THE ADA CONSTRAINED: HOW FEDERAL COURTS DILUTE THE REACH OF THE ADA IN PRISON CASES

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INTRODUCTION

People with disabilities constitute one of the most vulnerable populations in prison. The Department of Justice estimates that thirty-two percent of people incarcerated in prison report having at least one physical or cognitive disability.[1] Filthy living conditions, inadequate

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1. *See* Margo Schlanger, *Prisoners with Disabilities*, *in* REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295 (E. Luna ed., 2017); *see also* BUREAU OF JUST. STATISTICS, NCJ 249151, SPECIAL REPORT ON DISABILITIES AMONG PRISON AND JAIL INMATES 2011–2012 (2015).

medical and mental health care, and accounts of abuse and neglect make life in prison unbearable, particularly for individuals with disabilities.[2] As Professor Jamelia Morgan writes, "Gripping accounts of neglect, abuse, riots, suicides and violence amongst prisoners and by corrections staff reveal – with few exceptions - indicate nationwide failures of epic proportions and systems ill-suited to manage the task of true rehabilitation."[3]

The Americans with Disabilities Act (ADA) seeks to provide "clear, strong, consistent, enforceable standards addressing discrimination."[4] Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[5] In *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court recognized that "Title II of the ADA unambiguously extends to state prison inmates."[6] The implications of this decision are significant. Although the obligations on prison and jail officials are not absolute, prisons and jails must take affirmative steps to avoid discrimination, accommodate the disability-related needs of incarcerated people with disabilities, and provide them with the opportunity to participate in the programs, services and activities offered by the facility on an equal basis.[7]

Thirty years after the enactment of the ADA, however, the question remains: Why do incarcerated individuals with disabilities continue to "languish in despair, isolated, shut off and prohibited from gaining equal access to programs and services"?[8] The answer to this question is multifaceted, ranging from barriers imposed upon incarcerated people by the Prison Law Reform Act (PLRA)[9] to the fact that jail and prison

2. Jamelia Morgan, *Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 88 (2018).

3. *Id*. at 88–89.

4. 42 U.S.C. § 12101(b)(2) (2021).

5. 42 U.S.C. § 12132 (2021).

6. 524 U.S. 206, 213 (1998).

7. *See* Schlanger, *supra* note 1, at 301.

8. Morgan, *supra* note 2, at 90.

9. *See* Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153–54 (2015) (arguing that the PLRA has undermined the ability of incarcerated people to bring, settle, and win lawsuits and concurrently limited the ability of courts to be a part of the prison and jail oversight ecosystem); *see also* Maggie Filler & Daniel Greenfield, *A Wrong Without a Right? Overcoming the Prison Litigation Reform Act's Physical Injury Requirement in Solitary Confinement Cases*, 115 NW. U. L. REV. 257, 260 (2020) (arguing that the PLRA prevents incarcerated people from bringing meritorious claims challenging their placement in solitary confinement); *see also No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH, at 8, 31, 37 (June 16, 2009),

officials have been "very slow to learn the . . . lesson [of the ADA]," particularly the requirement that "officials must individualize their assessment of and response to prisoners with disabilities."[10]

Without denying the impact of these factors, this article focuses on the significant role that federal courts play in diluting the reach of the ADA in correctional facilities. It argues that federal courts have read into the interpretation of the ADA several doctrines that punish disability related behavior, inappropriately defer to prison administration and limit the relief available to incarcerated individuals with disabilities. In so doing, federal court jurisprudence rationalizes the continued discrimination against individuals with disabilities through the use of abstract, seemingly objective principles against which particular instances of discrimination can be tested and upheld or struck down, divorced from social context. What looks like a violation is explained away, neutralized, rendered by federal courts as not being a violation at all.

This Article undertakes an analysis of federal court decisions involving incarcerated individuals with disabilities. Part I will outline the experience of individuals with disabilities in correctional facilities and attempt to put that experience into context. Part II will outline how the problematic interpretation of the ADA entertained by some federal courts has the effect of undermining the scope and mandate of the ADA. In particular, this section will consider how courts incorporate doctrinal limitations into the interpretation of disability discrimination statutes that carefully frame instances of discrimination in ways that limit the opportunities for plaintiffs alleging discrimination to succeed. Part III offers possible doctrinal reforms to correct this trajectory and redirect the focus to addressing the discrimination on the basis of disability that the ADA was designed to prevent.

I. DISABILITY DISCRIMINATION IN PRISONS

A. The Number & Experience of Individuals with Disabilities in Prison

Official figures indicate that many incarcerated individuals report having a disability.[11] One relatively recent source of information is the Bureau of Justice Statistics Special Report which tracks the nature and

https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states (arguing that the PLRA deprives incarcerated people of effective remedies for the violation of their rights and violates international human rights treaties).

10. Schlanger, *supra* note 1, at 297.

11. *See* BUREAU OF JUST. STATISTICS, *supra* note 1, at 1.

prevalence of disabilities in jails and prisons across the United States.[12] The Report found that twenty percent of prisoners and thirty percent of jail inmates reported having a "cognitive disability."[13] The second most common reported disability was an ambulatory disability (10% of the prison and jail population).[14] Finally, seven percent reported a vision disability and six percent a hearing disability.[15] The rates of incarcerated individuals diagnosed with psychiatric disabilities is also extraordinarily high.[16] According to the Bureau of Justice Statistics, more than 37% of incarcerated people in prisons had been told by a professional that they had a mental health disorder such as a major depressive disorder, bipolar disorder, post-traumatic stress disorder, personality disorder, schizophrenia or another psychotic disorder.[17]

While incarceration is difficult for all incarcerated people, it is especially difficult for incarcerated people with disabilities.[18] Prisons are "maddening places."[19] Correctional facilities provide a harsh and unyielding environment made up of myriad rules and procedures.[20] Correctional officers function like police and charge inmates with "infractions" when they break the rules.[21] Incarcerated people with disabilities are at risk of being abused and neglected in prisons, subjected

12. *Id.* Issued in 2015, the Special Report is the most current, official and national report tracking the prevalence of disabilities among individuals incarcerated in prisons and jails across the United States. *Id.* Although the report provides some indication of the rate and categorization of disability across prisons and jails, the authors acknowledge that some inmates were unable to participate "due to serious cognitive limitations that precluded them from fully understanding the informed consent procedures or the survey questions." *Id.* at 2. In addition, "some inmates with a particular disability (e.g., a hearing disability) may have had a harder time completing the survey than inmates without a disability." *Id.* As a result, the rate of disability is probably higher than that reflected in the report.

13. BUREAU OF JUST. STATISTICS, *supra* note 1, at 3 (The Special Report defined cognitive disability as "a variety of medical conditions affecting different types of mental tasks, such as problem solving, reading, comprehension, attention, and remembering.").

14. *Id.*

15. *Id.*

16. *See* BUREAU OF JUST. STATISTICS, NCJ 250612, SPECIAL REPORT: INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–2012, at 3 (2017).

17. *See id.*

18. Schlanger, *supra* note 1, at 298.

19. Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL'Y & L. 281, 294 (2010).

20. *See* Jamie Fellner, Symposium, *Pro Se Litigation Ten Years After AEDPA, A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 391 (2006) (noting the inherent tension between the security mission of prisons and addressing the mental health needs of prisoners).

21. *Id.* at 396.

to excessive force and often singled out for placement in solitary confinement.[22]

Further exacerbating this is the lack of access to treatment while incarcerated.[23] The Center for American Progress report, *Disabled Behind Bars*, notes that while behind bars, people with disabilities are deprived of necessary medical care.[24] Incarcerated people with disabilities may also suffer from numerous preventable conditions, including lack of access to proper nutrition.[25] A 2014 study into the mental health screening and medication continuity amongst U.S. prisoners found that while twenty-six percent of incarcerated people were diagnosed with a mental health condition at some point in their lives, only eighteen percent were taking medication for their condition.[26] "More than 50% of individuals who were medicated for mental health conditions at admission did not receive pharmacotherapy in prison."[27] There is also limited access to mental health services in prisons and jails.[28] For instance, Professor Beth Ribet notes that although prison rape is a well-acknowledged phenomenon, the "vast majority of facilities" do not offer access to rape counselors.[29] If some form of psychological counselling exists, there are limited prospects of accessing continuity of care through consistent and regular access to a trusted clinician.[30] As such, "prison rape victims are immersed in a state of extreme psychological crisis, without

22. *See, e.g.*, Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Just., to The Honorable Tom Corbett, Governor of Pa., *Re: Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation*, 33–34 (May 31, 2013). In 2013 the Civil Rights Division of the U.S. Department of Justice undertook an investigation of the conditions of confinement at Pennsylvania State Correctional Institute at Cresson. *See id.* at 1. The report concluded unequivocally that Cresson used prolonged isolation on incarcerated people with serious mental illness and intellectual disabilities, failed to make modifications to policies, and used disciplinary procedures that punished disability related behavior. *See id.* The investigation also noted that the policies used in Cresson were employed across other facilities operated by the Pennsylvania Department of Corrections, and that these facilities were also likely to be in violation of constitutional and federal law. *See id*. at 2.

23. *See* REBECCA VALLAS, CTR. FOR AM. PROGRESS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS 1 (2016).

24. *See id.*

25. *See, e.g.*, Steve Visser, *Gordon County Inmates Underfed, Human Rights Group Alleges*, THE ATLANTA J.-CONST. (Oct. 28, 2014), https://www.ajc.com/news/gordon-county-inmates-underfed-human-rights-group-alleges/csgdakqQ5BP2fmDMEKEmsI/.

26. Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUB. HEALTH 2328, 2328 (2014).

27. *Id.*

28. *See id.*

29. Ribet, *supra* note 19, at 289.

30. *See id.*

any likelihood of a meaningful therapeutic outlet with which to manage or alleviate the experience."[31]

As such, the consequences of incarceration are profound and adverse for people with and without disabilities. The combination of poor conditions in prisons and jails, the use of sanctions like solitary confinement, and inadequate access to health care and mental health treatment can exacerbate existing conditions.[32] Conversely, those without disabilities are at risk, because of the abusive conditions of incarceration, of developing physical and mental health conditions.[33]

B. Disability Incarceration in Historical Context

The numbers of incarcerated individuals with disabilities suggest that disability is not a niche issue in prisons and jails. Rather, as Professor Margo Schlanger puts it, "choices relating to disability are central to the operation of U.S. incarcerative facilities—their safety and humaneness, and their success or failure in facilitating the pro-social community reentry of prisoners who get out."[34]

Activists like Angela Davis have done the important work of critically examining whether "punishment may be a consequence of other forces and not an inevitable consequence of the commission of crime."[35] Historically, the label of disability has functioned as a justification for incarceration. As Davis notes, for individuals with disabilities, "carceral practices are so deeply embedded in the history of disability that it is effectively impossible to understand incarceration without attending to the confinement of disabled people."[36]

Michel Foucault wrote about the creation of a medico-legal discourse at the beginning of the nineteenth century involving "doctors laying claim to judicial power and judges laying claim to medical power."[37] Foucault argued that this medico-judicial discourse did not

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31. *Id.*

32. *Id.* at 294; *see also* VALLAS, *supra* note 23, at 3.

33. *See* LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 148 (2020).

34. Schlanger, *supra* note 1, at 297.

35. Michael Rembis, *The New Asylums, in* DISABILITY INCARCERATED 140 (Ben-Moshe et al. eds., 2014); *see also* Laura I Appleman, *Deviancy, Dependency and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L. J. 417, 419 (2018) ("Our discussion of mass incarceration often neglects a central history: our long-term, wholesale institutionalization of the disabled.").

36. Angela Davis, *Foreword* to DISABILITY INCARCERATED viii (Ben-Moshe et al. eds., 2014).

37. *See* MICHEL FOUCAULT, ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE, 1974-75, 39 (2003); *see also* Liat Ben-Moshe, *Disabling Incarceration: Connecting Disability to*

originate in law or medicine, but from notions of "abnormality."[38] Historian Douglas Baynton explains that normality was "an empirical and dynamic concept for a changing and progressing world, the premise of which was that one could discern in human behavior the direction of human evolution and progress and use that as a guide."[39] The opposite of the normal person was the "abnormal," which pulled humanity "back toward its past, toward its animal origins."[40] The abnormal was linked with danger and criminality.[41] As Professor Liat Ben-Moshe writes: "The history of treatment and categorization of those labeled as feebleminded, and later mentally retarded, is also paved with cobblestones of notions of social danger, as prominent eugenicists tried to 'scientifically' establish that those whom they characterized as feebleminded had a tendency to commit violent crimes."[42]

The notion of abnormality was applied politically and liberally to reinforce existing structures of power, and to curtail the rights of certain categories of people. Disability became a label that could be applied to bodies that needed to be controlled.[43] For instance, physicians in the South who supported slavery promoted the idea that black people seeking freedom were afflicted with medical conditions like rascality or drapetomania—conditions that had to be treated in order to prevent escape from slaveholders.[44] The label of disability was applied to groups of people as a justification for the deprivation of rights.[45]

In the early colonial days of the United States, individuals with intellectual and psychiatric disabilities were grouped with and treated like the indigent, vagrant and the chronically ill, locked away for the "protection" of the community.[46] Eventually local governments began to

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Divergent Confinements in the USA, CRITICAL SOC. 5 (2011), https://b00c3ccb-5138-43f7-b397-98b086ecdad1.filesusr.com/ugd/601380_3381b920061a4da280aebfe5b0d44a69.pdf.

38. *Id.*

39. Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, *in* THE NEW DISABILITY HISTORY 35–36 (Paul K. Longmore & Lauri Umansky, eds., 2001).

40. *Id.* at 36.

41. Ben-Moshe, *supra* note 37, at 4.

42. *Id.* at 5.

43. *See, e.g.*, Baynton, *supra* note 39, at 33.

44. *See id.* at 38. *See generally* HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT (2006).

45. *Id.* at 33 (writing that "not only has it been considered justifiable to treat disabled people unequally, but the concept of disability has been used to justify discrimination against other groups by attributing discrimination to them.").

46. *See, e.g.*, Appleman, *supra* note 35, at 423–24 (discussing 1676 legislation from Massachusetts which permitted families to control and contain family members with

take responsibility for these "unfit" members of society, using a system of poor laws to confine individuals with disabilities in poor houses, almshouses and jails and thereby remove them from the community.[47] While initially the primary purpose of taking care of disabled in early colonial times was to preserve the peace of the community rather than to treat the individual,[48] a subsequent idea that shaped law and policy around incarceration of the disabled included a narrative of "rehabilitation," namely, a forcible excising of abnormality through "oppressive normative frames."[49] The idea was that "under the right conditions, degenerate, disabled, criminalistic, or uncivilized peoples can be corrected and brought up to acceptable social standards."[50] Spaces of incarceration, including psychiatric hospitals and prisons, operated from a principle of confining this abnormality, with the aim of governance and social control, and armed with the rhetoric of "curing" disability.[51] At the beginning of the second half of the nineteenth century, population growth in densely populated urban areas made individuals labelled as "insane" more visible, resulting in concern about the impact of these individuals on public safety.[52] State institutions aimed to control the poor as well as the "feebleminded" or "epileptic" were created.[53] By the 1950s more than half a million people were institutionalized in psychiatric and residential institutions for individuals with intellectual and developmental disabilities.[54]

The deinstitutionalization of individuals with disabilities, that is, the movement of individuals with disabilities from segregated settings to community living, began in earnest in the 1960s.[55] One popular argument often made to explain the presence of individuals with disabilities in prisons is that the irresponsible closure of psychiatric hospitals led to

psychiatric disabilities on the basis that the mentally ill may contaminate other members of the community and paying for the costs of such confinement out of their own estates.)

47. *Id.* at 424.

48. *Id.* at 423.

49. BEN-MOSHE, *supra* note 33, at 120.

50. *Id*. at 121.

51. *See id.* at 120.

52. Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1412 (2021); see also GERALD N. GROB, THE MAD AMONG US: A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL 40 (1994).

53. *Id*.

54. *See* BEN-MOSHE, *supra* note 33, at 40.

55. *See id.*; *see also,* Arlene S. Kanter, *There's No Place Like Home: The Right to Live in the Community for People with Disabilities, Under International Law and the Domestic Laws of the United States and Israel*, 45 ISR. L. REV. 181, 199–00 (2012) (discussing testimony presented about the history of institutionalization in the United States during hearings on the ADA).

homelessness of those labelled as mentally ill or intellectually disabled who were then increasingly re-incarcerated in prisons and jails.[56] However, this theory does not account for the fact that while the majority of those incarcerated in prisons are black and male, the demographic in psychiatric hospitals tends to be more white, older and more equally distributed by gender than those incarcerated in prisons.[57] Ben-Moshe writes that, "we are not speaking about the same population or group of people (who exited hospitals and institutions and entered prisons), but of ways in which the social control function of incarceration retained its importance, but for differing populations."[58] The simplistic narrative of trans-institutionalization scapegoats the deinstitutionalization of people with disabilities, without addressing policies, laws and regulations that have criminalized race and disability and lead to the imprisonment of people of color with disabilities .[59]

Prison abolitionists see a link between slavery and modern-day prison farms.[60] The continued incarceration of disabled and predominately black bodies suggests that incarceration serves broader capitalist purposes unrelated to the commission of crime.[61] In an essay

56. *See, e.g.*, Jenna Bao, *Prisons: The New Asylums*, HARV. POL. REV. (Mar. 9, 2020), https://harvardpolitics.com/prisons-the-new-asylums/ ("While deinstitutionalization was driven by noble ideals around patients' rights and cost reduction, its faulty execution resulted in a new system that provoked greater ethical concerns and prompted inefficient government spending."); Dominic Sisti, *Psychiatric Institutions Are a Necessity*, THE NEW YORK TIMES (May 8, 2016) (justifying the cost of long-term care in "high quality, ethically administered psychiatric asylums" on the basis that "when public dollars are being spent to accommodate mentally ill people inside prisons, isn't there a strong moral case to instead invest in places to care for our society's most vulnerable people the right way?"); Stephen Eide, *Systems Under Strain: Deinstitutionalization in New York State and City*, Manhattan Institute (Nov. 2018), https://www.manhattan-institute.org/deinstitutionalization-mental-illness-new-york-state-city ("Deinstitutionalization has sometimes been described, critically, as "trans-institutionalization": when the outpatient- oriented mental health care system failed to provide adequate treatment for the serious mentally ill, other government agencies were forced to bear a greater responsibility for addressing mental illness-related challenges. This effect is perhaps nowhere clearer than with respect to the criminal justice system.")

57. *See* Bernard E. Harcourt, Symposium, *Punishment Law and Policy: From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1781–82 (2006).

58. Liat Ben-Moshe, *Deinstitutionalization: A Case Study in Carceral Abolition*, 7 SCAPEGOAT J. 13, 20 (2018).

59 Rembis, *supra* note 35, at 145–46 (noting that labels of disability were frequently used to pathologize and incarcerate black bodies psychiatric disabilities like schizophrenia – which became known as a "violent social disease" – were attributed primarily to black men during the civil rights era of the 1960s and 1970s); *see also* Morgan, *supra* note 52, at 1405 (noting that disabled people continue to be arrested "pursuant to aggressive enforcement policies aimed at removing so-called "unwanted" persons labelled as "disruptive" or "disorderly"").

60. *See* BEN-MOSHE, *supra* note 33, at 240.

61. *See* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 44 (2003).

titled *It Can't Be Fixed Because It's Not Broken*, Syrus Ware et al. argue that the "prison industrial complex" (PIC), a term that recognizes the role of the prison in fueling the pursuit of profit through relationships with multi-national corporations,[62] "is based on a set of interests created and maintained to support capitalism, patriarchy, imperialism, colonialism, racism, ableism, and white supremacy."[63] Significantly, the PIC relies on the incarceration of bodies "destined for profitable punishment."[64] While Davis argues that this relies on racialized assumptions of criminality, Ware et al. argue that the system also criminalizes disabled bodies.[65] They note that ableism is intertwined with racism: "racism is strengthened and fueled by ableism, by the belief that any body/mind labelled as 'stupid' is worthless and expendable."[66] Under this system, there is very little incentive to change: cheap prison labor provides an incentive against criminal justice reform.[67] Chillingly, they conclude that far from being an aberration, the system is functioning exactly as it should in continuing to incarcerate and discriminate against individuals with disabilities.[68]

C. The Application of the ADA in Correctional Facilities

The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals

62. *Id.* at 84–85.

63. Syrus Ware, Joan Ruzsa & Giselle Dias, *It Can't Be Fixed Because It's Not Broken: Racism and Disability in the Prison Industrial Complex, in* DISABILITY INCARCERATED 163 (Ben-Moshe et al. eds., 2014).

64. *Id.*

65. *See id.* at 164.

66. *Id.* at 167 (quoting Kelly Fritsch, *Resisting Easy Answers: An Interview with Eli Clare*, UPPING THE ANTI-JOURNAL 9 (Nov. 23, 2009), http://uppingtheanti.org/journal/article/09-resisting-easy-answers/).

67. *See, e.g.*, Cindy Wu & Prue Brady, *Private Companies Producing with U.S. Prison Labor in 2020: Prison Labor in the U.S., Part II*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2020), https://corpaccountabilitylab.org/calblog/2020/8/5/private-companies-producing-with-us-prison-labor-in-2020-prison-labor-in-the-us-part-ii (noting that most prisoners work within correctional facilities through assignment in food service, cleaning, laundry, groundskeeping and custodial services, while also producing goods for external sale); Whitney Benns, *American Slavery, Reinvented*, THE ATLANTIC (September 21, 2015) https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/ (noting that in prisons across the U.S., incarcerated people are required to work, earning only pennies per hour, and that punishments for refusing to do so "include solitary confinement, loss of earned good time, and revocation of family visitation"); DAVIS, *supra* note 61, at 88 (noting that the prison industrial complex generates huge profits, and that "that which is advantageous to those corporations, elected officials and government agents who have obvious stakes in the expansion of these systems begets grief and devastation for poor and racially dominated communities in the United States and throughout the world.")

68. Ware et. al, *supra* note 63, at 178.

with disabilities."[69] It expanded the scope of section 504 of the Rehabilitation Act of 1973 (RA) which prohibits discrimination on the basis of disability by recipients of federal financial assistance.[70] Section 504, in turn, was premised on Title VI of the Civil Rights Act of 1964—a law that prohibits discrimination on the basis of race by federally assisted programs and activities.[71] The ADA also relied heavily on the structure of Titles II[72] and VII[73] of the Civil Rights Act, which prohibit discrimination on the basis of race by the private sector.

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[74] Individuals seeking the protection of the ADA may bring a claim alleging disparate treatment, disparate impact, or the failure to provide reasonable accommodations.[75] A public entity is prohibited from subjecting an individual with a disability to disparate treatment by denying the individual an "opportunity to participate" in a program, service or activity offered to others, providing an alternate service that is not equal to that afforded to others, or failing to provide aids, benefits and services to enable the individual to "gain the same benefit, or to reach the same level of achievement as that provided to others."[76] The ADA protects against the discriminatory effect of neutral policies (disparate impact), by preventing public entities from utilizing "criteria or methods of administration . . . [t]hat have the *effect* of subjecting qualified individuals with disabilities to discrimination on the basis of disability."[77] Finally, the ADA imposes on public entities the obligation to make reasonable modifications to policies, practices, or procedures where necessary to avoid discrimination.[78]

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69. 42 U.S.C. § 12101(b)(1) (2021).

70. 29 U.S.C. § 794(a) (2021).

71. 42 U.S.C. § 2000d (2021).

72. 42 U.S.C. § 2000a (2021) (prohibits discrimination on the basis of race, color, religion or national origin in specified places of public accommodation).

73. 42 U.S.C. § 2000e-2(a) (2012) (prohibits discrimination by employers on the basis of race, color, religion or national origin).

74. § 12132.

75. *See* Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 194 (2005).

76. 28 C.F.R. § 35.130 (2021).

77. § 35.130(b)(3)(i) (emphasis added).

78. *See* § 35.130(b)(7)(i); *but see* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) (rejecting the distinction frequently made between antidiscrimination and accommodation claims as being fundamentally distinct categories, and arguing that disparate impact claims are requirements of accommodation).

While borrowing heavily from the structure of various titles of the Civil Rights Act of 1964, the ADA is different in profound respects, particularly with respect to the obligation placed on public entities to provide reasonable accommodations or modifications to their policies.[79] Professor Bonnie Poitras Tucker notes that to address the principal form of discrimination that the Civil Rights Act was aimed at—"that based on irrational basis or hostility"—the Act requires individuals or entities to follow a "race-neutral approach."[80] This is because Congress theorized that race was never relevant to any decision made by entities covered under the Civil Rights Act.[81]

Entities covered by the ADA cannot follow a "disability neutral" approach.[82] As legal scholars have noted, the ADA deliberately eschewed the medical model of disability, and conceives of disability as a social construct, resulting from discriminatory conditions and attitudes rather than because of the biology or inherent characteristics of the individual.[83] The adoption of the social model of disability provides space to consider how the environment impedes the ability of the individual to access equality.[84] As activists Arlene Mayerson and Silvia Yee note, "the disability movement has known from the outset that for people with disabilities, a civil rights statute based solely on equal treatment would fall far short of achieving the goals of inclusion and participation."[85] As such, the ADA imposes a collective responsibility on employers, public entities, and places of public accommodation to remove barriers and alter environments to enable equal opportunity and participation for people

79. *See* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 344 (2001) (stating that "[t]he ADA gives recognition to the incontrovertible fact that to provide individuals with disabilities with equal opportunities the civil rights model must be amended or expanded to incorporate the concept of accommodations"); Jolls, *supra* note 78, at 645 (Professor Jolls argues, however, that "antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories.").

80. Tucker, *supra* note 79, at 365–66.

81. *See id.* at 366.

82. *See id.* at 363.

83. *See, e.g.*, Morgan, *supra* note 52, at 6; Adam Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV., 1251, 1252, 1255–56 (2007) (finding that the ADA requires that "social setting . . . be revised to make individual traits less disabling").

84. *See, e.g.*, Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1401 ("Even if one accepts some impairments as inherently undesirable, the social model shifts the focus from whatever physical or mental variation an individual might bear, to the ways that the environment renders that variation disabling.").

85. Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, OHIO ST. L.J. 535, 537 (2001).

with disabilities.[86] Far from divorcing discrimination from "the social fabric," the ADA acknowledges that many environments do not consider the needs of people with disabilities and make it difficult for them to access and partake in the activities of daily life.[87]

The ADA and the RA have been important sources of rights of incarcerated people with disabilities.[88] The protection offered by the federal disability anti-discrimination statutes is "robust."[89] Prison and jail officials must "avoid discrimination; individually accommodate disability; maximize integration of prisoners with disabilities with respect to programs, service and activities; and provide reasonable treatment for serious medical and mental health conditions."[90] Prisons may not, for instance, exclude incarcerated people with disabilities from a program because of theur disability or assign them to segregated cells where they may be denied most prison privileges, programs, or activities.[91] The ADA has permitted courts to intervene in the use of solitary confinement as a routine behavior management technique to manage prisoners with disabilities.[92] On occasion, federal courts have upheld settlement agreements requiring sweeping changes to prison systems to remedy discrimination based on disability.[93] Legal advocates and scholars have noted that the ADA's integration mandate is being used to challenge the logic behind the incarceration of individuals with disabilities.[94]

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86. *See* Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1056–57 (2019).

87. *See id.* at 1057.

88. *See* Schlanger, *supra* note 1, at 301.

89. *Id.*

90. *Id.*

91. *See id.* at 303 (Schlanger notes, however, that this kind of discrimination does routinely take place.).

92. *See* Scherer v. Pa. Dep't of Corr., No. CIV.A. 3:2004-191, 2007 U.S. Dist. LEXIS 84935, at *130 (W.D. Pa. Nov. 16, 2007); *see also* Purcell v. Pa. Dep't of Corr., No. 3:00-CV-00181-LPL, 2006 U.S. Dist. LEXIS 42476, at *35–36 (W.D. Pa. Mar. 31, 2006); *see also* Wright v. N.Y. State Dep't of Corr.'s & Cmty. Supervision, 831 F.3d 64, 79 (2d Cir. 2016) (invalidating blanket ban on motorized wheelchairs as violation of Title II of the ADA).

93. *See, e.g.*, Clark v. California, 739 F. Supp. 2d 1168, 1235–36 (N.D. Cal. 2010) (dismissing a motion brought pursuant to the PLRA to terminate a remedial plan that required the California Department of Corrections to implement systems to identify and accurately assess the needs of prisoners with intellectual and developmental disabilities, assist them as required and maintain an accessible grievance system).

94. *See, e.g.*, M.G. v. Cuomo, No. 19 CV 639(CS)(LMS), 2020 U.S. Dist. LEXIS 155026, at *2–4 (S.D.N.Y. Aug. 26, 2020); *see also* Shira Wakschlag & Robert D. Dinerstein, *Using the ADA's "Integration Mandate" to Disrupt Mass Incarceration*, 96 DENVER L. REV. 917, 925 (2019) (outlining how disability rights advocates are using the ADA to challenge the mass incarceration of individuals with disabilities).

This does not mean, however, that courts are entirely comfortable with enforcing the broad mandate of the ADA. Some scholars and commentators argue that while the ADA had bipartisan support by the time of its passage in 1990, this support was "broad but shallow."[95] People simply did not inquire too deeply as to what disability rights entailed.[96] Professor Michael Waterstone describes the passage of the ADA as somewhat covert—a deliberate decision by disability rights advocates to minimize political resistance.[97] Disability advocates also deliberately employed legal strategies that kept disability issues out of the Supreme Court.[98] As a result, "lower courts and [the] Supreme Court have not been partners in creating the social change envisioned by the ADA."[99] By contrast, cases like *Brown v. Board of Education* looked at the effects of segregation and unleashed a wave of political debate.[100] As a result, by the time the Civil Rights Act was passed in 1964, it had certainly garnered more public attention than the ADA.[101] The ADA, while radical in its "charmed passage,"[102] would continue to be haunted by a mismatch between formal rules on one hand, and social norms and institutions on the other.[103] Joseph Shapiro recognized the depth of this discrepancy: "nondisabled Americans still had little understanding that this group now demanded rights, not pity."[104]

Courts have had to straddle this gap between the law and public perception.[105] In the eighteen years following the passage of the ADA, courts began narrowly construing the definition of disability to limit the protection offered by the ADA.[106] Legal scholars argue that one reason

95. *See* Samuel Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. REV. F. 26, 32 (2020).

96. *See id.*

97. *See* Michael Waterstone, *Backlash, Courts and Disability Rights*, 95 B.U. L. REV. 833, 840 (2015).

98. *See id.* at 841, 843.

99. *Id.* at 844.

100. *See id.* at 839.

101. Waterstone, *supra* note 97, at 838–39.

102. Linda Hamilton Krieger, *Introduction* to BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 1 (Linda Hamilton Krieger ed., 2003).

103. *Id.* at 18.

104. JOSEPH P. SHAPIRO, NO PITY 141 (Times Books eds., 1993).

105. *See* Bagenstos, *supra* note 95, at 33.

106. *See e.g.* Toyota Motor Manufacturing, Kentucky, Inc v. Williams, 534 U.S. 184 (2002) (the Supreme Court held that the ADA's standard for qualifying as disabled should be "interpreted strictly to create a demanding standard for qualifying as disabled."); Sutton v United Airlines, Inc., 527 U.S. 471 (1999) (finding that the petitioners were not disabled when the impairment was considered with corrective measures); Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999) (applying the mitigating measures rule to find that a petitioner with monocular vision did not have a disability for the purposes of the ADA). *See also* Nicole

for this is that "[c]ourts were hostile to the ADA and were engaging in a backlash against it."[107] Professor Nicole Buonocore Porter writes that this backlash has persisted despite amendments made by Congress in 2008 to bring coverage into line with the more inclusive mandate of the original statute.[108]

While Porter's focus is on employment discrimination provisions of the ADA, Waterstone notes that Title II of the ADA presents different issues.[109] While it was of paramount concern to Congress to not *overburden* employers and private businesses when it enacted Titles I and III of the ADA, the provisions of Title II were met with comparatively less debate.[110] As such, the level of expectation placed on public entities was greater than and less forgiving than what was expected of private employers.[111] Certainly Waterstone has noted that "success at trial is noticeably less pro-defendant under Titles II and III than Title I."[112] He argues that this is because it is not revolutionary to expect that all individuals should be able to access government programs on an equal basis.[113]

It is arguable, however, that this idea *is* revolutionary in a prison context. In *Rhodes v. Chapman*, Justice Powell's majority opinion argued that punitive prison conditions were simply to be expected: "[t]o the extent that such conditions are restrictive and even harsh, they are part of

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Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 386 (2019) (outlining in detail the adverse impact of the Supreme Court jurisprudence during the first 18 years after the passage of the ADA).

107. *Id*. at 388; see also Matthew Diller, *Judicial Backlash, the ADA and the Civil Rights Model of Disability* in BACKLASH AGAINST THE ADA 64-65 (Linda H. Krieger ed., 2006) (stating that "The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resisting it."); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.- C.L. L. REV. 99 (1999) (arguing that district and appellate courts were abusing the summary judgment device and failing to defer to agency guidance in applying Title I of the ADA, resulting in "markedly pro-defendant outcomes")

108. *Id*. at 392; Bagenstos, *supra* note 95, at 27 (stating that the ADA "continues to provoke a backlash" and that courts "appear to be resisting the ADAAA just as they did the original ADA" leading to the conclusion that the "successes of the disability rights movement thus may be more fragile than at first appear."); *see generally*, Dorfman, *supra* note 86 (noting that people with disabilities continue to experience a public "backlash" to the ADA , encountering public suspicion when seeking to enforce their rights under disability antidiscrimination laws).

109. *See id.* at 384; *see also* Waterstone, *supra* note 97, at 838.

110. *See* Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 YALE L. & POL'Y REV. 49, 84 (1996).

111. *Id*.

112. Waterstone, *supra* note 97, at 829.

113. *See id.* at 830.

the penalty that criminal offenders pay for their offenses against society."[114] Steeped in Eighth Amendment jurisprudence that strongly advocated deference to prison administration, many federal courts historically strenuously resisted the application of the ADA to a prison context.[115] In *Torcasio v. Murray*, the Fourth Circuit argued that the ADA did not apply to prisons as management of state prisons was a core state function, and that this arena should be left "as free as possible of federal interference," a rationale that "is confirmed by a long line of Supreme Court precedent, which we recently had occasion to review in the context of an Eighth Amendment challenge to prison conditions at a state facility."[116] Other federal courts accepted that the ADA applied to correctional facilities but worried about potential of the ADA to compel prison administration to enact sweeping changes to the operation of prisons. For instance, the Third Circuit worried that, "[a]pplication of the ADA to internal prison management would place nearly aspect of prison management into the court's hands for scrutiny simply because an inmate has a disability."[117]

Without dismissing the real and positive impact of the ADA, it is important to be clear-eyed about the complicated relationship between courts and ADA-based prisoner litigation. The PLRA, which substantially rewrote laws of procedure and remedies in individual inmate cases,[118] has "imposed new and very high hurdles so that even constitutionally meritorious cases are often thrown out of court."[119] However, Schlanger points out that even prior to the enactment of the PLRA in 1996, incarcerated people in prisons typically only won relief in about one percent of their federal civil rights cases.[120] One reason for these limited successes is Supreme and federal court hostility to claims brought by incarcerated people.[121] Judges often express frustration about

114. 452 U.S. 337, 347 (1981).

115. *See id.* at 369.

116. 57 F.3d 1340, 1345 (4th Cir. 1995).

117. Yeskey v. Pa Dep't of Corr., 118 F.3d 168, 174 (3d Cir. 1997).

118. The PLRA requires exhaustion of all available administrative appeals prior to filing in federal court. *See* 42 U.S.C. § 1997e(a) (2021). It also requires prisoners to pay court filing fees in full. 28 U.S.C. § 1915(b) (2021). The PLRA prevents prisoners from filing a lawsuit seeking damages for mental or emotional injury unless one can also show physical injury. *See* § 1997e(e). Finally, the three strikes provision of the PLRA provides that each lawsuit or appeal dismissed on the basis that it is frivolous, malicious or fails to state a claim counts as a strike against the prisoner, limiting their ability to file future suits. *See* § 1915(g).

119. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1644 (2003).

120. *Id*. at 1597.

121. *Id*. at 1605.

poorly written pro se complaints and the time consuming nature of prisoner litigation.[122]

I argue that another reason is that courts incorporate doctrinal limitations into the interpretation of disability discrimination statutes that carefully frame instances of discrimination in ways that limit the opportunities for victims of discrimination to succeed. Some of these doctrines have no basis in the ADA. Take, for instance, the requirement that plaintiffs prove intent before the court will remedy disability discrimination.[123] These intent requirements have come into law "almost by accident"—from the borrowing of restrictive caselaw from Title VI of the Civil Rights Act—despite the fact that the demand that "disability discrimination claimants prove intent imposes a burden found nowhere on the face of section 504 or Title II of the ADA."[124]

Federal courts also incorporate narrow causation requirements, construing the phrase "because of the disability" in restrictive ways that reflect curial discomfort with providing preferential treatment for plaintiffs seeking reasonable accommodations or bringing disparate impact claims.[125] In a prison context, this can have the effect of permitting discriminatory prison policies relating to discipline to remain untouched and out of the scope of the ADA. Conversely, by reading in heightened standards of deference to prison administration, something that Professor Sharon Dolovich refers to as the "primary driver of the Court's prisoners' rights jurisprudence,"[126] federal courts validate prison decisions regardless of whether they are intentionally discriminatory or have a discriminatory effect on prisoners with disabilities.[127] These issues are the focus of the remainder of this Article.

II. ENTRENCHING DISCRIMINATION

A. Intent

In *Washington v. Davis*, the Supreme Court considered the validity of a qualifying test administered to applicants for positions as police

122. *Id.* at 1588–89 (noting that "[j]udges themselves occasionally confess their disinclination to give pro se pleadings a full and fair examination.").

123. *See* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1418 (2015).

124. *Id.* at 1417–18.

125. *See* Cheryl L. Anderson, *What is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323, 326 (2006).

126. Sharon Dolovich, *Prison Litigation Reform Act: Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 245 (2012).

127. *See id.* (describing the deference that the Court gives to prison officials).

officers [with]in the District of Columbia Metropolitan Police Department.[128] The Court opined that the unequal application of an otherwise neutral test was not proof of intentional discrimination.[129] Rather, liability under the Equal Protection Clause required direct or inferential proof that the discriminatory act was employed with the intent of producing a racially disproportionate result.[130] In *Guardians Association v. Civil Service Commission*, the Court extended the requirement to prove intentional discrimination to private claims brought pursuant to Title VI of the Civil Rights Act seeking compensatory relief.[131]

Although the text of the ADA and section 504 of the RA do not explicitly refer to any requirement to prove intent, federal courts require proof of intentional discrimination for compensatory claims.[132] Courts justify the imposition of an intent requirement on the basis that remedies under ADA Title II and section 504 are those of Title VI of the Civil Rights.[133] As a result, courts look to the cases regarding non-intentional race and sex discrimination under Title VI in deciding disability discrimination claims.[134]

This is a flawed argument. In *Alexander v. Choate*, the Supreme Court found that in enacting section 504, Congress recognized that discrimination against people with disabilities was "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect" and that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[135] The Court in *Choate* explicitly rejected comparisons between section 504 and Title VI on the

128. 426 U.S. 229, 232 (1976).

129. *Id.* at 239 (citing Akins v. Texas, 325 U.S. 398, 403–04 (1945)).

130. *Id.* at 238–39.

131. 463 U.S. 582, 584 (1983).

132. *See, e.g.*, Delano-Pyle v. Victoria Cty., 302 F.3d 567, 575 (5th Cir. 2002) (citing Carter v. Orleans Parish Pub. Sch., 725 F.2d 261, 264 (5th Cir. 1984)) (finding that while "[t]here is no 'deliberate indifference' standard applicable to public entities for the purposes of the ADA or the RA," plaintiffs must show intentional discrimination in order to receive compensatory damages for violations of the Act).

133. *See* Weber, *supra* note 123, at 1418.

134. *See* 42 U.S.C. § 12133 (2021) (incorporating "remedies, procedures, and rights set forth in section 794a of title 29" for violations of ADA Title II); 29 U.S.C. § 794a(a)(1) (2021) (incorporating "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964" for violations of section 504).

135. 469 U.S. 287, 295, 296 (1985); Weber, *supra* note 123, at 1440.

basis that while Title VI directly only reaches instances of intentional discrimination, section 504 forbade non-intentional discrimination.[136]

When the ADA was enacted, Congress broadly defined discrimination to capture conduct that results from intentional discrimination *and* benign neglect.[137] The ADA explicitly protects against conduct that has a discriminatory *effect*.[138] For instance, a public entity may not utilize criteria or methods that "have the *effect* of subjecting qualified individuals with disabilities to discrimination on the basis of disability . . . [or] have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities."[139] Further, the ADA and section 504 impose liability on public entities for the failure to make reasonable accommodations—a form of discrimination for which there is no analogue in Title VI.[140] It is incongruous with the mandate of the disability discrimination statutes for courts to demand the showing of intent before remedying disability discrimination and awarding compensatory damages.[141]

Despite this, the majority of circuit courts require that when seeking compensatory damages under the ADA or section 504, the plaintiff prove that the defendant was "deliberately indifferent" to a federally protected right to participate in the programs, services, and activities of the person.[142] This does not require proof of "personal ill will or animosity."[143] Rather the courts impose a two-part test.[144] First, the plaintiff must prove that the defendant knew that "harm to a federally

136. Weber, *supra* note 123, at 1441 (quoting *Choate*, 469 U.S. at 293).

137. *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 70 (1990) (stating that "it is . . . the Committees [sic] intent that section 202 [ADA Title II] . . . be interpreted consistent with *Alexander v. Choate*.").

138. *See id.* at 6.

139. 28 C.F.R. § 35.130(b)(3)(i)–(ii) (2021).

140. *See* Weber, *supra* note 123, at 1447.

141. *See generally id.* (discussing the erroneous reading of an intent requirement into the ADA and the consequences of such error).

142. *See* Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 345 (11th Cir. 2012); Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011); Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275 (2d Cir. 2009); Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001); Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999); Godbey v. Iredell Mem'l Hosp., Inc., No. 5:12-cv-00004-RLV-DSC, 2013 U.S. Dist. LEXIS 117129, at *19–20 (W.D.N.C. Aug. 19, 2013), *aff'd*, 578 F. App'x 317 (4th Cir. 2014).

143. Barber v. Colorado, 562 F.3d 1222, 1228 (10th Cir. 2009).

144. *Id.* at 1229 (first citing *Powers*, 184 F.3d at 1153; and then citing *Duvall*, 260 F.3d at 1139).

protected right [was] substantially likely."[145] Second, the plaintiff must prove the defendant failed to act upon that likelihood.[146]

Deliberate indifference is an "exacting standard" for plaintiffs to prove.[147] It centers the analysis on the defendant's state of mind and simply ignores the fact that the ADA protects against unintentional conduct, such as the failure to provide a reasonable accommodation.[148] It is all the more difficult for incarcerated plaintiffs with disabilities who may have limited literary and legal research skills, may be unable to conduct informal investigations, cannot interview witnesses or conduct effective discovery and may not have counsel.[149] As the Tenth Circuit has acknowledged, "[i]t would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of [disability] could be shown."[150]

The Tenth Circuit's analysis in *Havens v. Colorado Department of Corrections* highlights the demanding nature of the deliberate indifference standard.[151] Mr. Havens was an "incomplete quadriplegic" placed at the Special Medical Needs Unit (SMNU) at the Denver Reception and Diagnostic Center (DRDC) where he could receive full-time medical care.[152] DRDC was a facility that was designed only to provide temporary housing for individuals entering the system for "diagnosis, evaluation[,] and classification before being sent to serve their sentences in other . . . facilities."[153] As such, it lacked the programs and facilities available to individuals placed in long-term correctional facilities.[154] As a result, Mr. Havens was housed in isolated circumstances, where he was unable to socialize with anyone apart from "about a dozen other inmates [in the SMNU] who [had] severe

145. *Id.*

146. *Id.*

147. *See Liese*, 701 F.3d at 344 (quoting Doe v. Sch. Bd., 604 F.3d 1248, 1259 (11th Cir. 2010)).

148. *See, e.g.*, *Barber*, 562 F.3d at 1230 (finding that the plaintiff, who claimed that the state motor vehicle agency had denied her request for reasonable accommodation, had failed to show deliberate indifference because the senior official seemed "genuinely concerned" and "very sympathetic"); Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011) (finding that a zoo that failed to meet ADA accessibility standards by building a bridge with a steep incline had not been deliberately indifferent because there was no evidence that the zoo knew the bridge was out of compliance with ADA standards and later modified it so that it was flat).

149. *See* Schlanger, *supra* note 119, at 1611–12.

150. Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981).

151. *See* 897 F.3d 1250, 1264 (10th Cir. 2018).

152. *Id.* at 1253–54.

153. *Id.* at 1254 (alteration in original).

154. *Id.*

disabilities."[155] Notices and sign-up sheets for available educational programs were posted later at the SMNU than in other parts of the prison, which meant that programs were fully subscribed before he could sign up to them.[156]

The deliberate indifference standard permits the court to be highly deferential to the minimal efforts made by correctional facility to accommodate prisoners with disabilities.[157] The court opined that to succeed Mr. Havens needed to prove that the defendants had "actual" knowledge that its security or access policies were substantially likely to infringe the federal rights of incarcerated persons with disabilities.[158] "Allegations that one would have or 'should have known'" would not suffice.[159] Mr. Havens could not rely on the fact that the accommodations provided by the prison were ineffectual.[160] As the court stated, "[e]ven if meaningful participation were not provided, it would not be conclusive as to the question of whether CDOC possessed the requisite knowledge to establish deliberate indifference."[161]

This is problematic because the ADA seeks to prohibit the failure by a public entity to provide reasonable accommodations to permit meaningful access to the programs and services of that public entity. And indeed, there was some evidence that Mr. Havens had not been accommodated or provided with meaningful access to the prison's services and programs.[162] Mr. Havens had been sequestered in a remote corner of the facility, away from the general population of incarcerated people without disabilities.[163] He was frequently not permitted to pass

155. *Id.* (alterations in original).

156. *Havens*, 897 F.3d at 1255.

157. *See id.* at 1270 (The court explicitly acknowledged that it was inclined to be deferential to prison administrators: "Prison officials have the obligation to consider security and other factors unique to the prison environment in their decision-making, and courts have accorded them considerable discretion to do so.") (citing Onishea v. Hopper, 171 F.3d 1289, 1300 (11th Cir. 1999)).

158. *Id.* at 1267–68 (quoting S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 266 n.26 (3d Cir. 2013)).

159. *Id.* at 1267 (quoting Bistrian v. Levi, 696 F.3d 352, 367 (3d Cir. 2012)).

160. *Id.* at 1267; *see, e.g.*, Wright v. N.Y. State Dep't of Corr.'s & Cmty. Supervision, 831 F.3d 64, 73 (2d Cir. 2016) (arguing that the question of whether the plaintiff was provided with meaningful access depends on whether effective reasonable accommodations were provided); *see also* Noll v. Int'l Bus. Machs. Corp., 787 F.3d 89, 95 (2d Cir. 2015). At the same time, employers are not required to provide a perfect accommodation or the accommodation most strongly preferred by the employee. 29 C.F.R. § 1630.

161. *Havens*, 897 F.3d at 1269 n.10.

162. Brief for Appellant at 10, Havens v. Colo. Dep't of Corr., 897 F.3d 1250 (10th Cir. 2018) (No. 16-1436).

163. *See id.* at 11.

through the barrier to interact with non-disabled prisoners.[164] He was not allowed to eat with them or enter the chow hall or the day room on the first floor of the DRDC.[165] The day room was equipped with a cabinet, a television and two tables, neither of which were wheelchair accessible.[166] Mr. Havens had extremely limited access to the library and was not allowed to use the computers on the first floor that were accessible to individuals without disabilities.[167] When he was eventually allowed to use a computer to do his legal work, he had such limited access to it that he was not able to train the Dragon Naturally Speaking software to actually recognize his voice.[168] Mr. Havens could not, however, rely on these facts to prove deliberate indifference.[169]

A plaintiff may struggle to succeed even if they demonstrate that the correctional facility had actual knowledge of their disability and failed to act.[170] In *Matthews v. Pennsylvania Department of Corrections*, the plaintiff was diagnosed with Achilles tendinitis.[171] He was prescribed an air cast and crutches.[172] Mr. Matthews submitted a request for an accommodation, seeking a lower bunk and a wheelchair because he feared his cast and crutches would cause him to fall.[173] Medical staff at the facility repeatedly denied these requests.[174] Mr. Matthews' difficulty with descending stairs limited his access to various programs and services—"he was unable to use the phones, . . . 'frequently missed meals'" as he could not "'reach the dining hall in time,' and . . . 'experienced diminished access' to the commissary, recreation, and religious services."[175] He also fell down a flight of stairs, suffering multiple contusions.[176]

Mr. Matthews claimed deliberate indifference on the part of DOC for failing to act for several months despite knowledge that he required accommodations for his mobility impairment.[177] In assessing his ADA and RA claim, the Third Circuit applied the Eighth Amendment standard

164. *See id.*
165. *Id.*
166. *Id.*
167. Brief for Appellant at 14, 15, *Havens*, 897 F.3d 1250 (No. 16-1436).
168. *Id.* at 15.
169. *See Havens*, 897 F.3d at 1266.
170. *See, e.g.*, Matthews v. Pa. Dep't of Corr., 613 F. App'x 163, 170–71 (3d Cir. 2015).
171. *Id.* at 165.
172. *Id.*
173. *See id.*
174. *See id.*
175. *Matthews*, 613 F. App'x at 166.
176. *See id.*
177. *See id.* at 164.

for deliberate indifference.[178] This is a heightened standard that requires demonstrating that a defendant "knows of and disregards an excessive risk to inmate health and safety."[179] The deliberate indifference standard under the ADA is meant to be less onerous, requiring that the plaintiff demonstrate that the defendant knew that harm to a federally protected right was substantially likely and that it failed to act upon that the likelihood.[180] Nonetheless, the Third Circuit held that "the definition of deliberate indifference in the RA and the ADA context is consistent with our standard of deliberate indifference in the context of § 1983 suits by prison inmates."[181]

The court stated that Mr. Matthews could not show that medical staff recklessly disregarded a substantial risk of serious harm.[182] Without any explanation, the court argued that if the medical professional "exposed [him] to greater risk of injury by refusing to recommend a cell reassignment, their mistake was negligence, not deliberate indifference."[183] They excused the conduct of non-medical staff on the grounds that "non-medical prison officials are generally justified in relying on the expertise and care of prison medical providers."[184] In order to succeed on a claim against non-medical staff, Mr. Matthews would have to provide actual knowledge on the part of the correctional officer that prison doctors were mistreating or not treating a prisoner.[185]

As the decision in *Matthews* demonstrates, the deliberate indifference test permits courts wide latitude to excuse conduct that is

178. *See id.* at 170; *see also* Margo Schlanger, *How the ADA Regulates and Restricts Solitary Confinement for People with Mental Disabilities*, AM. CONST. SOC'Y L. & POL'Y 1, 2 (2016) (stating that "the ADA bans conditions milder than those reachable by an Eighth Amendment deliberate indifference lawsuit."); Matthews v. Pa. Dep't of Corr., 827 F. App'x 184, 188 ("the definition of deliberate indifference in the RA and the ADA context is consistent with our standard of deliberate indifference in the context of §1983 suits by prison inmates") (quoting S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 263 n.23 (3d Cir. 2013)).

179. Farmer v. Brennan, 511 U.S. 825, 837 (1994); *see also* Alexander v Nev. Dep't of Corr.'s, No. 3:15-cv-00213-MMD-VPC, 2016 WL 11184185, at *3 (D. Nev. Sept. 7, 2016) (noting that The Eight Amendment deliberate indifference standard differs from the ADA and RA standard).

180. Harper v Cuomo, No. 9:21-CV-0019 (LEK/ML), 2021 U.S. Dist. LEXIS 39173, at *47–48 (N.D.N.Y. Mar. 1, 2021) (acknowledging that the "deliberate indifference" standard under the ADA and RA is "less onerous" that than the deliberate indifference standard under the Eighth Amendment.)

181. *Matthews*, 827 F. App'x at 188 (citing *S.H.*, 729 F.3d at 263).

182. *Matthews*, 613 F. App'x at 170 (quoting Giles v. Kearney, 571 F.3d 318, 330 (3d Cir. 2009)).

183. *Id.*

184. *Id.* (citing Spruill v. Gillis 372 F.3d 218, 236 (3d Cir. 2004)).

185. *See id.*

merely "negligent" or a result of bureaucratic indifference.[186] In *Morris v. Kingston*, the plaintiff sought to recover damages for the delay by correctional officers in accommodating his hearing impairment while he had been placed in solitary confinement.[187] Over a period of twenty-four days, Mr. Morris missed showers, seventeen meals, and recreation time because he could not hear the audio alert.[188] As a result, he lost weight and did not receive the medication that he required for his psychiatric disabilities.[189] The Seventh Circuit argued that his complaints were ultimately heeded by prison administration, who resolved the problem with a "simple, low-cost, low tech" solution.[190] The court did wonder aloud "why . . . [this solution] took seventeen days to implement," but said that the facts merely indicated negligence and not intentional discrimination.[191] Why this conduct falls on the negligence side of the line and not the deliberate indifference side is not clear or explained by the court.

Similarly, in *Smith v. Harris County*, an incarcerated individual with disabilities died by suicide following a failure by the jail to comply with its own policies to refer the prisoner to the Mental Health Unit at the prison.[192] It appears that, as in *Matthews*, the Fifth Circuit incorporated a heightened "deliberate indifference" standard, borrowed from Eighth Amendment jurisprudence, into its interpretation of the ADA.[193] The court held that even a violation of the jail's own policies regarding the treatment of individuals with psychiatric disabilities would not convert a "perhaps-negligent mistake into intentional discrimination or deliberate indifference."[194]

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186. *See, e.g.*, *id.*
187. 368 F. App'x 686, 688 (7th Cir. 2010).
188. *See id.*
189. *See id.*
190. *Id.* at 690.
191. *Id.*
192. *See* 956 F.3d 311, 315 (5th Cir. 2020).
193. *See id.* at 320. In deciding this case, the Fifth Circuit relied on *Anderson v. Dallas County*, a case where the plaintiffs filed an Eighth Amendment claim on behalf of their son who died by suicide while incarcerated at the Dallas County Jail. 286 F. App'x 850, 852 (5th Cir. 2008). The court noted that "deliberate indifference" in an Eighth Amendment context did not include "an official's failure to alleviate a significant risk that he should have perceived but did not." *Id.* at 860 (quoting Farmer v. Brennan, 511 U.S. 825, 837–38 (1994)). Accordingly, the court concluded that, "[w]hile the staff at the Jail collectively may have acted negligently, or even grossly negligently, by ignoring Jail procedures, no single individual deliberately ignored an excessive risk of harm." *Id.* at 862 (first citing Gobert v. Caldwell, 463 F.3d 339, 352 (5th Cir. 2006); and then citing Evans v. Marlin, 986 F.2d 104, 108 (5th Cir. 1993)).
194. *Smith*, 956 F.3d at 320.

These cases demonstrate the plasticity of the intent requirement and the ability of courts to place certain conduct out of the scope of liability.[195] Congress recognized that the barriers imposed by public entities were frequently because of "thoughtlessness or a reluctance to employ the required resources to ensure accessibility."[196] Bureaucratic negligence is precisely the conduct that the ADA was intended to remedy.[197] Reading in aggravated denial of accommodation standards undermines this mandate. It also has the effect of undermining the experience of exclusion and segregation experienced by incarcerated individuals with disabilities.[198] As Professor Schlanger has noted, prisoners do not typically win windfalls in their civil rights claims.[199] However, prisoner litigation creates "a limited space in which inmates may act as citizens and adults entitled, at least, to explanations."[200] The manipulability and elusive nature of the intent requirement frustrates this goal, permitting minimal accountability on the part of the defendant and creating limited incentive for institutional change.

B. Causation

To establish liability under Title II of the ADA, plaintiffs must demonstrate that they were discriminated against "by reason of . . . disability."[201] Some courts argue that the term "by reason of disability" must be narrowly construed, excluding any claims where the plaintiff fails to prove that officials were motivated solely by reason of disability.[202] Other courts construe "by reason of disability" more broadly, recognizing that "the existence of additional factors causing an injury does not necessarily negate the fact that the defendant's wrong is also the legal cause of the injury."[203]

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195. *See* Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1423 (1990) ("The notion of intent is as elusive as the variety of its forms.").

196. Ferguson v. City of Phoenix, 157 F.3d 668, 679 (9th Cir. 1998), as amended (Oct. 8, 1998) (Tashima, J., dissenting) (citing Alexander v. Choate, 469 U.S. 287, 295–98 (1985)).

197. *See id.* at 678–79.

198. *See id.* at 679–80 (quoting 42 U.S.C. § 12101(5) (2021)).

199. Schlanger, *supra* note 119, at 1622 (noting that the ordinary rules of tort damages can limit compensation, as injured inmates typically have little or no lost wages or medical expenses).

200. *Id.* at 1666–67.

201. 42 U.S.C. § 12132.

202. *See, e,g.*, Sanders v. Ennis-Bullock, 316 F. App'x 610, 612 (9th Cir. 2009) (citing Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001) for the proposition that the claimant must prove that the defendants were motivated to discriminate "solely by reason of disability").

203. Henrietta D. v Bloomberg, 331 F.3d 261, 278 (2d Cir. 2003).

The difficulty inherent in proving causation in prison cases becomes particularly apparent when incarcerated persons challenge prison disciplinary policies.[204] Hesitant to intervene where the claimant argues that they have been discriminated against by being sanctioned for behaviors related to their disability, courts undertake a somewhat artificial analysis, separating disability-related conduct from the disability itself.[205] They argue that the sanction was imposed because of the *conduct* of the individual, rather than their disability, thereby permitting the correctional facility to escape liability.[206] Frequently, in these cases, courts proceed to frame the plaintiffs' claims as allegations of medical negligence—conduct that is not protected by the ADA.[207]

For instance, in *Mercado v. Department of Corrections*, the court granted the DOC's motion for summary judgment regarding an ADA claim where the plaintiff argued that he was denied treatment for bipolar disorder and ADHD and was punished for behaviors arising from those conditions by placement in administrative and punitive segregation.[208] The district court acknowledged that the plaintiff had provided evidence that his bipolar disorder could cause impulsivity and that his mood could swing from "normal to yelling."[209] It also found that Mr. Mercado had offered evidence that he had been denied the opportunity to participate in or benefit from DOC's services, programs, or activities.[210] While placed in punitive segregation, Mr. Mercado "was denied visitation and telephone privileges, and . . . was placed in restraints and on behavioral observation status."[211]

Despite this conduct, the district court held that he had failed to make out a claim under the ADA because he had failed to offer evidence that he was denied access to services "specifically because of his disability."[212] The court stated that he needed to demonstrate that he was treated "differently than [other] violent, self-destructive inmates who

204. *See, e.g.*, Mercado v. Dep't of Corr., No. 3:16-CV-1622, 2018 U.S. Dist. LEXIS 87681, at *30–31 (D. Conn. May 25, 2018).

205. *See, e.g.*, *id.* at *34.

206. *See id.*

207. *See, e.g.*, Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (holding that "the courts have labored mightily to prevent the transformation of the Eighth Amendment's cruel and unusual punishments clause into a medical malpractice statute for prisoners. We would be exceedingly surprised to discover that Congress had made an end run around these decisions in the Americans with Disabilities Act.").

208. *See Mercado*, 2018 U.S. Dist. LEXIS 87681, at *1.

209. *Id.* at *34–35.

210. *Id.* at *35.

211. *Id.*

212. *Id.*

[were] not disabled due to mental illness."[213] In reaching this conclusion, the court appeared to treat his claim as a disparate treatment claim, rather than as a request for accommodation or modification of the prison's disciplinary policies. As such, the court found that the "[p]laintiff has offered no evidence that DOC officials subjected non-disabled inmates engaging in conduct similar to Plaintiff's to different disciplinary measures."[214] The court concluded that the plaintiff could not frame a claim regarding inadequate treatment for disability as a discrimination claim.[215]

Another example is *O'Guinn v. Nevada Department of Corrections*, where Mr. O'Guinn argued that he was placed in disciplinary segregation for exhibiting symptoms of his disability.[216] He argued that because the prison failed to provide him with treatment, he engaged in misconduct and because of the misconduct he was disciplined.[217] Once again, the Ninth Circuit concluded that this was a case about inadequate medical treatment, not discrimination.[218] The court held that Mr. O'Guinn was seeking to rely on a chain of causation that the Ninth Circuit had dismissed in other cases and dismissed his claim on the basis that he "failed to produce evidence showing that the disciplinary action was on account of his disability—rather than on account of his misconduct."[219]

In both cases, the courts were careful to separate the disability-related conduct from the disability itself, although this is an artificial distinction that evinces a limited understanding of disability.[220] Many intellectual and psychiatric disabilities are likely to manifest in the form of conduct.[221] Individuals with Autism Spectrum Disorder experience difficulty functioning in unfamiliar environments and can engage in

213. *Mercado*, 2018 U.S. Dist. LEXIS 87681, at *35 (alterations in original) (quoting Atkins v. County of Orange, 251 F. Supp. 2d 1225, 1232 (S.D.N.Y. 2003)).

214. *Id*. at *36.

215. *Id*. at *37.

216. *See* 468 F. App'x 651, 653 (9th Cir. 2012).

217. *Id*. at 653–54.

218. *See id*. at 652.

219. *See id*. at 654 (citing Simmons v. Navajo Cty., 609 F.3d 1011, 1021–22 (9th Cir. 2010), in which plaintiff claimed that his depression was the cause of his attempted suicide, which caused him to be placed on suicide watch therefore depriving him of outdoor recreation).

220. *See* Anderson, *supra* note 125, at 358 (noting that in employment cases brought under Title I of the ADA, courts appear to be "disaggregating the disability into constituent parts and then dismissing the claims because the part they choose to concentrate on, the employee's conduct, is not itself, 'the disability'"); *see also O'Guinn*, 468 F. App'x at 653–54; *see also Mercado*, 2018 U.S. Dist. LEXIS 87681, at *35.

221. *See* Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 189 (2005).

unexpected violence and outbursts provoked by triggers in the environment caused by sensory overload.[222] People with psychiatric disabilities, like schizophrenia or bipolar disorder, may experience psychotic symptoms, delusions, debilitating fears, or "serious disruptions of . . . perceptions of the environment."[223] The conduct of individuals with intellectual and psychiatric disabilities, in particular, is also highly dependent on the nature of the individual's environment and the quality of interpersonal contact.[224] In a punitive prison context, with its myriad and complex rules, with limited access to the mental health interventions and without trained correctional staff, it is unsurprising that individuals with psychiatric and intellectual disabilities act out in violation of the rules.[225]

By interpreting causation in this narrow manner, however, courts sidestep the issue of whether the prison failed to reasonably accommodate or modify its disciplinary policies to take account of the individual's disability or whether the ostensible "neutral" policies of the prison unduly burden plaintiffs with disabilities. The courts' treatment of prisoner claims is similar to the treatment of claims brought by employees who have been sanctioned or dismissed for conduct relating to their disability, brought pursuant to Title I of the ADA.[226] As Professor Kelly Cahill Timmons points out within the context of these Title I cases, "courts [that reject] disability discrimination claims in misconduct cases due to a lack of causation appear to be proceeding under the disparate treatment theory of discrimination."[227] They do not proceed to consider whether the plaintiff could prove discrimination under either the reasonable accommodation or the disparate impact theory.[228] Similarly, courts repeatedly apply a disparate treatment lens to the analysis of plaintiff claims in prison cases, even where plaintiffs are raising reasonable accommodation or disparate impact claims. [229]

For instance, Mr. O'Guinn appears to have raised a disparate impact claim regarding NDOC's policy of requiring prisoners to inform staff if they had previously received treatment for a psychiatric disability.[230] His

222. Isabella Michna & Robert Trestman, *Correctional Management and Treatment of Autism Spectrum Disorder*, 44 J. AM. ACAD. PSYCHIATRY L. 253, 254–55 (2016).

223. Fellner, *supra* note 20, at 395.

224. Timmons, *supra* note 221, at 257.

225. *See* Fellner, *supra* note 20, at 394–95.

226. *See* Timmons, *supra* note 221, at 211.

227. *Id*. at 214.

228. *See id.*

229. *See id.* at 214.

230. Reply Brief for Appellant at 3, O'Guinn v. Nev. Dep't of Corrs., 468 F. App'x 651 (9th Cir. 2012) (No. 10-17716).

reply brief argued that: "[w]hile this process may function for inmates with issues unrelated to their mental conditions, mentally disabled inmates are required to remember and realize the necessity for honestly communicating where and how they have been treated. This process places an extra burden on mentally ill inmates beyond other inmates."[231] As a result of O'Guinn's failure to inform staff about this treatment, he argued that he was "repeatedly punish[ed] . . . for infractions he could not understand."[232] The court's analysis, however, did not address the disparate impact or reasonable accommodations claim. By abruptly deciding that the sanctions were because of O'Guinn's misconduct and not his disability, the court avoided resolving the broader question of whether NDOC's policies unduly burdened incarcerated people with diabilities or discriminated against individuals with psychiatric disabilities by denying them meaningful access to the prison's programs and activities.[233]

Even where claimants request reasonable accommodations, the court can still argue that the claim is one of medical negligence and not disability discrimination. In *Maccharulo v. New York State Department of Correctional Services,* the plaintiffs brought a claim under the ADA and section 504 of the RA on behalf of a deceased individual with paranoid schizophrenia who had been incarcerated in the New York prison system.[234] The court acknowledged that symptoms of schizophrenia included "a limited ability to communicate, control impulses, and interact appropriately with others."[235] The decedent's health deteriorated significantly, and he "experienced an increased number of auditory hallucinations and severe paranoia."[236] He was placed in the Special Housing Unit for failing to follow orders and cursing at correctional officers, exacerbating his mental health problems.[237] The plaintiffs claimed that DOCS incorrectly classified the decedent, resulting in him failing to receive the mental health services he required.[238] They argued further that DOCS failed to accommodate his

231. *Id.*
232. *Id*. at 4.
233. *See O'Guinn*, 468 F. App'x at 653–54; *but see* Crowder v. Kitagawa, 81 F.3d 1480, 1485 (9th Cir. 1996) (holding that Congress intended the ADA to cover both intentional and unintentional discrimination and that when the latter claim is raised the correct test is to assess whether disabled persons were denied meaningful access to state provided services).
234. No. 08 Civ. 301 (LTS), 2010 U.S. Dist. LEXIS 73312, at *2, 3 (S.D.N.Y. July 21, 2010).
235. *Id*. at *3.
236. *Id*. at *4.
237. *Id.*
238. *Id.* at *3–4.

disability by punishing him for disability-related conduct rather than reclassifying him and providing him with necessary medical services.[239]

The court acknowledged that public entities are obligated to make reasonable accommodations for individuals with disabilities to ensure that they have meaningful access to public benefits.[240] However, the court proceeded to state that to succeed on a reasonable accommodation claim, individuals would need to allege disparate treatment between disabled and non-disabled individuals.[241] As "[p]laintiffs do not plead facts demonstrating that Decedent was treated differently from non-disabled individuals exhibiting the same behavior" they had failed to state a claim under the ADA.[242] In so deciding, the court incorrectly framed the causal enquiry. When a plaintiff raises a reasonable accommodation claim, the issue is not whether the individual was treated less favorably than others, but whether he was denied meaningful access to the programs or services of the prison.[243] As courts have recognized, the failure to provide a reasonable accommodation constitutes discrimination by reason of disability.[244] The court should have proceeded to consider the reasonableness or unreasonableness of the accommodation requested by Mr. Maccharulo, rather than whether he was treated differently to non-disabled incarcerated persons.

A narrow interpretation of causation allows courts to ignore the real impact of disability, particularly psychiatric and intellectual disability, on the ability of incarcerated persons to comply with prison rules. It permits courts to avoid evaluating the burden on prisons to provide reasonable accommodations or implement policies that do not disproportionately affect incarcerated people with disabilities. One case that goes against the

239. *Maccharulo*, 2010 U.S. Dist. LEXIS 73312, at *11.

240. *Id.* at *9 (citing Henrietta D. v Bloomberg, 331 F.3d 261, 273 (2d Cir. 2003)).

241. *Id.* (quoting Atkins v. County of Orange, 251 F. Supp. 2d 1225, 1232 (S.D.N.Y. 2003)) (citing Doe v. Pfrommer, 148 F.3d 73, 82 (2d Cir. 1998)).

242. *Id.* at *13.

243. Kramer v. Connecticut, No. 3:15-cv-00251 (RNC), 2019 U.S. Dist. LEXIS 169962, at *25–26 (D. Conn. Sept. 30, 2019), *aff'd*, 828 F. App'x 78 (2d Cir. 2020) (citing *Henrietta D.*, 331 F.3d at 275–76 (noting that if a plaintiff raises a reasonable accommodations claim, the issue is whether "he could achieve meaningful access, and not whether the access [he] had (absent a remedy) was *less* meaningful than what was enjoyed by others.")).

244. *See, e.g.*, Parker v. Columbia Pictures Indus., 204 F.3d 326, 332 (2d Cir. 2000) (finding that a plaintiff who shows that he has a disability, that his employer had notice of that disability, and that he could perform the essential functions of the job with reasonable accommodations, established discrimination "because of" disability where the employer fails to provide the accommodation) (first citing Stone v. City of Mount Vernon, 118 F.3d 92, 96–97 (2d Cir. 1997); and then citing Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 870 (2d Cir. 1998)).

tide is *Sardakowski v. Clements*.[245] The plaintiff argued that over the period of his incarceration he had been denied adequate mental health treatment, including the denial of necessary medication, and placed in solitary confinement, resulting in escalating self-injurious behavior.[246] The district court rejected the prison's attempts to characterize the plaintiff's claims as medical malpractice claims.[247] Rather, the court looked more broadly at the implications of the defendant's discriminatory conduct, accepting Mr. Sardakowski's argument that, "he has been unable to complete the requirements of the leveling-out program successfully because of his mental impairment and because CDOC officials have prevented him from obtaining adequate treatment and accommodation so that he may progress out of solitary confinement."[248] By recognizing the discrimination inherent in the totality of the conditions of confinement, the court avoided the artifice of uncoupling the conduct from the disability and demonstrated an understanding of the barriers that prevent individuals with disabilities from equal access to prison programs and services.[249]

C. Legitimate Penological Interests

Judicial deference to prison administration has emerged over the past five decades as the "strongest theme" in prisoners' rights jurisprudence.[250] Professor Dolovich writes that deference to prison officials is written into the substantive standards that govern the constitutional claims brought by incarcerated people, "yielding rules of decision that tip the scale in favor of defendants."[251] This deference has also crept into interpretation of disability discrimination statutes, permitting courts to validate decisions of prison administrators that are manifestly discriminatory and ableist while lending them the guise of neutrality.[252]

In *Turner v. Safley*, the Supreme Court considered the constitutionality of regulations promulgated by the Missouri Division of Corrections governing the right of incarcerated individuals to marry.[253]

245. *See* No. 12-cv-01326-RBJ-KLM, 2013 U.S. Dist. LEXIS 91996, at *26 (D. Colo. July 1, 2013).
246. *See id.* at *3.
247. *See id.* at *25 (citing Anderson v. Colo. Dep't of Corrs., 848 F. Supp. 2d 1291, 1300 (D. Colo. Mar. 26, 2012)
248. *Id.* at *25.
249. *See id.* at *26.
250. Dolovich, *supra* note 126, at 245.
251. *Id.* at 246.
252. *See* Turner v. Safley, 482 U.S. 78, 100–01 (1987) (Stevens, J., dissenting).
253. *See id.* at 81.

Writing the majority opinion, Justice O'Connor wrote that federal courts "must take cognizance of the valid constitutional claims of prison inmates."[254] However, the Court emphasized that courts were not equipped to "deal with the increasingly urgent problems of prison administration and reform."[255] Accordingly the Court declined to adopt the strict scrutiny test on the basis that this test would hamper the ability of prison officials "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," and determined that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[256] The Court explained that a regulation will be sustained unless it is an arbitrary or irrational method of achieving its goal.[257] Further, the regulation will be upheld if claimants cannot identify "an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests."[258] The Court was also concerned that "in the necessarily closed environment of the correctional institution, few changes will have no ramifications . . . on the use of the prison's limited resources."[259]

In dissent, Justice Stevens recognized that virtually anything could fall within the scope of legitimate penological interests.[260] If reasonableness required nothing more than a "'*logical* connection' between the regulation and any legitimate penological concern perceived by a cautious warden, [then] it is virtually meaningless."[261] Rather, "[a]pplication of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation."[262] The application of this test could justify anything. There is, as Justice Stevens points out, "a logical connection between prison discipline and the use of bullwhips on prisoners."[263]

The ADA does not explicitly endorse deference to prison administration. Nonetheless, some federal courts have absorbed the notion that violations of the ADA may be justified where prison

254. *Id.* at 84 (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)).
255. *Id.* (quoting *Procunier*, 416 U.S. at 405).
256. *Id.* at 89.
257. *See Turner*, 482 U.S. at 89–90.
258. *Id.* at 91.
259. *Id.* at 90.
260. *See id.* at 105 (Stevens, J., dissenting).
261. *Id.* at 100 (Stevens, J., dissenting) (citations omitted).
262. *Turner*, 482 U.S. at 100–01.
263. *Id.* at 101.

administration can justify their conduct on the basis of legitimate penological interests.[264] In *Gates v. Rowland*, the Ninth Circuit found no reason to distinguish between the constitutional and statutory rights of incarcerated people in prisons.[265] It concluded, without much explanation, that "it is highly doubtful that Congress intended a more stringent application of the prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights."[266] Other courts have not ruled on the direct application of the standard but argue that deference to prison administration is appropriate and relevant to assessing claims under the ADA.[267]

It is not especially clear how the *Turner* standard should interact with the ADA. As noted above, the ADA bans disparate treatment of individuals with disabilities.[268] This means that prisons or jails may not deny an inmate the opportunity to participate in a service offered to other inmates or provide an alternative service that is not equal to those afforded to others.[269] Prisons or jails may exclude prisoners with a disability from programs, services or activities if the exclusion is necessary for the "safe operation of its services, programs, or activities."[270] When asserting this defense, prison officials must base these safety requirements on "actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities."[271] Alternately, prison officials may exclude an individual where they pose a direct threat to the health or safety of others.[272] Once again, this must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence."[273]

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264. *See* Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994).

265. *See id.* at 1446.

266. *Id.* at 1447.

267. Norfleet v. Walker, No. 3:09-cv-00347-JPG-PMF, 2011 U.S. Dist. LEXIS 132181, at *9 (S.D. Ill. Nov. 16, 2011) (citing Bell v. Wolfish, 441 U.S. 520, 547–548 (1979)) (finding that prison administrators should be "accorded wide-ranging deference in the adoption and execution of policies that . . . are needed to preserve internal order and discipline"); Scheanette v. Riggins, No. 9:05-cv-34, 2005 U.S. Dist. LEXIS 41777, at *19–20 (E.D. Tex. Dec. 14, 2005) (citing *Gates*, 39 F.3d at 1447) (noting that while some circuit courts have applied the *Turner* test to statutory claims, others have found the factors to be relevant to assessing claims under the ADA).

268. 28 C.F.R. § 35.130 (2021).

269. *See* § 35.130(b)(1).

270. § 35.130(h).

271. *Id.*

272. 28 C.F.R. § 35.139(a) (2021).

273. Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 86 (2002) (quoting 29 CFR § 1630.2(r) (2021)); *see also* Bragdon v. Abbott, 524 U.S. 624, 649 (1998) ("[T]he risk assessment must be based on medical or other objective evidence.").

Similarly, the ADA requires that a public entity "make reasonable modifications in policies, practices, or procedures" when necessary to avoid discrimination on the basis of disability.[274] This obligation is not absolute.[275] A public entity may refuse to make an accommodation if they "can demonstrate that making the modification[] would fundamentally alter the nature of the service, program, or activity."[276] Professors Brittany Glidden and Laura Rovner argue that one of the major benefits of disability discrimination statutes is that, once a prisoner has demonstrated a prima facie case of discrimination, "prison officials must demonstrate why in each case the particular prisoner cannot receive the requested services."[277] They write that "[a]s a result, it becomes more difficult for the prison to rely on generalized assertions of 'safety' to support the deprivations and instead forces an articulation of the reason for the particular condition."[278]

The ADA, therefore, requires prison administration to justify the exclusion of an individual from the services or programs offered by a public entity, or for refusing to provide a reasonable accommodation. However, courts appear to shift the burden back to the plaintiff when applying the *Turner* standard.[279] For instance, in *Bane v. Virginia Department. of Corrections*, Mr. Bane sued the Virginia Department of Corrections (VDOC) on the basis that prison administrators improperly changed his disability code resulting in his placement at a higher-level security facility with fewer privileges than his original placement.[280] Amongst other claims, Mr. Bane argued that he was denied privileges solely upon the basis of his disability, that the prison "selectively enforced an unlawful policy to transfer disabled inmates without regard to their actual [dis]abilities," and "failed to recognize the right[s] of inmates to refuse unwanted disability accommodations."[281] In the course of finding that VDOC's policy was reasonable, the court held that "[t]he burden is not on the state to prove the validity of the challenged prison

274. § 35.130(b)(7).
275. *See id.*
276. *Id*.
277. Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DENVER U.L. REV. 55, 68–69 (2012).
278. *Id*. at 69.
279. *See, e.g.*, Bane v. Va. Dep't of Corrs., No. 7:06CV00733, 2007 U.S. Dist. LEXIS 33742, at *38–39 (W.D. Va. May 8, 2007).
280. *Id.* at *3.
281. *Id*.

regulation but instead is on the inmate to disprove it."[282] This excuses the defendant from raising any affirmative defense.[283]

In other cases, courts appear to simply place certain decisions routinely made by prison administration out of the scope of consideration, once again without requiring any assertion of a defense by prison administration.[284] In *Jefferson v. Grey*, for instance, the District Court for the Southern District of California dismissed the complaint brought pro se by an incarcerated person diagnosed as HIV positive on the basis that, using the *Turner* standard of review, "deference is due to prison authorities' policy not to open food service jobs to HIV-infected inmates."[285] In *Havens*, the plaintiff with paraplegia challenged his placement in a facility that was intended for temporary stays and therefore did not have the services and programs typically found at prisons where inmates were housed on a non-temporary basis.[286] The Tenth Circuit cited with approval the lower court's statement that it was:

> disincline[d] to take up this strand of argument for numerous reasons, most significantly because the decision of where to locate a given prison unit [] is a textbook example of the type of prison administration decision that *Turner* emphasizes must be left to the expertise of CDOC, not usurped by the court.[287]

Similarly, in *Bane*, the court held that it "may not second-guess the medical reasons for [Bane's] transfer or interfere with prison officials' exercise of discretion in balancing inmate disability accommodations against other administrative concerns."[288]

The application of the *Turner* standard to the ADA also validates harmful stereotypes about disability.[289] This is precisely the kind of discriminatory conduct that the ADA sought to prevent, recognizing that "individuals with disabilities . . . have been faced with restrictions and

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282. *Id*. at *38–39 (citing Williams v. Morton, 343 F.3d 212, 217 (3d Cir. 2003)).

283. *See id.* at *39.

284. *See, e.g.*, Jefferson v. Grey, No. 3:17-cv-01754-DMS-RBB, 2017 U.S. Dist. LEXIS 169151, at *7 (S.D. Cal. Oct. 12, 2017).

285. *Id*. (quoting Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994)).

286. *See* Havens v. Colo. Dep't of Corr., 897 F.3d 1250, 1262 (10th Cir. 2018).

287. *Id.* (alterations in original). The Tenth Circuit did not explicitly rule on the question of whether the *Turner* standard applied "full force" to claims based on statutory rights. *See id.* Regardless, it held that it was appropriate to take into account the "unique circumstances and challenges" faced by prison administrators "in attempting to discern . . . whether a prisoner's access to prison services and programs was meaningful and whether the prison reasonably accommodated the prisoner's disability." *Id.* at 1269 n.11.

288. *Bane*, 2007 U.S. Dist. LEXIS 33742, at *37–38.

289. *See* Christopher J. Burke, *Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners' Statutory Claims under the Americans with Disabilities Act*, 98 MICH. L. REV. 482, 503 (1999).

limitations . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in . . . society."[290] For instance, in *Gates*, the Ninth Circuit gave credence to speculative assertions about the violence that HIV positive prisoners would experience at the hands of the non-disabled prison population.[291] The court relied on broad assumptions, proffered by correctional experts, about the characteristics of incarcerated individuals.[292] The plaintiffs, HIV positive incarcerated persons seeking access to food service jobs within the correctional facility, argued that educating other prisoners about the low risk of transmitting the HIV virus would ameliorate any perception of risk.[293] In dismissing this argument, the court accepted the prison authorities' argument that "many 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."[294] Further, the court held that "if the inmate population perceives a risk from the food they must eat, they will want the infected inmates removed from the food service jobs."[295] Failure to do this, the court considered, could result in "violent actions against the inmate with the virus."[296]

The notion of "legitimate penological interests" is premised on the idea that the objectives of prison regulations are essentially neutral and necessary, rather than profoundly racist and ableist.[297] As legal scholars and disability advocates have pointed out, however, the prison population

290. H.R. REP. NO. 101-485, pt. 4, § 2(a)(7) (1990).

291. Gates v. Rowland, 39 F.3d 1439, 1447–48 (9th Cir. 1994).

292. *See id.*

293. *See id.* at 1448.

294. *Id.* The Appellant's brief argued that the HIV positive prisoners posed a direct threat to themselves or others. The brief is replete with conclusory statements that, "All inmates in state prisons, HIV-positive or otherwise, are convicted criminals. It is axiomatic that criminals have difficulty conforming to societal norms." Brief for Appellant on Appeal at 23, Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1993) (No. 93-16136).

295. *Gates*, 39 F.3d at 1447.

296. *Id.* at 1447–48.

297. *See, e.g.*, *Turner*, 482 U.S. at 89 (conceiving of the complex and intractable problems of prison reform and management as being primarily administrative and out of the scope of curial scrutiny and criticism); Procunier v. Martinez, 416 U.S. 396, 404-405 (1974) (evincing support for prison administration goals of "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" and advocating for judicial restraint toward problems of prison administration); *see* BEN-MOSHE, *supra* note 33, at 123 (noting the goals of imprisonment, including the goal of rehabilitation, are inherently racist and ableist - an "apparatus of the carceral state to make people in its own image," namely, "white, proletariat, hetero, masculine, able-bodied, sane/rational and so on.")

is likely to be poor, black and disabled.[298] By entrenching deference to prison administration, the courts are "enforcing standards that relieve state officials of the obligation to be proactive vis-à-vis the health and safety of the people we put behind bars."[299] In so doing, courts operate as "sites of institutional cruelty,"[300] creating the "conditions whereby society's most despised population . . . routinely suffer systematic [discrimination] . . . without any meaningful judicial check."[301]

III. REDIRECTING THE FOCUS

A. Neutral Practices & Disparate Impact

It is within the scope of the ADA to challenge prison and jail policies and rules that do not consider the effect of an individual's disability on their ability to comply with those rules. Take, for instance, disciplinary rules that disproportionately affect people with disabilities. The Department of Justice Guidance is clear that, to avoid discrimination on the basis of disability, correctional facilities must implement policies to "forego discipline and provide treatment where it is apparent that a prisoner's behavior was related to a disability."[302]

The ADA's Title II regulations prohibit neutral rules that have a disparate impact on individuals with disabilities.[303] ADA regulations provide that a public entity may not use "criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability."[304] Disciplinary policies could be defined as "methods of administration." In order to state a claim, plaintiffs must show that a policy, procedure, or practice identified by the plaintiff has a significantly greater impact on

298. *See* LOIC WACQUANT, PRISONS OF POVERTY 156 (2009) (noting that "blacks have been overrepresented in American penitentiaries throughout the twentieth century . . ."); DAVIS, *supra* note 61, at 37 (exploring the racist roots of incarceration within the United States and finding historical links between the modern prison system and slavery); Chris Chapman, Allison C. Carey and Liat Ben-Moshe, *Reconsidering Confinement*, in DISABILITY INCARCERATED 140 (Ben-Moshe et al. eds., 2014) ("Prisoners are not randomly selected and do not equally represent all sectors of society. A disproportionate number of persons incarcerated in US prisons and jails are disabled, poor, and/or racialized.")

299. Sharon Dolovich, *Cruelty, Prisons and the Eighth Amendment*, 84 N.Y.U L. REV. 881, 978 (2009).

300. *Id.* at 979.

301. *Id.* at 978.

302. *Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act*, U.S. DEP'T OF JUST. C. R. DIV. (Jan. 2017), https://www.ada.gov/cjta.html.

303. *See* 28 C.F.R. § 35.130(b)(3) (2021).

304. § 35.130(b)(3)(i).

members of a protected class.[305] Certainly, data would appear to indicate that these policies do have a disproportionate effect on individuals with disabilities, who have higher than average disciplinary rates, many of whom may not be able to access the programs or services of the prison as a result of being sanctioned.[306] As Schlanger notes, the regulations would appear to support a "disparate impact challenge to a prison rule that is disproportionately adverse to prisoners with disabilities."[307]

Courts are, however, hesitant to allow disparate impact claims to proceed, leading Schlanger to argue that plaintiffs should rely on either the disparate treatment or reasonable accommodation theories of discrimination.[308] While this may be a prudent litigation strategy, curial suspicion of disparate impact claims is troubling. After all, the ADA recognizes that neutral policies may have a discriminatory effect.[309] Further, claims of disparate impact have particular salience in a prison context, where individuals with disabilities are routinely punished for violations of prison policy with extremely serious consequences.[310] A common consequence is placement in solitary confinement.[311] The effect of disciplinary policies that do not take into account the impact of disability is devastating.[312] Other than exacerbating pre-existing conditions,[313] individuals in solitary confinement are unable to access the programs and activities offered by the programs, some of which are critical for successful re-entry into the community.[314]

As Section IV demonstrates, incarcerated persons seeking to challenge disciplinary policies on the basis of disparate treatment have the burden of proving that they are being treated differently to individuals

305. *See* United States v. City of Beaumont, No. 1-15-CV-201, 2015 U.S. Dist. LEXIS 174741, at *8 (E.D. Tex. Nov. 3, 2015) (quoting Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996)).

306. *See* Jamie Fellner, *Callous and Cruel: Use of Force Against Inmates with Mental Disabilities in U.S. Jails and Prisons*, HUM. RTS. WATCH (May 12, 2015), https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and#_ftnref2. HRW reports that fifty-eight percent of state prisoners with psychiatric disabilities, nationwide, have been charged with rule violations compared to forty-three percent of those without disabilities. *Id.*

307. Schlanger, *supra* note 178, at 7.

308. *See id.* at 7–8.

309. *See* § 35.130(b)(3).

310. *See* Fellner, *supra* note 20, at 398.

311. *See id.* at 402.

312. *See id.* at 403.

313. Morgan, *supra* note 2, at 157.

314. *See id.* at 82.

without disabilities who engage in the same kind of "misconduct."[315] This is significant hurdle, because of course, the fundamental issue is not that the individual is being treated differently to other prisoners but that they are being sanctioned in precisely the same way without regard to the impact of their disability.[316] Incarcerated people fare slightly better when arguing that correctional facilities have failed to reasonably accommodate their disability. In a small handful of cases, courts have supported the proposition that "reasonable accommodation" requires modification of disciplinary procedures to take account of disability related behaviors.[317] Changes to disciplinary policies have also occasionally occurred as a result of settlement decrees arising from claims brought by prisoners about the failure of correctional facilities to reasonably accommodate their disabilities.[318] For instance, in *Clarkson v. Coughlin*, deaf individuals in New York State prisons filed a class action lawsuit against the New York State Department of Correctional Services (DOCS) alleging that the defendants had failed to provide them with access to services and programs that were routinely afforded to hearing prisoners in violation of the RA and the ADA.[319] When settling this suit, DOCS agreed to restore all lost privileges for the plaintiffs who were charged with a failure to obey an order that they did not understand because of a hearing loss or communication problem.[320] Similarly, the settlement decree entered into between plaintiffs with psychiatric disabilities and DOCS in *Disability Advocates, Inc. v New York State Office of Mental Health*, provides that there will be a presumption against

315. *See, e.g.*, Scherer v. Pa. Dep't of Corr., No. CIV.A. 3:2004-191, 2007 U.S. Dist. LEXIS 84935, at *37 (W.D. Pa. Nov. 16, 2007) (rejecting the plaintiff's argument that he should not have been placed in solitary confinement for behavior due to his psychiatric disability on the basis that he had not shown that he "was treated differently from other prisoners who receive a misconduct report for threatening other prisoners"); Atkins v. County of Orange, 251 F. Supp. 2d 1225, 1232 (S.D.N.Y. 2003) (finding that placement of mentally ill inmates within keep lock isolation were not disparately treated from other prisoners who were also a "danger to [themselves] or others.").

316. *See Scherer*, 2007 U.S. Dist. LEXIS 84935, at *33–34.

317. *Id.* at *132 (finding that "the lack of modification of [the prison's] disciplinary procedures to account for and place the staff on notice of Decedent's mental illness, similar to the claim in *Purcell*, possibly resulted in a violation of Title II of the ADA in the denial of necessary mental health treatment in response to his misconduct.") (citing Purcell v. Pa. Dep't of Corr., No. 3:00-CV-00181-LPL, 2006 U.S. Dist. LEXIS 42476, at *28 (W.D. Pa. Mar. 31, 2006)).

318. *See, e.g.*, Consent Judgement and Order, Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995) (No. 91 CIV 1792 (RWS)).

319. *Clarkson*, 898 F. Supp. at 1026.

320. Consent Judgement and Order at 21, Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995) (No. 91 CIV 1792 (RWS)).

pursuing charges against individuals threatening or engaging in self-harming behavior.[321]

The orientation of a reasonable accommodation claim is, however, different to a disparate impact claim.[322] A reasonable accommodation claim may result in the policy being altered for the individual.[323] It is notable, however, what is left out of this conversation. This enquiry does not delve, either statistically or anecdotally, into the impact of the historical or current impact of the neutral rule on other individuals with disabilities.[324] Defendants may move to swiftly accommodate the individual, without addressing the underlying discriminatory policies. They also allow the court to engage in atomistic and reductive thinking about the nature of the discrimination. For instance, in *Havens*, the Tenth Circuit found that Mr. Havens had not been denied access to the services, activities, or programs offered by the prison because of specific accommodations provided to him—namely, a prison job that he could perform, limited computer access, and the opportunity to engage in some educational and training programs that he completed.[325] This permitted the court to sidestep the crux of Mr. Havens' complaint—that the defendant's policy of placing individuals requiring intensive medical care in a facility with less accessible infrastructure for people with disabilities and fewer long term programs constituted discrimination under the ADA.[326]

Disparate impact claims are oriented towards a broader enquiry that provide context to a claim of discrimination in a way that a reasonable accommodation does not.[327] As Michael Waterstone and Michael Stein note:

> Because disparate impact law is dependent on asserting statistical groupwide disparities . . . , it cannot be theoretically conceived of as

321. Private Settlement Agreement at 13, Disability Advoc.s, Inc. v. N.Y. State Off. of Mental Health, No. 02 Civ. 4002 (GEL) (S.D.N.Y. Apr. 17, 2007).

322. *See* 42 U.S.C. § 12112(b)(5)(A), (b)(6) (2021).

323. Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L. J. 861, 880–81 (2006) (noting that in Title I cases "[f]ailure to accommodate claims typically proceed in a highly atomistic way, with the individual claimants requesting what they deem a 'reasonable' (hard- or soft-cost) accommodation. . . . If the trial court finds a requested accommodation to be reasonable, then that accommodation is provided, and the specific workplace policy is altered for an individual.").

324. *See id.* It is worth noting, at this juncture, that courts are especially resistant to certifying class actions or permitting disparate impact claims to proceed in Title I claims. *See id.* at 903. While there are very few disparate impact claims that succeed under Title II, courts are not as resistant to permitting class certification. *See id.*

325. Havens v. Colo. Dep't of Corr., 897 F.3d 1250, 1267 (10th Cir. 2018).

326. *Id.* at 1265–66.

327. *See* Stein & Waterstone, *supra* note 324, at 911.

> atomistic. Even when brought by a lone claimant, disparate impact cases must be understood in terms of questioning larger structured relationships that affect a broader number of individuals and that in turn challenge those hierarchies.[328]

The difference in approach is apparent in one of the few Title II cases to consider a disparate impact claim. In *May v. Sheahan*, the district court considered the Cook County Sherriff's policy of shackling pretrial detainees to their beds when they were taken to the Cook County Hospital.[329] All pretrial detainees were shackled regardless of the danger they posed or the risk of escape.[330] Sheehan claims that he had been denied reasonable accommodations, and the court permitted the claim to survive the motion to dismiss, stating that "whether the requested accommodation was indeed 'reasonable' must await the development of the facts."[331] However, in assessing the disparate impact claim, the court recognized the broader implications of the Sherriff's policy:

> [A]though the shackling policy neutrally applies to disabled and nondisabled hospitalized detainees, it is plausible that this policy has a much more severe impact on disabled individuals. . . . Disabled individuals are likely to spend more time in a hospital than nondisabled individuals. . . . As a result disabled individuals have a greater need for hospital services, these individuals spend more time in Cook County Hospital, and the shackling policy has a greater impact on them.[332]

Plaintiffs could bring, and courts should recognize, disparate impact claims challenging a prison's failure to implement policies that unduly punish incarcerated persons whose misconduct arises from their disability. Disparate impact liability centers the issue on the lived experience of the victim of discrimination.[333] It shifts the focus from the particular needs of the individual to social exclusion because of "social constructs created by the able-bodied majority."[334] Take, for instance, policies imposing sanctions for failing to maintain hygiene, creating a disturbance, or destroying state property without taking into account the impact of disability on the ability of individuals to comply with these rules. Individuals with I/DD may require prompting to maintain hygiene. Others with psychiatric disabilities may smear feces on the walls or kick

328. *Id.*
329. May v. Sheahan, No. 99 C 0395, 1999 U.S. Dist. LEXIS 11347, at *2–5 (N.D. Ill. July 20, 1999), *aff'd*, 226 F.3d 876 (7th Cir. 2000).
330. *See id.* at *4–5.
331. *See id.* at *14.
332. *Id.* at *14.
333. *See* Stein & Waterstone, *supra* note 324, at 902, 909.
334. *See id.* at 909.

their cell doors. The sanctions for such behavior can result in loss of privileges, or in extreme cases, placement in administrative segregation.[335] Challenging the policy on the basis of how it is applied in specific cases would not address the systemic violence of such policies. Plaintiffs risk courts separating the conduct from the disability and finding that the individual was treated the same as others without disabilities who destroy property or create a disturbance. A disparate impact claim that outlines the disproportionate impact of this policy on individuals with disabilities would provide context in a way that other theories of liability could not. Such claims would also be entirely within the scope of liability contemplated by the ADA and the RA whereby Congress recognized that most discrimination was not deliberate or intentional but a product of thoughtlessness or benign neglect.[336]

There are several challenges to bringing a disparate impact claim, particularly on behalf of a class of plaintiffs. To establish a disparate impact claim, plaintiffs must demonstrate a "significantly adverse or disproportionate impact on persons of a particular type produced by a defendant's facially neutral acts of practices."[337] It can be difficult to marshal evidence that will be deemed statistically significant to meet this standard.[338] Another challenge to this approach is the fact that prisons may be able to justify disciplinary rules on the basis that they serve a legitimate government interest[339] in preserving the safety and security of the prison.[340] As discussed in Part IV, deference to prison administration,

335. *See generally* New Jersey Prison System Report of Dr. Dennis Koson, D.M. v. Terhune, 67 F. Supp. 2d 401 (D.N.J. 1996) (No. 96-1840 (AET) (Dr. Koson reviewed and reported on the cases of several incarcerated people with psychiatric disabilities in the New Jersey prison system who exhibited behaviors like smearing feces around their cells, flooding their cells or setting fires, and were sanctioned by being placed in administrative segregation for prolonged periods of time).

336. Alexander v. Choate, 469 U.S. 287, 294–95 (1985), *superseded by statute*, 42 U.S.C. § 504 (2012), *as recognized in* Prakel v. Indiana, 100 F. Supp. 3d 661 (S.D. Ind. 2015) (citing Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 586 (1983) (recognizing that disparate impact claims could be brought pursuant section 504 of the RA which was enacted to combat benign neglect)).

337. Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 575 (2d Cir. 2003).

338. *See, e.g.*, B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 162 (2d Cir. 2016) (dismissing the disparate impact claim on the basis that the plaintiffs had failed to establish the statistical evidence with enough particularity);

339. *See, e.g.*, *Tsombanidis*, 352 F.3d at 575 (stating that once a "plaintiff makes a prima facie showing, the burden shifts to the defendant to 'prove that its actions furthered . . . a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect'") (quoting Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d. Cir 1988)).

340. *See, e.g.*, Jamelia Morgan, *The Paradox of Inclusion: Applying Olmstead's Integration Mandate in Prisons*, 27 GEO. J. ON POVERTY L. & POL'Y 305, 316 (2020) (arguing that

particularly when claims of safety and security are raised, pose a significant barrier to incarcerated persons' ADA claims. It is arguable, however, that undue deference violates the mandate of the ADA, an issue discussed further below.

B. Questioning Deference

Courts have held that deference to prison administration is appropriate and relevant when assessing whether a qualified individual was provided with meaningful access to the programs or services of the facility,[341] and when determining the reasonableness of any requested accommodation or modification of policies.[342] Courts have emphasized that the consideration of these factors often results in the resolution of the matter in favor of prison administration.[343] As outlined in Section II, in the context of ADA claims, courts use deference to place certain decisions made by prison administration out of the scope of consideration. Plaintiffs with significant disabilities may be placed in facilities with minimal access to the programs and services that other non-disabled incarcerated people are able to access but may not be able to challenge these placements because such decisions are deemed to be by courts entirely within the discretion of prison administration.[344] Requests for accommodation may be perfunctorily denied on the basis that they implicate security concerns.[345] While resource allocation and budgetary concerns are real, and prison administration may require the flexibility to

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"looming behind every discussion of prison reform (along with any prison policy or practice) is the concern that reforms . . . will compromise safety and security of prisons and jails").

341. *See, e.g.*, Havens v. Colo. Dep't of Corr., 897 F.3d 1250, 1269 (10th Cir. 2018) ("The district court's sound reasoning is congruent with our view that meaningful access and the question of whether accommodations are reasonable must be assessed through the prism of the prison setting.") (citing Turner v. Safley, 482 U.S. 78, 84–85 (1987); *see also* Wells v. Thaler, 460 F. App'x 303, 313 (5th Cir. 2012) ("[O]ur conclusion that the provided auxiliary aids and services are sufficient is informed by the context of this suit—a correctional facility—and we accord the officials at the Estelle Unit deference in their determination of an appropriate accommodation.") (citing Oliver v. Scott, 276 F.3d 736, 745 (5th Cir. 2002)).

342. *See, e.g.*, Pierce v. County of Orange, 526 F.3d 1190, 1217 (9th Cir. 2008) (holding that the court may "consider, with deference to the expert views of facility administrators . . . whether a given accommodation is reasonable") (citing Crawford v. Indiana Dep't of Corrs., 115 F.3d 481, 487 (7th Cir. 1997)).

343. *Havens*, 897 F.3d at 1270 (citing Onishea v. Hopper, 171 F.3d 1289, 1300 (11th Cir. 1999)).

Onishea, 171 F.3d at 1300).

344. *See, e.g.*, *id.* at 1270.

345. *See, e.g.*, Rubino v. County of San Diego, No. 05cv0942-LAB (BLM), 2007 U.S. Dist. LEXIS 17444, at *51–52 (S.D. Cal. Mar. 12, 2007) (dismissing the plaintiff's claim on the basis that his request for a reasonable accommodation was refused on security grounds).

manage these needs,[346] I argue that the ADA provides a structured way to consider the exigencies of the prison environment without dismissing the substantive claims of individuals with disabilities. Such a focus shifts the lens from deference to meaningful review of the discrimination itself.

The Ninth Circuit justified application of the extremely deferential *Turner* standard on the basis that there was no evidence that Congress intended the ADA to apply more stringently to prison facilities without consideration of the reasonable requirements of effective prison administration.[347] The evidence suggests, however, that Congress did intend to address the treatment of incarcerated persons with disabilities in state prisons when enacting the ADA.[348] Prior to 1973, the focus of disability-related legislation was on vocational rehabilitation and employment issues.[349] Section 504 of the RA, however, broadened that focus, providing not just for the rehabilitation and job training, but requiring that the federal government and the programs receiving federal financial assistance cease discriminating against individuals with disabilities.[350] With this "new civil rights component," the RA "began to change the landscape of disabled prisoner litigation, primarily by lending some credibility to inmate claims."[351] The ADA, premised on the RA, incorporated this civil rights element.[352] Prior to enacting the ADA, Congress relied heavily on the United States Commission on Civil Rights Report, *Accommodating the Spectrum of Individual Abilities*, which was entered as testimony before House and Senate Subcommittees[353] and specifically identified prisons as places where disability discrimination occurred. The report recognized that there are a "[d]isproportionate number of mentally retarded people in prisons and juvenile facilities."[354] It also recognized that, "[i]nstances of ridicule, torture, imprisonment, and execution of handicapped people throughout history are not

346. *See generally Budget Guide for Jail Administrators*, NAT'L INST. OF CORRS. (Sept. 2002), https://info.nicic.gov/nicrp/system/files/017627.pdf (guide designed to "to enhance the skills, knowledge, and capabilities of jail administrators in jail budgeting and resource management").

347. *See Gates*, 39 F.3d at 1447.

348. *See* NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE US: EXPLORING CAUSES AND CONSEQUENCES 159 (2014).

349. Robbins, *supra* note 110, at 71.

350. *Id.*

351. *Id*. at 71–72.

352. *See id.* at 73.

353. S. REP. NO. 101-116, at 6 (1989); H.R. REP. NO. 101-485(II), at 28 (1990).

354. *Accommodating the Spectrum of Individual Abilities*, U.S. COMM'N ON C.R., at 168 (Feb. 21, 2021), https://files.eric.ed.gov/fulltext/ED236879.pdf.

uncommon, while societal practices of isolation and segregation have been the rule."[355]

Given this history, excessive deference to prison administration is questionable. Congress intended to extend the broad mandate of disability discrimination statutes to a correctional context and to give courts the authority to assess claims of discrimination.[356] As Professor Christopher Burke has pointed out in response to the curial policy of non- intervention in the decisions of prison administration: "Congress's superior factfinding ability is no less relevant and still far superior to that of the courts when it is used to devise statutes with broad mandates."[357]

Deference to prison administration is also frequently justified on the basis that prison administrators must contend with the complexity of the prison environment and have expertise in balancing factors unique to the prison environment, including security, cost, and maintaining order.[358] This curial narrative is challenged by data that indicates that prisons mismanage the needs of individuals with disabilities.[359] Human Rights Watch reports that correctional officers frequently respond to "minor and non-threatening" conduct with violence.[360] The misuse of force against incarcerated persons with mental health conditions is widespread and increasing because of "deficient mental health treatment in correctional facilities, inadequate policies to protect prisoners from unnecessary force, insufficient staff training and supervision, and a lack of accountability for the misuse of force."[361] On rare occasions, federal courts have acknowledged the failures of prison administration. For instance, in *Clark v. California*, the court noted that prison administration created a "climate of indifference," exposing individuals with developmental disabilities to abuse at the hands of other prisoners.[362] The court concluded that the steps taken by the California Department of Corrections to remedy the discrimination experienced by individuals with intellectual and developmental disabilities in the California system fell "gravely short of the measures that must be taken to create conditions that satisfy . . .

355. *Id.* at 18 n.5.

356. *See* Robbins, *supra* note 110, at 73.

357. Burke, *supra* note 290, at 496.

358. Havens v. Colo. Dep't of Corr., 897 F.3d 1250, 1269–70 (10th Cir. 2018) (quoting Pierce v. County of Orange, 526 F.3d 1190, 1217 (9th Cir. 2008)) (citing Onishea v. Hopper, 171 F.3d 1289, 1300 (11th Cir. 1999) (stating that "[p]risons are unique environments where 'deference to the expert views' of prison administrators is the norm").

359. *See* Fellner, *supra* note 307.

360. *Id.*

361. *Id.*

362. 739 F. Supp. 2d 1168, 1203 (N.D. Cal. 2010)

constitutional and statutory mandates."[363] Undue deference to prison administration could result in the perpetuation of the abuses that plague the system in violation of disability discrimination statutes.[364]

If, as federal court jurisprudence suggests, deference is necessary, then it is worth asking what this deference should look like and when it should be deployed.[365] As courts have recognized, the obligations imposed by the ADA are not limitless and allow courts to take into account the specific administrative concerns of prison administration.[366] The ADA provides for defenses—individuals may be excluded from programs or services if they pose a direct threat[367] or if the accommodation would impose a fundamental alteration of the programs or services.[368] This provides sufficient latitude to consider the specific administrative concerns of prison administration, while also giving weight to the claims brought by incarcerated persons with disabilities.

One case where the court does this effectively is *Henderson v. Thomas*.[369] The lawsuit was brought on behalf of a class of incarcerated HIV-positive persons arguing that they were being segregated from the general prison population.[370] Housed in separate dorms, HIV positive prisoners had to meet a number of criteria that were not imposed on other prisoners to be considered for the work-release program.[371] They were excluded from "participation in any job related to food services."[372] The Alabama Department of Corrections (ADOC) argued that "even if the plaintiffs show[ed] a violation of the ADA, the department [would] face no liability if it justifi[ed] its segregation policies on the basis of legitimate penological concerns."[373] The district court held that *Turner* did not apply to statutory rights but noted that there was a "substantial overlap between factors that must be considered in both *Turner* analysis and ADA analysis."[374] The court proceeded to find that even when it gave

363. *Id.* at 1209.

364. *See* Dolovich, *supra* note 300, at 978 (noting that the current doctrinal emphasis on deference means that courts are "enforcing standards").

365. *See* Dolovich, *supra* note 126 (advocating for a more principled approach to deference to "overcome the impression of a skewed process that deprives a whole category of citizens of meaningful constitutional protections").

366. *See id.*

367. 28 C.F.R. § 35.139(a).

368. § 35.130(b)(7)(i).

369. *See generally*, 913 F. Supp. 2d 1267 (M.D. Ala. 2012) (effectively balancing the needs of prisoners with disabilities with those of correctional administration).

370. *Id.* at 1276.

371. *Id.* at 1281, 1282, 1283.

372. *Id.* at 1283.

373. *Id.* at 1313.

374. Henderson v. Thomas, 913 F. Supp. 2d 1267, 1313 (M.D. Ala. 2012).

"full consideration to the ADOC's purported penological justifications," it simply could not prevail.[375] While ADOC had an interest in curtailing the spread of HIV to the general prison population, the court held that "ADOC can in fact effectuate the plaintiffs' rights under the ADA while simultaneously preventing HIV transmissions."[376] ADOC also argued that cost was a significant concern.[377] The court considered whether the accommodations requested by the plaintiffs were unreasonable in terms of cost and concluded that "none of the accommodations necessary to dismantle the challenged policies would be unreasonably costly."[378] ADOC also argued that "dismantling the segregation policy in housing and in food services would result in violence, placing prisoners and correctional staff at risk."[379] Rather than relying on stereotypes about disability, the court found strong evidence of prejudice against incarcerated persons with HIV within ADOC, and that this was the reason for ADOC's policies.[380] The court also looked at ADOC's history of providing integrated services to prisoners with HIV, and found that while violence was anticipated, none actually took place.[381]

Henderson demonstrates the ability of courts to balance the needs of prisoners with disabilities with those of correctional administration.[382] While the plaintiffs succeeded in this particular case, courts may not necessarily find in favor of incarcerated disabled persons. The direct threat defense, for instance, can pose a "formidable barrier to inclusion."[383] However, as Professor Burke explains, undue deference encapsulated in the *Turner* test often allows courts to reject a prisoner's ADA claim without considering the nature or impact of the prisoner's disability.[384] The thorough and careful review of the justifications raised by correctional officials allows the prisoner to force judicial and correctional systems to confront his or her statutory claim head on.[385]

375. *Id*. at 1313–14.
376. *Id.* at 1314.
377. *Id.* (citing Onishea v. Hopper, 171 F.3d 1289, 1300 (11th Cir. 1999)).
378. *Id.* at 1314.
379. *Henderson*, 913 F. Supp. 2d at 1314.
380. *See id.* at 1315.
381. *See id.*
382. *See id*. at 1316.
383. Morgan, *supra* note 341, at 314. Morgan argued that the direct threat defense could be deployed successfully where the individual engages in "harmful conduct . . . that may be caused by or linked to disability." *Id.* at 315.
384. *See* Burke, *supra* note 290, at 503.
385. *See id*. at 508.

C. Remedies

The ADA provides for declaratory and injunctive relief.[386] As noted in 42 U.S.C. § 1981(a)(2), compensatory damages are also available in ADA claims where a prisoner is able to prove intentional discrimination.[387] The value of these awards may not necessarily lie in the compensation itself. Incarcerated plaintiffs frequently receive only low damage awards, in part because "injured [prisoners] who remain incarcerated after [an] injury [typically] have no . . . lost wages [or] medical expenses."[388] This is further limited by the PLRA whereby prisoners cannot bring a federal civil action without demonstrating that they have suffered a physical, rather than mental or emotional, injury.[389] Seeking damages or remedies that amend conditions of confinement can feel, as Rachel Herzig in an aptly titled essay puts it, like "tweaking Armageddon."[390]

Rather, prison litigation serves a broader purpose of highlighting conditions of confinement and bringing these issues to broader focus. The impact of this should not be understated: the reforms achieved are "significant, life-or-death advances."[391] However, the focus on conditions of confinement is not necessarily sufficient because it can entrench assumptions that imprisonment is a necessary evil and that if corrected, prisons could serve a useful function in society.[392] The increased bureaucratization of prisons as a result of consent decrees or litigation can have the effect of creating a more "governable iron cage."[393]

The antidiscrimination mandate of the ADA offers a way to look past the iron cage to the conditions that lead to and prolong confinement of individuals with disabilities. In *Olmstead v. L.C.*, the Supreme Court ruled that unjustified institutionalization constitutes discrimination under Title II of the ADA.[394] That integration mandate has required that state and local prisons modify their policies to ensure equal access to programs and services for individuals with disabilities while they are

386. *See* Hillesheim v. Holiday Stationstores, Inc., 953 F.3d 1059, 1060 (8th Cir. 2020) (noting that the plaintiff sought both declaratory and injunctive relief for violations of the Americans with Disabilities Act).

387. *See* 42 U.S.C. § 1981a(a)(2) (2021).

388. Schlanger, *supra* note 119, at 1622.

389. *See* § 1997e(e).

390. Rachel Herzig, *"Tweaking Armageddon": The Potential and Limits of Conditions of Confinement Campaigns*, 41 SOC. JUST. 190, 194 (2015).

391. *Id.* at 193.

392. *See id.*

393. BEN-MOSHE, *supra* note 33, at 246.

394. 527 U.S. 581, 597 (1999).

incarcerated.[395] Some commentators and advocates have argued that the ADA also requires alternatives to incarceration altogether.[396] The reasoning is that incarcerated individuals with disabilities should be placed in a community-based setting if a treatment professional recommends it and "placement would not constitute a fundamental alteration of the . . . program."[397] Litigation has explored alternatives to incarceration—"the fight is not so much about the institution and its conditions as about what comes *after or even instead of* the institution."[398] For instance, in *M.G. v. Cuomo*, the plaintiffs challenged the failure by the New York State Department of Corrections and the New York State Office of Mental Health to develop community-based mental health programs to serve prisoners who have completed their sentences, but continue to be imprisoned due to a lack of community based services to serve them upon release.[399]

This path is by no means uncomplicated. Much of the litigation along these lines is still nascent and occasionally, has been unsuccessful.[400] However, the integration mandate of the ADA cprovides a way to contest the "standard and pervasive. . . logics. . . of the American punishment system."[401] By drawing attention to the structural problems that lead to the incarceration of individuals with disabilities, courts can countenance remedies that go beyond remedying prison conditions, to dismantling the structures that lead to the over-incarceration of people with disabilities.[402]

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395. *See generally* Laura Sloan & Chinmoy Gulrajani, *Where We Are on the Twentieth Anniversary of* Olmstead v. L.C., 47 J. AM. ACAD. PSYCHIACTRIC L. 408 (2019) (discussing systemic changes made after the *Olmstead* decision).

396. *See, e.g.*, Wakschlag & Dinerstein, *supra* note 94, at 924.

397. *Id.* at 952.

398. BEN- MOSHE, *supra* note 33, at 254.

399. *See* M.G. v. Cuomo, No. 19 CV 639(CS)(LMS), 2020 U.S. Dist. LEXIS 155026, at *3 (S.D.N.Y. Aug. 26, 2020).

400. *See generally, e.g.*, Seth v. D.C., No. 18-1034 (BAH), 2019 U.S. Dist. LEXIS 77808 (D.D.C. May 8, 2019) (The court rejected the argument that an individual with an intellectual disability should be placed in a community-based program on the basis that he was denied community services not because of his disability but because he was a "danger to the community").

401. Morgan, *supra* note 341, at 317.

402. *See* Wakschlag & Dinerstein, *supra* note 94, at 954 (stating that the ADA's integration mandate "has the potential to begin to reverse the disturbing trend of over-incarceration of people with disabilities").

CONCLUSION

Carceral spaces, like prisons, continue a long tradition of segregating and institutionalizing individuals with disabilities, in settings that are punitive and unable to accommodate disability related needs. Despite this, federal courts have created doctrinal barriers to success in claims brought by incarcerated people with disabilities that have the effect of narrowly interpreting the ADA. In the cases outlined above, courts have focused myopically on linking intent to discrimination despite curial recognition that historically, discrimination against people with disabilities has stemmed from thoughtlessness and benign neglect. Plaintiffs who may be punished in prison for exhibiting disability related behavior may not succeed under the ADA as courts artificially separate disability related conduct from the disability. Courts defer to prison administrations in a manner that reduces the responsibility of administration to justify discriminatory conditions. To avoid the continued dilution and erosion of the ADA in prisons and jails it is important that courts reckon with the discrimination experienced by incarcerated people with disabilities by recognizing disparate impact claims, abandoning undue deference to prison administration, and giving full force to the ADA's integration mandate.