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George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison

Ira P Robbins

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Ira P. Robbins†

Let the shameful wall of exclusion finally come tumbling down.
President George Bush,
Signing the Americans with Disabilities Act
July 26, 1990

Inmates may not be discriminated against on the basis of race, religion, nationality, sex, disability, or political belief.
Policy of Non-Discrimination Toward Inmates
Bureau of Prisons, U.S. Department of Justice
28 C.F.R. § 551.90 (1996)

All hope abandon, ye who enter here . . . .
Dante Alighieri, *The Inferno*
Canto III

The conditions in America's correctional facilities have long been cause for concern. Even those who do not advocate a comfortable quality of life for inmates recognize that basic problems such as overcrowding, inmate violence,[1] inadequate staffing,[2] and increasing costs of building and maintaining prisons have approached crisis levels. Meanwhile, the prison population continues to swell. According to the Bureau of Justice Statistics of the United States Department of Justice, the number of prisoners incarcerated at state and federal prisons annually has grown at a rate of 8.4% in recent years.[3] This prison

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1. *See* John Hurst & Dan Morain, *A System Strains at Its Bars*, L.A. TIMES, Oct. 17, 1994, at A1 ("California prisons remain dangerous. Knifings are common. Convicts kill four or five of their fellows a year. Guards kill a like number.").

2. *See id.* ("Prison officials acknowledge that an inmate might wait as long as three months to see one of five physicians who serve the 4,000 convicts.").

3. *See* Office of Justice Programs, Bureau of Justice Statistics, U.S. Dep't of Justice, *Executive Summary, Correctional Populations in the United States, 1993* (last modified Oct. 1995) <http://www.ojp.usdoj.gov/pub/bjs/ascii/cupus93ex.txt>. For a report on the prison population explosion, see Pierre Thomas, *U.S. Prison Population, Continuing Rapid Growth Since '80s, Surpasses 1 Million*, WASH.

population explosion has been linked to harsher sentencing guidelines and "three strikes and you're out" provisions. According to sources at the Department of Justice, however, this prison population growth has resulted from a "'dramatic increase in the number of people arrested and admitted to the corrections system and not a growth in the length of sentences and the length of stay in prison.'"[4] Whichever viewpoint is more accurate, America imprisons more people every day.

This national trend exacerbates the problems that disabled prisoners[5] encounter, problems considerably unknown to the general population. Disabled prisoners are particularly susceptible to discrimination and oppression within the penal system, prey to the whims of correction officers and fellow inmates. Despite these vulnerabilities, they must be incarcerated. While some citizens might agree that every individual deserves certain basic necessities, many also would argue that the government should prioritize the weal of law-abiding people over that of convicts in an age of shrinking budgets. However, relatively few pay attention to the manner in which American courts augment the punishment accorded disabled defendants, stripping them of their human dignity in prison:

> If I told you about a human rights case involving men who are kept locked in filthy urine-soaked cells for 23 out of 24 hours, who aren't allowed to take showers, whose water is shut off in their cells so they can neither drink nor wash, whose bodies have large deep open festering sores that receive no medical care whatsoever, nor do any of the prisoners' other urgent medical crises (no doctors are stationed on this unit, nor do any make rounds), men who are prevented from using their toilets and forced to urinate on themselves or their bedclothes. . . . If I told you that prison guards periodically throw urine and feces on them, taunt them by calling them jeering names over a loudspeaker, beat them . . . . Got your attention, haven't I? . . . [M]y link to these cases was not Amnesty International, and no, I'm not talking about Turkey or Guatemala. The country in question is America, Land of the Free.[6]

Another commentator describes filthy conditions and appalling neglect:

> Two days after he filed a complaint about conditions for disabled prisoners at Stillwater prison, paraplegic inmate Douglas Hausmann was placed in a segregation cell for nine days, where he was left to lie in his excrement. He fell several times

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POST, Oct. 28, 1994, at A3.

4. Thomas, *supra* note 3, at A3 (quoting Allen J. Beck, who helped prepare Justice Department's *Sourcebook of Criminal Justice Statistics* in 1993).

5. Disabled pretrial detainees present additional concerns. While they share the same physical problems as disabled prisoners, disabled pretrial detainees occupy a more privileged status within the legal system. Public sympathy is generally greater, and deference to institutional interests is generally less, where the rights of pretrial detainees are involved. *See infra* Section I.B.

6. Jean Stewart, *Inside Abuse: Disability and Oppression Behind Bars*, DISABILITY RAG & RESOURCE, Nov.-Dec. 1994, at 1.

> from the bed, sprained his arm and hit his head so hard that it required x-rays to determine the extent of his injuries. . . .
>
> . . . .
>
> Because guards could not fit the wheelchair into a cell, he was left outside the cell for about 45 minutes. Hausmann said he defecated in his clothing before guards placed him on the toilet. He was ordered to remove his clothes and after about 1-1/2 hours, crawled down from the toilet onto the floor.
>
> He said he pulled a mattress and lay naked in his own waste for another hour before a nurse cleaned him. He said he remained on the bed for the next six days before he was taken for a shower. He stayed on the bed for another three days after that, falling from it six times and defecating in his pants three times despite requests for help, he said.[7]

Additional reports, sporadically issued in various national newspapers, make much the same case.[8]

By contrast, other writers offer rather pastoral portrayals of inmate populations cared for by well-intentioned professionals at the various corrections departments.[9] Articles in *Corrections Today*, a prison industry publication, suggest a longstanding problem of serious, yet less than horrific,

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7. Mark Brunswick, *Inmate Questions Treatment of Disabled*, STAR TRIB. (Minneapolis-St. Paul), May 18, 1991, at 1B. Brunswick's harrowing report is far from unique. In *Inside Abuse*, Jean Stewart details her encounters with disabled inmates at Shawangunk Correctional Facility in Wallkill, New York. She became involved with a lawsuit filed on behalf of Easton Beckford, Peter Grassia, and another wheelchair-bound inmate. *See* Stewart, *supra* note 6, at 4. Already disabled and wheelchair-bound, Beckford alleges he was severely beaten after he testified against a guard at his prior facility. At Shawangunk, his leg braces and wrist support were confiscated, and "grab bars were denied in his cell on the grounds that no metal objects were permitted in [the special housing unit]." *Id.* at 4-5. Beckford presented an increasingly standard list of complaints: inaccessible toilet and shower facilities, denial of catheters and leg bags, etc. *See id.* at 6-7. Grassia experienced similar problems, including a wrongly sized wheelchair, erratic medication for spasms, denial of physiotherapy, and use of a security restraint device called "the black box" that when used on paraplegics, prone to spasms, "becomes an ingeniously medieval instrument of torture." *Id.* at 7. For both inmates, life at Shawangunk has been a combination of steady verbal (and allegedly physical) abuse by the guards and constant medical crises of severe pain and potential infection. *See id.* at 7-8.

8. *See, e.g.*, Hurst & Morain, *supra* note 1 (reporting California case, settled by Department of Corrections (DOC), in which female inmate died of acute pancreatitis and was found lying in her cell, caked with feces); Dan Morain, *California's Prison Budget: Why Is It So Voracious?*, L.A. TIMES, Oct. 19, 1994, at A1 (discussing recent California case, settled by DOC, in which epileptic inmate convicted of second-degree murder was denied necessary medication and suffered more than 100 seizures over 20-month period, subsequently dying of grand mal seizure).

9. *See, e.g.*, Judy C. Anderson, *South Carolina Strives to Treat Elderly and Disabled Offenders*, CORRECTIONS TODAY, Aug. 1991, at 124; Scarlett V. Carp & Joyce A. Davis, *Planning and Designing a Facility for a Special Needs Population*, CORRECTIONS TODAY, Apr. 1991, at 100 ("[P]rison populations are not just growing larger—they are growing more diverse as well."); *id.* at 188 ("Creating a therapeutic environment requires attention to interior design. A 'soft' environment that includes natural light, wood plants and earth tone color schemes is recommended."); Joann B. Morton, *Training Staff to Work with Elderly and Disabled Inmates*, CORRECTIONS TODAY, Feb. 1993, at 42 ("With the number of special needs offenders growing, correctional programs, services and supervision must be designed or modified to fit these offenders' diverse needs."); Carol B. Shauffer & Loren M. Warboys, *Helping the Handicapped: It's the Law*, CORRECTIONS TODAY, June 1987, at 70 ("Because handicapped persons are overrepresented in local, state, and federal corrections institutions, facility administrators have become increasingly aware of their *special obligation* to offenders with handicaps.") (emphasis added).

dimensions.[10] Each version of correctional America undoubtedly contains some truth. Somewhere, aging and disabled inmates coexist peaceably with guards and prison regimens. Nevertheless, one should not dismiss harrowing accounts as simply extremist.

Disabled inmates must cope with problems endemic to being a prisoner, as well as disadvantages inherent in their disabilities. Public perceptions of inmates worsen daily both inside and outside prisons. While potential criminals frighten us, convicted criminals allow us the empowerment of safe hatred. Guards and administrators, too, often hold inmates in the lowest esteem:

> The attitude from the central office in Sacramento is these inmates don't deserve the cost of the medical services spent on them . . . . They aren't considered to be viable life forms by the department administration—they are just inmates. . . . The only time the problem comes into focus is when someone dies.[11]

Attitudes inside prisons, while occasionally more openly hostile, are generally matched and echoed throughout the country. Calculated political maneuvering has combined with anxiety about seemingly rampant crime to engender harsh theories of almost entirely punitive prison systems. Moreover, more than a few of these inmates have committed crimes that reinforce society's negative impression of them.[12]

The national political climate is demanding longer sentences and the restriction or elimination of parole. The Governor of Virginia, for example, recently leveraged a strict crime bill that abolished parole and increased sentences for violent crimes by as much as 500%.[13] The costs associated with such programs have not yet dimmed post-1994 election year enthusiasm, but those costs have been cited with some regularity.[14]

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10. *See* sources cited *supra* note 9; *see also* Anderson, *supra* note 9, at 124 ("Fortunately, the South Carolina Department of Corrections has been aware of older offenders' special needs since 1970 . . . ."); Herbert A. Rosenfield, *Issues to Consider in Meeting Handicapped Offenders' Needs*, CORRECTIONS TODAY, Oct. 1992, at 110 ("After all, the problem is not a new one; all that's new is the amount of attention it is receiving.").

11. Susan Sward & Bill Wallace, *Health Crisis Behind Bars; Ailing Prison Inmates Suffer from Lack of Care*, S.F. CHRON., Oct. 3, 1994, at A1.

12. One example of the public's antipathy toward inmates is the predisposition to believe that inmate injuries and health problems are not genuine. This perception can have disastrous effects in cases in which an inmate is legitimately injured. In one instance, a parole violator at San Quentin was assaulted by other inmates, suffering spinal cord damage, paralysis, and nervous shock. The prison guards assumed he was faking injury and left him on the floor for six days before coming to his aid. *See Deplorable Medical Care for State's Prisons*, S.F. CHRON., Oct. 8, 1994, at A22.

13. *See* Peter Baker, *Assembly Ratifies Allen's Assault on Violent Crime: Work on Paying for Parole Plan Is Put on Hold Until Next Year*, WASH. POST, Oct. 1, 1994, at C1. Governor Allen's program will mandate that convicts serve at least 85% of their sentence and that violent offenders serve considerably longer sentences across the board. *See id.* The result is a need for additional correctional facilities. *See id.*

14. *See* Charles Babington, *Voter Sentiments Prompt Review of Anti-Crime Legislation: Campaign-Conscious Md. Lawmakers Push Limited Parole*, WASH. POST, Feb. 7, 1994, at D1. Maryland Governor William Donald Schaefer's staff projected that elimination of parole would create $400 million in new

The American public is convinced that locking up criminals for longer terms will reduce the threat of crime. The media notes the predicament of institutionalized criminals in passing,[15] with only an occasional plea for decency in prison settings. One rather perverse consequence of the boom in prison building has been the creation of jobs, investment opportunities,[16] and what a New York newspaper referred to as "constituencies—architects, contractors, vendors, labor unions, whole communities—with a vested interest in maintaining the status quo."[17] The 1994 Federal Crime Bill provided nearly $7.9 billion for state prison and boot-camp construction, rendering the sprawl of prison building a decidedly national phenomenon.[18] Prisoners petition courts for relief, citing conditions that, in addition to approaching cruel and unusual punishment, conspicuously violate disability laws. These same courts, however, are increasingly denied the discretion in sentencing that is necessary to alleviate some of the problems. Meanwhile, prisoners such as Easton Beckford,[19] Peter Grassia,[20] and Douglas Hausmann[21] are still looking for

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prison construction expense. *See id.* Stuart Comstock-Gay, Executive Director of the ACLU of Maryland, projected that the state would pay millions to support an aging, no-longer-dangerous inmate population. *See id.*; *see also Bush Rethinks the Need for 50,000 Prison Beds*, MIAMI HERALD, Oct. 28, 1994, at 5B (noting Florida gubernatorial candidate Jeb Bush's plan to require that inmates serve 85% of sentences, and accommodating resulting additional 8000 inmates by operating Florida prisons at 150% capacity).

California will confront catastrophically high expenses in years to come, if analysts are correct. Projecting that the state would spend $3.1 billion in 1994 for prison operations, the Department of Corrections and the RAND Corporation anticipated a doubling of the prison population and the corrections expense by the year 2000, if "three strikes" provisions are strictly enforced. *See* Morain, *supra* note 8, at A1; *see also* Anthony Lewis, *Sunlight and Shadow*, N.Y. TIMES, Mar. 25, 1996, at A15 ("As recently as 15 years ago [California] spent six times as much on higher education as on prisons. Last year the prison budget was larger—and the disparity is going to grow.") Construction costs to build prisons necessitated by three-strikes law will be approximately $5 billion. *See id.*

15. The Peter Grassia story, *see supra* note 7, received limited print coverage following the filing of the lawsuit. *See* Jay Matthews, *Under a New Law, A Rising Sensitivity To Disabled Inmates?*, WASH. POST, Nov. 24, 1993, at A4.

16. *See* Dan Morain, *Three Strikes Law Will Boost Wall Street Firms That Sell Bonds to Finance Construction*, L.A. TIMES, Oct. 16, 1994, at 16 ("[California State Treasurer Kathleen Brown] sold prison bonds in denominations as small as $250 as part of a program to help families save for college tuition.").

17. Steven A. Holmes, *Prisons Replacing Military As Nation's Hot Growth Area*, STAR TRIB. (Minneapolis-St. Paul), Nov. 13, 1994, at 17A; *see also* Hurst & Morain, *supra* note 1, at A10 ("It's a machine that will chew you up. . . . There is no sense of rehabilitation. It's a multibillion-dollar industry, and we're the commodities.") (quoting "lifer" Luis Rodriguez, Pelican Bay State Prison); Dan Morain, *California's Profusion of Prisons*, L.A. TIMES, Oct. 16, 1994, at 1 (noting that, in past decade, California Department of Corrections has added 40,524 prison cells and dormitory beds, built 16 prisons and renovated existing facilities, and committed $5 billion to planning, engineering, and construction of new prisons—amount that will nearly double as consequence of bond debt). The willingness of California's officials to continue this trend is unmistakable. *See id.* Seventy-three million dollars has been paid to the state's main consultant for management of construction since 1982. *See id.*

18. *See* Holmes, *supra* note 17. California officials expect the number of state prisons to increase from 58 to 78; Florida projects eight new prisons, expansion at 22 existing facilities, and four work camps by the year 2000. *See id.* "Texas officials say they plan to open a new corrections installation *each week for the next 18 months.*" *Id.* (emphasis added).

19. *See supra* note 7.

20. *See supra* note 7.

relief from conditions of neglect that arguably reach unconstitutional proportions.

In July 1990, the Americans with Disabilities Act (ADA)[22] became law after surviving intense congressional scrutiny. The ADA built on the Rehabilitation Act of 1973,[23] expanding both the guarantees and the breadth of the earlier legislation.[24] It recognized an unprecedented right of access on behalf of disabled Americans.

While the ADA was enacted to prevent discrimination against disabled individuals, its applicability as a remedy to disabled prisoners is subject to debate. Critical to understanding why the ADA is not clearly applicable to prisoners is an awareness that prisoners' "rights" are unlike any other rights. Legal professionals and scholars alike recognize the peculiar substance of the quasi-rights accorded prison inmates, individuals incarcerated by the judgment of their peers and the legal system. This context colors the potential applicability of statutory rights such as those incorporated in the ADA.

Finding systematic responses to the difficulties associated with disabled prisoners challenges even the most beneficent prison administrations. Both prisoners' rights advocates and prison administrators must confront a broad spectrum of disabilities. One might immediately think of paraplegics, wheelchairs, amputees, etc.; but disabilities also include blindness, hearing impairment, mental retardation, mental illness, and other health problems. Often the most effective solutions for accommodating disabled prisoners conflict with security and administrative concerns, as well as, of course, lack of funding.[25] The history of deference to prison management, the conflict between punishment and rehabilitation as purposes of incarceration, and the unwillingness of elected legislatures to fight for basic decency in the care of convicted criminals have combined to make judicial relief for prisoners the exception rather than the rule. Insofar as the ADA provides a more powerful and accessible tool for obtaining such relief, it is an incredibly important resource for prisoners.

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21. *See supra* text accompanying note 7.

22. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in 42 U.S.C. §§ 12101-12213 (1994)) [hereinafter ADA].

23. 29 U.S.C. §§ 701—796 (1994).

24. *See infra* Sections II.B, III.A (discussing Rehabilitation Act).

25. Even with national enthusiasm for increasingly harsh crime bills, the costs of prison construction daunt taxpayers. The near failure of Virginia Governor Allen's efforts to eliminate parole was attributed in large part to the costs of the prison construction that would result. *See infra* Part VI (discussing financial crisis facing correctional systems). Given the unwillingness to expend resources for new prisons, the likelihood that costly structural adjustments that improve the quality of prisoners' lives will be made is slight. Even with legislative mandates for these upgrades, it will require creative genius on the part of prison directors and the criminal justice system to implement solutions within the cost constraints imposed by a mercurial electorate that favors both greater crime control and less government spending.

While commentary analyzing the ADA and its implications abounds, few articles have considered its impact upon American correctional facilities.[26] Those that have done so, however, have operated on the assumption that the statutory authority of the ADA necessarily overrides the traditional deference of federal courts to correctional interests. This is a significant and controversial leap, one that this Article seeks to clarify.

Part I assesses the applicability of certain provisions of the Americans with Disabilities Act to the particular problems posed by elderly, mentally disabled, HIV-infected, and hearing-impaired inmates, as well as by pretrial detainees and death-row inmates. Part II provides the historical and statutory background preceding the enactment of the ADA. Part III sets forth the substance of the ADA's requirements and briefly discusses their applicability to the prison context. Part IV considers the legal implications of Title II of the ADA with respect to establishing violations and pursuing remedies. Part V hypothesizes how the courts will respond to the ADA in light of their tendency to accord deference to correctional administrators in institutional matters. Part VI reviews the significant ADA-based cases to date, concluding that whatever application of the ADA in the prison context does occur will be highly restrained and cautious. Part VII surveys alternative methods for solving the problems of disabled prisoners, including early-release programs, increased transfer to medical facilities, and centralized facilities for disabled inmates. Despite these alternatives, this Part recommends placing added emphasis on medical care for the disabled within the existing prison system. Finally, the Article concludes that, like constitutional rights, statutory rights such as those purportedly accorded by the ADA dissipate once incarceration takes hold. Therefore, while the ADA may be a potential remedy for disabled prisoners at present, the prospects for the future are uncertain.

I. SPECIFIC DISABLED PRISON POPULATIONS

Disabled prisoners pose unique problems relative to the general prisoner population. Moreover, particular segments of the disabled prisoner population have more specialized concerns than others, and not all disabilities can be remedied in the same manner. Aging prisoners, mentally disabled prisoners,

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26. For a preliminary assessment of the effects of ADA on prisons, see Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 ST. LOUIS U. PUB. L. REV. 175, 177-99 (1994). The article surveys structural and operational changes that full implementation of ADA in prisons could require. However, Gardner assumes that the statutory authority driving ADA overrides the traditional separateness of prison condition litigation. That assumption is itself controversial. In November 1994 (after Gardner's article went to press), for example, the Ninth Circuit held in *Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994), *see infra* notes 57-59 and accompanying text, that statutory authority falls prey to the *Turner* reasonableness standard when applied to prisons. *See infra* Section V.B. (discussing four-part test of *Turner v. Safley*). More recently, the Fourth Circuit questioned anew the application of the ADA to state correctional facilities. *See infra* notes 276-281 and accompanying text.

prisoners with HIV, and hearing-impaired prisoners all present particular difficulties requiring particular remedies.[27]

A. *Disabled Prisoners*

1. *Elderly*

The average age of American prisoners is rising. With harsher mandatory sentencing guidelines as well as "three strikes and you're out" provisions, the criminal justice system confronts an increasingly geriatric incarcerated constituency.[28] Older prisoners are not necessarily disabled, but they are far more likely to be disabled, to become disabled, or to develop conditions that require special accommodation. The financial implications of this trend are ominous. The cost of incarcerating older prisoners, especially for medical care, greatly exceeds that of younger inmates.[29] While existing prisons were built in anticipation of younger, abler populations, the increased number of older prisoners[30] combines with the structural requirements of disability legislation to increase expenses. In addition, as with many younger disabled inmates, older prisoners are easy targets for inmate violence.[31] Lending a final sense of futility is the awareness of correctional officials that geriatric inmates are frequently incarcerated for nonviolent or minimally violent offenses and have long since ceased to present a threat to society.[32]

2. *Mentally Disabled*

Mental illness[33] and mental retardation[34] are also significant disabilities. The ADA provides characteristically broad coverage of mental disabilities, with

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27. While some would contend that these prisoners have special concerns, others argue that the purpose of the ADA was to present a level playing field rather than to give certain individuals particular benefits. Until this debate between equal protection and special needs is settled, it is unclear what role the ADA should play in the prison context.

28. *See* Bill Miller, *Making Old Folks at Home Behind Bars: Corrections Officials Try to Accommodate a Rising Number of Elderly Inmates*, WASH. POST, Dec. 29, 1993, at B1 ("Nationwide, the number of older prisoners—defined by corrections specialists as offenders age 50 and up—has more than doubled since the mid-1980s. More than 45,000 state and federal prisoners are 50 or older, and specialists believe the number will balloon up to 125,000 by 2000.").

29. *See id.*; *see also* Miles Corwin, *Doing Time in a Jail for Old-Timers*, L.A. TIMES, May 6, 1994, at 1 (estimating annual medical costs of $125,000 for one 67-year-old inmate and stating that older prisoners cost about $60,000 per year—three times more than cost for younger inmates).

30. *See* Miller, *supra* note 28, at B1.

31. *See id.*

32. *See id.*

33. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-10.1(b) (Definitions) (1984) ("A prisoner who suffers a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, or the capacity to recognize reality or the ability to meet the demands of life is referred to within this part as a severely mentally ill prisoner.").

34. *See id.* Standard 7-10.1(c) ("A prisoner with very significant subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior is referred to within this part as a seriously mentally retarded prisoner.").

certain exceptions.[35] The mentally disabled inmate population presents several unique and complex problems for prison management generally[36] and for application of the ADA in particular.[37]

First, the entire phenomenon of mental disabilities challenges traditional methods of thinking and evaluation. Where it is possible to assess physical disabilities and the degree to which they impede typical daily functions, it is far more difficult to appreciate, identify, or, in any useful sense, quantify mental disabilities. The plethora of scientific writing notwithstanding, mental states—their nature, their validity, and their implications—continue to elude clear and complete understanding. Until relatively recently, the criminal justice system effectively avoided or overlooked many of the complexities presented by mentally disabled defendants and inmates.[38]

Prisons regard mental-disability claims with resident suspicion.[39] Moreover, in understaffed, increasingly demanding prison environments, the time and patience required to address mental-disability issues adequately is difficult

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35. The definition for disability includes mental impairments. *See* 42 U.S.C. § 12102(2)(A) (1994). As with physical disabilities, the original text of the ADA does not provide extensive lists or discussion of the mental disabilities covered. The Department of Justice's Final Rule expanded on this to provide an illustrative, but not exhaustive, list of qualifying conditions: "It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 28 C.F.R. § 35.104 (1994). The exceptions noted in the rule include, but are not limited to, sexual orientation, personality traits, and cultural disadvantages. *See id.*

36. *See* Youngberg v. Romeo, 457 U.S. 307, 315-16, 319-20 (1982) (pointing out that state bears certain responsibilities, including provision of reasonable care and minimum levels of safety, when it confines mentally retarded individuals).

37. *See* Bryant v. Madigan, 84 F.3d 246, 248 (7th Cir. 1996). Chief Judge Richard Posner expressed doubt that the ADA should apply to prisons: "[T]here are formidable practical objections to burdening prisons with having to comply with the onerous requirements of the Act, especially when we reflect that alcoholism and other forms of addiction are disabilities within the meaning of the Act and afflict a substantial proportion of the prison population." *Id.*

38. For a good discussion of the problems associated with the mentally disabled prisoner population, as well as examples of the conditions they face, see Connie Mayer, *Survey of Case Law Establishing Constitutional Minimums for the Provision of Mental Health Services to Psychiatrically Involved Inmates*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243 (1989). *See also* B. James George, *The American Bar Association's Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 338, 342, 371-74 (1985); Elyce H. Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 568 (1985). *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).

39. Mental disabilities may constitute a basis for innocence claims, as well as provide potentially mitigating circumstances for sentencing purposes. In capital cases, insanity claims tie directly to prospects of execution. Claims of mental disability also might be raised in an effort to qualify for transfer or other accommodations. *See* Fred Cohen & Joel Dvoskin, *Inmates with Mental Disorders: A Guide to Law and Practice*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 339, 344 (1992) (citing Chambers v. Ingram, 858 F.2d 351, 353-54 (7th Cir. 1988) (involving inmate who faked mental illness; subsequent care and treatment led to severely negative side effects and charges of malpractice)). The incentives to feign mental disability include seeking relocation within the prison system or other advantages. Cohen and Dvoskin distinguished this strategy from the non-advantageous posture of feigning "bad"-ness. *See id.* at 346 n.62. Feigning mental illness is arguably somewhat easier than feigning paralysis or other significant physical disability. *See also* Sward & Wallace, *supra* note 11, at A1 (discussing "widespread belief among guards that almost all inmates feign illness").

to find.[40] The treatment of mental disabilities differs considerably from that necessary for physical disabilities[41] and introduces an additional party—the state hospital—to which prisoners may be sent briefly for treatment or, after the requisite procedures, transferred for a longer period, pending recovery.[42] The transfer protocol raises issues of due process, while the interplay of civil and criminal systems complicates an already exacting situation.[43] System complexity is accompanied by a potential for system abuse.

A second issue that arises is the often overlooked or misunderstood distinction between mental illness and mental retardation. Historically, mental retardation has taken second place to mental illness as a credible topic and concern.[44] Moreover, mentally retarded inmates have been treated for mental illness or simply dismissed as "stupid." Where the distinction is made, it is

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40. Because many prison officials lack the time or patience required to address the needs of mentally ill and retarded individuals, guards often respond to problems concerning these prisoners with violence. Many states allow corrections officers to use tasers or "stun guns" that fire 45,000-volt darts for controlling inmates. Thirty prison guards recently used tasers to free hostages at the medical unit of Virginia's Nottoway Correction Center. *See Prison Standoff Ends, Eight Guards Injured*, WASH. TIMES, Aug. 11, 1996, at A12. Although use of these weapons violates California Department of Corrections regulations, guards use them anyway. In at least two instances over the past ten years, the use of tasers resulted in fatalities, as guards repeatedly applied shocks to inmates who refused to leave their cells. *See, e.g.*, Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994); *see also* Gates v. Gomez, 60 F.3d 525, 530-31 (9th Cir. 1995) (continuation of *Gates v. Rowland*) (reviewing challenge to district court's order regarding continued use of 37-millimeter grenade launcher gun on inmates).

41. Moreover, rights to treatment are oriented toward physical disabilities. The deliberate-indifference standard, which is tied to ignoring serious medical needs, reduces the potential success of legal challenges. One definition of "serious medical need" is an injury so conspicuous that a layperson "would easily recognize the necessity for a doctor's attention." *See* Johnson v. Busby, 953 F.2d 349, 351 (8th Cir. 1991) (upholding jury instruction using this language). When discussing cuts, wounds, abrasions, and major physical injuries, this concept may have some merit. The frequent invisibility of mental disabilities, however, separates them from visible physical disabilities and becomes an additional obstacle to successful legal challenges.

42. Transfers raise issues of civil-commitment proceedings, standards of proof, determinations of dangerousness, and a litany of associated and responsive legal concerns. One primary concern has been the absence of process and judicial involvement in decisions to transfer inmates from prisons to state hospitals. A selection of statutory authorizations reflects, however realistically, these concerns for the process. *See, e.g.*, DEL. CODE ANN. tit. 11, § 406 (1993) (authorizing Superior Court to inquire into allegations of prisoner's mental disabilities and to order inmate transferred from prison to state hospital); WIS. STAT. ANN. § 51.37(4) (West 1993) (authorizing transfer where more appropriate care is available, *subject to approval of committing court*); *id.* § 51.37(5)(b) (mandating that emergency transfers under dangerousness clause in this section be accompanied by filing of statement with court within 24 hours). *But see* PA. STAT. ANN. tit. 50, § 4412 (West 1993) (authorizing transfer of mentally disabled inmates to medical facility or back to prison *without court approval*, albeit subject to procedure for internal reports on inmate's condition).

43. *See* Matthews v. Hardy, 420 F.2d 607, 610-13 (D.C. Cir. 1969) (holding appellant's rights violated when he was transferred without judicial hearing); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969) (holding that prisoner must be afforded substantially same procedural safeguards as are provided in civil commitment proceedings to be transferred to state institution for insane criminals). *But see* Humphrey v. Cady, 405 U.S. 504, 510-11 (1972) (noting that initial commitment of sex offender might not require safeguards present in civil-commitment proceeding where commitment is alternative to incarceration).

44. *See* Ellis & Luckasson, *supra* note 38, at 480-81.

often to the disadvantage of the mentally retarded individual.[45] American prisons hold a significant population of mentally retarded prison inmates whose problems are distinct from those of mentally ill inmates and, in many respects, much more difficult to resolve.[46]

Finally, prisons are confronted by a third pressure point: a steady increase in both the numbers of mentally disabled inmates[47] and the frequency of litigation challenging those inmates' prison conditions.[48] Particularly in the

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45. *See, e.g.*, Heller v. Doe, 113 S. Ct. 2637 (1993). The plaintiffs in *Doe* challenged Kentucky statutes that gave greater protection to mentally ill individuals than to mentally retarded individuals during the civil-commitment process. *See id.* at 2640. The Court justified this distinction by noting that, unlike mental illness, "[m]ental retardation is a permanent, relatively static condition . . . [and] a determination of dangerousness may be made with some accuracy based on previous behavior." *Id.* at 2644. Another line of demarcation is the just execution of mentally retarded prisoners versus mentally ill or insane prisoners. The Supreme Court has ruled that it constitutes cruel and unusual punishment to execute an insane person. *See* Ford v. Wainwright, 477 U.S. 399, 410 (1986). However, the Court has not yet indicated that execution of mentally retarded inmates violates the Eighth Amendment. *See* Wills v. Texas, 114 S. Ct. 1867, 1867-68 (1994) (recognizing that mental retardation is simply one mitigating factor that juries may consider in sentencing) (Blackmun, J., dissenting from denial of certiorari); Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (holding that capital punishment of mentally retarded individuals is not categorically prohibited by Eighth Amendment); *see also infra* Section I.C. (discussing issues concerning disabled death-row inmates).

46. Several problems distinguish mental retardation from mental illness. The former is a constant condition, not significantly treatable. "Right to treatment" discourse tends not to apply as clearly in these cases. Moreover, mentally retarded inmates constitute a major part of the discernibly "weak" prison population, which makes them conspicuous targets for internal violence and abuse. They are likely to incur the wrath of prison administrators and guards for their limited ability to follow prison regimen accurately, and more easily than most can become the tools of other inmates. A parallel can be drawn between the mentally retarded inmate and his or her blind or deaf cellmate, as each is precluded from understanding, seeing, or hearing essential information, instructions, or events. The distinction is that blind and deaf inmates may circumnavigate some of the problems with auxiliary aids. Their vulnerabilities overlap with regard to security; hearing aids notwithstanding, what one cannot see, hear, *or recognize as intending harm* may be harmful or dangerous.

For a useful discussion of the problems that mentally retarded individuals confront after conviction, see Ellis & Luckasson, *supra* note 38, at 480-81.

47. *See* Morain, *supra* note 8, at A1. A 1993 California Corrections Department study reported that 11% of male and 15% of female prison inmates suffered from severe mental disorders. *See id.* Lawsuits have been filed alleging deprivation of adequate mental-health care to more than 28,000 California inmates. *See id.* Kyle McKinsey, head of the Corrections Department's health-care unit, placed the potential costs at $300 million annually, should these cases be lost by the state, with control assumed by the federal courts. *See id.* With the 1995 decision in *Coleman v. Wilson*, 912 F. Supp. 1282, 1306-10 (E.D. Cal. 1995) (finding that, among other deficiencies, prison officials provided inadequate care to mentally ill inmates), it remains to be seen if McKinsey's projections will prove accurate.

48. As lawyers search for more effective equations with which to challenge the conditions in which their clients live, interesting logic formulations should emerge. *See* Cameron v. Tomes, 990 F.2d 14, 19-20 (1st Cir. 1993). Affirming a district court's grant of injunctive relief to a convicted sex offender who appealed a post-conviction commitment from one day to life in a special Massachusetts treatment facility, the court of appeals noted that it based its holding on slightly different grounds:

> [C]ontext works in Cameron's favor. While his prison sentence will expire in 2002 or even earlier, his confinement in the Treatment Center is from one day to life and will never end unless his condition improves and he is found to be no longer sexually dangerous. *Thus, Cameron's best argument is that the state's ordinary procedures and constraints are affirmatively and needlessly worsening his mental condition*, so that he may well be confined long after his sentence has expired. This is a claim with some bite, no matter how much latitude states ordinarily have to run their institutions.

Id. (emphasis added). The general worsening of conditions while in prison has not been an especially effective argument within the physical-disability context. Whether it will take on strength when directed

California correctional system, but generally throughout the nation as well, corrections facilities have had tremendous difficulty providing appropriate placement and treatment for mentally disabled inmates. Unfortunately, the problem can culminate in the mentally disabled inmate being driven to extreme heights of disorientation or, left unmonitored, to attempting suicide, sometimes successfully.[49]

3. *HIV- and AIDS-Infected*

Inmates with HIV present among the most severe challenges to corrections administrations today.[50] They are sick and getting sicker.[51] Protective legislation means that they cannot be ignored, but their medical needs require special care at a cost beyond easy calculation. Their presence among noninfected inmates is controversial and has resulted in violence.[52] Infected inmates claim both a right to freedom from segregation and a right to protection against inmate violence. Mainstreaming among the general prison population, however, renders infected inmates most vulnerable to assaults by fellow inmates. Uninfected inmates, fearful of the disease and fueled by a predictable brand of prejudice and hostility, demand that infected prisoners be segregated. The rights and needs of these various inmate groups conflict, raising questions of both policy priorities and constitutional due process.

Coverage of HIV infection as a disability under the ADA was prefigured by earlier case law addressing contagious diseases. In the landmark case of

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toward mental disabilities is purely conjectural. Moreover, the effectiveness of the court's theory is linked to the state's ability to sentence Cameron to a potentially endless term at the facility. In states in which statutory provisions preclude this option—limiting medical-facility time to the length of original sentence pending full civil-commitment proceedings—the argument loses potency. Nonetheless, some formulation might be proposed linking especially poor conditions during prison incarceration to the enhanced probability of civil commitment following release from prison.

49. *See* Bill Wallace & Susan Sward, *Suicidal Inmates Often Ignored—Until Too Late*, S.F. CHRON., Oct. 4, 1994, at A1 (reporting episodes of suicidal inmates ignored, overlooked, suspected of malingering, and even written up for attempts).

50. Federal and state prisons reported holding 22,713 HIV-positive inmates in 1994. Bureau of Justice Statistics, U.S. Dep't of Justice, *HIV in Prisons 1994* (last modified Mar. 19, 1996) <http://www.ojp.usdoj.gov/pub/bjs/abstract/hivip94.htm>. California state officials project that anywhere from 1100 to 3100 inmates carry HIV. *See* Morain, *supra* note 8, at A1.

51. HIV-infected inmates either have full-scale AIDS, Aids Related Complex (ARC) or Asymptomatic HIV infection. The disparity of symptoms and state of inmates' health among these three further complicates decisions regarding placement within the prison community.

52. *See, e.g.*, Adams v. Drew, 906 F. Supp. 1050, 1052 (E.D. Va. 1995) (recounting how group of inmates attacked another inmate after learning that he had AIDS). The victim in *Drew* asked correctional officers to move him from his cell block because he believed other inmates would attack him. *See id.* Prisoners known to carry HIV live under constant apprehension of harm. *See* Anderson v. Romero, 72 F.3d 518, 526 (7th Cir. 1995); Casey v. Lewis, 4 F.3d 1516, 1524 (9th Cir. 1993) ("[W]henever inmates discover another inmate is HIV-positive . . . threats are made against that inmate's life. According to [the Chief of Security at the Central Unit in the Florence facility], an HIV-positive inmate whose seropositive status is discovered by the general inmate population would be in a life threatening situation."), *rev'd and remanded*, 116 S. Ct. 2174 (1996).

School Board of Nassau County v. Arline,[53] the Supreme Court decided that a teacher infected with tuberculosis stated a claim for disability-based discrimination when she was dismissed because she had a contagious disease.[54] Subsequent cases under the Rehabilitation Act of 1973 confirmed that the same theory applied to AIDS. In *Harris v. Thigpen*,[55] for example, while reviewing a challenge to the treatment of HIV-positive inmates in the Alabama correctional system, the United States Court of Appeals for the Eleventh Circuit held that individuals testing positive for HIV qualified as "handicapped individuals" under the Rehabilitation Act standard.[56] At the same time, courts generally have agreed that concerns for security and medical integrity justify the segregation and disparate treatment of inmates with HIV.[57]

Accommodation of HIV-infected prisoners creates a range of issues, including mainstreaming, protection from physical violence and institutional staff prejudice, and providing for their extensive medical needs. These needs regularly clash with the peculiar threat that HIV and AIDS present in a prison setting. Sexual assault is commonplace among inmates, and with HIV infections already thriving, the potential for transmission of the disease is considerable. The conflict centers on the struggle between equal protection versus special needs, and on prisoners' rights versus deference to prison authorities.

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53. 480 U.S. 273 (1987).

54. *See id.*

55. 941 F.2d 1495 (11th Cir. 1991).

56. *See id.* at 1522-24. There was opposition to including HIV infections under the disability coverage provided by ADA. *See Conferees Clear Disability Rights Bill After Deleting House AIDS Amendment*, DAILY REP. FOR EXECUTIVES, June 26, 1990, at A-12 (discussing defeat of proposed Chapman Amendment to ADA, which would have allowed transfer of HIV-infected food service workers based on their disability).

57. *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 136 (1977) ("There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence."); Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994) (reversing district court's order requiring that defendants permit HIV-infected inmates to work in food service operations); Roe v. Fauver, CIV. A. No. 88-1225 (AET), 1988 WL 106316 (D.N.J. Oct. 11, 1988) (holding that confinement to hospital room was not likely to raise successful Eighth Amendment claim); *see also* Ayesha Khan, *The Application of Section 504 of the Rehabilitation Act to the Segregation of HIV-Positive Inmates*, 65 WASH. L. REV. 839, 848-49 (1990). As of 1990, states were employing a variety of strategies in housing HIV-infected inmates. Some jurisdictions screen on a case-by-case basis, while others mandate location on a categorical delineation (AIDS, ARC, or asymptomatic). Certain jurisdictions turned to special programming, including either single cells for infected inmates, or assignment of two infected inmates as cellmates, as well as tailored work assignments. The focus is on mainstreaming infected inmates while reducing the dangers of disease transmission. Texas, along with a few other jurisdictions, "permanently segregate[s] all three categories of HIV-infected inmates." *Id.* at 849. California had tried the complete segregation strategy, but eventually signed a consent agreement (encompassing many other complaints) that included a plan to review and amend this policy. *See id.* at 849 n.58. For more discussion on asymptomatic HIV-positive inmates, see *Dean v. Knowles*, 912 F. Supp. 519, 522 (S.D. Fla. 1996) (denying defendant's motion for summary judgment on plaintiff's claim that he was denied access to trustee program due to his HIV-positive status).

The United States Court of Appeals for the Ninth Circuit's recent holding in *Gates v. Rowland*[58] suggests that some courts will elevate the penological interests of security and efficiency above the statutory rights of HIV-infected inmates. Among the most interesting aspects of the *Gates* decision was the court's willingness to consider the irrational fears of guards or other inmates as legitimate interests.[59] Traditional antidiscrimination policy does not permit accommodation of prejudice and ungrounded fear; in a prison setting, however, with heightened security concerns and an intensely volatile population, the *Gates* court felt that such circumstances warranted recognition.

4. *Hearing Impaired*

Deaf inmate claims comprise a considerable percentage of prison disability cases.[60] These inmates encounter a uniquely problem-ridden path just getting into prison,[61] experience an uncommon type and degree of disadvantage in prison due to their disability,[62] and present a discrete set of challenges to

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58. 39 F.3d 1439 (9th Cir. 1994).

59. *See id.* at 1447-48 ("[M]any members of the general prison population are not necessarily motivated by rational thought and frequently have irrational suspicions or phobias that education will not modify."). The court found that excluding HIV-positive inmates from food service jobs served legitimate custodial security concerns because prisoners are particularly sensitive to food service and will perceive a health risk despite scientific pronouncements. *See id.* at 1447. For a general discussion of *Gates*' ramifications, see *infra* text accompanying notes 273-275.

60. *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994), provides an example of the difficulties deaf and hearing-impaired inmates face during incarceration. In *Tugg*, the court reviewed claims that "equivalent mental health services could only be provided by counselors, deaf or hearing, with sign language ability, who have a sufficient knowledge and understanding of the deaf community." *Id.* at 1204. Responding to defendants' claim that the legislation excludes culture from qualifying impairments (citing Department of Justice commentary on ADA), the court determined that

> [t]he Plaintiffs established that the interpreters offered by the Defendants fail to surmount the language barrier the Plaintiffs face in receiving effective mental health counseling. To the extent that this obstacle is heightened by a therapist's lack of education, training or experience regarding the specific psychological conditions common to the deaf, the Court finds this issue is rooted in the Plaintiffs' condition, not their culture.

Id. at 1208. For an extensive discussion of the problems confronted by deaf inmates, see Bonnie P. Tucker, *Deaf Prison Inmates: Time To Be Heard*, 22 LOY. L.A. L. REV. 1 (1988), *reprinted in* 2 PRISONERS AND THE LAW ch. 17B (Ira P. Robbins ed., 1996).

61. *See* Lennard J. Davis, *The Prisoners of Silence*, NATION, Oct. 4, 1993, at 354. A profoundly deaf defendant, awaiting trial in New Jersey (for 14 months when the article was published), was unable to read, write, or use sign language. Statutory options included a designation of mental incompetence, which required commitment to a mental hospital until the defendant acquired language skills, or a designation as competent, which required him to stand trial without any understanding of the significance of the process. Teaching these defendants enough sign language to communicate effectively is exceptionally difficult and prohibitively expensive—in the neighborhood of $70,000 per year to provide individualized cell-based training. The larger problem is that linguistic incompetence is not generally recognized in the American criminal justice system; this requires case-by-case challenges and treatment.

62. *See* Clarkson v. Coughlin, 783 F. Supp. 789 (S.D.N.Y. 1992).

> Clarkson's experience at Bedford Hills can be described best as "a prison within a prison." . . . Rarely was she fully aware of what was going on around her. The record indicates, for example, that Clarkson underwent HIV testing without her knowledge and that she received and took medicine without knowing why. Her ability to participate in educational training programs was limited; she could not take advantage of group counseling; and she did not enjoy the same telephone and television privileges as did inmates who are not hearing-impaired.

prison management attempting to solve problems or simply to comply with legislative mandates.

Deaf or hearing-impaired inmates have distinct problems adjusting to prison regimens. Their disability is not immediately observable, yet their lack of access to events surrounding them parallels that of the wheelchair-bound paraplegic.[63] Guards do not see their deafness, but do see their failure to respond to commands. Fellow inmates do not understand their incomprehension, but notice their seeming lack of intelligence or their inherent vulnerability to assault or abuse. Deaf inmates cannot hear announcements, nor the footsteps of an impending attack. They are often poorly educated, if at all, and may lack sufficient skills in American Sign Language.[64] Because they typically cannot manage their own interactions with prison staff, they are dependent on fellow inmates or guards to interpret for them in situations ranging from casual encounters to disciplinary hearings. There is little way of ensuring that the translation is neither errant nor deliberately sabotaged.

Title IV of the ADA, which pertains to telecommunications, holds particular promise for hearing-impaired inmates. It mandates the equitable provision of auxiliary devices such as TDDs.[65] In conjunction with Title II's general requirements, Title IV also requires adequate alternatives for receiving announcements, warnings, and official communications. Even the remedies carry problems, however, as these alternative devices implicate both privacy and equal protection issues.[66]

Id. at 793; *see also* Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996). Inmate Niece was not allowed access to TDD telephones to communicate with his deaf fiancee. *See id.* at 1212; *see also infra* note 65 (defining TDDs). He brought suit under 42 U.S.C. § 12134(a) (1994), which protects a person from discrimination based on his "known association with a disabled person." *Id.* at 1216. His fiancee actually went so far as to purchase a text telephone system and donate it to the prison so that Niece would be able to contact her. The prison still refused to allow him to use the device. *See id.* at 1212. *See generally* Rewolinski v. Morgan, 896 F. Supp. 879, 881 (E.D. Wis. 1995) (discussing other problems suffered by deaf inmates).

63. *See, e.g.*, Large v. Washington County Detention Ctr., No. 90-6610, 1990 U.S. App. LEXIS 18239, at *4 (4th Cir. Oct. 16, 1990) ("We hold only that under appropriate circumstances the refusal to supply a hearing aid to a convict could constitute deliberate indifference to a serious medical need, hence a violation of the eighth amendment rights.").

64. Controversy exists within the deaf community in America regarding how deaf individuals should be educated. American Sign Language (ASL) has become the traditional form of communication, emphasizing interaction among persons skilled in this language form. It warrants attention, however, that alternative methods of language acquisition like Cued Speech, a phonemically based method, are gaining ground and achieving noteworthy results in educational settings.

In any event, many hearing-impaired inmates have little or no formal education, training in ASL, or skills interacting successfully with non-ASL individuals. This characteristic leaves them singularly ill-equipped even to make the best of an admittedly bad situation. Some efforts are being made to provide ASL training in prison settings. In *Tugg*, however, a mental-health counselor testified that "[[i]t takes five years to be fluent in ASL. There is no written component for it. It has its own rules and instructions." 864 F. Supp. at 1207. For a discussion of projected costs of educating inmates or defendants in ASL, see *supra* note 61.

65. TDDs are text telephones that enable a visual circumnavigation of the hearing impairment.

66. Use of TDD equipment, for example, places the privacy and confidentiality of conversation in jeopardy. *See* Michael F. Kelleher, *The Confidentiality of Criminal Conversations on TDD Relay*

B. *Disabled Pretrial Detainees*

This Article focuses on conditions of confinement for convicted prisoners, but the ADA's provisions also affect pretrial detainees. *Bell v. Wolfish*,[67] the leading case on the rights of pretrial detainees, suggests that there is little practical difference between pretrial detention and post-conviction incarceration insofar as rights to reasonable treatment are concerned.[68] Pretrial detainees do not have any special protection against unpleasant or even painful detention conditions. Noting that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,"[69] the Supreme Court in *Wolfish* concentrated on whether the conditions constituted punishment.[70] This determination appears to turn on intent, rather than effect, but the standard for analysis is unclear.[71] The standard employed tends to resemble the deliberate indifference standard applied to convicted prisoners.[72]

Although not yet convicted of any offense, pretrial detainees encounter antagonism toward perceived "criminal elements" similar to that which confronts convicted prisoners. This absence of demarcation, in tandem with recent judicial holdings, suggests that ADA claims are unlikely to conclude differently for pretrial detainees,[73] unless the plaintiff can effectively

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Systems, 79 CAL. L. REV. 1349 (1991); Stephanie Hoit Lee, Wisconsin v. Rewolinski: *Do Members of the Deaf Community Have a Right To Be Free From Search and Seizure of Their TDD Calls?*, 10 LAW & INEQ. J. 187 (1992); Stuart N. Brotman, *Safeguarding Confidences*, NAT'L L.J., July 8, 1991, at 13.

67. 441 U.S. 520 (1979).

68. *See id.* at 533-39. *See generally* Ira P. Robbins, *The Cry of* Wolfish *in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211 (1980) (discussing *Wolfish* and its implications).

69. *Wolfish*, 441 U.S. at 533.

70. *See id.* at 534.

71. *See id.* at 538-39.

72. *See, e.g.*, Davis v. Hall, 992 F.2d 151 (8th Cir. 1993).

> Although this court has suggested that a more stringent standard than deliberate indifference would be appropriate in assessing pretrial detainees' claims of inadequate medical care, no standard has been clearly established. . . . In the absence of a clearly established standard for pretrial detainees' claims of inadequate medical care in the Eighth Circuit, we apply the deliberate indifference standard in the analysis of this case.

Id. at 152-53 (citation omitted). For a valuable discussion of standards used to evaluate complaints brought by pretrial detainees, see *Telfair v. Gilberg*, Civ. A. No. 493-310, 1994 WL 653518 (S.D. Ga. Oct. 24, 1994).

73. An example of failure to distinguish between pretrial detainees and convicted prisoners is in *Gorman v. Bishop*, 919 F. Supp. 326 (W.D. Mo. 1996). The plaintiff in this case is a paraplegic who was arrested after he "solicited assistance from two police officers." *Id.* at 327. The police van used to transport Mr. Gorman to the police station was not equipped with a wheelchair lift or wheelchair restraints. Thus, the officers "lifted Plaintiff from his wheelchair and placed him on a wooden bench inside the van. Plaintiff's physical condition prevented him from supporting himself on the bench, so [they] used Plaintiff's belt to tie his upper body to the wire mesh wall behind the bench." *Id.* Gorman fell at some point during the trip and suffered injuries to his back and shoulders. Surprisingly, the court dismissed Gorman's ADA claim, relying on the Fourth Circuit's decision in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995). A person who has been arrested

distinguish the state's interest in pretrial and post-conviction detention for his or her particular claim.

C. *Disabled Death-Row Inmates*

The execution of Charles Sylvester Stamper in 1994 illustrates several issues raised by the introduction of nondiscriminatory legislation into the criminal justice system. Stamper, a Virginia death-row prisoner, was the subject of passionate debate regarding the execution of severely disabled prisoners who may pose little further threat to society.[74] On one side were those who argued that it is inherently inhumane to support executions in these cases.[75] On the other side were a coalition of prosecutors, victims' rights advocates, and even an activist for the rights of the disabled.[76]

Adding to the population of disabled offenders sentenced to death are aging death-row inmates and those who become disabled *after* incarceration. Due to the interplay of legislative requirements and time delays between sentencing and execution, the state may find itself partially rehabilitating or improving the condition of these physically disabled inmates prior to execution. The grim irony of this cycle colors the capital punishment debate. Stamper, unable to walk to the electric chair even with his walker and braces, was carried to the death chamber by three corrections officers. He was the first wheelchair-bound inmate executed since 1959.

The execution of mentally retarded inmates raises especially disturbing considerations. The Supreme Court has not ruled that such executions violate Eighth Amendment guarantees.[77] While mental retardation can be used as a mitigating factor in determining whether to recommend a death sentence,[78] the mentally retarded defendant is frequently misunderstood by jurors and judges and becomes an easy target for zealous prosecutors,[79] particularly when represented by mediocre (at best) defense counsel.

> is not normally thought of as one who would have occasion 'to meet[] the essential eligibility requirements' for receipt of or participation in the services, programs or activities of a public entity. The terms 'eligible' and 'participate' imply voluntariness on the part of the applicant who seeks a benefit from the state; they do not bring to mind [criminal suspects] who are being held against their will.

Gorman, 919 F. Supp. at 329 (quoting *Torcasio*, 57 F.3d at 1347) (alteration and quotations in original). The court then held that the ADA's terms did not apply to Gorman's arrest, *see id.*, and that the police officers *"could not have been expected to know* that the ADA applied in this situation." *Id.* at 331 (emphasis added).

74. *See* Bill Miller, *The Execution of a Disabled Killer Rekindles the Debate on Capital Punishment*, WASH. POST, Feb. 2, 1994, at A10.

75. Not surprisingly, these tend to be representatives from groups that also are generally opposed to capital punishment.

76. *See* Miller, *supra* note 74.

77. *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

78. *See supra* note 45.

79. *See* John R. Woodward, *Disability & Death Row*, DISABILITY RAG & RESOURCE, Nov.-Dec. 1994, at 14, 17.

II. STATUS OF DISABLED PRISONERS PRIOR TO THE ADA

The national commitment to civil rights emerges from the crossfire of social theory and economic self-esteem. As a nation, we experience sporadic bouts of noble concern for bettering the lot of our fellow travelers. As an interdependent collective, however, we also retreat from these fits of optimism, bemoaning excessive costs and the impracticality of change. In especially dark episodes, those who might otherwise become the recipients of our sharing tendencies instead serve as the marginalized objects of our scorn and our fear.

Society is especially likely to push aside the health and welfare of prison inmates. Although prisoners are a segment of society highly susceptible to abuse by others, they are not a constituency that garners much sympathy. Perhaps more than any other "minority," prisoners cannot fight back against discrimination. While they are greatly in need of protection, courts seem hesitant to apply present statutory frameworks to disabled prisoners.

Historically, the language of civil rights legislation in this country has focused on increased access, enhanced opportunity, and improved prospects for all Americans. By contrast, the tone of prisoner litigation has been cautious at best, and typically discouraging. When the tenets of antidiscrimination policy meet the constraints of alleged penological necessity, the result is confusion and contradictory judicial analysis, accompanied by decreased prospects for success in the courts.

Nevertheless, the progress of civil rights litigation has not entirely escaped prisons. As the nation committed itself to protection of equal rights regardless of race, religion, and gender, the courts challenged social institutions and included prisons in the process. Lawsuits confronting prisons alleged racial segregation and denial of religious freedom among other claims.[80] The courts, while deferential to the unique circumstances inherent to the prison context,[81]

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80. *See, e.g.*, Cruz v. Beto, 405 U.S. 319, 322 (1972) (upholding rights of Buddhist inmate to exercise his religious rights to degree comparable to that afforded other inmates); Lee v. Washington, 390 U.S. 333, 333 (1968) (holding that state statutes mandating segregation of races within prison and jail populations violated Fourteenth Amendment, even weighed against competing interests of security and administrative efficiency); Sockwell v. Phelps, 20 F.3d 187, 191 (5th Cir. 1994) ("[A] generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation.").

81. Much literature addresses the judiciary's "hands off" doctrine, which essentially held that courts were ill-equipped to oversee prison management, and the peculiar requirements of prisons exempted those facilities from the usual degree of judicial scrutiny. *See* Procunier v. Martinez, 416 U.S. 396, 404 (1974) (noting traditional hands-off doctrine). The doctrine began to lose strength during the Warren Court era, as civil rights concerns permeated American society and the American legal system. Courts began to articulate the theory that fundamental constitutional rights are not checked at the prison door. *See* Henry v. Van Cleve, 469 F.2d 687 (5th Cir. 1972) (holding that district court erred in dismissing state prison inmate's claim of racially discriminatory treatment by prison staff under blanket theory of deference to prison management); *see also* Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966) (holding that district court erred in dismissing claim by black inmate regarding denial of access to publications granted to white inmates). In recent years, with the conservative Burger and Rehnquist Courts, judicial intervention has slowed, and this trend seems likely to continue. Indeed, we may well "be headed

still cooperated by acknowledging that a limited core of civil rights survived incarceration.[82] The identified core, however, remained susceptible to defenses of security considerations and administrative necessity on the part of prison administrators.

The civil rights policies of the 1960s and 1970s contained a vision of fundamental, inviolable freedoms for each individual. That these rights would travel with the person, even into prison settings, was not beyond imagination. By contrast, the disabled individuals' movement originated in debates over economic empowerment and employment prospects, long before anti-discrimination policy in this area seized the higher moral ground of fundamental rights. Delayed articulation in these terms, as well as a continuing perception that disabled persons' rights were a matter of improved employment opportunities, combined to obscure the application of nondiscriminatory practices. Disabled prisoners framed their allegations in Eighth Amendment "cruel and unusual punishment" terms, rather than as direct claims of discrimination.

A. *Constitutional Standards for Prison Litigation*

Prior to the passage of either the Rehabilitation Act of 1973 or the Americans with Disabilities Act, courts heard a series of lawsuits brought by physically and mentally disabled prisoners. Inmates alleged violations of their constitutional rights by filing 42 U.S.C. § 1983 claims.[83] The Cruel and Unusual Punishments Clause of the Eighth Amendment[84] provided the standard for determining the merits of these claims. Claims cited inadequate or inappropriate medical treatment, lack of access to exercise facilities, and lack

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toward a new hands-off doctrine in correctional law." Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights*, 144 F.R.D. 127, 169 (1993).

82. *See* Wolff v. McDonnell, 418 U.S. 539, 546 (1974) (noting that concerns for security and effective prison management counterbalance unfettered exercise of prisoners' rights). In *Wolff*, the Court articulated the potential applicability of both the Due Process Clause and the Fourteenth Amendment to prisoners' claims. In *Meachum v. Fano*, 427 U.S. 215 (1976), however, the Court curtailed an expansive reading of the *Wolff* decision. *See id.* at 224. The Court has been cautious in the cases that followed; essentially, prisoners are deemed to retain some constitutional rights following conviction and incarceration, but the Court has hesitated to identify the extent to which particular rights withstand challenge by alleged competing state interests. *See* Lewis v. Casey, 116 S. Ct. 2174, 2206-07 (1996) (Stevens, J., dissenting).

83. Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).

84. "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" U.S. CONST. amend. VIII (emphasis added).

of access to vocational or rehabilitative programs, as well as appalling conditions within the prison confines.

The cruel and unusual punishment standard proved to be exceptionally difficult to meet. In case after case, plaintiffs established that their medical needs had not been met and that prison life for severely disabled prisoners was painful, humiliating, damaging to their health, and effectively constituted an additional punishment of a most severe order. More often than not, however, the courts found that conditions did not constitute a violation of Eighth Amendment dimensions.

In *Estelle v. Gamble*,[85] the Supreme Court affirmed the "government's obligation to provide medical care for those whom it is punishing by incarceration."[86] Setting the high standard that would tilt prison conditions litigation to the side of the state for the next several decades, the Court concluded:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.[87]

As became evident even within the *Estelle* opinion, deliberate indifference was a strict test to meet.[88] The maltreatment or failure to treat must be both

85. 429 U.S. 97 (1976).

86. *Id.* at 103.

87. *Id.* at 104-05 (citation omitted); *see also* Hicks v. Frey, 992 F.2d 1450, 1457 (6th Cir. 1993) ("[N]o physical injury is required for a prisoner to recover on an Eighth Amendment claim of deliberate indifference to medical needs. Extreme conduct by custodians that causes severe emotional distress is sufficient.") (citation omitted); Brown v. Hill, No. Civ. A. 93-6424, 1994 WL 570880, at *3 (E.D. Pa. Oct. 17, 1994).

88. *See Estelle*, 429 U.S. at 105 (observing that second electrocution attempt after initial malfunction was not unconstitutional) (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947)). Further, "an inadvertent failure to provide adequate medical care" would not implicate "cruel and unusual" prohibitions. *Id.*; *see also* Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

intentional[89] and of such a degree that it "can offend evolving standards of decency."[90] Few litigants were able to establish deliberate indifference.[91]

As the deliberate-indifference standard reigned in medical and health-related litigation, other questions dominated claims alleging violation of "liberty interests."[92] Courts reviewed claims regarding security ratings within prisons,[93] double-bunking,[94] freedom from transfer even to a distant prison in another state,[95] the right to parole,[96] the right to rehabilitation,[97] the right

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89. The requirement of intent has continued throughout Eighth Amendment jurisprudence. However, Justice Stevens, dissenting in *Estelle*, argued:

> If this is meant to indicate that intent is a necessary part of an Eighth Amendment violation, I disagree. If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system that meets minimal standards of adequacy. As a part of that basic obligation, the State and its agents have *an affirmative duty* to provide reasonable access to medical care, to provide competent, diligent medical personnel, and to ensure that prescribed care is in fact delivered. For denial of medical care is surely not part of the punishment which civilized nations may impose for crime.

Estelle, 429 U.S. at 116 n.13 (Stevens, J., dissenting) (emphasis added).

90. *Id.* at 106 (internal quotation marks omitted).

91. Some claimants prevailed, notwithstanding the steep burden of proof. *See, e.g.*, Johnson v. Hardin County, 908 F.2d 1280, 1284 (6th Cir. 1990) ("Where there is credible testimony that a prisoner was denied prescribed pain relief medication, denied access to shower facilities, denied crutches, and denied needed bedding in spite of his repeated requests and complaints made personally to the defendants, we believe a jury could reasonably conclude [that the defendants' behavior amounted to deliberate indifference]."); Large v. Washington County Detention Ctr., No. 90-6610, 1990 WL 153978, at *22 (4th Cir. Oct. 16, 1990) (noting that "there is ample authority recognizing that the failure to provide comparable basic corrective/medical devices may amount to deliberate indifference"); LaFaut v. Smith, 834 F.2d 389, 394 (4th Cir. 1987) (arguing failure to provide proper toilet facility and physical therapy to paraplegic inmate constituted deliberate indifference); Cummings v. Roberts, 628 F.2d 1065, 1068 (8th Cir. 1980) (holding denial of access to wheelchair for three days stated claim of cruel and unusual punishment); Yarbaugh v. Roach, 736 F. Supp. 318, 319 (D.D.C. 1990) (requiring prison officials to provide medical care to inmate suffering from multiple sclerosis).

92. Liberty-interest determinations merit a separate article. Prior to *Sandin v. Conner*, 115 S. Ct. 2293 (1995), liberty interests arose either from sources of fundamental rights, such as the Constitution, or from plainly stated mandatory statutory language. *See infra* note 99 and accompanying text. Generally, prisoner litigation alleging a violation of liberty interests more often seemed to turn on whether the alleged liberty interest existed than whether it had been violated. *See, e.g.*, Reed v. Lewis, No. 90-15586, 1990 WL 186829, at *1 (9th Cir. Nov. 29, 1990) ("A state may create a constitutionally protected liberty interest by establishing regulatory measures that impose substantive limitations on the exercise of official discretion.") (citing Hewitt v. Helms, 459 U.S. 460, 470-71 (1983)) (internal quotation marks omitted); Milonas v. Williams, 691 F.2d 931, 942 (10th Cir. 1982) ("A person involuntarily confined by the state to an institution retains liberty interests that are protected by the due process clause of the fourteenth amendment. . . . Such person has the right to reasonably safe conditions of confinement, the right to be free from unreasonable bodily restraints . . . .") (citations omitted).

93. *See, e.g.*, Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (holding that conviction sufficiently extinguished defendant's liberty interest to empower state to transfer defendant from medium- to maximum-security prison); Slezak v. Evatt, 21 F.3d 590, 594 (4th Cir. 1994) ("The federal constitution itself vests no liberty interest in inmates in retaining or receiving any particular security or custody status.").

94. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."); Bell v. Wolfish, 441 U.S. 520, 542 (1979) ("We disagree . . . that there is some sort of 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment.").

95. *See, e.g.*, *Meachum*, 427 U.S. at 224-25; Stewart v. Davies, 954 F.2d 515 (8th Cir. 1992).

96. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979).

to work within the prison,[98] and many others. Consistently, the courts found that prisoners do not hold many liberty interests;[99] given the Supreme Court's new "atypical and significant hardship" standard, this trend is likely to continue.[100] Meanwhile, the areas of prisoners' rights and medical/health conditions merged through claims involving the right to treatment,[101] the right to be free from nonconsensual treatment, and even the right to refuse life-saving treatment.[102]

Within this setting, disabled prisoners complained about egregious conditions of confinement in addition to denial of adequate or equal access to prison resources and facilities. Their claims were bolstered by their disabilities, but not to an exceptional degree. Instead, the disability was simply a factor for judicial consideration. In balancing the merits of the prisoner's rights versus the state's correctional needs, courts viewed the plaintiff as a prisoner who happened to have a disability, rather than as a disabled prisoner.[103]

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97. *See* Sandin v. Conner, 115 S. Ct. 2293, 2300 (1995); *see also Stewart*, 954 F.2d at 516 (concluding that inmate had no due process right to or liberty interest in participation in rehabilitative programs or in possibility of parole); Reed v. Lewis, No. 90-15586, 1990 WL 186829, at *1 (9th Cir. Nov. 29, 1990) (holding that prisoner "does not have a general constitutional right to rehabilitation").

98. *See Reed*, 1990 WL 186829, at *1.

99. *See Sandin*, 115 S. Ct. at 2300. In *Sandin*, the Court recognized that states may create due process liberty interests in certain circumstances. *See id.* "But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* For an illustration of the Court's previous analysis of liberty interests, see *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (finding historic liberty interest protected by due process that survives conviction and incarceration); *see also Reed*, 1990 WL 186829, at *1 ("A protected liberty interest may be created by state statutes, administrative regulations, or published prison policy rules and regulations.") (citing Hewitt v. Helms, 459 U.S. 460, 470-71 (1983)).

100. For a discussion of the "atypical and significant hardship" standard, see *supra* note 99. The Ninth Circuit decision in *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), addressed statutory rights, concluding that prisoners are subject to the four-part test of *Turner v. Safley*, 482 U.S. 78 (1987). This was tied to the absence of express congressional intent to introduce these rights into prisons. *See id.* The reconciliation of the *Reed/Hewitt* thread and the *Gates* restriction may turn on the presence of explicit statutory text indicating legislative intent that the statute apply to prisoners.

101. *See* 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS ch. 3 (2d ed. 1993).

102. The prisoner's right to refuse treatment emerged as an articulation of the prisoner's right, even though incarcerated, to control certain fundamental decisions about his or her own life. The demand that prisons provide decent and comprehensive treatment, however, presumes a situation in which the inmate may choose to refuse. And the right-to-refuse decision complicates the presumption that medical care is absolutely mandated. *See* Thor v. Superior Court, 855 P.2d 375, 388 (Cal. 1993) (holding that state may not force prisoner to accept unwanted treatment or care).

103. The distinction may seem unclear. With the arrival of Rehabilitation Act and ADA cases, however, disabled prisoners at least achieved an acknowledgment for a type of class standing. It would be optimistic to conclude that this in turn takes them very far; but there is a discernible shift in perspective with the addition of the disability legislation.

B. *Statutory Civil Rights for the Disabled: The Rehabilitation Act of 1973*

Prior to 1973, national disability-related legislation focused almost entirely on vocational rehabilitation and employment issues.[104] Attempts to pass civil rights legislation on behalf of disabled Americans were unsuccessful, quashed by an increasingly conservative backlash against the civil rights movement of the preceding decades as well as concern over the economic impact of employment mandates. A series of Vocational Rehabilitation Acts[105] provided for training and physical rehabilitation. Concern for the rights and dignity of disabled Americans was articulated not in terms of civil rights, but in terms of the economic benefits the nation would gain from providing improved employment opportunities to the disabled.[106] The legislative discussion addressed the benefits of employment-based self-sufficiency to disabled persons and to the nation as a whole. The disabled would regain pride and self-esteem, while the country would be relieved of a tremendous drain on national resources.[107]

In 1973, Congress passed the Rehabilitation Act.[108] The Act provided not only for rehabilitation and job training, but also went a significant step further by demanding that both the federal government and programs receiving federal funding cease discriminatory practices toward disabled persons. Section 504 of the Rehabilitation Act provided: "No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his handicap, 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."[109] This section was not the cornerstone of the Act, since the text was surrounded by the traditional discourse of economic imperatives.[110] Nevertheless, an unbroken pattern of economic argument was finally interrupted by legislation that included an acknowledgment of social policy preferences and the civil rights of disabled individuals.

Through its new civil rights component, the Rehabilitation Act began to change the landscape of disabled-prisoner litigation, primarily by lending some

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104. *See* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1364 (1993).

105. *See id.* at 1364-70.

106. *See id.* at 1368, 1397.

107. While it is true that congressional legislation is often cloaked in economic justification so as to invoke the authority of the Commerce Clause, there seems to have been little discourse beyond consideration of economic issues. This may be the rare case in which legislation citing the Commerce Clause as its basis for authority is actually just what it claims to be.

108. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796 (1994)).

109. *Id.* § 794.

110. The current text of 29 U.S.C. § 701 (1994) reads: "The purposes of this chapter are: (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society . . . . " *Id.*

credibility to inmate claims. Rehabilitation Act claims were both grafted onto § 1983 constitutional violation claims and used as the sole legal basis for litigation. In *Bonner v. Lewis*,[111] for example, the United States Court of Appeals for the Ninth Circuit discussed the applicability of section 504 to prisoners.[112] Accepting the petitioner's argument that receipt of federal funds was the standard for application of the Rehabilitation Act and that the vocational aims of the Act did have application to prisoners, the court determined that the claim was cognizable under section 504. In *Casey v. Lewis*,[113] a federal district court established the standard that must be met to succeed on a Rehabilitation Act claim.[114] Plaintiffs had to show that they were: (1) "handicapped persons" under the Rehabilitation Act;[115] (2) "otherwise qualified";[116] and that (3) the program at issue was federally funded. The original Rehabilitation Act was promptly amended and underwent regular adjustments, changes, and annual reauthorization. Throughout the next two decades, however, the fundamental mandate of the Act remained unaltered. At the same time, other disability legislation was winding its way through Congress, bolstering the gradual national acknowledgment of the need for civil rights legislation for disabled individuals. This evolution would culminate in the Americans with Disabilities Act, which would provide the greatest hope for disabled prisoners.

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111. 857 F.2d 559 (9th Cir. 1988) (challenging inadequate provision of auxiliary aids and insufficient access to prison facilities to deaf inmate).

112. *See id.* at 562-63. The judicial dialogue continues in an inconsistent vein. *See, e.g.*, Gates v. Rowland, 39 F.3d 1439, 1445 (9th Cir. 1994) ("The Act was not designed to deal specifically with the prison environment; it was intended for general societal application. There is no indication that Congress intended the Act to apply to prison facilities."); Scudder v. Smith, No. 92-4127, 1993 WL 262514, at *1 (6th Cir. July 8, 1993) ("The Rehabilitation Act of 1973 . . . does not apply to involuntary incarceration."); Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) ("The section of the Rehabilitation Act cited by plaintiff . . . does not give plaintiff any substantive rights since the Federal Bureau of Prisons does not fit the definition of 'programs or activities' governed by that section."); Casey v. Lewis, 834 F. Supp. 1569, 1584 (D. Ariz. 1993) ("Section 504 of the Rehabilitation Act applies to inmates' access to prison activities, such as disciplinary proceedings and counseling.") (citing *Bonner*, 857 F.2d at 562), *vacated and rev'd in part and remanded*, 4 F.3d 1516 (9th Cir. 1994), *rev'd and remanded*, 116 S. Ct. 2174 (1996); Donnell v. Illinois State Bd. of Educ., 829 F. Supp. 1016, 1020 (N.D. Ill. 1993) ("Contrary to defendants' assertion, the Act is applicable to inmates at correctional facilities.") (citing *Bonner*, 857 F.2d at 562); Sites v. McKenzie, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976) (holding that section 504 of Rehabilitation Act is applicable to state prisoner with "a record of mental impairment" where state Department of Corrections "is a recipient of federal financial assistance").

113. 834 F. Supp. 1569.

114. *See id.*

115. *See id.* at 1584 (citing 29 U.S.C.A. § 706(8)(B) (West Supp. 1992)).

116. *See id.* (citing Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) ("one who is able to meet all of the program's requirements in spite of his handicap")).

III. THE AMERICANS WITH DISABILITIES ACT

A. *Background: The Interrelationship of the Rehabilitation Act of 1973 and the ADA*

The ADA invoked a popular American cultural commitment to individual freedom—unhindered mobility, unlimited participation, and unconstrained access to all that the modern world offers. The rhetoric of the ADA spoke of liberation from the impediments of handicaps and social prejudice.[117] The legislative debate highlighted the economic benefits that would surely ensue.[118] Presuming that a free and mobilized American is a profitable, self-supporting citizen, Congress bolstered its civil libertarian arguments with sheer financial incentive.[119]

On July 26, 1990, President George Bush's signature completed passage of the ADA,[120] placing disabilities squarely within the arena of protected civil rights.[121] The directives of the ADA deliberately echo those of the 1973 Rehabilitation Act.[122] The ADA not only mandates practices similar to those required by the Rehabilitation Act, however; it also imposes these requirements on employers and state and local governments, private entities providing certain services, providers of public accommodations, local governments, and other public and private entities. The differences between the ADA and the Rehabilitation Act arise in application and presentation. The 1973 law targeted recipients of federal funding. Consequently, state facilities that received significant federal money could fall under the Rehabilitation Act's authority. The issue of funding, however, proved an obstacle in litigation, as petitioners

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117. "[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services[.]" 42 U.S.C. § 12101(a)(3) (1994). "[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . [because] the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities . . . those opportunities for which our free society is justifiably famous." *Id.* § 12101(a)(8)-(9).

118. Attorney General Richard Thornburgh maintained that "the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increased earnings, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues." STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 1 THE AMERICANS WITH DISABILITIES ACT 115 (Comm. Print 1990).

119. Congressional linkage of economic argument and civil rights legislation has a direct precedent in the Civil Rights Act of 1964. The purpose of making such a connection, aside from adding incentive, is to add authority under the Commerce Clause. *See* U.S. CONST. art. I, § 8.

120. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

121. *See Bush Signs Anti-Discrimination Bill for the Disabled*, S.F. CHRON., July 27, 1990, at A13 ("We are keeping faith with the spirit of our courageous forefathers who wrote that . . . 'all men are created equal.'") (quoting President George Bush).

122. *See* 28 C.F.R. § 35.103 (1994).

had to establish both receipt of federal funds and proximity of the funded program to the program or service alleged to be discriminatory.[123] Moreover, the Rehabilitation Act issued its nondiscrimination mandate in concise form,[124] for the basic law was simple and nonspecific despite the supporting documentation, including architectural guidelines and agency rules.

By contrast, the ADA's mandates apply to private employers,[125] state and local governments, and private commercial enterprises—without respect to federal funding. As a result, the Rehabilitation Act and the ADA are often viewed as parallel weapons, available respectively within the federal and state/local realms. The basis for certain ADA claims can also serve as grounds for a Rehabilitation Act claim where the public entity (thus invoking the ADA) receives federal funds (thus invoking the Rehabilitation Act). In addition, where Rehabilitation Act claims against state or local government programs might be tenuously established with respect to federal funding, they can now be filed under the ADA.[126]

Social policy, political expediency, and the need to persuade an entire nation to accommodate extensive new requirements, combined to present the ADA as the threshold of a new dawn for all citizens.[127] Legislative discussions continued to address economic policy issues, but the rhetoric and justifications for passage finally included fundamental individual justice as a co-equal partner to economic concerns. The ADA was heralded as the cure for discriminatory evils besetting disabled persons.[128]

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123. *See, e.g.*, Judd v. Packard, 669 F. Supp. 741, 742-43 (D. Md. 1987) (finding that inmate failed to demonstrate nexus between alleged discriminatory conduct and specific program receiving federal funds).

124. *See supra* Section II.B.

125. The ADA defines employer—generally—as:

> a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C. § 12111(5)(a) (1994).

126. Even for facilities qualifying under Rehabilitation Act standards (receipt of federal funds), the extended coverage of ADA will be important. *See, e.g.*, Kunkel v. Pung, Civil No. 4-81-281 (D. Minn. Aug. 6, 1981) (holding that deaf inmate lost right to sue under Rehabilitation Act for discrimination that occurred after federal funding that made program subject to Rehabilitation Act was terminated). Under the ADA, the funding question ceases to be pertinent for state and local government functions.

127. *See* Robert L. Mullen, *The Americans With Disabilities Act: An Introduction For Lawyers And Judges*, 29 LAND & WATER L. REV. 175, 179 (1994) (citing statements of Senators Harkin and Hatch); *see also* Gaylord Shaw, *Knocking Down a Barrier; Bush Signs Americans With Disabilities Act*, NEWSDAY, July 27, 1990, at 7 ("This act . . . will assure that people with disabilities are given the basic guarantees for which they have worked so long and so hard—independence, freedom of choice, control of their own lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream.") (quoting President George Bush).

128. *See Bush Signs Disabled Anti-Bias Act*, L.A. TIMES, July 26, 1990, at 2 ("Every man, woman and child with a disability can now pass through a once-closed door to a bright new era of equality, independence and freedom.") (quoting President Bush).

For prisoners' rights advocates, the ADA presented myriad questions but precious few answers. Prisoners were not part of the population that Congress envisioned in passing the ADA. The noble purpose of the ADA was to liberate law-abiding citizens, not criminals. The rhetoric of freedom seemed odd when applied to confined inmates; the economic arguments for self-sufficiency similarly seemed inapplicable to life-term prisoners.

B. *Summary of ADA Requirements*

Generally, the ADA mandates the elimination of discriminatory practices toward disabled persons.[129] The bill opens with a list of findings that suggest that the disabled are comprehensively disadvantaged within contemporary American society.[130] Although the legislation is divided into distinct sections—each equipped with its own particularized mandate, definitions, and time frame for implementation—an assumption of general legislative intent applies across all of the sections.[131]

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129. The ADA employs the general definition of "disability" applied under the Rehabilitation Act of 1973: "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment," as defined in the Rehabilitation Act. 29 U.S.C. § 706(8)(B) (1994). *Cf.* ADA, 42 U.S.C. § 12102(2) (1994). The Department of Justice regulations provide further that:

> "[I]mpairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. . . . [E]xamples . . . [include] orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

28 C.F.R. § 35.105 (1994) (Nondiscrimination on the Basis of Disability in State and Local Government Services).

130. Actually, the text of the findings reads as a conspicuously deliberate echo of the list of indicia for suspect class status, articulated by the courts. *See infra* Section V.A (discussing levels of judicial scrutiny). Equal protection excerpts include:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Pub. L. No. 101-336, § 1(b)(2) (Findings and Purposes). This language is reminiscent of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing whether prejudice against discrete and insular minorities is special condition that tends to curtail operation of political processes ordinarily relied upon to protect minorities and may call for correspondingly more searching judicial inquiry). *See* James B. Miller, Note, *The Disabled, the ADA and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 394 (1994).

131. Title II, Subtitle A incorporates definitions and general intent from the other Titles. This is important, as the actual text within this section is limited in detail. *See* 28 C.F.R. § 35.103 (1994) ("Title II, however, also incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504.") (citing H.R. REP. NO. 485, 101st Cong., pt. 3, at 51 (1990) and H.R. REP. NO. 485, 101st Cong., pt. 2, at 84 (1990)).

The tangible ADA requirements target structural and architectural accommodation, as well as program, facility, and service availability and access. These categories include everything from wheelchair ramps, to TDD text-telephone systems, to large-print books for the visually impaired. Moreover, the ADA encompasses intangible issues of discriminatory policies and decisionmaking with respect to employment and accommodation of disabled prisoners. Some ADA requirements are more applicable to prison inmates than others. Title II of the ADA plays a prominent role in ADA prisoner litigation, while Titles I, III, IV, and V have only limited applications for prison inmates.

1. *Title II: Public Services—Prohibition Against Discrimination and Other Generally Applicable Provisions*

Title II of the ADA essentially extends the existing requirements of section 504 of the Rehabilitation Act of 1973 to all state and local governments.[132] Title II incorporates the specific prohibitions of discrimination against disabled persons, which are stated elsewhere in Titles I, III, and V of the ADA. Subtitle A of Title II, reinforced by Title IV ("Telecommunications"), gives rise to the bulk of ADA prisoner litigation. As interpreted by Department of Justice regulations, Title II requires "a public entity to provide each service so that it, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."[133]

The concise mandate of Title II states: "No qualified individual[134] with a disability[135] shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a

132. *See, e.g.*, Tugg v. Towey, 864 F. Supp. 1201 (S.D. Fla. 1994):
Congress noted that the purpose of Title II of the ADA is to "make applicable to prohibitions against discrimination on the basis of disability currently set out in regulations implementing Section 504 of the Rehabilitation Act of 1973 to all programs, activities and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities received federal financial assistance."
Id. at 1205 n.5 (quoting S. REP. NO. 116, 101st Cong. 44 (1989)).

133. 28 C.F.R. § 35.150(a) (1994).

134. *See* Casey v. Lewis, 834 F. Supp. 1569, 1585 (D. Ariz. 1993) ("The Ninth Circuit has found that prison inmates within the ADOC, are generally 'qualified (sometimes required) to participate' in activities such as disciplinary proceedings, Honor Dorm review committee hearings, counseling, rehabilitation, medical services and other prison activities."), *vacated and rev'd in part*, 4 F.3d 1516 (9th Cir. 1994), *rev'd and remanded*, 116 S. Ct. 2174 (1996).

135. Federal regulations define "qualified individual with a disability" as:
an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, or the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.
28 C.F.R. § 35.104 (1994).

public entity, or be subjected to discrimination by any such entity."[136] Title II defines a public entity as:

> (a) any State or local government;
> (b) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
> (c) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).[137]

Along with architectural requirements for existing and new constructions, Subtitle A of Title II of the ADA focuses on access to programs and services.[138] Subtitle A is exceptionally brief, particularly in comparison to the rest of the Act.[139] Much like section 504 of the 1973 Rehabilitation Act, Subtitle A contains little more than a tersely stated requirement of nondiscrimination for those programs and activities that fall under the given parameters. States are not immune, via Eleventh Amendment guarantees, to litigation under this Title V of the ADA, and the remedies available in lawsuits against states are the same as those available in suits against private individuals.

Remedies under Title II are identical to those available under section 505 of the Rehabilitation Act;[140] they consist of a private right of action, injunctive relief, and other damages (generally attorneys' fees with expenses and costs). The extent of available damages is purely speculative at this time. In addition, the remedies available under the ADA do not preclude relief available under other federal or state laws. Significantly for prisoner claims, the courts may order entities to accommodate plaintiffs by structural alterations, policy changes, or provision of facilitative equipment.[141]

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136. The general deadline for implementing Title II was January 26, 1992. *See* 28 C.F.R. § 36.508(a) (1991). Several Subtitle B transportation requirements, however, have extended deadlines into the late 1990s and even the next century. *See* 28 C.F.R. § 36.508(c) (1991).

The defense for noncompliance with this section is "undue hardship": an action requiring "significant difficulty or expense." 28 C.F.R. § 36.104 (1994).

137. *Id.*

138. *But see* Jackson v. Inhabitants of Sanford, Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (discussing legislative concern over effect of disability discrimination in police interaction with citizens, including "unjustified arrests of disabled persons").

139. Subtitle B of Title II, "Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory," presents an extensive scheme for implementation of nondiscriminatory practices and provisions in transportation systems. It has little if any application for incarcerated prison populations. *See* 42 U.S.C. § 12143 (1994). However, *Gorman v. Bishop*, 919 F. Supp. 326, 327 (W.D. Mo. 1996), exemplifies the need for Subtitle B. In *Gorman*, a paraplegic arrestee was injured when transported in a non-handicap-accessible van. *See supra* note 73 (discussing *Gorman*).

140. *See* 42 U.S.C. § 12188 (1994); *cf.* 29 U.S.C. § 794 (1994). On the issue of types of damages, see *Tyler v. City of Manhattan*, 849 F. Supp. 1442, 1443-44 (D. Kan. 1994).

141. *See infra* Part VI (discussing Torcasio v. Murray, 57 F.3d 1340, 1345 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996), and its implications for Title II).

2. *Other Relevant Provisions*

As discussed earlier, the ADA focuses heavily on discrimination in the area of employment. Title I thus far has been the most discussed and litigated section of the Act.[142] The central mandate of Title I is concisely stated: "No covered entity shall discriminate against a qualified individual with a disability[143] because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[144]

This section has limited application for prisoners.[145] As an employer of noninmates, prison management will be liable under Title I for discriminatory practices or failure to accommodate.[146] It is not certain, however, that inmates "employed" within the prison qualify as employees for purposes of this

142. *See* Harry Stoffer, *Disabilities Law Opening Doors*, PITTSBURGH POST-GAZETTE, Feb. 13, 1994, at A1. The EEOC issued statistical data following its first full year of ADA employment discrimination policy implementation. *See id.* Fiscal year 1993 included 87,942 complaints, of which 15,274 (18%) were based at least in part on the ADA. According to the director of the ADA policy division at EEOC, approximately half of the approximately 20,000 ADA cases since 1992 were filed by people who lost their jobs. *See id.* This was similar to the percentages filed claiming discrimination based on race, sex, or age. Approximately 25% of the cases claimed lack of "reasonable accommodation." *Id.* Approximately 12% of cases addressed the claimant's failure to get a job. *See id.* This percentage is higher than that generated by other bases of discrimination. The most common disabilities were back ailments (20%), neurological impairments, emotional and psychiatric conditions, heart problems, limbs/hand/feet (approximately 5%), and hearing/vision impairment (approximately 6.4%). *See id.*

143. In Title I of the ADA, "Qualified individual with a disability" is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. *See* 42 U.S.C. § 12111(8) (1994).

144. 42 U.S.C. § 12112(a) (1994).

145. *See* White v. Colorado, 82 F.3d 364, 367 (10th Cir. 1996) (holding that prison employment is not covered under ADA Title I); Pierce v. King, 918 F. Supp. 932, 937-38 (E.D.N.C. 1996) (invoking *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996), in holding that ADA does not apply to prison work programs).

146. *See, e.g.*, Capitano v. State, No. 2CA-CV93-0113, 1993 WL 435941 (Ariz. Ct. App. Oct. 29, 1993); Kate Shatzhus, *Disabled Prison Officer Disputes Suspension*, BALT. SUN, July 13, 1994, at 1B (reporting on challenge by fourteen-year veteran of Maryland correctional facility to termination for disability-based limitation on ability to cover all possible facility positions); *see also* Najera v. California Prison Indus. Auth., No. 94-55937, 1995 U.S. App. LEXIS 12568 (9th Cir. May 16, 1995) (involving state prison-industry employee's challenge to involuntary transfer); McDonald v. Kansas, 880 F. Supp. 1416 (D. Kan. 1995) (denying claim by former correctional officer claiming failure to accommodate disability).

On allocation of liability, see McClelland v. Nevada Dep't of Prisons, No. CV-N-94-209-ECR, 1994 WL 497545 (D. Nev. Aug. 29, 1994):

> Thus, under a plain reading of the above cited sections of Title I of the ADA, the complaint states a claim against the defendant individuals because as agents of NDOP they are statutorily defined as employers. . . . [But] [i]t is sufficient to note that . . . both Title VII and the ADEA, even after the Civil Rights Act of 1991, limit liability for damages to the employer and do not allow individual employees or officers of a plaintiff's actual employer to be held liable for damages, whether they be equitable, compensatory or punitive. . . . Therefore, the failure to provide for individual liability in those sections carries over into the ADA.

Id. at *1, *3.

Act. In *Williams v. Meese*,[147] for example, the United States Court of Appeals for the Tenth Circuit held:

> Although [the prisoner's] relationship with defendants may contain some elements commonly present in an employment relationship, it arises from [plaintiff's] having been convicted and sentenced to imprisonment in the [defendants'] correctional institution. The primary purpose of their association [is] incarceration, not employment. . . . Since plaintiff has no employment relationship with defendants, he cannot pursue a claim for discrimination against them under either Title VII or the ADEA. . . . The foregoing analysis precludes plaintiff's claims for discrimination under the Equal Pay Act *and the Rehabilitation Act, as well*.[148]

In *Franks v. Oklahoma State Industries*,[149] the same court held that inmates working for the prison also were not employees for purposes of the Fair Labor Standards Act (FLSA).[150] In *Haston v. Tatham*,[151] a district court in the Tenth Circuit specifically conjectured that "it is doubtful that the ADA applies in the case of a disabled prisoner who seeks prison employment."[152]

However, the record of judicial opinions regarding employee status for prison inmates is not entirely clear. In *Franks*, for example, the court noted that, where inmates work for private employers[153] or in similar capacities,[154] they may qualify for employee status. This distinction, while not perfectly defined, was discussed at greater length by the Ninth Circuit in *Moyo v. Gomez*.[155] While there is not a full body of ADA case law addressing this

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147. 926 F.2d 994 (10th Cir. 1991).

148. *Id.* at 997 (emphasis added) (citation omitted).

149. 7 F.3d 971, 972-73 (10th Cir. 1993).

150. *Id.*; *see also* McMaster v. Minnesota, 30 F.3d 976, 980 (8th Cir. 1994) ("We hold that inmates . . . who are required to work as part of their sentences and perform labor within a correctional facility as part of a state-run prison industries program are not 'employees' of the state or prison within the meaning of the Fair Labor Standards Act."); Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1993) (holding that inmates are not covered under Fair Labor Standards Act).

151. 842 F. Supp. 483 (D. Utah 1994).

152. *Id.* at 487. The issue of employee status under the ADA was avoided since the plaintiff's claim rested on events that predated the effective implementation date for the ADA. *See id.* at 487-88; *see also* Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996):

> This much is clear: no employment relationship of any kind exists between prisoners and their jailers. It is impossible for prisoners to complain that they have suffered any form of employment discrimination proscribed by the ADA. Prisoners are put to work as a term of their confinement. They need not be worried about competing for any jobs in the marketplace, and have absolutely no interest whatsoever in holding down any particular job within the prison.

Id. at 942.

153. *Franks*, 7 F.3d at 973 (noting that inmates in work-release program were entitled to minimum wage coverage of FLSA).

154. *See id.* (noting that "inmates employed by community college within prison as teaching assistants may be covered under the economic reality test") (citing Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984)).

155. 32 F.3d 1382, 1385 (9th Cir. 1994). In *Moyo*, a corrections officer alleged that his termination resulted from his refusal to discriminate against black inmate workers. The court distinguished between the defendants' contention that inmates required by law to do hard labor are not "employees," and the holding in *Baker v. McNeil Island Corrections Ctr.*, 859 F.2d 124, 128 (9th Cir. 1988), that inmates

issue, based on the available cases (which look primarily to FLSA and Title VII) it seems probable that the requirements of the ADA's Title I will apply to inmates employed by private employers. This conclusion is reinforced by the strong policy argument against encouraging avoidance of ADA mandates through employment of prisoners. By contrast, Title I would seem to be inapplicable to inmates working for the prison itself.[156]

Title III injects the ADA's requirements into the private sector, targeting public accommodations, commercial facilities, and certain private ventures.[157] Accessibility is the primary requirement for private entities under this Title. Consequently, this section would appear to be of limited application for prison inmates. However, to the extent that goods or services, including the certifications available from the private-entity list, can be obtained without their actual presence (through mail order, for example), it is conceivable that prisoners might bring suit under this Title. As with private employers of inmates, it is likely that private suppliers would be held responsible for accommodation under the Act's provisions insofar as the inmate's incarceration did not create the obstacle. No public policy justification exists for allowing private ventures to discriminate, even against prison inmates.

Obstructed access to goods or services due to the inmate's incarceration would fall outside the ADA's protection.[158] However, one possible scenario in which inmates might successfully bring a Title III suit would be an allegedly discriminatory provision of services or goods to the prison population by a vendor under contract with prison management. This challenge could take the form of a Title III suit against the vendor or a Title II suit against prison

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working for compensation or training on work-release programs are employees entitled to Title VII protection. *See id.*

156. The Tenth Circuit has repeatedly held that prisoners have no *right* to work and no liberty interest in the availability or distribution of jobs within the prison setting. Although prisons may not engage in discriminatory employment practices, such a basic prohibition provides a remedy for only the most egregious cases. *See Franks*, 7 F.3d at 972; Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991); Ingram v. Papaglia, 804 F.2d 595, 596 (10th Cir. 1986).

157. According to Title III, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12181(9) (1994) (prohibition of discrimination by public accommodations).

158. The case of *State ex rel. Nelson v. Fuerst*, 607 N.E.2d 836 (Ohio 1993), is notable, however. In *Nelson*, an inmate requested the court to order a public records office to mail documents to the prison for copying, as the inmate could neither get to the records office to examine the documents nor afford the records office rate for the copying of all possibly relevant documents. *See id.* The Ohio Supreme Court held that the office was not required to mail the requested documents. In two separate dissents, however, judges noted that the promise of public availability was meaningless to an incarcerated prisoner. In one dissent, the judge observed that this policy might well violate the ADA with respect to disabled persons, "ha[ve] a most devastating impact on the right of prisoners," and "implicate[ ] the equal protection rights of prisoners." *Id.* at 840 (Wright, J., dissenting). Nonetheless, the trend in judicial holdings does not offer much basis for Title III claims by prisoners. Along with the courts' traditional restraint when defining prisoners' rights, such a claim would most likely fail under the "reasonable accommodation" standard of the ADA.

management for being proprietarily responsible for the services for which they contract.[159]

Title IV primarily addresses the needs of hearing- and speech-impaired individuals. An amendment to the Communications Act of 1934, this title mandates the provision of accessible equipment and communications lines throughout telecommunications networks. Moreover, under this section, TDDs[160] and other auxiliary communications devices must be made available throughout the national communications network. The implications of this section for deaf or hearing-impaired inmates—in conjunction with subtitle A of Title II—are significant. Public entities that communicate by telephone must make TDD or comparable systems available.[161] Prison telephone systems, as well as all other communication channels, must be adapted to accommodate deaf and hearing-impaired inmates and visitors.[162] Enforcement of Title IV provisions may occur by filing with the Federal Communications Commission[163] or through a private cause of action for damages.[164]

Title V serves as a traditional legislative catch-all for clarification and interest-group-appeasement clauses. As mentioned earlier, states are denied Eleventh Amendment immunity from prosecution under ADA claims in appropriate state or federal courts. Moreover, remedies are available at both law and equity, much like suing a private venture under the Act. Attorney fees can be awarded to the plaintiff.[165] The United States will find itself sued under the ADA only on a limited basis, however, as generally the Act does not apply directly to federal programs.[166]

3. *Accessibility Guidelines and Their Limitations*

The standards for structural compliance with ADA requirements are detailed in literally hundreds of pages of specifications. Titles II and III

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159. 28 C.F.R. Pt. 35, App. A (1994) ("All governmental activities of public entities are covered, even if they are carried out by contractors.").

160. *See supra* note 65 (defining TDDs).

161. This may be achieved through relay systems. *See supra* Subsection I.A.4 (discussing privacy concerns implicated by relay systems and TDDs).

162. For a good discussion of the problems that deaf inmates experience when deprived of communications-access tools and other improvements, see *Clarkson v. Coughlin*, 145 F.R.D. 339 (S.D.N.Y. 1993). *See also* Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (discussing problems inmates encounter in receiving deaf visitors).

163. Title IV of the ADA amends Title II of the Communications Act of 1934, 47 U.S.C. §§ 201-276 (1994), and is covered by the latter's remedies and enforcement authority. *See* ADA § 401(a).

164. Title IV does not specifically authorize a private right of action. The Communications Act of 1934 permits such filings. *See* 47 U.S.C. § 207 (1994).

165. *See* ADA § 505.

166. *See supra* text accompanying note 125. However, ADA Title V, § 509 (Coverage of Congress and the Agencies of the Legislative Branch) includes the Senate, the House of Representatives and "each instrumentality of Congress." These last include "the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment and the United States Botanic Garden." *Id.*

mandate compliance with the ADA Accessibility Guidelines (ADAAG),[167] although, pending final adoption of the revised ADAAG issued in June 1994, Title II entities could also achieve compliance through the Uniform Federal Accessibility Standards (UFAS).[168]

Following passage of the ADA, concern over compliance requirements led to extensive hearings between state and local government officials and the Architectural and Transportation Barriers Compliance Board (the Board). In those discussions, requirements for prisons were actually a substantial topic.[169] The final interim rule, proposed in June 1994, incorporated the results of these hearings.[170]

The rule presents summaries of the queries and recommendations made by correctional officials and disability-related professionals. Discussion of the rule focused largely on the required numbers of accessible holding and long-term residential cells. State correctional facilities submitted statistical evaluations, contending that the need for wheelchair-accessible cells warranted a standard of approximately one to two percent. The Board, citing an increasingly aged prison population and the probable consequent increase in disabilities, decided on a minimum of three percent accessible holding or general-housing cells in new construction. The Federal Bureau of Prisons, which cooperated in the review process, recommended adaptable rather than accessible cells. The Board found that this was not an efficient approach in new prison construction, however.

An additional concern was the location of accessible cells. Unsurprisingly, the identified tradeoffs were efficiency and security, on the one hand, versus the integration mandated by the ADA, on the other hand. Acknowledging the problems with *any* decision, the Board concluded that there were no facial assumptions regarding the security risk to or from disabled inmates. As a result, standardized segregation would not be acceptable under the ADA. The

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167. Americans with Disabilities Act Accessibility Guidelines, 56 Fed. Reg. 35,408 (1991) (as corrected at 56 Fed. Reg. 38,174 (Aug. 12, 1991) and 57 Fed. Reg. 1393 (Jan. 14, 1992)) (to be codified at 36 C.F.R. § 1191) [hereinafter ADAAG]. Within the ADA is a requirement that the Architectural and Transportation Barriers Compliance Board provide minimum guidelines from which the Departments of Justice and Transportation can develop their final rules. The initial ADAAG were issued along with the signing of the law and were amended in subsequent months. The Department of Justice adopted ADAAG for Title III and indicated that the Board would probably adopt it as the standard after a revision. The proposed revised ADAAG was issued in June 1994 and became effective December 20, 1994. With DOJ adoption of this revised rule, ADAAG became the standard for Title II and Title III compliance.

168. UFAS serves as the guideline for federal entities' compliance with the Architectural Barriers Act, as well as the Rehabilitation Act.

169. *See* Paul Cohan, *Locals Fear Costs of ADA Implementation*, 108 AM. CITY & COUNTY, May 1993, at 14. Confronted by the confusion over requirements, the Board considered a 5% accessible cell requirement that many officials considered excessive. *See id.*; *see also* 59 Fed. Reg. 31,676, 31,698 (1994) (containing comments and responses regarding § 12 "Detention and Correctional Facilities") (incorporated into the final interim rule issued June 24, 1994).

170. *See* ADAAG § 12.1.

final interim rule requires distribution of accessible cells throughout the correctional facility; the allocation of those cells was not specified, however. As for "special holding cells" (for protective custody, detoxification, and medical isolation, among other purposes), at least one accessible cell of each type must be provided in new construction.

The rule lists additional accessibility requirements for correctional facilities. For example, common-use areas must be accessible.[171] All public entrances and at least one nonpublic security entrance must be accessible as well.[172] In addition, at least five percent, and minimally one percent, of the fixed cubicles in noncontact visiting areas must be accessible on each side.[173] An important distinction throughout discussions of the ADA's impact are the separate requirements for new construction as opposed to existing facilities. While reasonable alterations must be made to current structures, all new construction must fully comply with accessibility guidelines.[174]

The detailed accessibility guidelines of the ADA are not without limitations. The ADA does not require that all employment opportunities be available to all disabled persons. Rather, it requires that these opportunities be available to "qualified" disabled persons insofar as this provision does not egregiously burden the employer. The "availability of employment" provisions of the ADA are just beginning to undergo thorough judicial clarification. While employment discrimination cases comprise the vast majority of ADA litigation to date, the legal track record is still in the formative stages.[175] Equally important is the fact that the ADA does not require all programs and services to be made available to all disabled persons. Program access, rather than location access, is the prevailing directive, although conspicuously segregative practices will not be tolerated.[176]

It was of paramount concern to Congress that the Title I and Title III provisions not so burden businesses as to bankrupt them.[177] Consequently,

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171. *See id.*

172. *See id.* § 12.2.2.

173. *See id.* § 12.3.

174. *See supra* notes 13-18 and accompanying text (discussing longer prison sentences and boom in corrections-facility construction).

175. *But see* Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996). The court stated that the Fourth Circuit in *Torcasio* "specifically declined to reach the question of whether state prisoners have standing under the ADA. . . . [This] Court holds that the [ADA] does not create a cause of action for state inmates displeased with their prison work assignments." *Id.* at 938.

176. Where essentially similar programs can be made available in an alternate accessible location, the ADA does not require that every location be modified to permit access. The ADA does demand, however, that disabled participants not be *required* to attend at the special "disability-accessible" location. The precise balance among the seemingly inconsistent mandates has yet to be determined.

177. See 135 CONG. REC. S4984, S4997-98 (daily ed. May 9, 1989), which provides:

> [T]he Americans With Disabilities Act . . . substantially curtails the requirements of employers and localities contained in the 1988 version of the bill. No longer does a company have to prove the threat of bankruptcy to be exempt from the requirements; rather, the bill requires reasonable accommodations for handicapped employees unless such requirement

there are several available defenses that potentially allow employers and businesses to avoid full compliance with the Act. These defenses employ the language of "undue hardship" and "non-readily achievable accommodations."[178]

The level of expectation imposed on public entities is less forgiving than that placed on private employers and service providers. It is thus unclear to what extent the ADA's general tone of reasonableness will be read into Title II's provisions.

C. *General Applicability to Prisons*

Congressional consideration of the ADA did not address prisoners or prison management.[179] Title I (Employment) and Title III (Public Accommodations and Private Service Providers) engendered such heated debate that less economically volatile provisions of the ADA's Title II met with comparatively minimal review.[180] The general debate over the ADA was sketched in terms of economics[181] and of the mobility of free individuals; stated differently, the

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would pose an undue hardship.
Id. (statement of Sen. Riegle).

178. *See* Alexander v. Choate, 469 U.S. 287, 300 (1985); Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994) ("The test to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program.") (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987)); Nathanson v. Medical College, 926 F.2d 1368, 1384-86 (3d Cir. 1991).

179. For an interesting perspective on whether prisoners are "qualified individuals" under the ADA, see Chief Judge Richard Posner's opinion in *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996):

> Even if [persons within the prison who are not prisoners] are protected, however, which we need not decide (for Congress may not have wanted to burden the states with the potentially enormous costs of making their prisons fully accessible to disabled visitors and employees), it would not necessarily follow that prisons or jails that offer educational or vocational programs for prisoners must redesign their programs to accommodate the needs of disabled prisoners. It is very far from clear that prisoners should be considered 'qualified individual[s]' within the meaning of the Act.

Id. at 248.

180. Title II, subtitle A receives notably less attention than Titles I, III, or even Title II, subtitle B. Aside from the disparities in quantity of litigation, this section has been largely ignored by law review authors. *See, e.g.*, Penn Lerblance, *Introducing the Americans With Disabilities Act: Promises and Challenges*, 27 U.S.F. L. REV. 149, 160-62 (1992) (inverting discussion of Titles II and III without apparent reason); Edward J. McGraw, *Compliance Costs of the Americans with Disabilities Act*, 18 DEL. J. CORP. L. 521, 528 (1993) (noting that "[t]he second subchapter of the Act relates primarily to public transportation"); Mullen, *supra* note 127, at 195-96 (reversing order of subtitles in discussion of Title II, without explanation, first addressing Transportation (subtitle B) and then considering subtitle A (referred to disparagingly as "Other Services, Practices and Activities of State and Local Governments")). Granted, the volume of text committed to subtitle B (Transportation issues) is far greater than that expended on subtitle A. Further, a portion of the cases that can be brought under subtitle A (employment by state or local governments) may also be filed under Title I. Nonetheless, the implications of Title II, subtitle A are considerable and the lack of focused attention or interest is striking.

181. By far, the majority of debate over the legislation addressed this issue. At the signing ceremony, President Bush noted these concerns, remarking: "We have all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred." Gregory Spears, *Disabilities Act Signed By*

struggle pitted costs against equal protection, centering on equal access to facilities. Because Titles I and III were largely inapplicable to prisoners, prisoner concerns were largely ignored. Yet, in contrast to earlier vocational-rehabilitation legislation, the civil rights orientation of the ADA and of the Rehabilitation Act suggests that Congress intended to level the playing field for *all* disabled persons.[182]

Eventually, several courts held that Title II "public entities," as used in the rubric of the ADA, included state and local prisons.[183] The Justice Department also took notice of the ADA's applicability to prisons, incorporating correctional facilities among its targets in drafting ADA guidelines.[184] However improbably, the ADA thus joined that category of ill-defined moving targets labelled prisoners' rights.

As recently as the spring of 1995, it appeared that the ADA would be held applicable to prison operation. The application of the Rehabilitation Act of 1973 to federally funded correctional facilities laid the foundation for this belief, and courts addressing prisoners' ADA claims generally followed in kind.[185] Even a Ninth Circuit case that had questioned the extent to which the ADA effectively overrode traditional deference to correctional management acknowledged the ADA's basic applicability to prisons.[186] The United States Court of Appeals for the Fourth Circuit, however, recently disposed of a pending prisoner ADA claim[187] by closely scrutinizing the presumption that the ADA should have *any* application to state correctional facilities.[188] Beyond the Fourth Circuit, the trend has been to apply the ADA with varying

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Bush, PHIL. INQUIRER, July 27, 1990, at A8 (quoting President George Bush).

182. Notably, the ADA does not restrict its coverage to citizens; it provides expanded coverage to "persons." *But see* Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (Posner, C.J.) ("[A]n exception to the Americans With Disabilities Act for prisoners, though not express, may have textual foundation in the term 'qualified individual.'").

183. The presumption was derived from Rehabilitation Act case law citing *Bonner v. Lewis*, 857 F.2d 559, 561-64 (9th Cir. 1988) (holding Rehabilitation Act applicable to prisons). Whether the ADA has been clearly held applicable or merely assumed to be so is a subject of dispute, fueled recently by the Fourth Circuit. *See infra* Part VI (discussing Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996)). However, in the wake of the Fourth Circuit decision in *Torcasio*, several district and circuit courts have held that the ADA is inapplicable to prisons because they are not public entities. *See, e.g.*, *Bryant*, 84 F.3d at 248; Pierce v. King, 918 F. Supp. 932, 937-38 (E.D.N.C. 1996); Staples v. Virginia Dep't of Corrections, 904 F. Supp. 487, 490 (E.D. Va. 1995) (holding that Fourth Circuit precedent implies that ADA does not apply in state prison context).

184. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; State and Local Government Facilities, § 12, 59 Fed. Reg. 31,676, 31,698 (1994) (to be codified at 36 C.F.R. § 1191).

185. *See infra* note 190 (citing cases following *Bonner v. Lewis*).

186. *See infra* Part VI (discussing *Gates v. Rowland*).

187. *See* Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996); *see also* Gorman v. Bishop, 919 F. Supp. 326, 331 (W.D. Mo. 1996) (expanding *Torcasio* to apply to arrests).

188. *Torcasio*, 57 F.3d at 1344-46. In fact, the Fourth Circuit has cast some doubt on the entire premise of Title II. *See id.*; *see also Staples*, 904 F. Supp. at 490 (using language of Fourth Circuit in *Torcasio* to support conclusion that ADA does not apply to state prisons).

degrees of deference. As a result, whether the mandates of the ADA, subject to official review, merely impose responsibilities on prison administrators or actually grant rights to inmates is unclear. Only recently has this issue received attention within the judicial process. Given the current conservative political climate in Congress, there may be a legislative clarification of the ADA (to the detriment of prisoners) before the courts have completed their exegeses.[189] Pending such restrictive amendments, however, an analysis of the application of the ADA to prisons is critical. An examination of the interplay between ADA statutory rights and the prison context illustrates how thoroughly the latter defines legal rights of inmates in American correctional facilities.

IV. SOME LEGAL ASPECTS AND IMPLICATIONS OF ADA'S TITLE II

As late as May 1995, the extent of the ADA's application had been seriously challenged, but the threshold issue of whether it applied to prisons at all seemed to be resolved. Courts had recognized that the Rehabilitation Act of 1973 applied to prisons.[190] Logically, the ADA, as an extension of the Rehabilitation Act, also would apply. Nevertheless, it was hardly acknowledged automatically. Whether questioned outright or cloaked in deference to prison officials, the application of the ADA to prisons was initially suspect.

That state of indecision passed as court rulings either held officials responsible or relieved them only by virtue of qualified immunity. The core issue of general applicability seemed established.[191] Consistent with this premise, the Justice Department consulted with corrections officials in developing guidelines,[192] and in 1994 it issued several reports specifically addressing the applicability of the ADA to the criminal justice system. The Title I/II employment booklet, *The Americans with Disabilities Act and*

189. There are all too many ways in which prisoner access to the ADA may be lost. The costs of compliance for state facilities, as well as the public's displeasure with what is perceived as soft-on-crime coddling of dangerous inmates, provide sufficient motivation for legislators to curtail inmate recourse to the ADA. Moreover, as additional responsibilities are shifted to the states themselves, federal opportunities to monitor or influence compliance will lessen, if not disappear altogether.

190. *See* Bonner v. Lewis, 857 F.2d 559, 551-64 (9th Cir. 1988). Subsequent discussions cited to *Bonner* and built on its analysis. *See, e.g., Torcasio*, 57 F.3d at 1349 (noting that court in *Bonner* was first to apply Rehabilitation Act to prisons); Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) (acknowledging that Rehabilitation Act applies to prisons receiving federal funding); Little v. Lycoming County, 912 F. Supp. 809, 819 (M.D. Pa. 1996) (stating that Ninth Circuit retreated from its *Bonner* holding that section 504 applied to prisons). *But see* Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) (holding that section 504 "does not give plaintiff any substantive rights since the Federal Bureau of Prisons does not fit the definition of 'programs or activities' governed by that section").

191. *See* Bruce Tomaso, *Inmate Petitions Decried, Data Requests Clog Systems, Officials Say*, DALLAS MORNING NEWS, Feb. 9, 1995, at 2. The Executive Director of the Department of Criminal Justice listed the ADA as one reason inmates are adequately protected from discrimination. *See also Official Urges Limit on Inmate Access to Courts*, CHI. TRIB., Nov. 15, 1994, at 3 (noting that Attorney General, discussing wasteful lawsuits, indicated that those would not include suits filed under ADA).

192. *See supra* note 129.

Criminal Justice: Hiring New Employees,[193] explains the requirements for hiring and employee management.[194]

The Title II services booklet, *The Americans with Disabilities Act and Criminal Justice: Providing Inmate Services*,[195] summarizes the applicability of Title II to inmate care. These guidelines discuss ADA requirements and available defenses to complete compliance. This publication left no doubt that the Justice Department believed that state correctional facilities fell under the ADA's authority.[196] Yet the Justice Department booklet did not necessarily dominate judicial opinions on the matter.

A. *Liability of State Governments and Individual Officials*

Traditionally, the Eleventh Amendment[197] protected state governments from prosecution under federal statutes such as § 1983. However, that protection can be eliminated by congressional mandate.[198] ADA Title II, section 502 clearly reads: "A state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act." Moreover, the remedies available in suits against the state are equivalent to those available in actions against other parties, public or private. Establishing state liability remains an uphill challenge;[199] but the official vulnerability of a normally immune governing entity encourages compliance by that entity and underscores the comprehensive intentions of the legislation itself.

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193. PAULA N. RUBIN, THE AMERICANS WITH DISABILITIES ACT AND CRIMINAL JUSTICE: HIRING NEW EMPLOYEES (National Institute of Justice, Oct. 1994).

194. Notably, ADA requirements changed several standard employer practices—including the use of written examinations, polygraphs, and agility tests, as well as medical and psychological examinations—prior to the issuance of a job offer. As a consequence of the ADA, these procedures are now precluded until an applicant has been offered a position based on disability-neutral criteria.

195. PAULA N. RUBIN & SUSAN W. MCCAMPBELL, THE AMERICANS WITH DISABILITIES ACT AND CRIMINAL JUSTICE: PROVIDING INMATE SERVICES (National Institute of Justice, July 1994).

196. It also recognized that the degree of ADA application was unclear. *See id.*

197. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). This clause has been read generally to preclude suits against states in federal courts. *See, e.g.*, Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 694 (3d Cir. 1996); Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1511 (9th Cir. 1994); Bockes v. Fields, 999 F.2d 788, 790 (4th Cir. 1993).

198. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989); Fitzpatrick v. Bitzer, 427 U.S. 49 (1976). The intent to waive states' immunity, however, must be explicitly stated in the legislation. *See* Dellmuth v. Muth, 491 U.S. 223, 230 (1989).

199. The doctrine of qualified immunity frequently operates to protect the states and the federal government from liability. It "enables a public official to avoid suit on an alleged constitutional or federal law violation where the law governing the claimed right was not clearly established at the time of the official's conduct." Mason v. Stallings, 82 F.3d 1007, 1010 (11th Cir. 1996) (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)). For example, qualified immunity was granted to the police officers in *Gorman v. Bishop*, 919 F. Supp. 326 (W.D. Mo. 1996), when the court determined that the officers "could not have been expected to know" that the ADA applied to that situation. *Id.* at 331.

Even where a violation of ADA standards is established, the plaintiff may lose, because qualified immunity provides a potential defense to administrators acting in their official capacity.[200] The availability of this defense depends on whether a court finds that the defendant had reasonable notice of the standard or legal requirement alleged to have been violated.[201] If the defendant had clear notice, the qualified-immunity defense may not be available. The plaintiff bears the burden,[202] however, of proving that qualified immunity is not available.[203] Further, a successful qualified-immunity claim will generally defeat whatever violations the plaintiff has established.[204]

The national applicability of the ADA, as well as the comprehensive public education campaign that accompanied its passage, precludes a claim of qualified immunity in all but the borderline cases. Public officials will not be permitted to claim unawareness of the ADA. But they may be able to argue successfully that its requirements are obscure in certain circumstances.[205] Moreover, courts will disagree concerning the affirmative responsibility placed on prison officials to provide program access and facilities without proactive

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200. Qualified immunity applies to all government officials not protected by absolute immunity. *See, e.g.*, *Mason*, 82 F.3d at 1010; *Gorman*, 919 F. Supp. at 331. Judges are almost completely protected by this defense. *See, e.g.*, Turgeon v. Brock, No. Civ. 94-269-SD, 1994 WL 529919, at *2 (D.N.H. Sept. 29, 1994):

> It is well established that judges have "absolute immunity from civil liability for any normal and routine judicial act". "A judge does not lose immunity because an action is erroneous, malicious, in excess of his authority, or disregardful of elementary principles of procedural due process, as long as the judge had jurisdiction over the subject matter before him."

Id. (citations omitted).

201. *See, e.g.*, Felce v. Fiedler, 974 F.2d 1484, 1501 (7th Cir. 1992) (finding that defendants were qualifiedly immune because procedural rights were not clearly established so as to infer notice); *see also* Weeks v. Chaboudy, 984 F.2d 185, 188 (6th Cir. 1993) ("Chaboudy is not entitled to qualified immunity if he violated clearly established law of which a reasonable prison physician would have been aware."); Parsons v. Wright, 649 A.2d 1108, 1111 (Me. 1994) (finding individual defendants who claimed unfamiliarity with statutory requirements for treatment of handicapped inmates entitled to qualified immunity defense, while county officers allegedly "unaware of their statutory duties with respect to the jail" were not so entitled); Santiago v. Leik, 508 N.W.2d 456, 458 (Wis. Ct. App. 1993) ("One purpose of qualified immunity is to spare a public official 'not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a lawsuit.'") (citations omitted).

202. The plaintiff must establish that his constitutional or federal statutory rights have been violated. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987). Furthermore, the plaintiff must meet a heightened opening pleading standard. *See* Siegert v. Gilley, 500 U.S. 226, 231-32 (1991).

203. *See* Camarillo v. McCarthy, 998 F.2d 638, 640 (9th Cir. 1993) (challenging segregated housing for HIV-positive inmates). A law is clearly established when "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting Anderson v. Creighton, 483 U.S. at 640) (citation and internal quotation marks omitted).

204. *See supra* note 199.

205. *See, e.g.*, Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995) (holding that, from spring 1993 through early 1994, neither application of ADA to state prisons nor qualification of morbid obesity as disability was "clearly established"), *cert. denied*, 116 S. Ct. 771 (1996). *But see* Noland v. Wheatley, 835 F. Supp. 476, 488 (N.D. Ind. 1993) (holding that, even in early 1992, defendants could be expected to know their responsibilities under ADA).

inmate demands.[206] Nevertheless, these cases are uncommon exceptions to the presumption of adequate notice.

B. *Remedies*

The availability of damages to prisoner litigants under Title II of the ADA remains unresolved.[207] Title II incorporates the damages available in section 505 of the Rehabilitation Act[208] and includes attorney's fees and some expenses.[209] These remedies were originally adopted from Title VI of the 1964 Civil Rights Act.[210] It is unclear how amenable the courts will be to granting these monetary awards.

The expansion of available damages authorized in the 1991 Civil Rights Act—including a provision for punitive damages—applies to ADA claims.[211] Although the Act specifically mentioned the change in available damages for ADA Title I claims, it did not refer specifically to Title II. Courts have taken different positions regarding the availability of damages in Title II cases. One theory holds that the explicit reference to the effects of the 1991 Civil Rights Act on Title I damages indicates that Congress did not intend to extend these changes to Title II.[212] An alternative theory holds that, historically at common law and throughout judicial rulings, remedies are presumed to exist in the absence of explicit language excluding them.[213] This position would

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206. *See, e.g.*, Lue v. Moore, 43 F.3d 1203, 1206 (8th Cir. 1994) (expressing concern over whether inmate must request accommodation before bringing ADA suit).

207. The recognition of punitive damages may present particular problems for prisoners. Although such damages might be seen as a prisoner's right, it is unlikely that a prisoner will gain enough public sympathy to have a realistic chance of obtaining punitive damages. The prisoner's right might be subordinated to fears about the cost that punitive damages would inflict upon the penal system. The public might also rely on the perception that punitive damages would encourage frivolous lawsuits by prisoners "with nothing else to do."

208. *See* 42 U.S.C. § 12133 (1994); 29 U.S.C. § 794a (1994) (Rehabilitation Act).

209. *See* ADA § 505 (attorney's fees).

210. 42 U.S.C. §§ 2000d-2000d4(a) (1994).

211. Some members of Congress felt that any additional or expanded damages authorized under the 1991 Civil Rights Act should not be available to ADA litigants. Representative Sensenbrenner introduced an amendment to the ADA to limit victims of disability-based job discrimination to remedies then available under Title VII of the 1964 legislation. *See* 136 CONG. REC. H2599-01 (daily ed. 1990). However, the amendment was voted down. It was pointed out that the purpose of ADA was to bring disabled persons under coverage that was equal to the benefits contained in other civil rights legislation.

212. *See* Harrelson v. Elmore County, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994):

> On its face, Title II of the ADA does not provide for an award of punitive damages. Moreover, Congress' express provision of punitive damages under Title I of the ADA via the Civil Rights Act of 1991, counsels against a statutory construction that punitive damages are available under Title II by inference.

(citation omitted).

213. *See* Rodgers v. Magnet Cove Pub. Schs., 34 F.3d 642, 644-45 (8th Cir. 1994) ("The [Supreme] Court announced the general rule that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.") (internal quotations marks omitted); *see also* Torcasio v. Murray, 862 F. Supp. 1482, 1489 (E.D. Va. 1994) (referring to Fourth Circuit holding "that under certain circumstances plaintiffs proceeding under the Rehabilitation Act are entitled to the full panoply of legal remedies") (citation omitted), *rev'd in part*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 771

allow for the granting of expanded damages if appropriate to the case at bar.[214]

Whether the award of damages will reflect the defendant's intent more than the violation's effect on the plaintiff is similarly open to conjecture. Certain Rehabilitation Act cases suggest a judicial reading of the statute as corrective rather than compensatory. Presumably, ADA remedies would be interpreted analogously. Equitable relief has been the more frequent purpose and consequence of inmate litigation under the Rehabilitation Act and the ADA. There is no bar, however, to awarding damages to prisoners, and attorney fees and expenses have been granted to inmates filing other claims of discrimination.[215] It is unclear what overall effect the ADA will have on these determinations. Moreover, it is unlikely that punitive damages will be awarded unless an exceptionally egregious case arises.

The rejection of an administrative exhaustion requirement under Title II represents a particularly significant change with regard to ADA remedies. Even the Rehabilitation Act had required that available administrative remedies be exhausted prior to bringing suit. The elimination of this requirement under Title II opens state and federal courts to ADA actions by prisoners without the usual delays of administrative processes.

C. *Diminished or Disappearing Intent Requirement*

Disabled prisoners' civil rights claims have always contended with unresolved intent requirements.[216] While bringing § 1983 claims alleging Eighth Amendment violations, prisoners have run headlong into the "deliberate indifference" standard.[217] This issue may prove to be among the most important effects of the ADA, especially for prisoner litigants.

(1996).

214. *See* Love v. McBride, 896 F. Supp. 808, 811 (N.D. Ind. 1995) (upholding ADA Title II violation plus damages in amount of $1000 and remanding case on issue of amount of damages).

215. *See, e.g.*, Lowrance v. Coughlin, 862 F. Supp. 1090, 1120 (S.D.N.Y. 1994) (granting compensatory damages of $132,000 and punitive damages of $25,000).

216. Law journals abound with discussion of the conflict between discriminatory impact and discriminatory intent. *See, e.g.*, Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223 (1990) (employment context); Leah Farish, *The Intent Requirement at the Crossroads: Racial Discrimination and* City of Memphis v. Greene, 34 BAYLOR L. REV. 309 (1982) (residential property rights); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733 (1987) (employment context); James Wrona, *Eradicating Sex Discrimination in Education: Extending Disparate Impact Analysis to Title IX Litigation*, 21 PEPP. L. REV. 1 (1993) (educational context); Celynda L. Brasher, Note, *A New Standard of Proof for Title VII Disparate Impact Cases:* Wards Cove Packing Co. v. Atonio, 34 ST. LOUIS U. L.J. 669 (1990) (employment context).

217. *See* Estelle v. Gamble, 429 U.S. 97 (1976). In his dissent, Justice Stevens contended that the Court's focus on intent should be relevant only to remedy and not to determining whether a constitutional violation has occurred. *See id.* at 111-13 (Stevens, J., dissenting).

The ADA does not explicitly require a showing of intent to establish discrimination. But the courts have yet to resolve the question. Arguably, the act of discriminating against disabled persons requires intent to do so. However, mere obstruction of access to employment, programs, or services as a consequence of disability violates its provisions. Given the generally objective presentation of the ADA's requirements, which are even clinical in certain sections, intent may no longer be a required element for prevailing claims.[218] Certainly, any lowering of the requirements for successful claims could only improve prisoner litigants' prospects. However, inmates confront a long line of cases lost for inability to establish intent, notwithstanding a compelling factual display of substandard or inadequate conditions.[219] Thus, to the extent that the ADA does erode or eliminate intent as an element for successful claims, this legislative change may have profound implications.

D. *Objective Standards*

In contrast to section 504 of the Rehabilitation Act, the text of the ADA was laden with detail. Title II, Part A follows a detailed roadmap for compliance included elsewhere in the legislation. This degree of specificity has several consequences. First, compliance becomes easier with the clear identification of requisite standards. Second, failure to comply becomes more easily identifiable, either for purposes of contemplating legal action or for resolution of the litigation itself. Third, the quantity of detail distances the issue of compliance from personal, subjective conditions. Notwithstanding the available defenses,[220] a ramp is either there or it is not, and it is either graded correctly or it is not. The question becomes less whether the particular plaintiff personally needs a ramp to a specified grade at a particular location, and more whether the building should have a ramp for purposes of compliance with the ADA.[221] This small, incremental change could benefit inmate

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218. *See* Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986, 991 (D. Fla. 1994) ("Certainly intentional discrimination is banned by Title II. But further, actions that have the *effect* of discriminating against individuals with disabilities likewise violate the ADA."); Peoples v. Nix, No. Civ. A 93-5892, 1994 WL 423856, at *3 (E.D. Pa. Aug. 11, 1994) ("A showing of discriminatory intent is not necessary to sustain a claim of violation of the ADA.").

219. *See, e.g.*, Staples v. Virginia Dep't of Corrections, 904 F. Supp. 487 (E.D. Va. 1995) (dismissing plaintiff's claim for failure to establish intent); *see also supra* notes 87-91 and accompanying text. *See generally* Gary A. Cook, *Applying the Brakes to Prison Reform Litigation*—Wilson v. Seiter *and* Rufo v. Inmates of Suffolk County, 17 LAW & PSYCHOL. REV. 135 (1993) (observing that brief trend toward prison reform is moribund); *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 231 (1994) (noting that "virtually insurmountable barrier [hinders] inmates who challenge the conditions of their confinement").

220. *See supra* Section IV.A.

221. *But see* Gorman v. Bishop, 919 F. Supp. 326, 331 (W.D. Mo. 1996). In *Gorman*, a paraplegic arrestee's ADA claim against the police department was dismissed because the court felt that the police officers could not be held responsible for their failure to comply with the ADA by having a wheelchair accessible van for arrestees. *See id.*

plaintiffs because it removes the stigma of an individual looking for "special treatment"[222] and focuses once again on the notion of equal access, which was the original purpose of both the Rehabilitation Act and the ADA. For litigation purposes, plaintiffs must still meet the "qualified individual with a disability" threshold requirement. In addition, courts will still make short shrift of claims in which the plaintiff cannot show personal injury resulting from the alleged discrimination. Thus, the personal focus is not eliminated, but rather, subdued in the judicial considerations following that initial qualification. In effect, the reasonableness of an inmate's request is bolstered by preexisting standards incorporated within the ADA.

That the ADA may objectify standards for physical and programmatic access is of considerable importance. To the extent that courts look predominantly to the specific circumstances of the claim and their impact on the plaintiff, a litigant's status as a prisoner could set a lower standard for acceptable conditions. However, courts instead may begin to find more objective minimum standards, as opposed to the "rational basis" standard that they have often utilized in the past. While the ADA's provisions may not be applied with equal vigor in prison settings, the articulation of basic structural requirements without respect to beneficiary may inhibit the development of implicitly separate standards for prisoners.

V. JUDICIAL CONSTRAINTS

A. *The Class: Disabled Individuals and Levels of Judicial Review*

Historically, the courts have not accorded disabled persons suspect-class status for purposes of equal protection review.[223] *City of Cleburne v.*

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222. *But see* Bryant v. Madigan, 84 F.3d 246 (7th Cir. 1996). Chief Judge Posner dismissed a paraplegic inmate's claim under the ADA for the prison's failure to supply a bed with guardrails. The inmate fell and broke his leg. Judge Posner stated:

> Even if there were (as we doubt) some domain of applicability of the Act to prisoners, the Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners. No discrimination is alleged; Bryant was not treated worse because he was disabled. His complaint is that he was not given special accommodation. . . . [H]e is not complaining of being excluded from some prison service, program, or activity . . . . He is complaining about incompetent treatment of his paraplegia. The ADA does not create a remedy for medical malpractice. . . . Sleeping in one's cell is not a "program" or "activity."

Id. at 249.

223. *See* U.S. CONST. amend. XIV; Pierce v. King, 918 F. Supp. 932, 942 (E.D.N.C. 1996). Suspect-class status qualifies for strict or heightened judicial scrutiny. The level of scrutiny applied substantially influences prospects for a successful claim. The only legislative action to survive strict scrutiny was internment of the Japanese during World War II. *See* Korematsu v. United States, 323 U.S. 214 (1944). By contrast, very little fails under rational-basis review, which accepts any reasonable and relevant purpose as adequate justification for the legislative enactment.

Cleburne Living Center, Inc.[224] exemplifies this denial of suspect-class status. In *Cleburne*, the Supreme Court purported to apply a rational-basis analysis even as it undertook what can only be described as at least quasi-suspect intermediate scrutiny. Officially disabled persons were not recognized as meriting even intermediate scrutiny.[225]

According to the "ratchet theory" of Equal Protection Clause analysis,[226] Congress has the power under section 5 of the Fourteenth Amendment to raise the protective standing of persons. The success of these attempts has varied.[227] Congress clearly indicated its intention to override *Cleburne*'s judicially established standard when it drafted the opening "findings" of the ADA. In its observations, the classic "indicia of suspectness" are listed as if straight from a constitutional law textbook.[228] While Congress unmistakably intended that the courts consider disabled persons a suspect class, the judiciary thus far has resisted this invitation,[229] leaving open the critical question of whether the ADA will ever bring disability cases under strict scrutiny. If strict scrutiny is employed, then the prototypical case pattern would be found in

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224. 473 U.S. 432, 441-42 (1985) (deciding that court of appeals erred in holding mental retardation quasi-suspect classification calling for more exacting standard of judicial review than that normally accorded economic and social legislation).

225. *See Pierce*, 918 F. Supp. at 942:

> Plaintiff's claim under the Equal Protection Clause does not require much comment. Disabled individuals do not constitute a suspect class. . . . The Court thus analyzes plaintiff's equal protection claim under the rational basis test, and concludes that it is rational to base work-assignment decisions on a prisoner's ability, or lack thereof, to perform particular tasks.

Id. (citations omitted).

226. *See* Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993). The basic premise of the ratchet theory is that Congress, though prohibited from reducing the constitutional protection afforded to citizens, can raise these levels to effect appropriate ends.

227. In *Heller v. Doe*, 113 S. Ct. 2637 (1993), petitioner raised an argument for judicial review of state distinction between treatment of mentally retarded individuals and mentally ill individuals. Justice Souter, dissenting, acknowledged the argument and declined to address the matter:

> This approach complies with two of the cardinal rules governing the federal courts: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . and is consistent with our past practice.

Id. at 2651 n.2 (Souter, J., dissenting) (citations and internal quotation marks omitted).

228. *See supra* note 130.

229. In *More v. Farrier*, 984 F.2d 269 (8th Cir. 1993), the court cited *Cleburne* in ruling that "wheelchair-bound inmates are not a suspect class." *Id.* at 271. In a footnote, the court acknowledged the inmates' claim that "they are entitled to heightened scrutiny as a result of 'increased federal and state concerns over the rights of handicapped individuals,'" but concluded that "[t]hese statutes do not, however, purport to alter the standard for constitutional equal protection claims." *Id.* at 271 n.4 (citing ADA as well as state code). Admittedly, the ADA is moot for this case, as the events in *Farrier* predated ADA's implementation by four to five years. Subsequently, in *Haston v. Tatham*, 842 F. Supp. 483 (D. Utah 1994), the court stated that, "even if plaintiff could show discriminatory intent, his claims could not survive the summary judgment motion." *Id.* at 487. For purposes of equal protection analysis, persons with disabilities do not constitute a suspect class. With the lack of public sympathy for disabled inmates, as well as the focus on cost, it appears that prisoners' rights activists may not be successful in adding the class of disabled prisoners to the list of suspect classes.

inmate cases alleging racial discrimination.[230] Courts reluctant to adopt strict-scrutiny standards for disabled prisoners may also find discussion in the case law of quasi-suspect class standing, primarily based on gender-discrimination claims.[231]

B. *The Context: Prisons and Appropriate Levels of Judicial Deference*

The unique nature of prisons indicates that even fundamental rights may be restricted or curtailed in the interest of prison security or discipline, and courts historically have deferred to decisions of prison administrations. This deference rests on an unresolved controversy regarding the rights that prisoners retain following incarceration. Theorists argue either that, as a consequence of their conviction, prisoners are essentially stripped of all rights except those that exigencies and efficiencies of prison administration leave them, or that prisoners retain all constitutional rights except those that are necessarily precluded by prison needs and priorities.[232] In more deferential times, courts have held that considerable nonintrusion is necessary for efficient prison management and because courts are not the appropriate entities to second-guess management decisions.[233] In less deferential periods, courts have reminded

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230. *See supra* note 80 (addressing racial-discrimination claims in prison setting).

231. *See, e.g.*, Pargo v. Elliott, No. 94-3399, 1995 WL 107504 (8th Cir. Mar. 15, 1995) (questioning automatic application of *Turner* standard in discussion of whether female and male prison inmates could be deemed similarly situated for purposes of equal protection analysis); Jeldness v. Pearce, Nos. 91-36271, 91-36350, 1994 U.S. App. LEXIS 19403 (9th Cir. July 28, 1994) (applying intermediate scrutiny to challenge by class of women prisoners and concluding that "penological necessity is not a defense to Title IX"); Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989) (rejecting equal protection challenge to separate incarceration of D.C.'s female prisoners in location distant from the District; court found arrangement within legitimate administrative needs); West v. Virginia Dep't of Corrections, 847 F. Supp. 402, 406-07 (W.D. Va. 1994) (applying intermediate scrutiny to hold that "legitimate government interest" did not justify discriminatory access to Boot Camp Incarceration program on basis of sex); Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979). *Glover* held that "parity of treatment," versus identical treatment between male and female correctional populations, is the correct standard for prison, and that, where "[p]laintiffs in this case have presented clear evidence that the rehabilitation opportunities afforded them are substantially inferior to those available to the State's male prisoners in terms of both the quality and variety of programming offered," they stated a compelling equal protection claim. *Id.* at 1101.

232. *See* Lewis v. Casey, 116 S. Ct. 2174, 2206-07 (1996) (Stevens, J. dissenting).

233. *See* Procunier v. Martinez, 416 U.S. 396 (1974):

> More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. . . . Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate

critics that prisoners, while somewhat out of sight, nonetheless remain a legitimate concern for the judiciary in its vigilant protection of individual liberty.[234]

Certainly, these characterizations of prisoners' rights could yield precisely the same result in any given case. The emphases are conspicuously inverted, however; thus, where judicial balancing tests are concerned, the particular version of rights theory chosen considerably affects the outcome. Judicial deference to prison management will not disappear as a consequence of the ADA. The comprehensive nature of the ADA's mandate, however, as well as its objective of looking at structural accessibility instead of subjective effects on individual claimants, may cause judicial decisionmakers to confer slightly less automatic deference to correctional administrators.[235]

The prevailing standard for judicial deference to prison management emerged in *Turner v. Safley*,[236] in which an inmate challenged the constitutionality of restrictions on inmate marriages and inmate-to-inmate correspondence.[237] Responding to an Eighth Circuit application of strict scrutiny, the Supreme Court demurred: "[A] lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules."[238] Following a review of prior holdings considering prisoners' rights, the Court issued what has become known as the *Turner* "reasonableness test," consisting of four elements. The first requirement is "a valid rational connection" between the regulation and the alleged governmental interest.[239] The second inquiry is whether alternative means exist for inmates to exercise the right under consideration.[240] The third issue is the effect that accommodation of the asserted right will have on security, administrative efficiency, prison staff, and

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prison authorities.

Id. at 404-05. In a footnote, Justice Powell provided further discussion of the inappropriateness of federal courts "to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints. Moreover, the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints." *Id.* at 405 n.9.

234. *See* Matthews v. Hardy, 420 F.2d 607, 610 (D.C. Cir. 1969) ("We agree that prison authorities have wide discretion to decide on appropriate methods of handling their wards. However, such discretion is not unlimited, and where 'paramount federal constitutional or statutory rights' come into play the prison regulations must conform to them.").

235. *But see* Torcasio v. Murray, 57 F.3d 1340, 1344-46 (4th Cir. 1995) (taking dim view of federal court intervention in core state functions such as prison management), *cert. denied*, 116 S. Ct. 772 (1996).

236. 482 U.S. 78 (1987).

237. *See id.*

238. *Id.* at 81.

239. *Id.* at 89 (citing Block v. Rutherford, 468 U.S. 576, 586 (1984)). The government objective must be neutral. Where the relationship between the state's interest and the regulation is tenuous, the court will look closely for indications of arbitrary or abusive action. *See id.* at 89-90.

240. *See id.* at 90 (citing Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 131 (1977)). If alternatives exist for inmates to exercise their rights, "courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

the larger inmate population.[241] The final prong of the test is whether an alternative means exists for prison officials to accomplish their objectives without infringing on inmates' rights. This last element is not a least-restrictive-alternative test. If there exists one or more reasonable alternatives, however, the courts may consider this point in their analysis.[242]

Subsequently, in *O'Lone v. Estate of Shabazz*,[243] the Supreme Court reaffirmed the *Turner* standard with respect to alleged infringement of inmates' First Amendment right to free exercise of religion. The Court reversed a Third Circuit decision, explaining: "To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."[244]

The Ninth Circuit created considerable controversy in 1994, holding that the *Turner* standard applied to statutory rights such as those created by the ADA. In *Gates v. Rowland*,[245] the court reversed a lower court's ruling that denial of food-service positions to HIV-positive inmates discriminated against them impermissibly.[246] Instead, the Ninth Circuit held that the reasonableness gauge of *Turner* should prevail.[247] Arguing that, where constitutional protections bend, statutory privileges must too, the court accepted the penological concerns maintained by prison officials.[248] The implications of this ruling are profound, as it subjects the ADA as well as other statutory rights to *Turner*'s accommodating guidelines.[249]

Not all circuit courts have concurred with *Gates*, however. In *Pargo v. Elliott*,[250] for example, the Eighth Circuit stated:

> Not all reviews of prison policies or practices require judicial deference . . . . The District of Columbia Circuit held in *Pitts v. Thornburgh* that the *Turner* standard of scrutiny was inapplicable to the District of Columbia's policy of housing women

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241. *See id.* at 90 (citing Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 132-33 (1977)). The intention is that deference to prison officials' judgment should increase in proportion to the expected effects of the proposed accommodation.

242. *See id.* at 91 ("[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.").

243. 482 U.S. 342 (1987).

244. *Id.* at 349.

245. 39 F.3d 1439 (9th Cir. 1994).

246. *See id.* at 1448.

247. *See id.* at 1447-48.

248. *See id.* at 1444.

249. *See* William C. Collins, *Use of* Turner *Test Deferring to Institutions' Security Concerns May Sharply Limit Inmates' ADA Protection*, CORRECTIONAL L. REP., Feb. 1995, at 65 (describing decision as "startling" and concluding that, if *Turner* application stands, ADA's "ultimate impact may be dramatically reduced").

250. 49 F.3d 1355 (8th Cir. 1995).

> inmates in a distant facility and men inmates in a nearby institution because the practice involved "general budgetary and policy choices." . . . *Turner* does not foreclose all heightened judicial review. . . . Our cases also indicate that *Turner* does not render prison regulations immune from judicial review.[251]

Arguably, whether statutory rights are subjected to formal *Turner* analysis or instead are simply drained by a generic deference to prison concerns, the results for a litigant's case will be the same. The route the courts take, however, alters the debate thereafter.

Following closely on the heels of deference to prison management is the deference accorded to professional judgment. Much as prison management is granted quasi-expert standing by the courts, physicians are accorded heightened standing for their exercise of judgment. In cases challenging medical care, or lack thereof, courts regularly discuss the extent to which they should defer to the professional judgment of the attending physician or administrator.[252]

VI. ADA-BASED PRISONER LITIGATION TO DATE

Thus far, there have been relatively few ADA cases involving prisoners. Although the law was enacted in 1990, provisions within each Title took effect over a several-year period. Of the claims filed, most are Title I employment claims.[253] The majority of Title II's requirements took effect in January 1992.[254] Given the time delay involved in filing, trying, and appealing a case, the factual basis for most recent prisoner litigation predates the ADA[255] and the prevailing understanding is that the ADA is not retroactive.[256]

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251. *Id.* at 1357 (citations omitted).

252. *See, e.g.*, Cameron v. Tomes, 990 F.2d 14, 20 (1st Cir. 1993) ("Professional judgment, as the Supreme Court has explained, creates only a 'presumption' of correctness; welcome or not, the final responsibility belongs to the courts.") (citing Youngberg v. Romeo, 457 U.S. 307, 323 (1982)); *see also* Sawyer v. Sigler, 320 F. Supp. 690, 694 (D. Neb. 1970) (holding that courts should defer to physicians' judgment on issue of whether inadequate medical treatment is being rendered).

253. *See supra* note 142. Title II education-related claims rate a distant second.

254. ADA § 205(a).

255. *See, e.g.*, Haston v. Tatham, 842 F. Supp. 483, 487 (D. Utah 1994) (dismissing ADA portion of claim because events predated Title II's date of implementation).

256. *See, e.g.*, Huston v. Nadim, No. 93-16760, 1995 U.S. App. LEXIS 6337 (9th Cir. Mar. 9, 1995) (dismissing petitioner's ADA-based claims arising from 1991 events as barred for nonretroactivity of ADA); Aramburu v. Boeing Co., No. 93-4064-SAC, 1993 WL 544567, at *3 (D. Kan. Dec. 29, 1993) (finding ADA not retroactive). *But see* Raya v. Maryatt Indust., 829 F. Supp. 1169, 1173 (N.D. Cal. 1993) (reasoning that, although delayed effective date suggests no congressional intent for ADA to apply retroactively, such date is not dispositive of issue).

Attention has been drawn to *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995), in which the plaintiffs were granted leave to amend with addition of an ADA claim even though the events in question arose prior to Title II's effectiveness date. *See id.* at 1051-52. Although not clarified by the court, it appears that the claim addressed ongoing problems that brought more recent action within the appropriate time frame. *See infra* notes 288-93 and accompanying text (discussing *Clarkson*).

An additional problem that arises when researching cases in this field is the frequency of settlements.[257] While settlements may avoid the expense of protracted litigation and, indeed, do secure some relief for inmates, they also result in a misleading shortage of case law.[258]

Therefore, as a result of timing and settlements, there is relatively little case history to analyze. Moreover, case "results" are mostly still pending. Where decisions have been handed down, the results are either negative or merely confirm the applicability of the ADA to prisons. It remains to be seen how much relief the plaintiffs in these cases will actually receive. Nevertheless, the existing cases merit review, if only to provide a sense of the issues and problems inherent in bringing prison-based ADA claims.

Several cases presenting ADA-based claims have run into procedural walls. The plaintiff in *Tomey v. Gissy*,[259] for example, complained about abusive treatment and inadequate facilities for handicapped persons at the county jail.[260] A federal court held that his suit was time-barred under the ADA's 180-day complaint filing requirement.[261] Another federal district court, however, held that the 180-day limitations period applied only to agency filings and did not preclude later federal court filings.[262] In *Haston v. Tatham*,[263]

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257. Example 1: A case originally brought in 1989 against a doctor at a New Jersey prison initially resulted in the state succeeding in having the case dismissed. However, the passage of time allowed for additional evidence to be gathered and additional plaintiffs to be identified. In June 1994, the case was settled with five inmates and the estate of a sixth receiving a total amount of $275,000. The physician, may be liable for up to $50,000 if he is not indemnified by the attorney general's office. The same physician also recently settled an inmate-initiated case for $150,000. Both cases result from events at Bayside Prison. The physician is continuing as a medical-services provider to the Cape May County Jail, also in New Jersey. There have been allegations and charges surrounding that location as well. *See* Linda Bean, *Prison M.D. May Have to Pay Inmates*, N.J. L.J., July 4, 1994, at 8; Linda Bean, *Suing the Jailhouse Doc*, N.J. L.J., Nov. 8, 1993, at 1.

Example 2: A California suit brought by a paraplegic inmate against Santa Clara County officials was settled on February 3, 1993. The inmate requested injunctive relief and unspecified damages, based on alleged violations of the ADA, the Rehabilitation Act of 1973, and various state statutes. The settlement is essentially one of equitable relief, with accommodation of the inmate's needs by the county. Costs and fees are to be borne by each side. *See* Angela Baughman, *Big Deals, Big Suits*, RECORDER, Feb. 25, 1993, at 5.

Example 3: *Gates v. Rowland*, which challenged conditions for physically disabled and HIV-positive inmates in the California correctional system resulted in a settlement agreement that applied only to the Vacaville prison facility. (There has since been continuous litigation regarding details of implementation. Accepting the recommendations of a magistrate judge, a United States district judge has levied substantial fines against the State of California and threatened imprisonment for contempt if the Department of Corrections does not honor the consent agreement.) *See* 3 PRISONERS AND THE LAW app. B-112 to -114 (Ira P. Robbins ed., 1996).

258. This is the unreported underside of prison-conditions litigation, complicating an assessment of how actively inmates are pursuing the remedies made available by ADA and other legislation.

259. 832 F. Supp. 172 (N.D. W. Va. 1993).

260. *See id.*

261. Title II provides a 180-day statute of limitations for filing of complaints. *See* 28 C.F.R. § 35.170(b) (1994) ("A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown.").

262. The time bar for these filings is based on state law. *See* Doe v. County of Milwaukee, 871 F. Supp. 1072, 1078 (E.D. Wis. 1995).

263. 842 F. Supp. 483 (D. Utah 1994).

the inmate petitioner alleged disability-based discrimination in the correctional industry's failure to hire him. The court questioned the applicability of the ADA to prisoner employment and granted summary judgment to the defendants on that claim.[264] In *Crowder v. True*,[265] a paraplegic pretrial detainee in a federal facility raised claims under the Fifth Amendment, the Eighth Amendment, the ADA, the Rehabilitation Act, and the Architectural Barriers Act.[266] The court invalidated the ADA claim on the ground that the ADA does not apply to federal agencies or prisons.[267]

Many claims nationwide have failed under the interpretive scrutiny of the courts. In *Rivera v. Dyett*,[268] a diabetic amputee prisoner sought a preliminary injunction, claiming inadequacy of prison facilities for wheelchair-bound inmates. The court initially acknowledged the possibility of success on an Eighth Amendment claim, but dismissed the ADA claim because the plaintiff "fail[ed] to demonstrate a likelihood of success on the merits or a sufficiently serious question going to the merits combined with a balance of hardships tipping decidedly in his favor with respect to his claim."[269] The court's unusual distinction—that a claim could reach Eighth Amendment standards without triggering ADA protections—followed from his failure to show "that he [was] discriminated against in connection with any evaluation for placement in a vocational program on the basis of any handicap."[270] Similarly, in *Wagner v. Jett*,[271] a Kentucky prisoner alleged discriminatory delivery of food service within the prison. The federal district court granted summary judgment for the defendant and the plaintiff appealed. The Sixth Circuit found that the plaintiff could not establish the elements of his discrimination claim

264. *See id.* at 487. The events underlying the claim predated the effective date of the ADA provisions. *See id.* at 488; *see also* White v. Colorado, 82 F.3d 364, 367 (10th Cir. 1996) (holding that ADA Title I does not apply to prison employment); Pierce v. King, 918 F. Supp. 932, 937-38 (E.D.N.C. 1996) (stating that ADA does not apply to prison work programs).

265. 74 F.3d 812 (7th Cir. 1996).

266. *See id.*; 42 U.S.C. § 4151 (1994) (Architectural Barriers Act).

267. *See* 74 F.3 at 813. The Rehabilitation Act and Architectural Barriers Act claims failed for lack of exhaustion of administrative remedies, the Eighth Amendment allegations were deemed inadequate and dismissed without prejudice, and the Fifth Amendment (due process) claim survived long enough to be dismissed in a separate proceeding when met by the defendants' claim of qualified immunity. *See id.* at 813-15.

268. No. 88 CIV. 4707 (PKL), 1992 WL 233882 (S.D.N.Y. Sept. 10, 1992). This case bears some resemblance to *Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir. 1996) (stating that plaintiff had no claim under ADA for medical malpractice).

269. *Id.* at *7.

270. *Id.* at *9. Ironically, in *Candelaria v. Coughlin*, 155 F.R.D. 486 (S.D.N.Y. 1994), a paraplegic inmate's Eighth Amendment challenge to conditions in New York's correctional system failed, but the court noted that "it is possible that Candelaria has a viable claim against the Clinton Facility under the Americans with Disabilities Act." *Id.* at 493.

271. No. 94-5522, 1994 U.S. App. LEXIS 27812 (6th Cir. Sept. 30, 1994).

and affirmed, exercising deference to prison managers' concerns over operational efficiency.[272]

In November 1994, the Ninth Circuit issued a decision that could fundamentally determine the effectiveness of ADA legislation for prisoners. The case of *Gates v. Rowland* provides extensive discussion of the various aspects of prisoner litigation generally and disability-related claims in particular. In *Gates*,[273] the court held that inmates' statutory rights, like constitutional rights, are restricted following incarceration. Consequently, the court reasoned, claims under the ADA and other statutes must be weighed under the *Turner* reasonableness test.[274] *Gates* did not eliminate the possibility of prison-conditions reform under the ADA, but it placed the prospects for such reform almost beyond reach. As with rational basis scrutiny for equal protection claims, the *Turner* analysis heavily favors prison management. If the *Gates* decision prevails nationally, then the same court that decided *Bonner v. Lewis*[275] and supported the Rehabilitation Act's applicability to prisoners will effectively recapture the ground that *Bonner* provided.

Torcasio v. Murray,[276] unlike *Gates*, involved a single plaintiff. In his original action, prisoner Anthony Torcasio claimed that the facility failed to accommodate his alleged disability of morbid obesity.[277] On appeal, the Fourth Circuit affirmed the dismissal of his Eighth Amendment claim, but remanded the case for reconsideration of his Rehabilitation Act and ADA claims, which were originally deemed moot due to Torcasio's transfer.[278] On remand, the district court reviewed the defendants' motion for summary judgment on all claims. The court found for the plaintiff on several of the claims, noting that "a reasonable juror could find [that] defendants' accommodations were unreasonable," and referred the case to a magistrate judge for further action.[279] The defendants appealed the denial of qualified immunity, and the Fourth Circuit reversed, concluding that, "at the time of the alleged violations, it was not clearly established that these acts applied to state prisoners or that an obese individual such as appellee Anthony Torcasio was

272. *See id.* at *3 ("Prison authorities are entitled to adopt and execute policies and practices that in their judgment are needed to preserve institutional security, even if it requires treating disabled inmates somewhat differently.").

273. 39 F.3d 1439 (9th Cir. 1994).

274. *See supra* notes 236-242 and accompanying text (discussing *Turner* and judicial deference generally).

275. 857 F.2d 559 (9th Cir. 1988).

276. 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996).

277. *See* Torcasio v. Murray, 862 F. Supp. 1482, 1486 (E.D. Va. 1994).

278. 12 F.3d 206 (4th Cir. 1993).

279. 862 F. Supp. 1482 (E.D. Va. 1994). Interestingly, in the appeal that followed, defendants specifically challenged the applicability of both the Rehabilitation Act and the ADA to state prisons during this phase of the litigation; the district court held both statutes applicable. *See* Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995).

entitled to the protections of either act."[280] The court did not stop there. It also asked whether statutes such as the ADA and the Rehabilitation Act apply to state prisons. The court vehemently rejected Torcasio's claim that this question was judicially well-established. Implicit within the opinion is a challenge to the interference of federal law in any "core" state functions. Potentially, all of Title II could be questioned under the court's logic. Other courts could easily find in *Torcasio* support for automatic dismissal of inmate ADA claims.[281]

Prisoners' rights advocates should be encouraged by several cases that have survived procedural and substantive challenges. In *Gates v. Deukmejian*,[282] for example, the plaintiffs alleged that conditions at the California Medical Facility at Vacaville violated the Rehabilitation Act. A consent agreement was entered in 1990, but four years later the federal district judge was still levying fines on the defendants and reinforcing these fines with threats of arrest.

Noland v. Wheatley,[283] decided in 1993, stands as the prototype of a successful challenge to prison conditions under the ADA. A semi-quadriplegic inmate brought claims under the Rehabilitation Act, the ADA, federal civil rights statutes, and Indiana jail standards, alleging "deplorable conditions" regarding colostomy and urostomy bags for waste disposal, pressure sores, renal problems, padded cells, open drains, lack of running water, stench, twenty-four-hour camera monitoring, infected ankle sores, and numerous episodes of exposure to human waste. The defendants filed a motion to dismiss. The court's holding was mixed. On the one hand, the court dismissed the inmate's Rehabilitation Act claim without prejudice because Noland failed to allege receipt of federal funds in his complaint.[284] On the other hand, the court found that the inmate stated a valid ADA claim as well as a valid § 1983 claim for the portions of his complaint based on ADA violations.[285] The opinion confirmed that Title II claims do not require a "right to sue" letter or the exhaustion of administrative remedies. Further, the court noted that the

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280. *Torcasio*, 57 F.3d at 1342.

281. *See* Gorman v. Bishop, 919 F. Supp. 326, 331 (W.D. Mo. 1996) (extending *Torcasio* to apply to arrests); Staples v. Virginia Dep't of Corrections, 904 F. Supp. 487, 490 (E.D. Va. 1995) (expanding *Torcasio* and holding that ADA does not apply to state prisons).

282. 987 F.2d 1392 (9th Cir. 1992). The *Gates* history is extensive, involving both court litigation and negotiated consent agreements. *See, e.g.*, Gates v. Deukmejian, No. CIV S-87-1636 LKKJFM, 1988 WL 92568 (E.D. Cal. July 27, 1988) (addressing motion to compel document production); Gates v. Deukmejian, 987 F.2d 1392 (9th Cir. 1992) (post-consent agreement consideration of requests for attorney fees); Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994) (resolving appeals and cross-appeals arising from consent agreement); Gates v. Rowland, Nos. 94-15259, 94-15884, 1995 WL 346091 (9th Cir. June 9, 1995, as amended Aug. 3, 1995) (considering challenge to district court's orders with respect to use of taser guns and other weapons on inmates); Gates v. Gomez, 60 F.3d 525 (9th Cir. 1995) (regulating prison's use of grenade launcher and holding that it was covered under decree).

283. 835 F. Supp. 476 (N.D. Ind. 1993).

284. *See id.* at 481.

285. *See id.* at 485.

ADA creates enforceable rights and consequently can serve as the basis for a claim under federal civil rights statutes.[286] Finally, the court held that a defense of qualified immunity is not available against ADA claims unless the defendant can establish that his or her actions appeared consistent with ADA provisions.[287] Although not yet fully litigated, *Noland* has become the seminal case for attorneys presenting prisoners' ADA claims.

Confirming that nothing in law is either static or secure, the federal district court in New York decided *Clarkson v. Coughlin*[288] in the same month that the Fourth Circuit dismissed the plaintiff's case in *Torcasio*. Hearing-impaired inmates originally brought a civil rights action including both constitutional[289] and statutory challenges,[290] alleging inaccessible facilities, lack of auxiliary communication aids, lack of notice and grievance procedures, and failure to provide qualified interpreters.[291] After years of procedural shadowboxing and an extensive analysis of the inmates' needs and the defendants' responses, the court held for the plaintiffs, granting summary judgment and declaratory and injunctive relief.[292]

The importance of the *Clarkson* decision is twofold. First, the prisoners prevailed after mounting a strong case that the defendants had systematically refused to accommodate disabled prisoners for years. The individual stories of inmates, when combined, created a powerful statement of noncompliance. The defendants' lack of accommodation was comprehensive and had devastating effects on inmates' daily lives and access to their legal rights. The second consequence of *Clarkson* lies in the declaratory judgment and the premises reflected therein. The federal district court did not question that statutory rights—the Rehabilitation Act and the ADA—applied to prisons. Moreover, the court refused to engulf the plaintiffs' claims in a *Turner v. Safley*[293] analysis. In the aftermath of the *Gates* decision, the *Clarkson* ruling holds some promise for disabled prisoners.

The bulk of prisoner ADA litigation remains unresolved. *Coleman v. Wilson*[294] focused on mental-health care in the California state prison system. A class action alleging deliberate indifference was brought on behalf of 28,000 mentally ill California inmates. The magistrate judge found for the plaintiffs

286. *See id.* at 482.
287. *See id.* at 488.
288. 898 F. Supp. 1019 (S.D.N.Y. 1995).
289. These challenges included Fifth, Eighth, and Fourteenth Amendment issues. *See id.* at 1038-44.
290. The plaintiffs invoked both the Rehabilitation Act of 1973 and the ADA. *See id.* at 1035-38.
291. *See* Clarkson v. Coughlin, 783 F. Supp. 789, 793 (S.D.N.Y. 1992).
292. *See Clarkson*, 898 F. Supp. at 1033-35.
293. 482 U.S. 78 (1987); *see also supra* notes 236-242 and accompanying text (discussing *Turner* test).
294. 912 F. Supp. 1282 (E.D. Cal. 1995).

and recommended that a special master be appointed to monitor the situation. The case is awaiting review by the chief judge.[295]

The defendants in *Outlaw v. City of Dothan*[296] challenged, among other things, whether their alleged failure to accommodate an inmate with a severe skin condition violated the Rehabilitation Act and the ADA.[297] The court applied a definitional analysis of the components outlined in the statutes[298] and concluded that, "under common usage and understanding of the terms, the jail and all of its facilities, including the shower, constitute a service, program, or activity of the City of Dothan to which the ADA applies."[299] The court permitted the plaintiff's case to proceed on these issues.

In *Armstrong v. Wilson*,[300] a class action suit was filed on behalf of allegedly hundreds of disabled inmates. Originally filed by nine male and two female inmates, the suit challenged everything from access to law libraries and rehabilitation programs to basic issues of security for blind and deaf inmates. The case was brought against the State of California under both the ADA[301] and the Rehabilitation Act of 1973. The plaintiffs requested injunctive relief mandating an end to discriminatory denial of access and requiring compliance with structural accessibility guidelines.[302]

Harrelson v. Elmore County[303] is also pending resolution. A paraplegic individual alleged violations of the ADA as well as of the First, Fourth, Eighth, Ninth, and Fourteenth Amendments, based on two periods of incarceration of thirty-six to seventy-two hours in an Alabama county jail.[304] The allegations included deprivation of wheelchair use, lack of a handicapped-accessible toilet and shower facilities, and other injurious conditions of confinement.[305] In August 1994, a federal court granted the defendants'

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295. *See* Bill Kisliuk, *Prisoners Sue California Under 1991 Disabilities Act*, RECORDER, June 30, 1994, at 3.

296. No. CV-92-A-1219-S, 1993 WL 735802 (M.D. Ala. Apr. 27, 1993).

297. *See id.* at *4.

298. This included whether the shower in the jail is a "service, program or activity." *Id.* at *4. The court answered in the affirmative. *See id.*

299. *Id. But see* Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (finding that provision of bed for paraplegic was not service, program, or activity covered under ADA).

300. No. C 94-2307 (N.D. Cal., filed June 27, 1994), *described in* Kisliuk, *supra* note 295, at 3; *see also* Jean Stewart, *California Inmates Fight Back*, DISABILITY RAG & RESOURCE, Nov.-Dec. 1994, at 11.

301. *See* Kisliuk, *supra* note 295, at 3 ("The suit is believed to be the first time a state prison system has been sued under the ADA.").

302. *See* Armstrong v. Wilson, No. C 94-2307, 1996 WL 580847 (N.D. Cal. Sept. 20, 1996) (denial of defendants' summary judgment motion). The plaintiffs allege that, since the passage of the Rehabilitation Act of 1973, the California Department of Corrections (CDC) has spent billions of dollars of public funds on new prison construction and alterations to existing facilities that do not comply with the Uniform Federal Accessibility Standards.

303. 859 F. Supp. 1465 (M.D. Ala. 1994).

304. *See id.* at 1466 n.1.

305. *See id.* at 1466.

motion to dismiss the plaintiff's claim for punitive damages, holding that such damages were not available under Title II of the ADA.[306]

Also awaiting further developments is a claim filed on behalf of blind prisoners in the California correctional system.[307] The Vacaville settlement in *Gates v. Rowland*[308] did not address other facilities, and blind inmates were excluded from that suit. This complaint had been filed with the United States Department of Justice after the problems with prison administration could not be resolved. The Justice Department apparently channeled the complaint to the Federal Bureau of Prisons, then to the California Department of Corrections, which sent it back to the prison administrators.[309] Subsequently, notice was received that, pending developments in *Armstrong*,[310] the larger class action suit, ADA complaints for California prisoners have been put on hold.[311]

In summary, little can be extrapolated from the case law thus far. ADA litigation in prison is still in its relative infancy. Moreover, the holdings that have emerged are not irreversible. Early cases stumbled over effective dates and application to federal versus state institutions. Several cases have been slowly winding through the courts, gaining ground on the question of applicability in prisons but running headlong into deference theories. The Ninth Circuit recently has determined that the ADA will be subject to the *Turner* analysis, while the Fourth Circuit is beginning to question whether the ADA should apply at all in prison cases. The Southern District of New York held that widespread systemic deprivation of access to basic needs and legal rights will not be tolerated. Several court-sponsored settlements have involved disability discrimination challenges, but implementation has been slow and partially successful at best. In the four years since the effective date for Title II, the case law is neither conclusive nor even strongly indicative. The only analysis that reasonably can be sustained is that any application of the ADA in prisons will be limited and cautious.

VII. STRATEGIC POSSIBILITIES

The problem of disabled, aging, infirm, and terminally ill prisoners is not a new challenge. With the general aging of the American population and the changes in sentencing options created by legislative mandates, however, the

306. *See id.* at 1468.

307. *See* Ed Eames & Toni Eames, *Justice & Blindness*, DISABILITY RAG & RESOURCE, Nov.-Dec. 1994, at 12.

308. *See supra* note 257, Example 3.

309. *See* Eames & Eames, *supra* note 307, at 12.

310. Armstrong v. Wilson, No. C 94-2307, 1996 WL 580847 (N.D. Cal. Sept. 20, 1996).

311. *See id.* For a discussion of the lawsuits brought by California inmates, see 3 PRISONERS AND THE LAW app. B-112 to -114 (Ira P. Robbins ed., 1996).

size and urgency of demands placed by this population have swelled and are expected to explode within the next decade.[312]

There is no simple answer to the inevitable expense and unmanageability of the problems confronting the disabled-prisoner population. Legislative mandates are but the opening foray. Costs, strategic inefficiencies, the difficulties of policing an individual facility's adherence to ADA standards, and the competing—generally overriding—priorities of the prison system combine to thwart any well-intentioned effort to solve the problems. A comprehensive solution will require major changes to structures, policies, and attitudes among corrections professionals.[313] Amidst this bleak picture, some courts are stepping in to guide the results. As discussed above, California corrections facilities have been and continue to be the subject of judicial inquiry and orders.[314]

As simplistic as it seems, the judicial system strives to meet ADA standards by keeping the disabled out of prison as much as possible. In *People v. Reets*,[315] for example, the court dismissed an indictment against a deaf-mute defendant charged with criminal sale and possession of a controlled substance, noting that "no finding of guilt could fairly be obtained given the circumstances of defendant's disability."[316] In *People v. Colon*,[317] the trial court dismissed an indictment charging a thirty-nine-year-old mentally retarded defendant with

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312. *See* Morain, *supra* note 8, at A1 (discussing California prison population). Increasing numbers of new inmates in California carry communicable diseases; one in four carries the tuberculosis virus. *See id.* One in five inmates suffers from mental illness or associated problems. California is on the losing side of several class-action lawsuits addressing the care of mentally ill prisoners. The potential costs of these combined factors are well into the millions. *See id.*

313. *See* Barbara Brown Nichols, *Sensitizing Staff*, DISABILITY RAG & RESOURCE, Nov.-Dec. 1994, at 21. Nichols, the warden of an Ohio facility for adult women, contends that hiring people with disabilities to staff correctional facilities is the fastest route to improving institutional attitudes and the experience of disabled inmates. *See id.*

314. *See, e.g.*, Maura Dolan, *Judge Orders End to Brutality at High-Tech Prison*, L.A. TIMES, Jan. 12, 1995, at A1. Pelican Bay Prison was intended to be a national model for high-tech, high-security prisons. A federal district judge determined that the state permitted guards to exercise "grossly excessive force" and that the facility denied adequate medical and mental-health care to inmates. The judge did not close the facility, but ordered short-term modifications and placed the Department of Corrections on notice. Complicating the problems at Pelican Bay is the reality that, while the inmate population is perceived to be the worst of the incorrigible violent offenders, the facility also houses some drunk driving and drug offenders. *See id.*

Additional judicial intervention is underway, emerging from the Vacaville consent agreement litigation and several other suits filed on behalf of mentally ill and other disabled inmates in the California prison system. *See supra* Subsection I.A.2 (discussing these issues). *See generally* 3 PRISONERS AND THE LAW app. B-112 to -114 (Ira P. Robbins ed., 1996).

315. 597 N.Y.S.2d 577 (Sup. Ct. 1993).

316. *Id.* at 579. The court added:

> It is fully realized that this court's discretionary power to dismiss in the interest of justice is to be exercised sparingly, and that a sensitive balancing of the interests of the individual and the People is required. The present decision is not meant to serve as a general license for disabled individuals to commit crimes.

Id.

317. 209 A.D.2d 254 (N.Y. App. Div. 1994).

sale and possession of controlled substances "in the interests of justice."[318] In its opinion, the court noted:

> The people also point out that defendant's "mild mental retardation" did not impede her ability to form the requisite criminal intent. But dismissal in furtherance of justice is a remedy to be used "even though there may be no basis for dismissal as a matter of law."[319]

For those disabled prisoners already incarcerated, the best prospect is some form of early-release or compassionate-parole structure.[320] Texas has a statutory "special needs parole" option, available for those identified as "elderly, physically handicapped, mentally ill, terminally ill, or mentally retarded."[321] A considerable amount of the support for compassionate early releases is intended to benefit terminally ill prisoners,[322] but the structure allows for expansion to cover disabilities as well.[323]

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318. *Id.* at 254 (referring to trial court decision).

319. *Id.* at 255-56 (citation omitted). *Cf.* Peter Baker, *Agreement Reached on Parole Bill; Va. House Democrats Make Few Changes In Allen Anti-Crime Plan*, WASH. POST, Sept. 29, 1994, at A1 (reporting that, in Governor Allen's program, certain nonviolent offenders would be placed in alternative settings); Eva M. Rodriguez, *Panel Gives Break for Diminished Capacity*, LEGAL TIMES, Apr. 19, 1993, at 6. A District of Columbia defendant convicted of bank robbery was initially denied a lighter sentence based on diminished mental capacity because the judge deemed the robbery to be commission of a violent crime, precluding leniency of the sort requested. *See id.* On appeal, however, the court held that judges have greater discretion than facially apparent in statutory restrictions. *See id.* As stated by D.C. Circuit Judge Harry Edwards, "Such lenity is appropriate in part because . . . two of the primary rationales for punishing an individual by incarceration—desert and deterrence—lose some of their relevance when applied to those with reduced mental capacity." *Id.* (internal quotation marks omitted).

320. Parole reform raises a spectrum of problems, however. While advocates encourage increased parole for nondangerous disabled prisoners, communities pressure legislatures and prison officials to restrict parole opportunities. *See* Lisa O'Neill, *Rapist Fails Mental Test, Won't Be Freed*, L.A. TIMES, Dec. 2, 1994, at 1. Corrections officials use psychiatric examinations to deny inmates parole even at the last minute. The use of this tactic has been controversial; yet, confronted by angry frightened voters, officials are likely to continue this and other methods for denying or delaying parole.

321. TEX. CODE CRIM. P. ANN. art. 42.18 (West 1996) (Adult Parole and Mandatory Supervision Law). This law also authorizes officials to grant intensive supervision parole to otherwise ineligible prisoners if prison capacity is greater than 95%. *See Ex parte* Choice, 828 S.W.2d 5, 7 (Tex. Crim. App. 1992); *see also* Sultenfuss v. Snow, 35 F.3d 1494, 1498 n.7 (11th Cir. 1994) ("Sultenfuss' tentative Parole Month was later adjusted slightly *in conjunction with a periodic review to account for prison overcrowding.*") (emphasis added) (internal quotation marks omitted).

322. *See* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799 (1994). While the legislation that exists is geared toward terminally ill inmates, the path is far from smooth. Even where corrections officials recommend release, judges have been slow to approve these recommendations. *See* Susan Sward & Bill Wallace, *Inmates Suffer Despite Calls for Reforms*, S.F. CHRON., Oct. 5, 1994, at A1. (Department of Corrections urged release of bedridden multiple sclerosis patient, but judge refused, citing prisoner's lack of remorse). Fear of public opinion drives judicial reluctance. *See generally* Working Group on Compassionate Release, *Compassionate Release of Terminally Ill Prisoners*, *in* 2 PRISONERS AND THE LAW ch. 14B (Ira P. Robbins ed., 1996).

323. *See* Yarbaugh v. Roach, 736 F. Supp. 318, 320 n.7 (D.D.C. 1990) ("The Court continues to encourage the defendants to explore whether a medical pardon is appropriate or whether there is another facility that can better accommodate plaintiff's needs."); Baker, *supra* note 13, at C1; Baker, *supra* note 319, at A1. Virginia Governor Allen's plan provides eligibility for early release to inmates who have served at least 10 years and are 60 or older. *See id.*

The success of early-release programs is disputed. Pressure for stricter penalties is erupting throughout the country. Mandatory sentencing and abolition of parole are the current fashion. Sooner or later, however, the monumental costs of prison construction and administration will erode public enthusiasm for extended incarceration.[324] Early release of disabled prisoners might find some public acceptance if handled gradually and discreetly.[325]

As an alternative to early release, prisons might accelerate the ongoing practice of transferring disabled inmates to appropriate medical facilities. Authorization exists for these transfers where prison facilities are inadequate to treat a specific medical problem or, rather commonly, where the mental disabilities of the prisoner require at least temporary relocation to psychiatric facilities.[326] This strategy does not relieve the state of its burden to provide adequate medical and psychiatric care for the inmate, but it allows some

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The Federal Sentencing Guidelines include a provision allowing flexibility in sentencing for disabled defendants:

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, *an extraordinary physical impairment* may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

FEDERAL SENTENCING GUIDELINES § 5H1.4 (1994) (emphasis added). *See, e.g.*, United States v. Ghannam, 899 F.2d 327, 329 (4th Cir. 1990) ("Section 5H1.4 allows downward departures any time a sentencing court is presented with sufficient evidence of impairment."); United States v. Maltese, No. 90 CR 87-19, 1993 WL 222350, at *1 (N.D. Ill. June 22, 1993) (finding defendant entitled to downward departure pursuant to §§ 5H1.1 and 5H1.4 because of defendant's age and extremely poor health); United States v. Grullon, No. 91 Cr. 141-05 (RWS), 1993 WL 361613, at *1 (S.D.N.Y. Sept. 14, 1993) (confirming that § 5H1.4 authorizes downward departure in sentencing based on physical infirmity).

Various states have incorporated into their statutory schemes some method for sentence reduction or amendment, based upon the inmates' health. *See, e.g.*, MICH. COMP. LAWS ANN. § 791.235(10) (1995) ("The parole board may grant a medical parole for a prisoner determined to be physically or mentally incapacitated.").

324. There will likely be a growing split between courts that continue to expand capital-offense lists and those that look for alternatives.

325. This could work—right up until a disabled parolee or compassionately released prisoner makes headlines for a violent crime. And disability is a relative term, as illustrated in the case of Anthony C. Garafolo. In 1991, Garafolo was convicted of robbery and sentenced to 15 years' probation—lenience that the judge attributed to the defendant's paralysis. In September 1993, however, Garafolo "rolled into one of the same banks he hit during the original crime spree and escaped with $2500 in cash without showing a weapon. An accomplice helped him pack his wheelchair into a car and drove him off." He was apprehended and has begun serving a 15-25 year sentence. *See Nation In Brief: Paralyzed Holdup Man Sent To Prison*, ATLANTA J., Nov. 10, 1993, at B7.

326. *See* OHIO REV. CODE ANN. § 715.59 (1995) (Hospitals for diseased prisoners) ("The legislative authority of a municipal corporation may provide suitable hospitals for the reception and care of such prisoners as are diseased or disabled, under such regulations and the charge of such persons as the legislative authority directs.").

As previously discussed, transfers raise several legal concerns, including retaliatory abuses by prison administrators and due process protections against peremptory transfer *sans* full hearing. *See supra* Subsection I.A.2 (discussing mentally ill inmates); *see also* Dwayne Bray, *Convicted Molester Avoids Prison Term*, L.A. TIMES, June 9, 1994, at B2 (reporting that mentally disabled man convicted of engaging in sex acts with six-year-old boy was ordered to state hospital after jury declined to send him to prison).

shifting of the burden to facilities that may be better able to cope. Admittedly, the judgments underlying a transfer would be subject to considerable scrutiny and could not rest simply on institutional efficiencies. Legislation such as the ADA would act as a bar to excessive transferring of inmates if the transfers achieved little more than convenient segregation of prisoners requiring extensive treatment. Nevertheless, the common interests of the disabled inmate and the prison administration might be served by responsible application of this option. Moreover, transfer strategies would leave societal concerns for security undisturbed, as neither transfer into hospitals nor return of transferred prisoners by medical facilities would result in release of the prisoner into the community.[327]

The motivation to undertake these strategies has not been especially compelling until recent years. Perhaps the pressure that legislation such as the ADA places on the criminal justice system will inspire these and other creative alternatives.

In response to the costs involved and the inefficiently scattered population of disabled inmates, some prisons have created centralized facilities for disabled prisoners. It is yet unclear how far this approach can be taken. The ADA allows for some programmatic efficiencies, and no doubt the courts will allow prison administrators flexibility in attempting to address these issues. Should the opportunities and caliber of facilities vary identifiably between disabled-prisoner facilities and other corrections facilities, an equal protection issue may arise.[328] Even if conditions are similar, however, programmatic segregation of disabled prisoners would violate a core tenet of the ADA. The prison context might well prevail, but that conclusion has not yet received judicial imprimatur. Finally, there is the ideal solution, for both the long term and the short term: provide decent care for all inmates in the first place. This goal could be realized only if it were possible for voters to recognize the potential savings in this approach, which would avoid spending tax dollars for huge class action lawsuits resulting in systemwide structural change. Lest one get carried away with idealism, however, it is substantially more likely that the

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327. *See* Zenoff, *supra* note 38, at 568.

328. It is likely that this will only be a problem if the facilities for disabled prisoners are considerably worse than facilities for others. If the distinctions are minor, courts will probably offset the variance with a balance of state interests. If the other facilities are worse, *quaere* how far a complaint from that population is going to get. *See, e.g.*, Roe v. Fauver, CIV A. No. 88-1225 (AET), 1988 WL 106316 (D.N.J. Oct. 11, 1988):

> In [*Perez v. Neubert*, 611 F. Supp. 830 (D.N.J. 1985)], prison officials had placed an entire class of inmates, all Marielitos [Cuban aliens] in MCU's in various state prisons. This court held [i]f we had found that the conditions of confinement of the plaintiffs were substantially similar to those affecting inmates in the general population we would be proceeding no further. Mere sequestration under "separate but equal" conditions would not in the prison context, be cognizable under § 1983.

Id. at *2-3 (internal citation and internal quotation marks omitted).

voters, led by short-sighted politicians, would sooner support legislation precluding inmates from bringing such actions at all.

CONCLUSION

The perception among legal professionals working on prisoner-litigation issues is that the impact and ramifications of the Americans with Disabilities Act have yet to be seen or understood. Even the basic question of whether courts will apply the ADA to state correctional facilities has not been definitively settled. The few cases with ADA-related issues do not provide an adequate indication of judicial intentions. In all probability, there will be a considerable increase in ADA-based prisoner claims in the next few years. At the same time, a balancing of judicial activism—which has lessened markedly since the wave of Reagan and Bush federal court appointments and the election of a Republican-controlled Congress—and judicial deference to prison administrators, suggests that the impact of the ADA for prisoners will be limited.

The effects of the ADA on prison inmates will tend to be felt, if at all, in the areas of basic prison conditions and equal access to programs and activities. For egregious cases of discriminatory treatment, the ADA may swing the balance in favor of the inmate. In traditional disability litigation, prisoners have often established the conditions-of-confinement prong of the equation only to fail under the intent requirement.[329] With the ADA in place, prisoner-plaintiffs may succeed in bypassing that obstacle. Moreover, the nondiscretionary character of the ADA will allow courts to address deplorable prison-condition cases without appearing to interfere unduly with prison management. Additionally, the ADA does not require exhaustion of other administrative remedies, thereby permitting swifter recourse to judicial involvement.

Inmates enduring severely discriminatory treatment, or denied access to the most fundamental resources within the prison, may find relief through an ADA claim. It seems unlikely that lower level forms of inequity within prisons will be remedied to any significant degree. Many factors—including judicial deference to prison management, the peculiar and restricted constitutional status of prison inmates, the available defenses of reasonable accommodation and undue hardship, and a national lack of sympathy for convicted persons—render

329. Petitioners ran into either the "deliberate indifference" intent requirements or the semantic requirements for "punishment" versus conditions. Among the prime articulators of the semantic obstacle course is Supreme Court Associate Justice Clarence Thomas. *See* Farmer v. Brennan, 114 S. Ct. 1970, 1990 (1994) ("[B]ecause the unfortunate attack that befell prisoner was not part of his sentence, it did not constitute 'punishment' under the Eighth Amendment."); Helling v. McKinney, 113 S. Ct. 2475, 2483 (1993) ("'[P]unishment' has always meant a fine, penalty or confinement inflicted upon a person . . . [which] does not encompass a prisoner's injuries that bear no relation to his sentence.").

improbable any substantial judicial attention toward improving the quality of life of prisoners, even those with disabilities.

The best pro-prisoner scenario would be a judicial attempt to redress the effects of harsher legislative strategies that reflect a punitive national climate. It is possible that, with an increased prison population yielding a greater number of disabled prisoners and less violent offenders locked up for longer terms, judges will try to restore a balance. The speed with which the prison population increases is outpacing prison construction. This equation creates nothing less than a crisis not just of corrections, but of the entire criminal justice system. Even courts will feel the pressure of limited alternatives and ever-increasing demand. While this may inspire them to intervene, however, courts are unpredictable and judicial activism may be spurned in favor of judicial deference. A third, equally possible course of judicial action would be to forge a delicate middle path in applying these remedies, leaving prisoners only slightly better off than they were in the past, and the legal standards and availability of remedies only slightly clearer for the legal community.

The prospects of the ADA as a meaningful legal remedy for prison inmates are tied inextricably to the future of the ADA and other civil rights legislation nationally. With decentralization of legal rights away from federal law and federal enforcement, civil rights law threatens to become a right without a functional remedy. Constraints on the ability of inmates to access the courts will offset the availability of those remedies that are left in place. While the Republican majority on Capitol Hill will not repeal the ADA, they may well expand its exemptions until the distinction is unimportant. The strengths of the ADA may be severely diluted in the next few years. In such a case, the substance and effect of the ADA for incarcerated populations may be entirely nullified. Even if the ADA remains substantially intact, its utility for prisoners may be almost completely eliminated. Courts already defer aggressively to prison management policies and decisions. If the subjecting of statutory rights such as the ADA to a *Turner*-like reasonableness review prevails, only the truly horrifying scenario of inmate abuse will have a prospect for relief. And if the Fourth Circuit's recent decision in *Torcasio* prevails, then victims of even the worst scenarios will find no relief under the ADA. Simultaneously, the success of a class action suit in the federal district court in New York sustains hope that, regardless of the theoretical debate over statutory rights and judicial deference, clear-cut wrongs will find some relief—eventually.

This Article is replete with unanswered questions and unresolved issues. Unfortunately, that condition reflects all too accurately the collective state of knowledge regarding the ADA's possible benefits for prisoners. Ironically, this stage of legal confusion may prove to be the high water mark for inmates. With a generally conservative judiciary, a Congress partial to short-term solutions to complex problems, and a rather unsympathetic public, the answers

that finally emerge may restrict or altogether eliminate any relief for prisoners under the ADA.

Notwithstanding the platitude that inmates retain certain constitutional rights, in practice those rights fade beyond recognition following incarceration. So, too, will statutory rights—in theory as well as well as practice—if the decisions of the Fourth and Ninth Circuits are followed. The Americans with Disabilities Act holds only limited promise for prisoners. Currently, it still represents a viable weapon in a desperately inadequate arsenal. While the ADA does not even come close to providing what disabled prisoners need, for now it is the best alternative they have.

POSTSCRIPT

After this Article went to press, the federal courts handed down several relevant decisions. In particular, the United States Courts of Appeals for the Third and Ninth Circuits held that the ADA does apply to correctional facilities.

In *Inmates of the Allegheny County Jail v. Wecht*,[330] Allegheny County Jail inmates appealed from an order entered by the district court on May 26, 1995, approving a modification of a consent decree entered in 1989.[331] The consent decree required that jail officials provide services to mentally ill inmates.[332] The May 1995 order vacated this directive, replacing it with a requirement that the county provide services to mentally ill inmates through community-based mental-health programs.[333] The plaintiffs asserted that, because many inmates are ineligible for admission to the community programs, the limitation established by the May 1995 order violated the Rehabilitation Act and the ADA.[334] In resolving this question, the United States Court of Appeals for the Third Circuit, on August 22, 1996, held that correctional facilities are within the scope of the Rehabilitation Act and the ADA.[335] On September 20, 1996, however, the court vacated the opinion and judgment, listing it for rehearing en banc.[336]

On October 11, 1996, the United States Court of Appeals for the Ninth Circuit, in *Duffy v. Riveland*,[337] held that both the ADA and Rehabilitation Act applied to state prisons.[338] Duffy, a deaf inmate, filed suits against the Washington State Reformatory and the Washington State Department of

330. 93 F.3d 1124 (3d. Cir.), *vacated, reh'g en banc granted*, 93 F.3d 1146 (3d Cir. 1996).
331. *See id.* at 1126.
332. *See id.*
333. *See id.*
334. *See id.* at 1130.
335. *See id.* at 1130-35.
336. *See id.* at 1146.
337. 98 F.3d 447 (9th Cir. 1996).
338. *See id.* at 453-56.

Corrections after his request for a certified interpreter at a prison disciplinary proceeding and two classification hearings had been denied.[339] The district court granted summary judgment for the defendants, holding that the Eleventh Amendment afforded immunity for the state entities.[340] Deciding that Congress expressly provided that states could not claim Eleventh Amendment immunity from ADA claims and that the Rehabilitation Act had been amended to the same effect,[341] the court of appeals affirmed in part, reversed in part, and remanded for further proceedings.[342]

Finally, the federal court in *Armstrong v. Wilson*[343]—after examining California Department of Corrections surveys finding that the prison system contained 345 inmates in wheelchairs, 650 inmates with lower extremity disabilities requiring prosthetics or a walker, 141 hearing-impaired inmates, and 219 blind inmates[344]—denied the defendants' motion for summary judgment, and held that the ADA and the Rehabilitation Act applied to state correctional facilities.[345] The suit was brought by a certified class consisting of past and future inmates with "mobility, sight, hearing, learning or kidney disabilities."[346] The court examined the case law of the Third,[347] Fourth,[348] Ninth,[349] and Tenth[350] Circuits, finding the Ninth Circuit's holding in *Bonner v. Lewis*[351] to be dispositive and distinguishing the Fourth Circuit's holding in *Torcasio v. Murray*.[352]

Each of the foregoing decisions is consistent with the theme of this Article: if interpreted reasonably, the ADA can remedy many basic problems confronted by disabled individuals in prison.

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339. *See id.* at 450.
340. *See id.* at 451-52.
341. *See id.* at 452.
342. *See id.* at 459.
343. No. C 94-2307 CW, 1996 WL 580847 (N.D. Cal. Sept. 20, 1996).
344. *See id.* at *1.
345. *See id.* at *2-*7. *Armstrong* was decided several weeks before the Ninth Circuit reached the same conclusions in *Duffy v. Riveland*, *see supra* notes 337-342 and accompanying text.
346. *See Armstrong*, 1996 WL 580847, at *1.
347. *See id.* at *5.
348. *See id.* at *7 (discussing Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996)); *supra* notes 276-281 and accompanying text (addressing *Torcasio*).
349. *See Armstrong*, 1996 WL 580847, at *3-*7 (discussing Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988)); *supra* Part VI (*inter alia*, discussing Ninth Circuit precedent).
350. *See Armstrong*, 1996 WL 580847, at *7 (discussing White v. Colorado, 82 F.3d 364 (10th Cir. 1996) and Williams v. Meese, 926 F.2d 994 (10th Cir. 1991)); *supra* note 112 (citing *Williams* and other cases).
351. 857 F.2d 559 (9th Cir. 1988) (holding that the Rehabilitation Act applies to state prisons); *see supra* notes 111-112 and accompanying text (discussing *Bonner*).
352. 57 F.3d 1340 (4th Cir. 1995) (failing to hold explicitly that the ADA and the Rehabilitation Act do not apply to prisons but implying that they do not), *cert. denied*, 116 S. Ct. 772 (1996); *see supra* notes 276-281 and accompanying text (discussing *Torcasio*).