard, Iowa to pass an ordinance "imposing reasonable limitations on backyard burning of residential waste."[153] Like the plaintiffs in *Foster*, the plaintiff in *Heather K.* alleged that the open burning was a threat to her health and caused her to be segregated from the

147 *See, e.g.*, Paul-Emile, *supra* note 88, at 356, 360 ("[U]nlike Title VI of the CRA, which precludes private enforcement and requires proof of discriminatory intent for compensatory relief to be ordered, Title II and Section 504 allow for a private right of action to enforce their antidiscrimination provisions regardless of whether intent is shown."); *cf.* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1434 (2015) ("The courts that have read the law carefully have not found an intent requirement in Title II reasonable modification cases, *though the record is mixed* . . . ." (emphasis added)).

148 Memorandum in Support of Motion to Dismiss, *supra* note 138, at 15.

149 *See id.*

150 *See, e.g.*, Wilson v. City of Southlake, 936 F.3d 326, 330 (5th Cir. 2019) ("Under Section 504, the plaintiff must establish that disability discrimination was the sole reason for the exclusion or denial of benefits. While under Title II of the ADA, discrimination need not be the sole reason." (internal citations and quotations omitted)); *see also* Weber, *supra* note 106, at 1434 (discussing the lack of an intent requirement in the ADA).

151 *See* Zoom Interview with Barbara Olshansky, *supra* note 116.

152 Heather K. v. City of Mallard, Iowa, 946 F. Supp. 1373 (N.D. Iowa 1996).

153 *Id.* at 1375.

rest of her community.[154] The defendants argued that the open burning practices of private residents were not a program or activity of the City that could subject it to liability under Title II of the ADA.[155] The court disagreed. Rather, it found that if the Mallard's regulation of the practice of open burning had a discriminatory effect on the ability of people with disabilities to take advantage of City services, programs, and activities, then Title II applied.[156]

Heather K. asked more of the government than *Foster* did. While *Foster* asked the LDEQ to act within the course of its duties and deny Shintech's permit, *Heather K* asked the government to regulate the private actions of private citizens that were having an adverse impact on people with disabilities, seemingly in line with Fineman's thesis about the affirmative duty of the state to intervene and protect the vulnerable.[157] This interpretation of the breadth of the scope of activities that the ADA covers provides intentionally wide latitude of protection for people with disabilities,[158] and the notion that the ADA can require the government to regulate harmful practices—both public and private—is an important one. Although the outcome in Heather K. was promising, there is no guarantee that the court would have answered the questions *Foster* posed in the same way.

B. *Developing* Baez v. New York City Housing Authority

The plaintiffs in *Baez v. New York City Housing Authority* built off the principles raised and established in *Foster* and *Heather K.*[159] New York City public housing tenants with asthma and other respiratory conditions filed a class action lawsuit seeking injunctive relief against the New York City

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154 *Id.* at 1376.

155 In order for a claim under Title II of the ADA to be successful, there must be a qualified service, program, or activity that the plaintiff has been excluded from or denied. Incorporating the "nondiscrimination principles" of § 504 of the Rehabilitation Act, the elements are as follows:

> (1) that the plaintiff is, or represents the interests of, a 'qualified individual with a disability'; (2) that such individual was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

See id. at 1383.

156 *See id.* at 1386-87. The court said "if" because the court was ruling on a motion for summary judgment, and "[t]here [was], at a minimum, a genuine issue of material fact as to whether permitting open burning has an adverse effect on disabled persons." *Id.*

157 *See supra* Section II.B.

158 *See,* Heyl, *supra* note 105, at 329 (pointing out that the legislative history of the ADA indicates that the scope of covered activities was not explicitly defined because it was meant to extend the anti-discrimination prohibition of the Rehabilitation Act).

159 Baez v. N.Y.C. Hous. Auth., No. 13CV8916, 2015 WL 9809872 (S.D.N.Y. Dec. 15, 2015).

Housing Authority (NYCHA) under the ADA for its failure to remediate excessive mold and moisture in their apartments.[160]

Albert Huang, previously an attorney for the Natural Resources Defense Council (NRDC), which served as co-counsel on *Baez*, helped develop and litigate the case.[161] The lawsuit stemmed from conversations with NYCHA residents who had filed repeated repair requests about mold and excessive moisture in their apartments to little or no avail.[162] Most landlord-tenant claims for mold were individualized, which meant that if or when NYCHA responded to the severe backlog of more than three hundred thousand repair requests, it would simply move the tenant to a different apartment.[163] Residents and organizers hoped to find a more systemic solution.[164]

While researching, the attorneys found several NYCHA cases involving access to buildings under the ADA and began thinking, "what are the lists of disabilities?"[165] In their conversations with tenants, many residents had told stories about struggling to breathe.[166] Thus, the legal team decided to focus on asthma as the applicable disability.[167]

Further explaining the decision to use the ADA, Huang discussed the difficulty enforcing Title VI and the lack of an existing cause of action available to challenge environmental injustice based on race. Indoor air quality was also not regulated by federal or state environmental laws,[168] and Huang appreciated that the use of the ADA would allow the advocacy to maintain a civil rights narrative not apparent in traditional environmental laws, such as those that determine emission limits.[169] Acknowledging that the ADA was modeled after civil rights laws, he expressed a feeling that "there's

160 *Baez*, 2015 WL 9809872, at *1, *4.

161 Zoom Interview with Albert Huang, Attorney, Nat. Res. Def. Coun. (June 21, 2022).

162 Zoom Interview with Albert Huang, *supra* note 161; *see also* Albert Huang & Sara Imperiale, *Indoor Air Quality and Public Housing: An Environmental Justice Story*, Viewpoint, ENV'T L. N.Y., Oct. 2015, at 164.

163 Zoom Interview with Albert Huang, *supra* note 161; *see also* Huang & Imperiale, *supra* note 162, at 164.

164 Zoom Interview with Albert Huang, *supra* note 161.

165 *Id.*

166 Zoom Interview with Albert Huang, *supra* note 161.

167 Asthma is more firmly established as a disability under New York law than under federal law. *See, e.g.*, Das, *supra* note 112, at 307 ("[C]ourts are more likely to include asthma as a disability under IDEA and [New York State Human Rights Law] than under the ADA and the Rehabilitation Act.").

168 Zoom Interview with Albert Huang, *supra* note 161; *see also* Huang & Imperiale, supra note 162, at 164.

169 Zoom Interview with Albert Huang, *supra* note 161; *cf.*, Foster, *supra* note 88, at 140 (arguing that environmental regulations do not take the vulnerabilities and characteristics of specific communities into account when setting emissions limits).

a different political narrative around the ADA" due to a general societal reluctance to say "we don't want disabled people to have things."[170]

In light of concerns that prioritizing race could be found to be unconstitutional, Huang described disability as a potentially "race neutral" way of addressing race because many of the social and health vulnerabilities associated with environmental injustice correlate with racially marginalized groups.[171] Like Olshansky, Huang expressed discomfort with having to resort to different means to address racial injustice. "I don't love bringing cases where we're not talking about what we're actually talking about," he said.[172] However, he continued, "at least with the ADA, there is a foot in the door to federal courts."[173]

Before filing the complaint, the legal team hired experts to evaluate the extent of the mold across NYCHA and produce reports.[174] Due to the individualized nature of accommodation requests under the ADA,[175] the legal team gave the expert reports to each of the plaintiff's treating primary physicians, who then wrote a letter detailing the necessary accommodation requests for their respective patients.[176] The attorneys then reviewed each NYCHA policy around mold, moisture, paint, or other practices related to the plaintiffs' individual accommodation requests in order to craft sufficiently systemic policy requests to include in the class action complaint.[177]

The plaintiffs in *Baez* alleged that the mold and moisture in their apartments was "particularly hazardous" to them because it "exacerbate[d] their asthma."[178] They alleged that they informed NYCHA of their conditions and asked for reasonable modifications in the form of prompt and effective mold remediation, and that NYCHA failed to respond to their complaints and modify their repair practices in response to the plaintiffs' needs.[179]

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170 This is not an unfamiliar sentiment. *See, e.g.*, Konnoth, *supra* note 8, at 1235 (arguing that framing rights in terms of medicine and health "shift[s] blame away from the individual" and increases support for society to address these issues).

171 Zoom Interview with Albert Huang, *supra* note 161.

172 *Id.*

173 *Id.*

174 *Id.*

175 *See, e.g.*, Christopher v. Laidlaw Transit Inc., 899 F. Supp. 1224, 1227 (S.D.N.Y. 1995) ("Generally, the determination of whether an individual is otherwise qualified and to what extent he needs an accommodation requires an individualized factual inquiry.").

176 Zoom Interview with Albert Huang, *supra* note 161.

177 *Id.* This process is necessary because in class actions, "[t]he common question must lend itself to classwide resolution such that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke . . . to generate common *answers* apt to drive the resolution of the litigation." . A.T. v. Harder, 298 F. Supp.3d 391, 408 (N.D.N.Y. 2018) (internal citation and quotations omitted).

178 Complaint at ¶ 3, Baez v. N.Y.C. Hous. Auth., No. 13CV8916 (S.D.N.Y. Dec. 17, 2013).

179 *Id.* at ¶¶ 3-8.

Like *Foster*, *Baez* was not litigated because NYCHA elected to settle the case and enter into a consent decree rather than contest the claims.[180] However, the litigation is important because it frames NYCHA's lack of response to disabled plaintiffs' mold complaints as a denial of a reasonable modification under the ADA. Additionally, unlike many other environmental justice cases that target a specific and affirmative discriminatory practice or act (a proposed plant or toxic dumping), *Baez* challenges environmental deterioration, or government inaction, that disproportionately affects the health of people of color and people with disabilities.[181]

It is difficult to determine the full potential of cases like *Foster* and *Baez* because they were not ultimately litigated. Therefore, we do not know whether and how municipal and state agencies might have raised their fundamental alteration defenses and how courts might have responded to that in the environmental context. However, both cases were clearly crafted with the ADA's affirmative obligation to modify discriminatory practices that harm a marginalized group in mind. While this renewed possibility is what attracts advocates and scholars to the use of the ADA and medicalization framing to address structural racism, its practical implications warrant further scrutiny.

IV. IMPLICATIONS OF THE ENVIRONMENTAL JUSTICE DISABILITY FRAME

The parallel use of disability and the ADA as both conceptual harm and legal solution in environmental justice suggests legal and social benefits and disadvantages for the ADA as an alternative to racial antidiscrimination law. These lessons also have important implications for racism and ableism. This Section will examine the legal and social implications of the use of the ADA and the disability frame to challenge environmental injustice. First, it explores the potential legal advantages of the use of the ADA, including the required inclusion of people with disabilities in environmental justice advocacy that has been criticized for using people with disabilities as examples of the negative consequences of environmental harm. Then, it weighs the potential disadvantages, such as having to prove or wait for the manifestation of a disability within the meaning of the ADA to have a legal claim and the potential limitations of an applicable remedy. Next, the analysis of the social implications of the disability frame acknowledges that the use of

180 Baez v. N.Y.C. Hous. Auth., No. 13CV8916, 2015 WL 9809872, at *1, *4 (S.D.N.Y. Dec. 15, 2015).

181 Approximately ninety percent of NYCHA residents are Black or Latinx. NYU FURMAN CENTER, FACT BRIEF 2019, HOW NYCHA PRESERVES DIVERSITY IN NEW YORK CITY'S CHANGING NEIGHBORHOODS, https://furmancenter.org/files/NYCHA_Diversity_Brief_Final-04-30-2019.pdf [https://perma.cc/2KGU-DKCN].

the ADA in the environmental justice context has the ability to illustrate important connections between race and disability. Finally, it pays particular attention to the potential combined effects of the use of the disability frame for people of color with disabilities.

A. *Legal Implications*

1. Required Inclusion of People with Disabilities

The required inclusion of people with disabilities is arguably the greatest advantage of the use of the ADA to challenge environmental injustice. While the environmental justice movement worked to emphasize its connection to public health, public health and disability—though also related—have had a more complicated history. The complexity between public health and disability largely stems from public health's model of prevention that focuses on "elimination of the threat before harm occurs."[182] Traditionally, disability is framed as the otherwise negative or undesirable outcome that public health seeks to eradicate.[183] This aspect of public health's focus sometimes alienates the disability community because the "goal of public health has historically been to prevent them from existing in the first place."[184]

This framing of disability is analogous to the medical model of disability, which views disability as a flaw or individual problem to be fixed, treated, or cured.[185] The medical model of disability views disability as a "personal tragedy"[186] and does not recognize the inherent value in the lives and bodies of disabled people as they are. Instead, the medical model emphasizes the perceived limitations of the disabled body in comparison to the "normal," nondisabled body.[187]

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182 Bullard, *supra* note 17, at 154.

183 *See, e.g.*, Campos, *supra* note 43, at 41 ("Disability and health are sometimes cast as opposite ends of a spectrum.").

184 Roberts, *supra* note 42, at 1974.

185 *See* Gerst & Gerst, *supra* note 97, at 150 ("The medical model frames disability as an individual defect, or deficit, in need of diagnosis, treatment, and remediation."); Michael L. Perlin & Mehgan Gallagher, *Temptation's Page Flies Out the Door: Navigating Complex Systems of Disability and the Law from A Therapeutic Jurisprudence Perspective*, 25 BUFF. HUM. RTS. L. REV. 1, 23 (2019) ("The medical model of disability looks at disability as a 'problem' that belongs to the disabled individual, forcing the individual to make accommodations in order to adapt to the environment. The medical model views disability as something that needs to be corrected." (citation omitted)).

186 Guevara, *supra* note 97, at 278.

187 Gerst & Gerst, *supra* note 97, at 150.

187 Gerst & Gerst, *supra* note 97, at 150. The medical model is different from the social model of disability, which deemphasizes the individual and argues that it is society's barriers, structures, stereotypes, and treatment of people with disabilities that disables people, not their condition or perceived impairment. *See* Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1406–07 (2021) ("In the social model of disability, 'disability is viewed not as a physical or mental

Social scientists and disability advocates have critiqued the framing of environmental justice concerns in terms of the fear or threat of disability.[188] Professor Valerie Ann Johnson notes that when environmental justice advocates protest the negative effects of environmental policies, the "complexities of disability" are rarely part of the conversation.[189] Instead, she argues that advocates discuss the harms created "at length" while seldom interrogating their own "underlying biases and prejudices regarding what is 'normal.'"[190] Johnson also challenges proponents of environmental justice to ask themselves "what it means for disabled persons when we use the fear of possible disability in confronting environmental injustice and advocating for changes in policy regarding the environment."[191] As she explains, "[w]hat is not seen is the implicit assumption that we want healthy environments so that we do not end up damaged (i.e. disabled)."[192] The primary framing of disability as an undesirable consequence of environmental injustice is

impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations.'" (footnotes omitted)); *see also* Lisa Eichhorn, *Hostile Environment Actions, Title VII, & the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 595 (2002) ("Under the medical model, disability was viewed as a measurable biological fact and thus 'an inherent individual defect.'"). The Disability Rights Movement champions the social model of disability as a counter to "historically paternalistic attitudes" rooted in health law and the medical model about their capabilities and treatment in order to achieve "access, independence, and integration." Roberts, *supra* note 42, at 1984.

188 *See* VALERIE ANN JOHNSON, BRINGING TOGETHER FEMINIST DISABILITY STUDIES AND ENVIRONMENTAL JUSTICE 3 (Ctr. for Women Pol'y Stud.) https://www.peacewomen.org/assets/file/Resources/Academic/bringingtogetherfeministdisabilitystudiesandenvironmentaljustice_valerieannjohnso.pdf [https://perma.cc/L6Y8-J9PE] (criticizing the message communicated to people with disabilities when being or becoming disabled is posited as the fearsome consequence of environmental harm); *see also* Jampel, *supra* note 9, at 5 (discussing Johnson's reflections on disability in the environmental justice movement); s.e. smith, *When Disability Is a Toxic Legacy*, CATAPULT (Apr. 23, 2019), https://catapult.co/stories/when-disability-is-a-toxic-legacy-se-smith [https://perma.cc/7PNX-3BJN] (explaining the complexities of acknowledging disability as a symptom or consequence of environmental justice as a disabled person without disability itself being a tragedy).

189 JOHNSON, supra, note 188, at 3.

190 *Id.*

191 *Id.* at 6-7.

192 *Id.* at 3; *see also* Mia Mingus, *Changing the Framework: Disability Justice*, LEAVING EVIDENCE (Feb. 12, 2011), https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice [https://perma.cc/4JZ2-ZSSD] ("Disabled people are used as the poster children of environmental injustice . . . ."); Jampel, *supra* note 9, at 5 (discussing the framing of autism as "a potential and unwanted consequence of toxic exposures"); Khiara M. Bridges, *The Dysgenic State: Environmental Injustice & Disability-Selective Abortion Bans*, 110 CAL. L. REV. 297, 301 (2022) (discussing the various disabilities believed to be caused by environmental toxins and arguing that states that simultaneously fail to protect their residents from those toxins that "impair fetal health" while restricting abortion access are creating a "dysgenic state" which "seems committed to producing an impaired citizenry").

particularly concerning because it can lead to the exclusion of people with disabilities from environmental justice considerations.[193]

This exclusion is particularly problematic because people with disabilities are "specifically exposed to and vulnerable to environmental injustice" and a "disproportionately large number of people with disabilities currently live in areas that are proximate to point sources of pollution" due to ableism.[194] However, using the ADA to challenge environmental injustice in court potentially counters this effect, because it makes the inclusion of people with disabilities a legal necessity.

Conversely, the required inclusion of people with disabilities could also potentially limit what environmental injustice issues can be challenged and who the remedy impacts. For example, as the plaintiffs in *Foster* alleged, using the ADA could mean an environmental justice issue can only be challenged when the conditions of people with disabilities are being "exacerbated" by the environmental harm, i.e., when the environment is making people with disabilities sick or more disabled. It could also mean having to wait for a disability to manifest itself before challenging environmental harm. Furthermore, the process of alleging and proving legal claims through the litigation process may reinforce the stigma associated with the medical model of disability by forcing attorneys to elaborate on the symptoms associated with or the effects of a disability in order to establish its existence.[195]

Moreover, while the parties to the *Baez* litigation reached a settlement requiring NYCHA to remediate mold in all apartments regardless of whether

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193 *See* JOHNSON, *supra* note 188, at 3, 7 ("Constant reference to environmental causes of disability renders those who are disabled passive recipients of harm and implies their inability to be full participants in environmental justice work.").

194 Jampel, *supra*, note 9, at 6; Chakraborty, *supra* note 3, at 531. I contend that ableism, as a ranking system based on perceptions of bodies and minds (many of which are based on skin color), includes racism, by definition. However, in keeping with the concept of intersectionality, ableism and racism also work together and have overlapping effects. *See* SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE 23 (2d ed. 2019) [hereinafter SINS INVALID]. Coined by Professor Kimberlé Crenshaw, the principle of intersectionality, "[s]imply put, . . . says that we are many things, and they all impact us. We are not only disabled; we are also each coming from a specific experience of race, class, sexuality, age, religious background, geographic location, immigration status, and more. *Id.* Thus, the same structural forces that lead to worse environmental outcomes for people of color do the same for people with disabilities and people of color with disabilities. *See* Chakraborty, *supra* note 3, at 522 ("Because people with disabilities are not equally disadvantaged, factors such as race, ethnicity, income, education, nativity, language proficiency, homeownership, and older age can interact differently with disability status to amplify or attenuate environmental exposure for specific subgroups within the broader disability category.").

195 *See, e.g.*, Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 976 (2019) (arguing that litigation on behalf of people with disabilities often results in their lawyers engaging in ableism to protect their clients from the offensive treatment).

the occupant had asthma,[196] the potential limitations of a remedy under the ADA could mean that only plaintiffs with the specifically enumerated disability would be eligible for the requested relief.[197]

2. The Lack of Intent Requirement Compared to the Need to "Prove" Disability

The lack of an intent requirement similar to that in racial discrimination law makes the ADA an attractive alternative for challenging structural harm.[198] However, as the state's arguments in *Foster* demonstrate, taking advantage of the ADA's standard first requires establishing a disability within the meaning of the ADA.[199] Thus, depending on the circumstances, proving the substantial limitations disability imposes, for example, can arguably be as complex a process as gathering facts to meet the *Arlington Heights* standard.

3. Whether the ADA Maintains a Civil Rights Narrative in Environmental Justice Causes, or Whether its Use Reiterates the Need for New Strategies to Address Racial Injustice

Although the ADA might be useful for addressing issues that current laws or societal conditions do not, it should not detract from efforts to develop laws and other advocacy strategies that do. For example, both Olshansky and Huang discussed using the ADA at least in part because of gaps, flaws, or complications in existing environmental law. The difficulty of litigating racial injustice also should not deter from efforts to tackle racism explicitly rather than through the use of laws that allege disability discrimination rather than racial discrimination. [200]

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196 *Private Developers Will Be Required to Remedy Toxic Mold, Under ADA*, NAT'L CTR. FOR L. & ECON. JUST. (Feb. 9, 2022), https://nclej.org/news/private-developers-will-be-required-to-remedy-toxic-mold-under-ada [https://perma.cc/3FP3-AUE6].

197 *See* Christopher v. Laidlaw Transit Inc., 899 F. Supp. 1224, 1227 (S.D.N.Y. 1995) (discussing the individualized nature of accommodations); *see also* Ruth Colker, *The ADA's Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1813, 1828-29 (2022) (discussing the individualized nature of reasonable accommodations).

198 *See, e.g.*, Paul-Emile, *supra* note 88, at 356, 360 (discussing how the ADA's disparate impact standard can actively address structural harm and balance societal costs through the reasonable modification structure).

199 *See*, *supra* notes 140–144 and accompanying discussion.

200 *See, e.g.*, Allison K. Hoffman, Response, *How Medicalization of Civil Rights Could Disappoint*, 72 STAN. L. REV. ONLINE 165, 169 (2020) ("My second, and greater, sociologically related concern is whether the translation of civil rights harms into medical terms actively obscures part of the social problem, like a scrim curtain over sexism, racism, or homophobia.").

4. Whether the ADA Provides the Potential for Structural Remedies

There is also still an open question of whether the ADA is a more suitable option for achieving structural change. While the reasonable accommodation standard might seem more flexible or responsive to concerns of injustice, Samuel R. Bagenstos argues the accommodation requirement is not that different from traditional antidiscrimination standards, which are not very well suited to "attack . . . structural barriers" due to the exclusion of certain types of accommodations. [201] While the *Baez* settlement is promising, such limitations might be particularly concerning to efforts to address environmental injustice under the ADA because proponents have not seen what could come in light of the availability of a fundamental alteration defense, for example.[202]

B. *Social Implications*

1. Whether the Use of the ADA to Challenge Racial Injustice Constitutes Appropriation of Disability or an Important Illustration of the Intersection of Issues of Race and Disability

One of the potential unintended effects of the use of the ADA and disability to challenge structural racism is the appropriation[203] of disability in ways that could be especially detrimental to disabled people of color. As the aforementioned litigators have demonstrated, the wellbeing of people with disabilities and the advancement of disability justice[204] were arguably not the initial or even primary reasons they wanted to use the ADA, but it was a potentially viable strategy they stumbled upon that happened to fit the

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201 *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 35 (2004) (discussing the categorical exclusion of certain types of accommodation under the ADA); *cf. id.* at 23-24 ("[The reasonable accommodation] requirement, after all, is thought to be the ADA's great innovation, a tool that goes beyond a mere nondiscrimination rule to demand the alteration of societal structures that, however unintentionally, stand in the way of opportunities for people with disabilities.").

202 *See* Hoffman, *supra* note 200, at 167 ("Even laws like the [ADA] and the Rehabilitation Act that demand more structurally oriented reforms can still produce fairly narrow and small-scale remedies."); *see also* Colker, *supra* note 197, at 1829 (discussing how accommodations do not provide the requisite structural benefits).

203 *See, e.g.*, Sari Sharoni, *The Mark of a Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation*, 26 FED. CIR. BAR J. 407, 410 (2017) ("Professor Sally Engle Merry [states] that the appropriator 'takes' the cultural product from the source community and replays it with 'different meanings or practices.'").

204 Disability justice is a framework and practice that includes disabled people of color, women, transgender people, queer people, the working class, and the poor. *See* Mingus, *supra* note 192. It has ten principles that including, "intersectionality," "leadership of those most impacted," and a "commitment to cross-disability solidarity" that, among other things, "breaks down isolation between people with physical impairments, people who are sick or chronically ill . . . [and] people with environmental injuries." SINS INVALID, *supra* note 194, at 23-25.

circumstances.[205] This observation is not an indictment or criticism of advocates' sentiments, reasoning, or motives—many of which also track those of legal scholars.[206] Rather, it is an exploration into the potential consequences that could result. This exploration is especially important given the existing critique of the framing of disability in environmental justice and the disability community's historic commitment to self-determination.[207]

Attorneys who used the ADA in litigation explain that they view it as a potential vehicle for highlighting the concrete effects of structural racism that environmental laws and courts resistant to race jurisprudence do not.[208] Thus, using disability to account for medical conditions that disproportionately impact certain racial groups or to challenge the affirmative disabling of people of color through environmental harm provides an important opportunity to capture the relationship between race, environmental injustice, and health outcomes in a legally and narratively substantive way that has overwhelmingly been foreclosed to impacted communities. While this is both a positive and promising effect of the use of the ADA in this context, the ADA and disability are susceptible to many of the same challenges and pitfalls that complicate a race-based civil rights strategy.

First, many might disagree with the notion that disability is a more sympathetic identity that society is more willing to help.[209] Second, the positioning of disability as a substitute for race neglects the existence of

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205 *See supra* notes 119, 122, 166–171 and accompanying text (discussing how litigating attorneys understood their initial reasons for exploring the use of ADA); *see also* Paul-Emile, *supra*, note 88, at 338 (discussing the framing of Blackness as a disability in order to take advantage of the ADA's reasonable accommodation standard).

206 *See supra* note 170 (discussing the sentiment that society is more willing to support people with disabilities).

207 *See infra* notes 186–191 (discussing the critique of the framing of environmental justice in terms of the fear and threat of disability). The "health justice paradigm" also requires "the vigorous engagement and leadership of front-line communities, the targets of subordination." Robyn M. Powell, *Applying the Health Justice Framework to Address Health and Health Care Inequities Experienced by People with Disabilities During and After Covid-19*, 96 WASH. L. REV. 93, 137 n.26 (2021) (citing Harris & Pamukcu, *supra* note 88, at 807).

208 See, *supra* notes 119, 122, 166–171 and accompanying text (detailing interviews with litigating attorneys).

209 Hoffman, *supra* note 200, at 173 ("The second way in which I question Konnoth's normative conclusions concerns his assertion—albeit an admittedly tentative one—that medicalization may make people more open to civil rights claims because it shifts blame away from individuals and makes them more deserving of support."); Dorfman, *supra* note 144, at 1054 (discussing nondisabled people's suspicion of accommodations as "perks or special rights" (quotations omitted)); Alice Wong, *"I'm Disabled & Need a Ventilator to Live. Am I Expendable During this Pandemic?"*, VOX, (Apr. 4, 2020), https://www.vox.com/first-person/2020/4/4/21204261/coronavirus-covid-19-disabled-people-disabilities-triage [https://perma.cc/46KN-YFW5] (detailing practice of medical rationing and the concern that disabled people are less worthy of saving because they have an inferior "quality of life").

people of color with disabilities.[210] The idea that it is possible to supplant one marginalized identity with another supposedly less politically polarizing one and obtain better results suggests either that members of both groups do not exist or that the more "politically polarizing" identity will have no effect on the outcome, which would presumably negate the need for the substitution. In short, one cannot erase the effects of racism on disabled people of color by talking about disability instead of race. Finally, as there is with race jurisprudence, there is already suspicion and criticism of the use of ADA litigation.[211]

On the other hand, just as it may offer a substantive means to address the relationship between race, environmental harm, and health outcomes in court, the use of the ADA to challenge environmental injustice provides a valuable opportunity to demonstrate the integral relationship between issues of race and disability, generally. For example, ideally, an intersectional environmental justice campaign could be a vehicle to illustrate and challenge the classification and ranking of people's bodies and lives as well as the distribution or denial of resources based on race, disability, or any other category in other areas of society.

2. Downsides & Compounded Effects of Disability Framing

Proposals for the use of the ADA and medicalization framing to challenge structural racism and injustice may underestimate the compound effects of racism and ableism. As Cyrée Jarelle Johnson explains, the presumption of Black illness and inherent racial inferiority "both evinces and encourages a lax, shrugging attitude towards [B]lack illness and death. . . . We were deemed enough to live without the medication that keeps us alive, yet inherently too sick to survive the latest plague and there's nothing anyone can do about it: the paradox of black disease."[212] Thus, due to the history of structural racism, society is more likely to disregard Black illness or

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210 *See, e.g.*, Paul-Emile, *supra* note 88, at 321 (arguing for the treatment of Blackness as a disability to address structural racism and stating "individuals with disabilities, like black people, have struggled against social practices that create shared experience of discrimination . . . ."); *see also* Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 925 (2021) ("Paul-Emile's argument is not that a disproportionate number of Black people are *also* people with disabilities who might meet the statutory definition and thus be entitled to disability legal remedies for discrimination under Title II." (emphasis added)).

211 *See, e.g.*, Lauren Markham, *The Man Who Filed More Than 180 Disability Lawsuits*, N.Y. TIMES MAG. (updated Aug. 29, 2021), https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html [https://perma.cc/2HZ3-KAMF] (questioning whether ADA litigation is "profiteering" or "justice").

212 Cyrée Jarelle Johnson, *A Paradoxical History of Black Disease*, DISABILITY VISIBILITY PROJ. (May 14, 2020), https://disabilityvisibilityproject.com/2020/05/14/a-paradoxical-history-of-black-disease [https://perma.cc/5JDM-V87S].

disability.[213] Instead, illness or disability is often viewed as a weakness that confirms preconceived ideas about Black inferiority.[214]

Structural racism and stereotypes also lead many people to believe Black people are superhuman and can survive whatever they are subjected to even if they are sick or disabled.[215] Thus, linking environmental justice and disability may not lead to the righteous indignation and solutions one expects and could have particularly adverse consequences for disabled people of color.[216]

CONCLUSION

The use of the ADA to challenge environmental injustice offers important lessons for the use of the ADA—and medicalization framing, generally—as an alternative to race-based discrimination laws to address structural discrimination. Although there is not enough information to determine the degree of difference between the ADA and racial discrimination laws and the ADA imposes proof requirements of its own, it provides at least some flexibility that race-based anti-discrimination laws do not. In the realm of environmental justice, it also forces the inclusion of people with disabilities into an area from which they are disproportionately affected by but from which they are often left out. However, any expansion of the ADA or the disability frame to combat injustice must reflect an understanding of the interconnected systems of racism and ableism or risk further perpetuating injustice and harm.

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213 *See id.* ("[Black sick people] were deemed totally disposable, just a roadblock in the way of getting everyone else *our* meds.")

214 *See, e.g.*, Bridges, *supra* note 192, at 368 ("Unlike the days of eugenics, when racial minorities were *imagined* to be impaired, the racialization of disability today occurs when racial minorities actually *become* impaired due to environmental injustice . . . .").

215 Elias R. Feldman, Note, *Strict Tort Liability for Police Misconduct*, 53 COLUM. J.L. & SOC. PROBS. 89, 103 n.57 (2019) (discussing the murder of Mike Brown and how racial biases may lead police to use deadly force, based on stereotypes in which Black people are associated with "superhuman" attributes); *see also* Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 699-700 (2021) (discussing "false science" claiming that Black people have a higher tolerance for pain than white people).

216 *See, e.g.*, Craig Konnoth, *Race and Medical Double-Binds*, 121 COLUM. L. REV. F. 135, 156 (2021) ("Black Americans are endangered both for, and for not, wearing masks. . . . On one hand, medical institutions and norms place certain demands on Black Americans. On the other hand, other coercive forces to which Black Americans are subject, including police profiling, penalize them for conforming to those norms.").

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