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Betsy Ginsberg

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**Cover Page Footnote**
Acting Assistant Professor, New York University School of Law. This Article was presented at the Fordham Urban Law Journal's Colloquium on Conditions of Confinement. I owe thanks to Alexander Reinert for wise comments on an earlier draft and to David Skillman for excellent research assistance.

# OUT WITH THE NEW, IN WITH THE OLD: THE IMPORTANCE OF SECTION 504 OF THE REHABILITATION ACT TO PRISONERS WITH DISABILITIES

*Betsy Ginsberg*[*]



## INTRODUCTION

While being booked at the Orient Road jail in Tampa, Florida on a traffic warrant, Brian Sterner was subjected to a "routine" pat-down search.

[*] Acting Assistant Professor, New York University School of Law. This Article was presented at the Fordham Urban Law Journal's Colloquium on Conditions of Confinement. I owe thanks to Alexander Reinert for wise comments on an earlier draft and to David Skillman for excellent research assistance.

Mr. Sterner, who is quadriplegic, was ordered to stand for the search. When, for obvious reasons, he remained in his wheelchair, a Sheriff's deputy forcefully dumped him from his chair, while other jail staff looked on. The deputy and another jail official then proceeded to search Mr. Sterner while he lay prone on the floor and when they were through, they dragged him back into his chair. Shortly afterward, jail personnel placed him on the floor of a van without his wheelchair or any other device to keep him secure and transported him approximately four miles to another jail facility.[1] What is most unusual about this incident is not how Mr. Sterner was treated, but that it was actually captured on surveillance video, uncovered by the media, and viewed hundreds of thousands of times on YouTube.[2]

Orient Road Jail and Abu Ghraib notwithstanding, it is highly unusual for the American public to glimpse what goes on behind the walls of our prisons and jails. If they could, they would see all too many incidents like the one involving Mr. Sterner, in which prisoners and detainees with disabilities experience abuse, discrimination, and inequitable access to services. There is a long history of discrimination against prisoners with disabilities, some of which is made public through civil rights litigation brought by prisoners. In one such case, prison officials were found to have denied access to a paralyzed prisoner who was forced to drag his body across the floor to use the commode, which was not adequate to support him.[3] In another case a quadriplegic prisoner was denied access to prison facilities, therapeutic, and religious programs that were available to non-disabled prisoners.[4] In another example, deaf prisoners were denied sign language interpreters for medical appointments and disciplinary hearings.[5]

Congress considered this history of discrimination against prisoners with disabilities in enacting Title II of the Americans with Disabilities Act[6] ("ADA" or "Title II") in 1990, and the Supreme Court unanimously decided more than a decade ago that the law applies to state prisoners.[7]

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1. Casey Cora & Rodney Thrash, *Treatment of Disabled Man Attracts National Spotlight*, ST. PETERSBURG TIMES, Feb. 13, 2008, *available at* http://www.sptimes.com/2008/02/13/news_pf/Hillsborough/Treatment_of_disabled.shtml.

2. *See, e.g.*, YouTube, Deputies Dump Paralyzed Man from Wheelchair, http://www.youtube.com/watch?v=UAGb7_g4Aso (last visited Sept. 27, 2008); YouTube, Police Dump Quadriplegic from Wheelchair, http://www.youtube.com/watch?v=UYMKyJRAabE&feature=related (last visited Sept. 27, 2008).

3. *See* LaFaut v. Smith, 834 F.2d 389, 393-94 (4th Cir. 1987).

4. *See* Love v. McBride, 896 F. Supp. 808 (N.D. Ind 1995).

5. *See* Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995).

6. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §12101 (2006)).

7. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998).

Nonetheless, attempts of state prisoners with disabilities to seek damages[8] for violations of the ADA have often been thwarted, as courts have found states to be immune from suit under the Eleventh Amendment.[9]

While the primary focus of disability rights cases brought by prisoners has been under the ADA, its less comprehensive predecessor statute, Section 504 of the Rehabilitation Act[10] is also applicable in most of these cases and poses fewer sovereign immunity problems. Both statutes continue to be important tools for prisoners and their advocates for several reasons. First, the changing demographics of the prison population reveal that the number of prisoners with disabilities has increased and is likely to continue to increase. Furthermore, there are several reasons why proceeding under Title II or Section 504 offers some advantages over traditional constitutional claims. The federal disability statutes provide, in some circumstances, increased substantive rights for prisoners than does the Constitution. The statutes also promote greater legal access than constitutional claims because they provide for greater access to attorneys' and experts' fees and are not subject to the defense of qualified immunity. Despite the potential advantages that these statutory claims carry, ADA litigants are faced with a significant roadblock in the sovereign immunity that is granted to the states. Given the sovereign immunity problem associated with ADA damages claims, I explore the important differences between the ADA and Section 504 and argue that there are situations in which prisoners and their advocates should take steps to avoid the sovereign immunity problem altogether by suing under Section 504 only.

In Part I, I explore the demographics of the prison population, noting the dramatic increase in prisoners with disabilities and discussing its various causes. Lengthy sentences and the resulting aging of the prison population, the over incarceration of people with mental illness and the link between poverty and disability all contribute to the explosion in the population of disabled prisoners. The importance of the ADA and Section 504 as tools available to prisoners with disabilities is heightened by this demographic shift. In Part II, I continue to address the importance of these statutory claims by highlighting some of their advantages over traditional constitutional claims. I categorize these advantages as either being substantive or

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8. Because a narrow exception to Eleventh Amendment immunity exists for suits brought against individuals in their official capacity, where prospective relief is sought, *Ex parte* Young, 209 U.S. 123, 166-68 (1908), this Article focuses solely on claims for damages. .

9. *See, e.g.*, Kilcullen v. N.Y. State Dep't of Labor 205 F.3d 77, 82 (2d Cir. 2000); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998).

10. Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified at 29 U.S.C. § 794 (2006)).

as pertaining to legal access. With respect to substance, claims under the disability statutes are arguably easier to prove than claims under the Eighth Amendment's prohibition on cruel and unusual punishment because courts have held Eighth Amendment claimants to an extremely stringent standard and because the statutes impose an affirmative obligation upon public entities to provide accommodations for people with disabilities. Furthermore, because there is no respondeat superior liability for Section 1983 claims, these can be more difficult to prove than claims under the disability statutes, which allow for both respondeat superior and entity liability. The statutes also provide better legal access to plaintiffs because ADA and Section 504 defendants are not entitled to claim qualified immunity as are defendants in Section 1983 litigation. Furthermore, the Prison Litigation Reform Act's severe restrictions on attorneys' fees do not apply to the disability statutes. Finally, while fees for expert witnesses are not available to Section 1983 plaintiffs, they are available to ADA claimants. Part II also points out the few, but significant, advantages of constitutional claims over statutory claims for prisoners with disabilities.

Part III discusses how courts have addressed the question of states' sovereign immunity from claims under the ADA and Section 504. It concludes that while sovereign immunity remains a barrier for prisoner plaintiffs bringing ADA claims, sovereign immunity is not a barrier to prisoners' Section 504 claims. Although it appeared that in 2006 the Supreme Court would resolve whether Congress validly abrogated states'sovereign immunity from ADA claims concerning prison conditions, the Court left much of this question open; it has since been addressed in divergent ways by the lower courts. Because Section 504 was enacted pursuant to the Spending Clause, the abrogation analysis is not dispositive for plaintiffs seeking damages from the state. The question of whether states accepting federal funds has constituted a valid waiver of sovereign immunity has been answered uniformly and positively. Part IV addresses the differences between Section 504 and the ADA. While courts regularly find that the statutes are virtually identical, there are some distinctions between them that litigants may need to recognize when determining whether Section 504's sovereign immunity advantage is worth abandoning claims under the ADA. Finally, Part V suggests an approach for litigants that involves abandoning the traditional kitchen-sink approach to civil rights litigation in favor of a more nuanced and strategic approach that takes into account the advantages and disadvantages of statutory versus constitutional claims, the problems posed by sovereign immunity and the differences between the two statutes.

## I. DEMOGRAPHICS OF THE PRISON POPULATION

The ADA and Section 504 are becoming increasingly important tools for prisoners seeking redress through the legal system. This is not only because these statutes offer certain advantages over constitutional claims, as shown below. The demographics of the prison population are such that the population of incarcerated people with disabilities is disproportionately large and growing. There are several reasons for this. First, because our criminal justice system has been imposing longer sentences on people who have been convicted of crimes, the prison population is aging before release. With increased age often comes disability. Next, the deinstitutionalization of people with mental illness in the last half of twentieth century and the lack of adequate mental health treatment have led to the over-incarceration of people with mental disabilities. Finally, because people with disabilities are more likely than the non-disabled to live in poverty and because there are close links between poverty and crime, people with disabilities are overrepresented in prison.

In recent years, states have enacted legislation and promulgated policies that have greatly affected the make-up of the prison population. Not only have approximately half of the states enacted "three strikes" legislation,[11] but many states have also enacted both "truth in sentencing" laws that ensure that offenders serve far longer sentences than previously, and parole policies that delay or deny release to prisoners serving indeterminate sentences.[12] Furthermore, many states have adopted laws requiring certain offenders to serve sentences of life without the possibility of parole, ensuring that these prisoners age and eventually die inside prison.[13] These harsh sentencing policies, requiring lengthy prison sentences necessarily lead to people growing old in prison.[14]

In fact, elderly prisoners—those over the age of fifty—are the fastest growing age group in the prison population. For example, in California,

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11. RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, AGING BEHIND BARS: "THREE STRIKES" SEVEN YEARS LATER (2001), *available at* http://sentencingproject.org/Admin/Documents/publications/inc_aging.pdf.

12. RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 10-11 (2003).

13. Catherine Appleton & Bent Grover, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY. 597 (2007) (noting that most states that permit the death penalty require a sentence of life without parole for anyone convicted of capital or first degree murder and that many states require life without parole sentences for crimes involving homicide as well as drug offenses, greatly increasing the number of prisoners who age and die in prison).

14. ADAY, *supra* note 12, at 11.

13% of the prison population is fifty years old or older; as a decade ago, the elderly population made up only 6% of the population.[15]

Recognizing that their prison populations are aging, some states have built prisons specifically designed to address the needs of the growing population of prisoners with disabilities.[16] As the Department of Justice recently commented in its findings relating to its proposed amendments to the Title II regulations, "[w]ith thousands of prisoners serving life sentences without eligibility for parole, prisoners are aging, and the prison population of individuals with disabilities and elderly individuals is growing."[17] Physical and mental changes often come with age, such as progressive loss of physical mobility, hearing, and sight, as well as decreased mental capacity.[18] While the types of geriatric mental health problems are substantially the same as those experienced by the general population, there is a greater prevalence of such problems among the older prison population.[19] Similarly, there is a greater incidence of physical disabilities among elderly prisoners.[20]

In addition to harsh sentencing laws contributing to the increase in people with disabilities who are in prison, the over-incarceration of people with mental disabilities further increases these numbers. Individuals with mental illness are significantly overrepresented in our prisons. While about 5% of the general population suffers from mental illness, studies show that between 8% and 19% of the prison population has a significant psychiatric disability and an additional 15% to 20% of prisoners will require some form of mental health intervention during the course of their incarcera-

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15. Don Thompson, *Aging Inmates Add to Prison Strain in California*, S.F. GATE, July 5, 2008, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/07/05/state/n090037D66.DTL&tsp=1 (discussing the rising costs to California taxpayers of caring for more elderly prisoners serving longer sentences under California's Three Strikes Rule).

16. Angel Riggs, *Now in Business: Handicapped Accessible Prison; State Opens First Prison for Disabled*, TULSA WORLD, Feb. 20, 2007, *available at* http://www.tulsaworld.com/news/article.aspx?articleID=070220_Ne_A1_pstxc44709.

17. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,465, 34,494 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35, 36) (discussing the reasons for the increased numbers of complaints concerning a lack of accessible cells by disabled inmate).

18. *See* ADAY, *supra* note 12, at 19-20.

19. Jill Doerner et al., The Consequences of Incarceration on Aging Prisoners: An Examination of Well-Being and Overall Health Outcomes, Presentation at the annual meeting of the, Am. Soc'y of Criminolgy, Atlanta Marriott Marquis, Atlanta, Georgia, Nov. 14, 2007, *available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/0/1/2/1/p201213_index.html*.

20. *Id.*

tion.[21] Although estimates of the size of the population of prisoners with mental disabilities vary, there is a consensus that they are disproportionately represented in prisons, causing concerns that our prisons are warehouses for the mentally ill.[22] Many attribute the ever growing number of the incarcerated mentally ill to the deinstitutionalization of fifty years ago.[23] With the closing of public mental hospitals, hundreds of thousands of people with mental illness were released to communities that were and continue to be ill-prepared to care for them. The utter lack of community mental health services, particularly for the poor, has resulted in the criminalization of the mentally ill.[24]

Finally, because disability and poverty are closely linked and because poverty and incarceration are closely linked, there is likely to be an overrepresentation of people with disabilities in prisons. Living with a disability is often a cause of poverty; a life of poverty can cause or exacerbate disabilities.[25] The clear link between poverty and committing crime[26] indicates a likelihood that people with disabilities will be overrepresented in prisons.

## II. ADVANTAGES OF STATUTORY DISABILITY-RIGHTS CLAIMS OVER CONSTITUTIONAL CLAIMS

The federal disability statutes are not only of great interest because of the increased number of people with disabilities behind bars who might seek to enforce them, but also because they provide prisoners with disabilities with significant advantages over more traditional constitutional claims. This Article characterizes some of these advantages as substantive; that is, they provide litigants with more favorable standards, making it easier to

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21. HUMAN RIGHTS WATCH, ILL EQUIPPED, U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 2003, at 17 (2003) [hereinafter ILL EQUIPPED].

22. *See, e.g.*, *id.* at 18; William Kanapaux, *Guilty of Mental Illness*, PSYCHIATRIC TIMES, Jan. 1, 2004, http://www.psychiatrictimes.com/display/article/10168/47631?pagenumber=1.

23. In the mid-twentieth century, people with severe psychiatric disabilities were generally housed in mental hospitals. For a number of reasons, including the horrible conditions of these hospitals and the advent of new psychiatric medications, starting around 1960, the process of deinstitutionalizing the mentally ill began. *See* ILL EQUIPPED, *supra* note 21, at 19-20.

24. *Id.* at 19-21. This is a crude explanation for a complicated phenomenon. For purposes of this Article, however, what is important is an understanding that our prisons are filled with people with disabilities.

25. Sam Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 6 (2004) (citing COMM. ON A NAT'L AGENDA FOR THE PREVENTION OF DISABILITIES, INST. OF MED., DISABILITY IN AMERICA: TOWARD A NATIONAL AGENDA FOR PREVENTION 47 (1991)).

26. *See, e.g.*, Richard A. Berk et al., *Crime and Poverty: Some Experimental Evidence from Ex-Offenders*, 45 AM. SOC. REV. 766, 766 (1980).

prevail on claims of disability-based discrimination or lack of program access. Others of these advantages the Article categorizes as pertaining to legal access, enabling prisoners to even have their claims heard on the merits at all.

### A. Advantages of Statutory Claims: Issues of Substantive Law

#### *1. Eighth Amendment Claims*

The Eighth Amendment's prohibition against cruel and unusual punishment is the predominant constitutional provision cited by prisoners with disabilities challenging their treatment in prison. A plaintiff seeking to challenge the conditions of his or her confinement under the Eighth Amendment must show that prison officials showed deliberate indifference to a serious need.[27] Thus, the test for whether prison officials have violated the Eighth Amendment contains both a subjective and an objective element. A plaintiff seeking relief under the disability statutes must show that he or she is a qualified individual with a disability who has been denied the programs, services, or activities of a public entity or who has experienced discrimination by the public entity because of his or her disability.[28]

The deliberate indifference standard under the Eighth Amendment is similar to the requirement that plaintiffs seeking compensatory damages under Title II and Section 504 show discriminatory intent on the part of prison officials. Under the Eighth Amendment, deliberate indifference requires a showing that a prison official disregarded a risk of harm of which he was aware.[29] Unlike deliberate indifference in other contexts,[30] here it is truly a subjective standard; that prison officials *should* have known that a risk of harm does not meet the standard.[31]

Liability under Title II and Section 504 does not require proof of intent. However, because this Article focuses on a disabled prisoner's ability to pursue damage claims, it is important to note that in the Title II and Section 504 contexts, most courts have described the state of mind required to ob-

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27. Farmer v. Brennan, 511 U.S. 825, 837 (1994); Wilson v. Seiter, 501 U.S. 294, 304-05 (1991).

28. 42 U.S.C. § 12132 (2006); United States v. Georgia, 546 U.S. 151, 143 (2006).

29. *Farmer*, 511 U.S. at 842.

30. *See* City of Canton v. Harris, 489 U.S. 378, 391 (1989) (holding that deliberate indifference is the standard for determining whether municipalities are liable under 42 U.S.C. § 1983 for failure to train officials resulting in constitutional deprivations, and that the standard is an objective one).

31. *Farmer*, 511 U.S. at 839-43.

tain compensatory damages as deliberate indifference.[32] However, there is no clear or universal interpretation of what deliberate indifference means in this context. It seems that at least some courts treat the standard as an objective one,[33] while others do not make clear whether the standard is objective or subjective.[34] Very little can be drawn from any possible distinction between the Eighth Amendment deliberate indifference standard and the ADA/Section 504 deliberate indifference standard. It is impossible to say with a degree of certainty that a court would apply a more favorable deliberate indifference standard to claims brought under the disability statutes than to those brought as Eighth Amendment Claims. This is particularly so as the line between the subjective and objective versions of deliberate indifference are not always plain. For instance, the obviousness of a risk of harm may support an inference of actual knowledge under the subjective Eighth Amendment standard[35], whereas an obvious risk under the objective standard can support a finding of constructive knowledge. Thus, the Title II state of mind requirement is either the same or slightly more favorable to plaintiffs than the Eighth Amendment standard.

The objective prong of the Eighth Amendment test requires that the deliberate indifference be to "excessive risks to inmate health or safety"[36] or that the conditions at issue be "sufficiently serious."[37] Title II and Section 504 have no such requirements, and this is where the statutes may be seen to provide a more favorable standard for plaintiffs than the Eighth Amendment. The statutes require that prisoners with disabilities are provided with access to programs, services, and activities that the prison provides to the general population. Failure to provide qualified prisoners with disabilities access to certain prison services, such as showers and toilets, would likely

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32. S*ee, e.g.*, Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 89 (2d Cir. 2004); Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999); Ferguson v. City of Phoenix, 157 F.3d 668, 675 (9th Cir. 1998).

33. Duvall v. County of Kitsap*,* 260 F.3d 1124 (9th Cir. 2001) (holding that "[d]eliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood"). *Id.* at 1139. For this proposition, the court cited *City of Canton v. Harris*, 489 U.S. 378 (1989), which held that deliberate indifference in the context of claims against a municipality under 42 U.S.C. § 1983 does not have a state of mind requirement and required a showing of obviousness.

34. Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds by* 527 U.S. 1031 (1999).

35. *Farmer*, 511 U.S. at 842-43; *see, e.g.*, Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) (stating deliberate indifference supported by "obvious and pervasive nature" of challenged conditions).

36. *Farmer*, 511 U.S. at 836.

37. Chandler v. Crosby, 379 F.3d 1278, 1289 (11th Cir. 2004).

violate the Eighth Amendment as well as the disability statutes.[38] It is, however, unlikely that the Eighth Amendment would provide relief to a prisoner who was denied access to educational or vocational programs on the basis of disability.

Perhaps even more advantageous to ADA and Section 504 litigants is the statutes' affirmative obligation imposed upon public entities to make reasonable modifications so that people with disabilities can participate in its programs and activities.[39] A reasonable modification claim does not require a plaintiff to show intentional discrimination on the part of a prison official. The ADA's requirement that public entities provide reasonable accommodations is not, however, without limits. Defenses available to public entities permit them to deny accommodations that are unreasonable or that fundamentally alter the nature of the program, service, or activity.[40] Nonetheless, the Eighth Amendment imposes no such affirmative burden to accommodate on prison officials.

There are, of course, prison conditions experienced by people with disabilities that cannot provide the basis for a claim under the ADA or Section 504, but that do sound in the Eighth Amendment. Most notable among these are claims regarding inadequate medical treatment by prison authorities. Claims regarding poor medical treatment are simply not litigable under the statutes unless the lacking treatment can be adequately connected to the prison's failure to make prison programs available to people with disabilities or to disability-based discrimination.[41] These claims are, however, properly litigated under the Eighth Amendment.[42]

### *2. Respondeat Superior and Entity Liability*

Under Section 1983, state officials cannot be held liable for the acts of their agents on a *respondeat superior* basis.[43] Furthermore, states and their

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38. *See* Miller v. King, 384 F.3d 1248, 1261-62 (11th Cir. 2004) (holding that allegations by paraplegic prisoner of denial of*, inter-alia*, wheelchair-accessible showers and toilets, raised issues of material fact under the Eighth Amendment), *vacated and superseded on other grounds by* 449 F.3d 1149 (11th Cir. 2006).

39. *See, e.g.*, 28 C.F.R. § 35.130(b)(7) (2007); Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000).

40. § 35.130(b)(7).

41. *See, e.g.*, Rashad v. Doughty, 2001 WL 68708, at *1 (10th Cir. 2001); Bryant v. Madigan, 84 F.3d 246 (7th Cir. 1996).

42. Estelle v. Gamble, 429 U.S. 97 (1976).

43. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (holding that municipalities cannot be held liable on a respondeat basis); Robbins v. Oklahoma, 519 F.3d 1242 (10th Cir. 2008) (holding that there is no respondeat superior liability for state officials under Section 1983). The *Monell* court held that while a municipality cannot be held vicari-

agencies cannot be held liable under Section 1983.[44] Although Section 1983 permits supervisory liability against state officials, such liability can only be premised upon a showing of the supervisor's personal involvement in the commission of the wrong.[45] Conversely, Title II and Section 504 permit entity liability as well as suits against states and state agencies on a respondeat superior theory.[46] The ability to hold officials vicariously liable for the actions of their subordinates can be a significant litigation advantage. For instance, at the pleading stage of an ADA or Title II case, it is not necessary to know the names of the individuals involved in committing the violation when suing agencies. However, in Section 1983 cases, the individuals alleged to have been involved in the constitutional violation must generally be named at the outset.[47] Additionally, recovering damages from the entity is often easier than from individual officers (who may not have adequate resources) in cases in which the state does not indemnify its officers.[48]

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ously liable under Section 1983 for the acts of its employees, entity liability is possible, but only where the plaintiff can prove that the unconstitutional act was a result of an unconstitutional policy. 436 U.S. at 691.

44. Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989). Municipalities, on the other hand, can be held liable for the unconstitutional acts of their employees, but only where those acts were the result of a municipal policy, practice, or custom. *Monell*, 436 U.S. at 690. It is, however, notoriously difficult for plaintiffs to prevail on these policy-based claims. Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System,* 95 GEO. L.J. 591, 621 (2007).

45. *See, e.g.*, Hydrick v. Hunter, 500 F.3d 978 (9th Cir. 2007). To establish supervisory liability, a plaintiff must show that the official was either directly involved in committing the wrong, that she directed others to commit it, or that she was in a position to prevent the wrong and failed to do so. *Id.* at 988.

46. *See* Bonner v. Lewis, 857 F.2d 559, 566-67 (9th Cir. 1988). Of course, in courts that find Congress not to have validly abrogated states' sovereign immunity with respect to Title II, plaintiffs will not be able to sue states and their agencies because they will be entitled to sovereign immunity.

47. Courts do allow plaintiffs to allege claims against unnamed defendants or "doe defendants" but most courts require plaintiffs to discover these names before the statute of limitations has run. *See* Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 470 (2d Cir. 1996), *amended by* 74 F.3d 1366 (2d Cir. 1996). The only circuit to rule that where the plaintiff did not know the name of the officer at the time of filing, and later amends the complaint to include the officer's identify after the statute of limitations has run, the complaint is found to relate back to the original filing is the Third Circuit. *See* Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 202-03 (3d Cir. 2001).

48. Indemnification of state officials is a matter of state law, which varies from state to state. Although state actors are generally indemnified for costs associated with civil rights litigation, this is by no means universal, as state laws contain provisions for denying reimbursement for various reasons, including the nature of the conduct at issue in the litigation. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 586 n.12 (1998).

### B. Advantages of Statutory Claims: Legal Access

#### *1. Qualified Immunity*

Qualified immunity is a defense frequently asserted by government officials performing discretionary functions in civil rights cases brought by prisoners. It shields them from damages liability if their conduct is objectively reasonable in light of clearly established federal law.[49] It is meant to be asserted and addressed early in litigation so as to avoid the public cost of government litigation, and in particular the cost of broad discovery,[50] and to avoid diverting public officials' attention from performing their duties and toward defending lawsuits.[51] As many scholars have noted, qualified immunity presents a significant barrier to plaintiffs seeking damages for constitutional violations.[52] Even in cases in which the court ultimately does not grant the defendant qualified immunity, the defense still serves as an obstacle to the litigation of a prisoner's Section 1983 claim because defendants who have been denied qualified immunity by a trial court can tie up litigation for long periods of time and significantly delay a plaintiff's recovery by making an interlocutory appeal of that decision.[53] Not only might an appeal occupy the time and energy of plaintiff's counsel, but discovery, at least with respect to the defendants asserting qualified immunity, is likely to be stayed pending the decision on appeal.[54]

While a qualified immunity defense is likely to derail a prisoner's Section 1983 action, it is not an available defense under Title II. Qualified immunity is a personal defense available only to individuals.[55] In suits for damages under Title II, the proper defendants are public entities, not indi-

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49. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978)).

50. Crawford El v. Britton, 523 U.S. 574, 597-98 (1998).

51. *Harlow*, 457 U.S. at 814 (citing Gregoire v. Biddle, 339 U.S. 949 (1950)).

52. One small study of federal cases showed that the defense of qualified immunity was granted in 80% of cases. *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999); *see also* Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution,* 34 IDAHO L. REV. 61, 68 (1997) (noting that "qualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through").

53. Mitchell v. Forsyth, 472 U.S. 511, 528-30 (1985).

54. Because one of the purposes of granting qualified immunity to government officials is to allow them to avoid onerous discovery where their conduct was not in violation of clearly established law, discovery will almost always be stayed pending a decision on qualified immunity by the district and circuit courts. *Harlow*, 457 U.S. at 818 (stating that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed").

55. Owen v. City of Independence, 445 U.S. 622, 638 (1980).

viduals.[56] Thus, courts have generally found, and scholars agree, that qualified immunity is not available in suits for damages under Title II.[57]

### *2. Attorney's Fees*

Prisoner litigation changed dramatically with the passage of the Prison Litigation Reform Act[58] ("PLRA") in 1996.[59] According to the statute's sparse legislative history, it was passed to reduce frivolous litigation by prisoners and to limit the reach of federal court jurisdiction over prisoners' civil rights claims.[60] The PLRA restricts prisoners' access to the courts and, for those prisoners who make it there, impedes their ability to obtain relief.[61] For example, unlike other indigent civil litigants, the $350 federal district court filing fee is not waived for prisoners wishing to proceed *in forma pauperis*.[62] The PLRA also contains a stringent requirement that all prisoners wishing to challenge the conditions of their confinement exhaust all administrative remedies.[63] Prisoner litigants who are not barred at the courthouse door are subject to the PLRA's provision barring actions for damages for mental or emotional injury in the absence of physical injury.[64]

The PLRA's provisions generally apply to all federal lawsuits brought by prisoners, including those raising Title II and Section 504 claims. How-

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56. *See, e.g.*, Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir. 2001); Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999).

57. Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000). *But see*, Hall v. Thomas, 190 F.3d 693, 696-97 (5th Cir. 1999); Key v. Grayson, 179 F.3d 996, 999-1000 (6th Cir. 1999). Both of these decisions granted qualified immunity to defendants in a Title II claim, but neither case considered whether individuals can even be proper defendants in the first place. *See Walker*, 213 F.3d at 346; *see also* Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1929 (2007).

58. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

59. Margo Schlanger, *Inmate Litigation* 116 HARV. L. REV. 1555, 1557 (2003).

60. 141 CONG. REC. S14312-03 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).

61. *See* John Boston, *The Prison Litigation Reform Act, The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001); Margo Schlanger, *The Politics of Inmate Litigation*, 117 HARV. L. REV. 2799 (2004); Giovanna Shay, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting The Prison Litigation Reform Act*, 29 CARDOZO L. REV. 291 (2007).

62. 28 U.S.C. § 1915 (a)-(b) (2006).

63. 42 U.S.C. § 1997e(a) (2006).

64. *Id.* § 1997e(e). That prisoners cannot seek damages for mental or emotional injury where physical injury is not attendant presents the question of whether a prisoner who was denied access to prison programs, services, and activities or who otherwise experienced discrimination by prison officials on the basis of disability who could not show concomitant physical injury could even seek damages under the federal disability statutes. One could easily imagine such claims: a deaf prisoner who was denied a sign language interpreter at medical appointments and disciplinary hearings or a blind prisoner who was not provided legal materials in alternative format.

ever, one particular provision—the statute's restriction on attorneys' fees—does not seem to apply to Title II and Section 504 litigation brought by prisoners. While prevailing civil rights plaintiffs are generally able to recover reasonable, market-rate attorney's fees,[65] the PLRA severely restricts the fees available to these prisoner-plaintiffs. Specifically, the statute restricts fees awarded pursuant to 42 U.S.C. § 1988 to 150% of the Criminal Justice Act ("CJA") rate,[66] and states that up to 25% of money judgments must be used to satisfy attorneys' fees claims, and prohibits attorneys' fees awards to defendants greater than 150% of money judgments.[67] Although a stated purpose of the PLRA is to reduce *frivolous* prisoner litigation, the statute severely restricts the attorneys' fees that are available to other prevailing civil rights litigants.

It is not clear why the fees provision does not restrict ADA and Section 504 litigants, or whether this exclusion is anything more than a drafting oversight. Inexplicably, there is no uniformity in the statutory language among the provisions of the PLRA with respect to what types of actions are covered by each provision. For instance, the limitation on recovery for mental or emotional injury applies to "federal action[s] brought by a prisoner," whereas the administrative exhaustion provision applies to "action[s] brought with respect to prison conditions under Section 1983 . . . or any other federal law, by a prisoner . . . ." Nonetheless, it is clear from the language of the statute that these two and most other provisions of the statute apply to ADA and Section 504 litigation.

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65. In 1976 Congress enacted the Civil Rights Attorney's Fees Awards Act, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C § 1988 (2006)), in an effort to increase the likelihood that victims of civil rights violations would be able to seek legal redress. Section 1988 provides: "[i]n any action or proceeding to enforce a provision [of civil rights statutes, including 42 U.S.C. §1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

66. In some jurisdictions, the base rate used to calculate PLRA fees is the rate authorized by the Judicial Conference, based on inflation. *See, e.g.*, Webb v. Ada County, 285 F.3d 829, 839 (9th Cir. 2002) (applying 150% multiplier to maximum CJA rate, not the lower actual rate implemented in the District of Idaho due to lack of congressional funding). In other jurisdictions, in which the authorized rate is not actually paid to attorneys due to budget shortfalls, the base rate used to calculate the rate for prisoners' attorneys is the actual CJA rate paid to attorneys. *See* Hernandez v. Kalinowski, 146 F.3d 196, 201 (3d Cir. 1998) (holding the authorized rate that was not "implemented" due to budgetary constraints was not the "established" rate for PLRA purposes); Jackson v. Austin, 267 F. Supp. 2d 1059, 1064-65 (D. Kan. 2003) (assuming the lower funded rates apply).

67. 42 U.S.C. § 1997e(d) (2006). The statute also requires fees to be directly and reasonably incurred in proving violation of the plaintiff's rights and that either the amount of the fee was proportionately related to the relief awarded by the court for the violation, or the attorney's fees were incurred in enforcing a court's order of relief. *Id.*

The provision limiting attorneys' fees, however, applies only to actions in which "fees are authorized by Section 1988 of [Title 42]."[68] 42 U.S.C. § 1988, is the statute authorizing attorneys fees for prevailing plaintiffs under 42 U.S.C. § 1983. Prevailing plaintiffs suing under the ADA and Section 504 are entitled to fees under entirely separate fee provisions.[69] Whether or not Congress intended for the restrictions on attorneys' fees to apply in all prison conditions cases or simply those brought under Section 1983, it seems clear from the language of the statute that ADA and Section 504 litigants are not subject to the PLRA's fee restrictions.[70] Courts that have addressed this issue have all found that the attorney fee award limitations of the PLRA did not limit fee awards to prisoner plaintiffs to the extent that such fees were sought under attorney fee provisions of the ADA and Rehabilitation Act.[71]

The difference in fees available to plaintiffs in cases not restricted by the PLRA can be overwhelming, which is a factor that can severely limit a prisoner's ability to retain competent counsel in civil rights cases.[72]

### *3. Expert Fees*

Just as fee-shifting provisions that permit a prevailing civil rights plaintiff to recover attorneys' fees from defendants encourage the private enforcement of civil rights laws, so do provisions that similarly require defendants to pay the fees of expert witnesses hired by plaintiffs. The inability to recover the usually steep cost of hiring an expert witness can make civil rights cases unappealing and risky to plaintiffs' counsel.[73] Expert witness presentation is crucial to the success of civil rights cases.[74] Prisoner's rights cases frequently involve the use of expert testimony. Prison security experts are regularly called upon to testify in a variety of

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68. *Id.*

69. 42 U.S.C. § 12205 (ADA fee provision); 29 U.S.C. § 794a (2006) (Section 504 Fee Provision).

70. The statute applies to "any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, *in which attorney's fees are authorized under section 1988.*" 42 U.S.C. § 1997e(d)(1) (emphasis added).

71. See Armstrong v. Davis, 318 F.3d 965, 974 (9th Cir. 2003); McClendon v. City of Albuquerque, 272 F. Supp. 1250 (D.N.M. 2003); Beckford v. Irvin, 60 F. Supp. 2d 85, 88 (W.D.N.Y. 1999); D.M. v. Terhune, 67 F. Supp. 2d 401, 412 (D.N.J. 1999).

72. *See* Lynn Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees* 89 CAL. L. REV. 999, 1010 (2001).

73. T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning,* West Virginia University Hospitals, Inc. v. Casey*, and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 706-07 (1992).

74. *Id.* at 711.

types of prisoner suits. Medical and psychiatric experts are regularly employed in cases involving inadequate medical and mental health treatment for prisoners and in disability rights cases brought by prisoners.

The Civil Rights Attorney's Fees Award Act[75], the fee-shifting statute governing Section 1983 has been interpreted by the Court not to permit prevailing plaintiffs to recover fees for expert testimony.[76] The ADA, as noted above, has its own fee-shifting provision, however.[77] The fee shifting provision of the ADA has been interpreted to permit prevailing plaintiffs to recover expert fees.[78] Given the importance of expert testimony in prisoner civil rights cases, this difference between the ADA and constitutional claims brought under Section 1983 is clear. As mentioned below, Section 504 does not permit plaintiffs to recover expert fees.

### *4. Punitive Damages*

One advantage to constitutional claims brought under Section 1983 that should be acknowledged is that punitive damages are permissible, whereas they are held to be unavailable under the disability statutes. Under Section 1983, punitive damages are available when the plaintiff shows "reckless or callous disregard for the plaintiff's rights."[79] Because this standard has significant overlap with the Eighth Amendment standard for compensatory liability, punitive damages are actually frequently awarded in cases in which prisoners win at trial.[80] The Supreme Court has made clear, how-

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75. 42 U.S.C. § 1988 (2006).

76. W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 92 (1991).

77. 42 U.S.C. § 12205 (2006) ("In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.").

78. *See, e.g.*, Lovell v. Chandler, 303 F.3d 1039, 1058 (9th Cir. 2002). In *Lovell*, the court found that the language of 42 U.S.C. § 12205 had been interpreted in other contexts to cover expert fees. The court also found that the ADA's regulations and its legislative history supported its interpretation. The court noted that the preamble to the ADA Title II regulations states that "[l]itigation expenses include items such as expert witness fees, travel expenses, etc." 28 C.F.R. § 35, app. A (2007). Further, as the *Lovell* court noted, the ADA's legislative history also makes clear that Congress intended the ADA's fee shifting provision to cover expert fees. *See* H.R. REP. NO. 101-485(III), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 496 ("Litigation expenses include the costs of expert witnesses. This provision explicitly incorporates the phrase 'including litigation expenses' to respond to rulings of the Supreme Court that items such as expert witness fees, travel expenses, etc., be explicitly included if intended to be covered under an attorney's fee provision.").

79. Smith v. Wade, 461 U.S. 30, 51 (1983).

80. *See* Schlanger, *supra* note 59, at 1606-07 (attributing the high rate of punitive damages awards in cases in which prisoners win at trial to the stringent standard for awarding prisoner-plaintiffs compensatory damages).

ever, that Title II and Section 504 do not allow for punitive damages awards.[81]

While the federal disability statutes provide significant substantive and strategic advantages over traditional constitutional claims to prisoners seeking money damages, the ADA carries with it the separate problem of sovereign immunity. Section 504, on the other hand, does not present prisoner-plaintiffs with this hurdle.

## III. THE ADA, SECTION 504 AND SOVEREIGN IMMUNITY

The ADA has been described as "the most comprehensive civil rights measure" passed since the 1960s.[82] Congress passed the ADA in 1990 in order to address disability-based discrimination in employment (Title I),[83] public services (Title II),[84] and public accommodations (Title III).[85] As scholars and disability rights advocates have pointed out, and as Congress has recently recognized, the statute's goal of providing a "broad scope of protection" from disability-based discrimination has been frustrated by the courts.[86] In passing the ADA Amendments Act of 2008, Congress specifically rejected the Supreme Court's interpretations of the statute with respect to who is considered disabled under the law and engaged in a conversation with the courts about who is meant to be protected by the law.[87]

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81. Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under Title II of the ADA and Section 504 of the Rehabilitation Act. Barnes v. Gorman, 536 U.S. 181, 189 (2002) (holding that because the ADA and Section 504 clearly incorporate the remedies permitted under Title VI, and because punitive damages may not be awarded in private suits under Title VI, punitive damages are not permissible under the ADA and Section 504).

82. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 414 (1991).

83. 42 U.S.C. §§ 12111-12117 (2006).

84. *Id.* §§ 12131-12165.

85. *Id.* §§ 12181-12189.

86. *See* Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 4 (2007);

87. ADA Amendments Act of 2008 states as its purpose:

> (2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
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> (3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad

This bill, which was signed into law by President Bush on September 25, 2008, will protect a far broader class of people than it has under the current judicial interpretations of the law.

Placing strict limitations on who is considered disabled under the law is not the only way in which the courts have thwarted congressional intent with respect to the ADA. In passing the original statute, Congress made clear that states "shall not be immune under the eleventh amendment to the Constitution . . . from an action in federal or State court . . . for a violation of [the statute]."[88] Despite Congress's explicit abrogation of state sovereign immunity, the courts have not uniformly held that people with disabilities are entitled to sue states for damages and the Supreme Court's decisions on this question have not fully resolved the issue.

Congress can abrogate a state's sovereign immunity through legislation enacted pursuant to Section 5 of the Fourteenth Amendment.[89] In the last decade and a half, the Court has taken a particularly restrictive view of Congress's authority to abrogate states' immunity by enacting legislating pursuant to Section 5.[90] Section 5 empowers Congress to remedy both past

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> view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
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> (4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
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> (5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
>
> (6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554 (2008).

88. 42 U.S.C. § 12202 (2006).

89. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).

90. The Eleventh Amendment has been interpreted to bar suits by private individuals against states when their sovereign immunity has not been waived or abrogated. The Supreme Court's decision in *Seminole Tribe* marks the beginning of its restrictive view of

violations of constitutional rights as well as to enact "prophylactic legislation" that prohibits constitutionally permissible conduct in order to deter unconstitutional conduct. The Court is often divided over the extent of Congress's authority to abrogate states' immunity with respect to conduct that is itself not violative of Section 5; the ADA has been central to this debate.[91]

The Supreme Court first addressed state sovereign immunity in the ADA context in *Board of Trustees of the University of Alabama v. Garrett*, holding that the Eleventh Amendment barred damages actions against states for damages brought under Title I of the ADA.[92] In *Garrett*, the Court found that there was not sufficient history of a pattern of unconstitutional employment discrimination by the states and that the statutory response was not proportional to the violations.[93] The *Garrett* Court specifically left open the question of whether Congress had validly abrogated state sovereign immunity in enacting Title II of the ADA.[94] Nonetheless, many lower courts relied on *Garrett* to find that Congress did not validly abrogate sovereign immunity in enacting Title II.[95]

The Title II question had the disability legal community and state attorneys general waiting on pins and needles for several years[96] before the Su-

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Congress's power to abrogate state sovereign immunity. There, the Court held that Congress's power to abrogate sovereign immunity was limited to its efforts to enforce the Fourteenth Amendment. A year later, in *City of Boerne v. Flores*, the Court imposed significant limitations on the Congress's power to enforce the Fourteenth Amendment, holding that Congress's powers under Section 5 of the Fourteenth Amendment are limited to enforcing its actual substantive guarantees. In order for legislation to be a valid exercise of congressional power to enforce the Fourteenth Amendment, Congress must make specific findings that the states have violated the Constitution. Even if those findings are made, the resulting legislation to enforce the Fourteenth Amendment must be congruent and proportional to the harm sought to be prevented. City of Boerne v. Flores, 521 U.S. 507, 519 (1997). For a discussion of the Court's restrictive views on abrogation of sovereign immunity, see Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and the Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 157-58 (2002); *see also* Jaclyn A. Okin, *Has the Supreme Court Gone Too Far?: An Analysis of University of Alabama v. Garrett and Its Impact on People with Disabilities*, 9 AM. U. J. GENDER SOC. POL'Y & L. 663, 689 (2001).

91. United States v. Georgia, 546 U.S. 151, 158 (2006) (acknowledging split amongst the members of the Court concerning Congress's enforcement power).

92. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001).

93. *Id.* at 372-73.

94. *Id.* at n.1.

95. *See, e.g.*, Reickenbacker v. Foster, 274 F.3d 974, 981-83 (5th Cir. 2001); Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001), *amended by* 278 F.3d 1020, 1034 (10th Cir. 2001).

96. The Court had actually granted certiorari to address the Title II question three times prior to *Garrett*. *See* Med. Bd. v. Hason, *cert. granted*, 537 U.S. 1028 (2002), *cert. dismissed* on motion of petitioner, 538 U.S. 958 (2003); *Garrett*, 531 U.S. at 360 n.1 (dismissing as improvidently granted that portion of the writ of certiorari addressing Title II); Als-

preme Court granted certiorari in *Tennessee v. Lane* in 2003. At this point the circuits were deeply divided, with five of them holding that Congress had exceeded its authority in enacting Title II,[97] three of them holding that at least in some respects, Congress properly abrogated the states' immunity,[98] and with petitions pending in the remaining four circuits.[99]

In *Lane*, the Court chose to address the question of whether Congress was within its authority to enact Title II on an as-applied basis, and held that Title II was validly enacted pursuant to Section 5 with respect to the fundamental right of access to courts.[100] Having avoided the question of whether Congress validly abrogated states' immunity with respect to Title II as a whole, the fate of prisoner damages actions under the ADA was still up in the air after *Lane*.

In the aftermath of *Lane*, few courts addressed its impact on Title II cases brought by prisoners[101] before the Court granted certiorari a year later in another Title II case, this one brought by a prisoner.[102] In *United States v. Georgia*, the plaintiff, Tony Goodman—who had paraplegia and used a wheelchair for mobility—alleged that he was held in a Georgia prison for more than twnety-three hours a day in a cell so narrow that he could not turn his wheelchair. He further claimed that prison toilet and bathing facili-

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brook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc), *cert. granted and cert. dismissed*, (dismissed by agreement of the parties); *see also* Petition for Writ of Certiorari, Tennessee v. Lane, 539 U.S. 941 (2003) (No. 02-1667).

97. *See* Wessel v. Glendening, 306 F.3d 203, 215 (4th Cir. 2002); Randolph v. Rodgers, 253 F.3d 342, 345 & n.4 (8th Cir. 2001); Thompson v. Colorado, 278 F.3d 1020, 1034 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002); Reickenbacker v. Foster, 274 F.3d 974, 983 (5th Cir. 2001); Walker v. Snyder, 213 F.3d 344, 347 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001).

98. See Hason v. Med. Bd., 279 F.3d 1167, 1170 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 958 (2003); Garcia v. S.U.N.Y. Health Scis. Ctr., 280 F.3d 98, 111-12 (2d Cir. 2001); Popovich v. Cuyahoga County Ct., 276 F.3d 808, 813-16 (6th Cir. 2002) (en banc).

99. *See* Goodman v. Ray, 449 F.3d 1152 (11th Cir. 2006); Barbour v. WMATA, 374 F.3d 1161 (D.C. Cir. 2004); Kiman v. N.H. Dep't of Corr., 332 F.3d 29 (1st Cir. 2003), *vacated by* 332 F.3d 29 (1st Cir. Jun 13, 2003); Bowers v. NCAA, 346 F.3d 402 (3d Cir. 2003).

100. 541 U.S. 509, 518 (2004).

101. Three circuits addressed the issue in this period. The Third Circuit held that Congress did not validly abrogate the states' sovereign immunity where the issue at stake was a prisoner's rights under the Equal Protection Clause. *See* Cochran v. Pinchak, 401 F.3d 184, 193 (3d Cir. 2005), *vacated by* Cochran v. Pinchak, 412 F.3d 500 (3rd Cir. 2005). The Eleventh Circuit similarly held that abrogation was not valid where the issue at stake was a prisoner's right to be free from cruel and unusual punishment. *See* Miller v. King, 449 F.3d 1149 (11th Cir. 2006). The Ninth Circuit held that its pre-*Lane* holding that Title II in its entirety was validly enacted pursuant to Section 5 and thus that Congress validly abrogated sovereign immunity as to all of Title II remained good law after *Lane*. *See* Phiffer v. Columbia River Corr. Inst. 384 F.3d 791 (9th Cir. 2004).

102. Goodman v. Georgia, 544 U.S. 1031 (2005).

ties were not accessible to him such that he was forced to sit in his own feces and urine, and that he was excluded from prison educational and religious programs because of his disability.[103] The Court's decision in Mr. Goodman's case was unusual amongst its recent Eleventh Amendment decisions in that it was unanimous. The Court relied on the Eleventh Circuit's finding that Mr. Goodman had properly alleged constitutional claims to hold that Title II validly abrogates state sovereign immunity where the conduct at issue actually violates the Fourteenth Amendment.[104] The Court found that the Eleventh Circuit was wrong to have dismissed those Title II claims that were also valid constitutional claims, but did not address the viability of Title II claims that were not also valid claims under the Fourteenth Amendment.[105]

The Supreme Court's decision in *United States v. Georgia* leaves open the question about the viability of Title II claims challenging conduct that does not also violate the Fourteenth Amendment. The Court's decision in *Lane* makes clear that such claims will be decided on an as-applied basis. Thus, it is wholly likely that whether prisoners will be barred from raising Title II claims that do not also constitute violations of the Fourteenth Amendment will remain unsettled for some time. This is evident in looking at the decisions of lower courts after *United States v. Georgia*. None of the circuits have yet decided the question of Congress' prophylactic reach with respect to prisoners' claims under the ADA. In those circuits in which the issue has arisen, one court remanded to the district court,[106] which then avoided the issue,[107] and another did not address it after the plaintiff took a voluntary dismissal of his ADA claims.[108] The district courts that have decided the issue have either held that Congress did not validly abrogate state sovereign immunity with respect to Title II claims concerning conduct not violative of the Constitution,[109] or have avoided the question by finding

103. 546 U.S. 151, 155 (2006).

104. *Id.* at 159.

105. *Id.*

106. *See* Kiman v. N.H. Dep't of Corr., 451 F.3d 274 (1st Cir. 2006).

107. *See* Kiman v. N.H. Dep't of Corr., No. 01-CV-134, 2007 WL 2247843 (D.N.H Aug. 1, 2007).

108. *See* Spencer v. Earley, No. 07-6460, 2008 WL 2076429 (4th Cir. May 16, 2008).

109. While some courts have come to this conclusion by employing the *City of Boerne* test to determine whether Title II was a congruent and proportional response to a history of disability-based discrimination against prisoners, *see, e.g.*, Chase v. Baskerville, 508 F. Supp. 2d 492 (E.D. Va. 2007); Perry v. Mo. Dep't of Corr., No. 4:05CV1384, 2007 WL 892460 (E.D. Mo. Mar. 21, 2007), others have simply, and wrongly, cited *United States v. Georgia* for the proposition that sovereign immunity is only abrogated under Title II in cases where defendants' conduct violates the constitution. *See, e.g.*, Fox v. Poole, No. 06-

that the conduct challenged by plaintiffs also violates the Constitution.[110] Since the Supreme Court's decision in *United States v. Georgia*, no federal court has ruled that prisoners can bring Title II damages claims based on conduct that does not violate the Constitution.

Courts address the issue of whether Congress validly abrogated state sovereign immunity in enacting Section 504 almost identically as they do with respect to the ADA.[111] However, abrogation is not the only way around the Eleventh Amendment for Section 504 litigants. Section 504, which requires agencies receiving federal funds to refrain from disability-based discrimination, was enacted under Congress's Spending Clause authority in addition to its authority under Section 5.[112] States' ongoing acceptance of federal funds waives the Eleventh Amendment defense to Rehabilitation Act claims.[113] Almost every circuit to have addressed the question of whether states accepting federal funds are subject to suit under Section 504 has found that the states' waiver of immunity is valid.[114] The Second Circuit is the only court to have held otherwise, but limited its ruling such that it found the states' waiver invalid only during a particular

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CV-148, 2008 WL 1867939, at *10 (W.D.N.Y. Apr. 24, 2008); Sanders v. Ryan, 484 F. Supp. 2d 1028, 1037 (D. Ariz. 2007).

110. *See, e.g.*, Lamzot v. Phillips, No. 04 CIV. 6719, 2006 WL 686578 (S.D.N.Y. Mar. 16, 2006); Degrafinreid v. Ricks, 417 F. Supp. 2d 403, 416 (S.D.N.Y. 2006).

111. *See, e.g.*, Kilcullen v. N.Y. State Dep't of Labor, 205 F.3d 77, 82 (2d Cir. 2000); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998).

112. 29 U.S.C. § 794(b) (2006).

113. In 1985, the Supreme Court held that Section 504 did not adequately make clear Congress' intent to condition federal funding on a waiver of Eleventh Amendment immunity *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 245-246 (1985). Congress enacted 42 U.S.C. § 2000d-7 (2006), part of the Rehabilitation Amendments Act, in response to the Court's decision in Atascadero. It provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act . . . .
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (I), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

§ 2000d-7(a).

114. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005); Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1163 (D.C. Cir. 2004); Miranda B. v. Kitzhaber, 2003 WL 21078049 (9th Cir. May 14, 2003); Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1293 (11th Cir. 2003); Koslow v. Pennsylvania, 302 F.3d 161 (3d Cir. 2002); Nihiser v. Ohio Envtl. Prot. Agency, 269 F.3d (6th Cir. 2001); Stanley v. Litcher, 213 F.3d 340, 343 (7th Cir. 2000); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997).

time period.[115] This limitation has allowed several courts within the Second Circuit to hold a state's waiver of immunity to be valid outside of the time period described by the circuit's decision.

*United States v. Georgia* has left open the question of whether prisoner plaintiffs can seek damages from state officials for violations of the ADA, where the conduct in question does not also violate the Fourteenth Amendment. Given that Section 504 does not place this sovereign immunity hurdle before plaintiffs, the question of the whether the ADA confers any rights upon prisoners that its predecessor statute does not becomes significant.

## IV. TITLE II AND SECTION 504: A COMPARISON

Under Title II, "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."[116] In 1973. Congress passed the Rehabilitation Act prohibiting discrimination against people with disabilities "under any program or activity receiving federal financial assistance."[117]

As predicted shortly after the ADA took effect, the differences between the two statutes exist more in theory than in practice.[118] Courts have consistently found that the substantive provisions of the ADA are coextensive

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115. In *Garcia v. S.U.N.Y. Health Sciences Center*, the Second Circuit found that the language of Section 504 clearly expressed Congress's intent to condition the acceptance of federal funds on the states' waiver of immunity. 280 F.3d 98, 113 (2d Cir. 2001). However, the court held that New York's waiver had not been "knowing" during the time period when the dispute in Garcia arose. *Id.* at 114-15. That time period was between the effective date of the ADA (1992) and the Supreme Court's decision in *Garrett* (2001), holding that at least in some contexts, Congress's abrogation of sovereign immunity was not valid. *Id.* The Second Circuit reasoned that because the language of the ADA made clear that Congress intended to abrogate immunity, "a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits [because] by all reasonable appearances, state sovereign immunity had already been lost." *Id.* at 114. Because the question of whether Congress validly abrogated states' immunity with respect to the ADA has been unresolved at least since the *Garrett* decisions, most courts interpreting the Second Circuit's decision in *Garcia* have held the state's waiver to be valid. Thus, the effect of *Garcia* is minimal to the extent that the Title II question remains unanswered or to the extent that the Court finds abrogation invalid.

116. 42 U.S.C. § 12132 (2006).

117. 29 U.S.C. § 794(a) (2006).

118. Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1109-12 (1995).

with those of Section 504 and have tended to analyze the claims as one.[119] Thus it will often be the case that prisoner litigants can choose to pursue their damages claims under Section 504 and not under the ADA without a fear that their claims will be dismissed or delayed because defendants move to dismiss on sovereign immunity grounds. However, some differences between the statutes do exist, and in some subset of prisoners' rights cases, Section 504 may not be an adequate substitute for the ADA.

### A. Federal Financial Assistance

The most obvious and well recognized difference between the two statutes is Section 504's requirement that a covered entity receive federal financial assistance. In fact this difference was one of the statue's key shortfalls that precipitated the movement to push for a more comprehensive statute in the ADA.[120] While this limitation of Section 504 will certainly be an impediment to addressing disability-based discrimination by some private and state actors,[121] it will rarely limit the ability of prisoner litigants to challenge their treatment by state prison authorities.

All state departments of corrections receive federal financial assistance and as such are subject to the anti-discrimination provisions of Section 504.[122] Section 504 prohibits disability-based discrimination by "any program or activity receiving federal financial assistance"[123] and defines "program or activity" to include all of the operations of a state agency.[124] Therefore, all that is necessary for a state department of corrections to be covered by the statute is for it to receive some federal funding. Courts have agreed that as long as a state's department of corrections receives federal monies, regardless of whether those funds were earmarked for programs designed to further the anti-discrimination purpose of Section 504, it is properly governed by the statute.[125]

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119. Bennett v. Dominguez, 196 Fed. App'x 785, 791 (11th Cir. 2006); Iverson v. City of Boston, 452 F.3d 94, 97 (1st Cir. 2006); Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998); Allison v. Dep't of Corr., 94 F.3d 494, 497 (8th Cir. 1996); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

120. *See* Burgdorf, Jr., *supra* note 82, 430-31, 431 n. 94.

121. *See* Katie Eyer, *Rehabilitation Act Redux*, 23 YALE L. & POL'Y REV. 271, 282 (2005).

122. According to state budget documents, fifty states' prison systems receive federal funding (on file with author).

123. 29 U.S.C. § 794(a) (2006).

124. *Id.* § 794(b).

125. Some departments of corrections (and other agencies) have argued that they are not subject to Section 504 because the federal money that they receive is not related to the goals of the statute. They argue that under the Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), conditions attached to Spending Clause legislation are only valid if

### B. Causation

Another potential difference between the statutes themselves is in the causation standards. Section 504 prohibits discrimination "solely by reason of" disability,[126] whereas Title II prohibits discrimination "by reason of such disability."[127] According to Title II's legislative history, Congress omitted the word "solely" from the causation language of Title II because "literal reliance on the phrase 'solely by reason of his or her handicap' leads to absurd results," such as permitting under the statute discrimination based on *both* race and disability.[128] Although there is evidence that Congress did not intend for these phrases to result in a difference in the causation standards that apply in Title II and Section 504 cases,[129] some courts have held that they must.

These courts have held that under Section 504, disability must be the only basis for discrimination, but that under Title II, disability may simply be a motivating factor for the discrimination.[130] Other courts have applied the "solely by reason of disability" causation standard to both Title II and Section 504 claims, reasoning that the statute itself and the Supreme Court's interpretation of the statute require the two schemes to be interpreted consistently, but failing to account for the fact that Congress omitted the word "solely" from the language of Title II.[131] Nonetheless, the major-

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they are unambiguous and reasonably related to the purpose of the expenditure and, if the expenditure is for the general welfare and the legislation does not violate any independent constitutional prohibition. 483 U.S at 207-08. However, all of the five federal circuits to have addressed this issue have held that a state agency that accepts federal financial assistance waives its Eleventh Amendment immunity and is subject to Section 504 even if those federal funds are not earmarked for programs that address the goals of the statute. *See* Miller v. Tex. Tech Univ. Health Scis. Ctr., 421 F.3d 342, 348 -50 (5th Cir. 2005); Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1171 (D.C. Cir. 2004); Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir.2002); Koslow v. Pennsylvania, 302 F.3d 161, 174 (3d Cir. 2002); Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc).

126. 29 U.S.C. § 794 (2006).

127. 42 U.S.C. § 12132 (2006).

128. H.R. REP. NO. 101-485, at 85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 368.

129. Weber, *supra* note 118, at 1110-11; *see also* H.R. REP. NO. 101-485, at 85-86 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 368.

130. *See, e.g.*, New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 301 (3d Cir. 2007) (explaining that the two statutes are "significantly dissimilar" with respect to the "causative link between discrimination and adverse action" and thus finding that the "solely by reason of disability" language applies only in Section 504 and not Title II cases (quoting Baird v. Rose, 192 F.3d 462 (4th Cir. 1999))); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 49 (2d Cir. 2002).

131. In *Zukle v. Regents of the University of California*, the Ninth Circuit stated in dicta that courts should apply the same analysis to claims under both statutes, relying on the language of 42 U.S.C. § 12133 (2006), which states that "[t]he remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable

ity of circuits have found that the causation standards of the statutes do differ from one another, based on the plain meaning of the statutory language.

It does not necessarily follow, however, that the more stringent causation standard of Section 504 is reason to always plead claims under both the ADA and Section 504. There are likely many prisoner cases in which the plaintiff's prospects of success would be the same under both statutes. Many prisoners' claims under the ADA or Section 504 are premised on the prison system's failure to provide reasonable modifications. In such cases, the causation standard is generally not at issue. The statutes place an affirmative obligation on prison authorities to provide reasonable accommodations where necessary to permit a prisoner with a disability access to its programs, services, and activities.[132] Although prison officials may be entitled to assert a defense to excuse them from providing accommodations,[133] causation is not a part of the inquiry into whether the accommodation is reasonable.[134] Furthermore, relatively few Title II claims are premised on a disparate treatment theory, and when they are, the result would generally not differ based on which statute's causation standard applied.[135] Finally, no reported decisions demonstrate a court relying on the differences in the causation standards to allow a prisoner's ADA claim to go forward, but not her Section 504 claim. In these cases, courts often acknowledge the differing standards when reciting the elements of Title II and Section 504 claims, but do not address the difference in the analysis of the prisoner's claims under the statutes.[136] Thus, it appears unlikely that

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to ADA claims]" and the Supreme Court's decision in *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), finding that courts must "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." 166 F.3d 1041, 1045 n.11 (9th Cir. 1999). However, in a more recent case that involved Title I of the ADA, which prohibits disability-based employment discrimination, the Ninth Circuit—without reference to *Zukle*—found that the "motivating factor" standard is the appropriate causation standard under all liability provisions of the ADA. *See* Head v. Glacier Nw. Inc., 413 F.3d 1053, 1065 (9th Cir. 2005).

132. 42 U.S.C. § 12131(2) (2006).

133. The defendant may assert that despite the plaintiff's need for the accommodation, providing it would impose an "undue financial or administrative burdens" or would require a "fundamental alteration in the nature of the program." *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 n.17 (1987) (quoting Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410, 412 (1979)).

134. *See* Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005) (recognizing that the causation standards of Title II and Section 504 are different, but finding that the inquiry into whether the requested accommodations were to be afforded would be the same under both statutes precisely because causation is not at issue in such claims).

135. Eyer, *supra* note 121, at 301.

136. *See, e.g.*, Schwarz v. City of Treasure Island, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008).

courts would treat prisoner Title II claims differently from prisoner Section 504 with respect to the causation standard.[137]

### C. Expert Fees

One advantage that prisoners litigating under the ADA may have over Section 504 litigants is that prevailing plaintiffs under the ADA may be entitled to expert fees. As stated in Part II.B.3 above, the ADA's attorneys' fees provision has been held to permit recovery of expert fees. This is not so with respect to Section 504. Because Section 504 incorporates "the remedies, procedures and rights" of Title VI, and because Title VI has been interpreted not to permit recovery of expert fees, courts may not be willing to award expert fees to Section 504 plaintiffs.[138]

### D. Regulations

Because the anti-discrimination provisions of Title II and Section 504 are so minimal, the question of their differences must also focus on the statutes' regulations. This question is somewhat complicated by the fact that there are several agencies responsible for the Section 504 regulations, and by the fact that Title II's regulations are currently in the process of being amended. The focus here will be on differences between the standards that might lead to an interpretation of Title II as more protective of a disabled prisoner's rights than Section 504, such that the prisoner might think twice before abandoning ADA claims in an effort to avoid the Eleventh Amendment problem.

The conduct prohibited by both Title II and Section 504, as well as the affirmative obligations they impose on government agencies, and the defenses available to those agencies, are laid out in the implementing regulations.[139] These regulations are substantially similar, however, some differences exist between the two sets of regulations currently in operation, and perhaps even more significant differences for prisoner plaintiffs between

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137. *But see* Eyer, *supra* note 121, at 302 & n.168 (warning that courts could treat claims under Title II and Section 504 differently with respect to causation if those courts relied on pre-ADA interpretations of Section 504, which relied heavily on the stringent causation standard).

138. *See, e.g.*, M.P., *ex rel.* K.P. v. Indep. Sch. Dist. No., 2007 WL 844688, at *3-4 (D. Minn. Mar. 16, 2007) ("The Rehabilitation Act incorporates the 'remedies, procedures, and rights" of Title VI in cases brought under section 504 of the Rehabilitation Act."); *see also* 29 U.S.C. § 794a(a)(2) (2006); Barnes v. Gorman, 536 U.S. 181, 185 (2002). A Title VI plaintiff can recover attorney fees, but not expert fees. 42 U.S.C. § 1988(b)-(c) (2006). Moreover, the Rehabilitation Act does not state that expert fees are available as part of an award of attorney fees. *See* 29 U.S.C. § 794a(b) (denying expert fees).

139. 28 C.F.R. § 35 (2008); 28 C.F.R. § 41 (2008).

the new proposed Title II rules and the regulations implementing Section 504.

As one author has noted, while the regulations implementing the two statutes differ with respect to the reasonable accommodation duty, affirmative defenses, standards for communication, and program accessibility, these differences are unlikely to be of great significance to litigants.[140] The Title II regulations require state entities to provide reasonable modifications unless doing so would fundamentally alter the nature of the program.[141] While no such duty or defense exists in the Section 504 regulations, both the duty and defense were well established by pre-ADA case law and are thus unlikely to be a source of difference in courts' interpretations of the statutes.[142]

Another difference between the two sets of regulations concern their mandates to ensure effective communication with people with disabilities.[143] The ADA regulations are more detailed, and require that public entities ensure that communication with people with disabilities is *as effective* as it is with others and provide auxiliary aids and services to afford people with disabilities an equal opportunity to participate in the entity's programs.[144] Section 504's regulations, on the other hand, are far less specific and contain no requirement that communication with people with disabilities must be *as effective* as with others or that it must afford equal participation in the agency's services.[145] Based solely on their text, it would seem that the Title II regulations would provide far greater protection to the disabled with respect to communication-related claims. Courts, however, have found no difference in this area, either applying the ADA standards to

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140. *See* Eyer, *supra* note 121.

141. 28 C.F.R. § 35.130(b)(7) (2008) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

142. *See* Eyer, *supra* note 121, at 304.

143. *Id.* at 305.

144. 28 C.F.R. § 35.160 (2008) (providing that "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants and members of the public with disabilities are as effective as communications with others" and that "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity").

145. 28 C.F.R. § 41.51(e) (2008) ("Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.").

Section 504 claims, or determining that the Section 504 standards provide the same rights as the ADA's.[146]

Given that the Department of Justice is likely to amend the Title II regulations soon,[147] it is also important to examine the proposed new rules, at least as they differ from the Section 504 regulations, and as they are likely to apply to prisons and jails. Most notable is the proposal to add to the Title II regulations a section devoted solely to detention and correctional facilities.[148] The Department of Justice issued this proposal in response to

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146. *See* Eyer, *supra* note 121, at 305 (citing Chisolm v. McManimon, 275 F.3d 315, 324 n.9 (3d Cir. 2001) (applying Title II communications standards to both ADA and Section 504 communications claims)); Duvall v. County of Kitsap, 260 F.3d 1124, 1135-36 (9th Cir. 2001); Center v. City of West Carrollton, 227 F. Supp. 2d 863, 867-70 (S.D. Ohio 2002); McCray v. City of Dothan, 169 F. Supp. 2d 1260, 1273 (M.D. Ala. 2001), *aff'd in part and rev'd in part on other grounds*, 2003 WL 23518420 (11th Cir. 2003); Estate of Alcalde v. Deaton Specialty Hosp. Home Inc., 133 F. Supp. 2d 702, 707-08 (D. Md. 2001); Hanson v. Sangamon County Sheriff's Dep't, 991 F. Supp. 1059, 1062 n.2 (C.D. Ill. 1998); Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996), *aff'd* 157 F.3d 668 (9th Cir. 1998); Duffy v. Riveland, 98 F.3d 447, 454-56 (9th Cir. 1996); Proctor v. Prince George's Hosp. Ctr., 32 F. Supp. 2d 820, 826-27 (D. Md. 1998) (relying in part on ADA communications regulations in evaluating Section 504 claim).

147. The Department of Justice issued its Notice of Proposed Rulemaking to amend 28 CFR Part 35: Nondiscrimination on the Basis of Disability in State and Local Government Services in the Federal Register on June 17, 2008. 73 Fed. Reg. 34,466 (June 17, 2008). However, immediately after President Obama took office, his administration directed all executive agencies, including the Department of Justice, to defer publication of any new regulations until the new administration had the opportunity to review them. DOJ's draft final rules amending the Title II regulations were among those placed on hold. *See* http://www.ada.gov/ADAregswithdraw09.htm (last visited June 8, 2009).

148. *Id.* The following is the text of the proposed new rule:

> *§ 35.152 Detention and correctional facilities*.
>
> (a) *General*. Public entities that are responsible for the operation or management of detention and correctional facilities, either directly or through contracts or other arrangements, shall comply with this section.
>
> (b) *Discrimination prohibited*.
>
> (1) Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because that facility is inaccessible to or unusable by individuals with disabilities, 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 public entity unless the public entity can demonstrate that the required actions would result in a fundamental alteration or undue burden.
>
> (2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless the public entity can demonstrate that it is appropriate to make an exception for a specific individual, a public entity-
>
> (i) Should not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;
>
> (ii) Should not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

the numerous complaints it receives from disabled prisoners who are not provided with accessible cells, and has found through its investigations and compliance reviews a serious lack of available cells, showers, and toilets accessible to prisoners with disabilities.[149]

An Examination of a few of the provisions of the proposed rules indicates the possibility of a wider gap developing between Title II and Section 504. For instance, the proposed rules prohibit prison officials from denying access to any of its programs, services, or other activities because a particular facility is inaccessible, unless providing access would constitute a fundamental alteration or undue burden.[150] This is significant because many prisons provide certain programs or services in a small number or even one facility, and if that facility is inaccessible to a person with a disability, he or she might be prohibited from participating in the program. The rules further provide specific guidance to prisons on how to achieve the ADA's integration mandate, by prohibiting prisons from: (a) housing a prisoner in a higher security area than he would otherwise be housed because of a lack of accessible cells at the appropriate security level; (b) placing prisoners with disabilities in facilities that do not offer the same programs as the prison where they would ordinarily be housed; (c) from housing a prisoner in a medical facility if not receiving medical treatment; and (d) from being housed further from her family than he would ordinarily be housed because of a lack of accessible cells. This specific integration mandate would be significant and important, given that prisons regularly deny prisoners with

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(iii) Should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed; and

(iv) Should not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.

(c) *Alterations to detention and correctional facilities*. Alterations to jails, prisons, and other detention and correctional facilities will comply with the requirements of § 35.151(b). However, when alterations are made to specific cells, detention and correctional facility operators may satisfy their obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (i.e., cells other than those where alterations are originally planned), provided that each substitute cell-

(1) Is located within the same facility;

(2) Is integrated with other cells to the maximum extent feasible; and

(3) Has, at a minimum, equal physical access as the altered cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees.

149. *Id.*

150. *See* 28 C.F.R. § 35.152(b)(1), 73 Fed. Reg. 34,466 (June 17, 2008).

disabilities access to programs, house them in more restrictive conditions than their classification or medical condition warrants, and deny them opportunities to be housed in prisons closer to home because of the lack of accessible cells dispersed throughout a system. The regulations implementing Section 504 contain nothing similar to these proposed new rules (or to many of the other proposed rules). This may mean that if the new rules are adopted, courts will begin to interpret the statutes differently in cases brought by prisoners. Courts may, however, rely on past precedent and regulations mandating co-extensive interpretation of the statutes as they have done when presented with differing regulations.[151]

Another potentially significant change to the Title II regulations would adopt Section 35.151(c), which proposes to adopt Parts I and III of the Americans with Disabilities Act and Architectural Barriers Act Guidelines[152] as the ADA Standards for Accessible Design.[153] Title II currently allows public entities the choice between two sets of design standards, the Uniform Federal Accessibility Standards[154] ("UFAS") or the ADA Accessibility Guidelines for Buildings and Facilities[155] ("ADAAG"). The Section 504 regulations reference the UFAS, but allow for other standards if they provide equal or better access.[156] UFAS are generally regarded as less stringent than ADAAG.[157] The standards are quite technical, and it is beyond the scope of this Article to determine in what ways they are more or less stringent than the Section 504 design standards.[158] Whether the ADA will provide greater accessibility with respect to design and construction will likely depend on the particular element and standard at issue in a given case.

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151. *See supra* note 118.

152. 69 Fed. Reg. 44,084 (July 23, 2004).

153. Both statutes have standards for accessible design that require covered facilities constructed after their respective enactment dates to be fully accessible to people with disabilities. Some of these standards apply to alterations to covered facilities as well.

154. 41 C.F.R. pt. 101-19.6 app. A (2008).

155. 28 C.F.R. pt. 36, app. A (2008).

156. 45 C.F.R. § 84.23(c) (2008).

157. Weber, *supra* note 118, at 1133.

158. According to the Department of Justice, the Access Board, the agency responsible for developing the new standards, identified ways in which these standards were substantially different from the current standards. Some of these differences were categorized as "reduced cost requirements" which "include those for which the scoping or technical specifications for newly constructed or altered facilities have been made less stringent, or where new exceptions have been provided." Americans with Disabilities Act Website, ADAAG Background, http://www.ada.gov/NPRM2008/ria_2.htm (last visited Apr. 27, 2009). Thus, it is likely that the new standards will be both more and less stringent than the current standards.

## V. OUT WITH THE NEW?

Given the strategic advantages and disadvantages of bringing constitutional versus statutory claims and the few differences between the ADA and Section 504, it will not always be obvious what advocates, litigants and judges should do with this information. A talented and well-respected civil rights lawyer once described drafting a complaint in a prisoner civil rights suit to me as "throwing [expletive] at the wall and waiting to see what sticks." It is common for civil rights lawyers to take a kitchen-sink approach to complaint drafting, including every potentially viable cause of action in the hope that after defenses concerning standing, various immunities, administrative exhaustion, and others are raised and ruled upon, there will not be a cause of action remaining. This is not a matter of careless lawyers not taking the time to think through their clients' claims, but rather a sense among these advocates that they are engaging in an uphill battle and need to harness every weapon available. In prisoners' rights litigation in particular, success rates for plaintiffs are exceedingly low,[159] and getting beyond motions to dismiss is a difficult feat unto itself.

Nonetheless, I urge advocates to rethink this approach with respect to disability rights claims brought on behalf of prisoners, as paring down their claims may better serve their clients. First, with respect to whether to bring constitutional claims in addition to statutory claims, thought must be given to what constitutional claims may add in a particular case. Most importantly, they may add causes of action not covered by the disability statutes, such claims for inadequate medical treatment under the Eighth Amendment. Even where bringing constitutional claims is necessary to cover all of the plaintiff's causes of action, it would be useful to make clear in pleadings that the constitutional causes of action are only brought with respect to some of the challenged conduct in an effort to avoid unnecessary satellite litigation, such as a motion to dismiss for qualified immunity that would only be germane to the constitutional claims, or ensure maximum attorneys' fees.[160] In addition to adding new causes of action, constitutional claims may have some expressive value, even where they do not contribute legally to the pleadings. In cases in which prison officials have engaged in particularly egregious behavior, alleging constitutional violations may send a stronger message to the court, public, and opposing parties than would a claim solely under the disability statutes.

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159. Schlanger, *supra* note 59. In this empirical analysis of inmate litigation in federal courts, the author found that the success rate for civil cases brought by prisoners in federal court to be less than 15%.

160. In cases in which both ADA claims and Eighth Amendment claims were raised, courts have apportioned.

Finally, advocates should question whether the case is one in which punitive damages are likely, and if so, whether a jury is likely to award them to this particular plaintiff, or whether a request for, or a threat of punitive damages is likely to provide a settlement advantage.

In addition to questioning whether to bring constitutional claims along with their statutory claims, advocates should give serious consideration to bringing their claims solely under Section 504 and leaving out Title II claims entirely. First, advocates should assess whether the case is analogous to *United States v. Georgia*, in that all of the conduct forming the basis for the plaintiff's complaint violates not only the statutes but the Fourteenth Amendment. If so, there would be no disadvantage to raising ADA as well as Section 504 claims because in these situations it is clear that states are not entitled to sovereign immunity.[161] However, in many cases it would be nearly impossible to determine with confidence whether a court would find that there is the necessary overlap between the statutes and the Constitution. Given the stringent standards by which prisoners' constitutional claims are granted, this strategy could prove risky in many cases.

Further, thought should be given to whether the facts of the case bring any cause for concern that the more onerous causation standard of Section 504 is likely to factor into the plaintiff's chances for success or whether a particular court has shown greater tendencies toward assigning great significance to the difference in causation standards. Additionally, given that Section 504 does not provide for recovery of expert fees, it may be important to assess the role that expert witness presentation might play in the case.

Finally, attention should be paid to the regulations. Is one of the ADA regulations that is different from the section 504 regulations significantly implicated by the case? If so, is a court likely to find that, given statutory language and case law about the need to interpret these statutes consistently, the regulation does not apply in the section 504 context? The importance of this question will depend greatly upon whether the Department of Justice adopts the new proposed regulations implementing Title II.

One reason to include ADA claims that are unrelated to the differences between the statutes is precisely to address the sovereign immunity problem head on. Lawyer and client may decide that the risk of protracted litigation is worth an effort to try to shape the law on sovereign immunity with respect to Title II. Some advocates (presumably with their client's blessing) may wish to forge ahead to make sure to make sure that Title II remains available to prisoner litigants whose claims under Section 504 are

161. *See supra* notes 23-25 (discussing *United States v. Georgia*).

weaker or who cannot fall back on the predecessor statute at all. Although all state prison systems receive federal financial assistance, many sheriff departments are hybrid state and municipal entities and may be less likely to receive federal funding than state prison systems. It may be seen as important to find good test cases so that the ADA is available in these circumstances.

A mid-way position is also available to litigants and advocates. In cases in which the advocate and client decide to proceed under both statutes either because of one of the above-mentioned distinctions or simply out of discomfort with giving up a potentially viable claim, the advocate should attempt to persuade the court to decline to decide the sovereign immunity question based on the doctrine of constitutional avoidance, arguing that because Section 504 protects the same rights and offers the same remedies as Title II, there is no need to decide the question of the ADA's constitutionality in that case.

## CONCLUSION

People with disabilities are all too well represented in America's prisons and are frequently not provided with the accommodations necessary to ensure their full participation in prison life. The Supreme Court's 1997 pronouncement that Title II of the ADA applies to their claims of failure to accommodate and disability-based discrimination has been making its way through the prison grapevine (and hopefully the prison law libraries) over the last dozen years, inspiring prisoners, their advocates and the federal government to use this broad civil rights statute to enforce these rights. Their efforts have been thwarted to some extent by the states' assertion of sovereign immunity from suits for money damages. To ensure greater success and ease in litigating claims of disability-based discrimination, prisoners and their advocates should be strategic about the claims they raise rather than employ a kitchen-sink approach to litigation. Determinations must be made about whether to abandon constitutional claims in favor of statutory ones and whether the ADA's predecessor statute, Section 504, provides equivalent protection and should be invoked in lieu of the ADA to avoid dismissal on sovereign immunity grounds.