OVERCOMING SECTION 1983 HURDLES: USING THE AMERICANS WITH DISABILITIES ACT TO RE-OPEN THE CIVIL RIGHTS DOOR AND HOLD GOVERNMENT AND POLICE ACCOUNTABLE

TABLE OF CONTENTS

OVERCOMING SECTION 1983 HURDLES: USING THE AMERICANS WITH DISABILITIES ACT TO RE-OPEN THE CIVIL RIGHTS DOOR AND HOLD GOVERNMENT AND POLICE ACCOUNTABLE

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Federal court decisions in recent years have made civil rights cases more difficult for plaintiffs to litigate, and, even when successful at trial level, problematic on appeal. Doctrines of qualified ("good faith") immunity, interlocutory appeals from the denial of qualified immunity, municipal immunity, and sovereign immunity all coalesce to make traditional civil rights actions under 42 U.S.C. §1983[1] ever more troublesome.

People with disabilities face an even greater hurdle in §1983 cases because the United States Supreme Court has refused to accord them any cognizable class status or greater equal protection status than that which attends to people in general.[2] Despite the horrible history of maltreatment, segregation, and isolation at the hands of majority society, discrimination against people with mental disabilities, remarkably enough, does not even rise to middle-tier equal protection constitutional scrutiny.[3]

However, the Americans with Disabilities Act ("ADA"),[4] enacted in 1990, offers an alternative vehicle for vindicating the rights of people with physical, developmental, and mental disabilities beyond that accorded by §1983. The ADA, one of the most comprehensive civil rights laws passed by Congress, provides relief in a number of situations where §1983 does not.

This article offers examples in which the ADA fills a void left by §1983 decisional law in the context of government and law enforcement personnel. The examples are just that — not a comprehensive list, but suggestions of possibilities for the practitioner, advocate, and court. The article also shows how, in some situations, §1983 and the ADA go hand-in-hand to make a stronger lawsuit, and how at times the ADA can inform §1983 standards. The examples here point toward the direction in which careful and creative civil rights litigation is moving, and where it may move further in the future.

While it addresses §1983 and the ADA in terms of state and local government and their law enforcement operations, this article may be helpful in a broader context. Although the ADA does not apply to the federal government, the Rehabilitation Act of 1973 ("Section 504")[5] does. Regulations, legal theories, and decisional law under Title II of the ADA and Section 504 are virtually the same, and the courts interpret them as such. Therefore, the concepts put forward in this article have similar counterparts and court decisions under Section 504 with regard to federal entities, and a similar interplay with a *Bivens* action.

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[1] References throughout the article to 42 U.S.C. §1983 (2000), which applies to state and local governments and officials, parallel actions brought against the federal government and officers directly through a *Bivens* action under the Fourteenth Amendment. *See* Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) (allowing government agents to be sued for actions conducted under governmental authority). The courts have steadily harmonized the case law under §1983 and *Bivens*. *See, e.g.*, Evans v. Ball, 168 F.3d 856, 862-63 (5th Cir. 1999) (noting that "a *Bivens* action parallels a §1983 action")

[2] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (declaring that mental retardation is not a "quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

[3] *See id.* at 444-47; *see also* Americans with Disabilities Act, 42 U.S.C. §12101(a)(3) (2000) ("discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services").

[4] 42 U.S.C. §§12101-12213.

[5] *See* 29 U.S.C. §794.

I. DOCTRINES OF DIFFICULTY IN §1983 ACTIONS

There are five major impediments to a plaintiff in typical §1983 litigation: qualified ("good faith") immunity, interlocutory appeals from the denial of qualified immunity, sovereign immunity, municipal immunity, and the appellate courts' propensity to review factual situations, a realm once left to the trial court. [6]

A quick overview of these immunities and practices helps show the pitfalls in §1983 actions. The remainder of the article suggests how the ADA, sometimes with the help of Section 504, can surmount these roadblocks in many instances.

A. Qualified ("Good Faith") Immunity

Qualified immunity comes into play when a public official claims to have acted in an objectively reasonable fashion and the law under which the official operated at the time was not well-settled or clearly-established.[7] This is not to say that the officer's conduct itself was reasonable, but only that the official behaved in a not-unreasonable fashion.[8] This test, obviously, serves to make the civil rights plaintiff's burden almost insurmountable such that, as a practical matter, officials quite often secure qualified immunity, either from the trial court or appellate tribunal.[9] Only the most flagrant and shocking conduct will defeat qualified immunity.[10]

B. Interlocutory Appeal

The U.S. Supreme Court has created an interlocutory appeal to review denial of summary judgment to an official claiming qualified immunity; this saves the official the time and expense of a defense, and allows the official to go about public service without looking over the shoulder, worrying about liability for every action.[11] On the other hand, an interlocutory appeal puts the plaintiff in a bind because it delays the litigation by months, if not more, and may require the plaintiff to overcome an immunity claim without being able first to complete anything but perfunctory discovery.[12]

C. Municipal Immunity

Municipal liability is a high hurdle for civil rights plaintiffs to jump. To do so, *Monell v. New York City Department of Social Services*[13] requires that a civil right plaintiff prove that the implementation or execution of a

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[6] For an excellent overview of 42 U.S.C. §1983, *see* Martin A. Schwartz, "Fundamentals of Section 1983 Litigation," 731 PLI/Lit 73 (Oct. 2005).

[7] *See* Saucier v. Katz, 533 U.S. 194, 200-07 (2001); Wilson v. Layne, 526 U.S. 603, 609 (1999); Siegert v. Gilley, 500 U.S. 226, 231-33 (1991); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Gómez v. Toledo, 446 U.S. 635, 639-42 (1980). For an excellent compilation of qualified immunity cases, in the U.S. Supreme Court and Circuit-by-Circuit, *see* Karen M. Blum, "Section 1983: Qualified Immunity," 748 PLI/Lit 79 (Oct. 2006).

[8] *See* Steffanoff v. Hayes County, 154 F.3d 523, 525 (5th Cir. 1998)(holding that the court must determine whether the official's conduct was objectively reasonable in light of clearly established law as it existed at the time of the conduct in question). *See also* Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 869-919 (1998).

[9] *See* Alton v. Texas A&M University, 168 F.3d 196, 201 (5th Cir. 1999) (affirming summary judgment for Corps of Cadets officials based on qualified immunity despite defendants' failure to take immediate action to protect a cadet from nightly beatings and physical abuse after learning of earlier incidents); *and see* Snyder v. Trepagnier, 142 F.3d 791 (5th Cir.1998) (upholding qualified immunity for police officer who shot unarmed man in the back at a range of six to ten inches, while the man was stuck in the mud in a swamp).

[10] *See* Hope v. Pelzer, 536 U.S. 730 (2002) (denying qualified immunity to guards who handcuffed prison inmate to hitching post on two occasions, one of which lasted for seven hours without regular water or bathroom breaks); Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

[11] *See Harlow*, 457 U.S. at 818 (ruling defendants were entitled to qualified immunity standard that permits the defeat of insubstantial claims without resort to trial); Mitchell v. Forsyth, 472 U.S. 511, 526-27, 529 (1985) (holding that a district court's denial of qualified immunity, to the extent it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. §1291, notwithstanding the absence of a final judgment.).

[12] *See* Shultea v. Wood, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (en banc) (holding that qualified immunity issue must be determined prior to unlimited discovery in order to avoid burdening official, but allowing some discovery to disprove immunity).

[13] 436 U.S. 658 (1978).

municipality's policy, custom, or longstanding policy-like practice inflicted the alleged constitutional injury.[14] Even if the plaintiff meets this burden, only actual damages, not punitive damages, are available.[15]

D. Appellate Courts' Propensity to Construe and Interpret Facts on Appeal

The appellate bench's propensity to substitute its own interpretation of facts for that of judge or jury makes municipal and qualified immunities even more problematic. The appeals judges contend they are not really construing the facts but merely ascertaining whether they are sufficient for denying an immunity claim.[16] In reality, they often become involved in fact-deciding, which favors the official.[17] The role of appellate judges is not to resolve fact issues, but to respect their rendition below, or, where there is lack of clarity, remand for further fact-finding.

E. Sovereign Immunity

The Eleventh Amendment shields state government agencies from liability for damages.[18] Courts consider suits against state officials in their official capacities as against the person's office, and therefore against the state itself.[19] A plaintiff may not recover damages against the state, but are limited to an equitable remedy, such as declaratory and prospective injunctive relief.[20]

II. AMERICANS WITH DISABILITIES ACT (ADA)

Most ADA cases arise under Titles I, II, and III of the Act.[21] Title I deals with public and private employment.[22] Title II generally requires government agencies to modify their programs and facilities to accommodate people with disabilities.[23] Before the advent of the ADA, Section 504 (the Rehabilitation Act of 1973) had imposed the same

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[14] *Monell*, 436 U.S. at 690-92 (finding a municipality may be subject to suit under §1983 if a policy or custom is the source of the constitutional or statutory deprivation); *see Snyder*, 142 F.3d 791 (granting City of New Orleans municipal immunity for actions of a police officer who shot an unarmed man in the back at a range of six to ten inches while the man was stuck in swamp mud). For an excellent compilation of municipal immunity cases over the last twenty years, see Karen M. Blum, "Local Government Liability under Section 1983," 749 PLI/Lit 7 (Oct. 2006).

[15] Newport v. Fact Concerts, Inc**.,** 453 U.S. 247 (1981). *See* Carey v. Piphus, 435 U.S. 247, 256-257 (1978) ("To the extent that Congress intended that awards under §1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.") (citation omitted).

[16] Tamez v. City of San Marcos, 118 F.3d 1085, 1098 (5th Cir. 1997) (affirming magistrate judge's overturning of jury verdict and granting judgment as a matter of law because officer who entered house without a warrant and shot resident enjoyed qualified immunity), *cert. denied*, 522 U.S. 1125 (1998). *See Snyder*, 142 F.3d at 794-99 (affirming a finding of qualified immunity for police officer who shot an unarmed man who was not resisting arrest).

[17] *See, e.g.*, Colston v. Barnhart, 130 F.3d 96, 99 (5th Cir. 1997) (panel decision granting police immunity in shooting of unarmed automobile passenger), *reh'g en banc denied by equally divided court*, Colston v. Barnhart, 146 F.3d 282, 285-86 (5th Cir. 1998).

[18] *See* U.S. CONST. amend. XI; *see also* Cory v. White, 457 U.S. 85, 89-91 (1982) ("the Eleventh Amendment bars suits against state officers unless they are … acting contrary to federal law or … the authority of state law").

[19] *See* Brandon v. Holt, 469 U.S. 464, 471-72 (1985).

[20] *See* Edelman v. Jordan, 415 U.S. 651, 663-69 (1974)

[21] 42 U.S.C. §§ 12101-12189.

[22] *See* 42 U.S.C. §§12111-12117.

[23] *See id*. §§12131-12165. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. *See generally* 28 C.F.R. §35.130(b)(1):

> A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability –
>
> (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
>
> (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

obligations on entities receiving federal funds,[24] but compliance was spotty and sporadic, as was litigation under the statute.[25] Thus, the duties to accommodate and modify are not new as to governmental entities that receive federal monies, and the vast majority of such entities have received federal funds. As this article shows, the ADA has served to revitalize Section 504 and, in many instances, turn it into a helpmate.[26]

Title III was a great expansion over Section 504 in that the ADA extended federal disability law into the private sector. It requires private businesses, as public accommodations, to modify their programs and facilities in the same fashion as demanded of governmental entities.[27]

The ADA prohibits discrimination based on disability, perceived disability, or association with a person with a disability.[28] On the flip side of the same coin, the ADA also requires reasonable modification to accommodate individuals with disabilities.[29] The exceptions are few;[30]and the exemptions, limited.[31] Titles II and III, on which this article focuses, may be enforced by the Department of Justice or through a private cause of action for injunctive, declaratory, and, in the case of Title II, monetary relief (as well as attorneys' fees, costs, and litigation expenses) [32] Title II of the ADA generally was modeled after, and restates, Section 504.[33]

One may collect damages through a private cause of action under Title II to the extent that one may collect damages under Section 504 in the circuit in which the action arises.[34] In most circuits, damages are available, but only for intentional violations of Section 504,[35] although, as this article points out in the following pages, "intentional" for disability actions may not be as strictly construed as "intentional" for §1983 actions.

Title III of the ADA extends the principles of Section 504 and Title II to the private sector, except that damages are not allowed in a private cause of action.[36]

Disability "discrimination," however, "differs from discrimination in the constitutional sense" because the ADA and Section 504 contain their own definitions of discrimination.[37] For example, discrimination may include a

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(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others ....

[24] *See* 29 U.S.C. §794.

[25] *See, e.g.,* Washington v. Indiana High School Ath. Ass'n, 181 F.3d 840, 845 n.6 (7th Cir. 1999) (holding that Rehabilitation Act required a basketball association to allow a disabled student to finish his season).

[26] For two excellent resources on disability law, *see* Laura Friesen Rothstein & Julia Rothstein, *Disabilities and the Law* (Thomson/West 2006); *and* Laura F. Rothstein, *Disability Law: Cases, Materials, Problems* (4th Ed.) (Matthew Bender 2006).

[27] *See* 42 U.S.C. §§12181-12189.

[28] 42 U.S.C. §§12101(2), 12132, 12182(b)(2).

[29] *Id*. §§12182(b)(2)(A)(ii).

[30] *Id*. §12182(3) (excepting ADA applicability when the individual poses a direct threat to the health or safety of others).

[31] *Id*. §12187 (exempting religious organizations and some private clubs).

[32] *Id*. §§12133, 12188.

[33] See generally 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 (1995).

[34] 42 U.S.C. §12201(a). However, damages are not recoverable against the federal government under Section 504 because the Supreme Court has found no waiver of sovereign immunity by the United States for Section 504 purposes. Lane v. Pe□ a, 518 U.S. 187, 192 (1996) (reinstatement, but not damages, allowed for Merchant Marine Academy cadet, whose enrollment was wrongly terminated because of his recently diagnosed diabetes mellitus).

[35] *See, e.g.,* Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999) (reversing $560,000 jury award to paraplegic technical school student and remanding for new trial with a jury instruction on intentional discrimination); Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998) (holding that deaf and hearing-impaired users of 9-1-1 emergency telephone service not entitled to damages under Title II and Section 504, absent discriminatory intent); Wood v. President & Trustees of Spring Hill College, 978 F.2d 1214, 1219-20 (11th Cir. 1992) (upholding jury verdict that schizophrenic student failed to show college intentionally constructively dismissed her because of her disability); Carter v. Orleans Parish Public Schools, 725 F.2d 261, 264 (5th Cir. 1984) (father failed to prove that school had violated the Rehabilitation Act with respect to placement of his children in classes for the mentally retarded students); United States v. Forest Dale, Inc., 818 F.Supp 954 (N.D. Tex. Dallas 1993) ("any award of monetary damages under Section 504 requires a finding of intentional discrimination.... Further, damages under Section 504 are limited to retrospective equitable damages; punitive damages and damages for emotional distress, mental suffering, and the like are not available under Section 504."), citing *Shinault v. American Airlines, Inc.,* 738 F.Supp. 193, 198-99 (S.D.Miss.1990), *aff'd in part and rev'd in part*, 936 F.2d 796 (5th Cir.1991).

[36] *See* 42 U.S.C. §12184.

defendant's failure to make reasonable accommodations to the needs of a disabled person.[38] In a sense, there are three theories of discrimination under the statutes: (1) intentional discrimination; (2) discriminatory impact; and (3) a refusal to make a reasonable modification or accommodation.[39]

While the legal mandate requires reasonable accommodation, whether an accommodation is "reasonable" requires consideration of various factors, such as: (1) the size, facilities, and resources of an entity, (2) the nature and cost of the accommodation, (3) the extent to which the accommodation is effective in compensating for the person's disability, and (4) whether the accommodation would require a fundamental alteration in the nature of an entity's program.[40]

As such, whether an accommodation is reasonable is generally a question of fact, precluding resolution on summary judgment.[41] This well-accepted legal proposition obviates the difficult summary judgment motions in §1983 practice.

Pursuant to Congress' direction, the Department of Justice promulgated the Americans with Disability Act Accessibility Guidelines (ADAAG) for the purpose of implementing Title III.[42] Although the ADA does not require that Title II entities use ADAAG, the courts and the Department of Justice generally apply ADAAG to Title II

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[37] *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 672 (5th Cir. 2004) (acknowledging that failure to reasonably modify paratransit system would constitute discrimination prohibited by the ADA and the Rehabilitation Act, but finding paratransit operation compliant with both statutes).

[38] *See id.* (under Title II of the ADA "public entities generally are required ... to make reasonable modifications to avoid discrimination on the basis of disability"); *see also* Tennessee v. Lan*e*, 541 U.S. 509, 531 (2004) (Congress recognized "that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion" or discrimination) (failure to make courthouse accessible); Henrietta D. v. Bloomberg, 331 F.3d 261, 273 (2d Cir. 2003) (discussing claims of discrimination based on failure to make a "reasonable accommodation" for failing to provide meaningful access to public assistance programs, benefits, and services for persons with AIDS or HIV-related illnesses).

[39] Swenson v. Lincoln County School Dist. No. 2, 260 F.Supp.2d 1136, 1144 (D.Wyo.2003) (claim by student with cerebral palsy, confined to a wheelchair, that school was inaccessible). *See* Delano-Pyle v. Victoria County, 302 F.3d 567, 575 (5th Cir.2002) (noting differences between constitutional claims and the ADA, including the fact that there is "no 'deliberate indifference' standard applicable to public entities" for purposes of the ADA or Section 504) (upholding $230,000 jury award to man, alleging that county violated ADA and Section 504 when deputy failed to take into account his serious hearing impairment during process of arresting him for driving while intoxicated and holding that evidence was sufficient to support jury's finding of intentional discrimination)..

[40] *See, e.g.*, 45 C.F.R. §84.12(c)(1-3); School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 n.17 (1987) (holding that school teacher with tuberculosis was a "handicapped individual" within meaning of Rehabilitation Act and remanding to determine whether she was otherwise qualified for her position); Nathanson v. Medical College of Penn., 926 F.2d 1368, 1386 (3d Cir.1991)(remanding case to determine whether medical college knew that student's condition was disability and had failed to provide reasonable accommodations, required by Section 504).

[41] *See, e.g.*, Buskirk v. Apollo Metals, 307 F.3d 160, 170-71 (3d Cir.2002) ("Generally, the question of whether a proposed accommodation is reasonable is a question of fact")(Title I); Chisolm v. McManimon, 275 F.3d 315, 327 (3d Cir. 2001)("[g]enerally, the effectiveness of auxiliary aids and/or services is a question of fact precluding summary judgment")(reversing summary judgment in suit by hearing-impaired detainee against pretrial detainment facility and county court system); Kennedy v. Dresser Rand Co., 193 F.3d 120, 122 (2d Cir.1999) ("the question of whether a proposed accommodation is reasonable is fact-specific and must be evaluated on a case-by-case basis"); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir.2002) ("Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties")(upholding summary judgement that city wrongly denied residential program for brain injured and developmentally disabled individuals a zoning variance); Niece v. Fitzner, 922 F.Supp 1208, 1218 (E.D. Mich.1996)(the "reasonableness of an accommodation under the ADA is a question of fact appropriate for resolution by the trier of fact")(denying prison's motion to dismiss ADA and Section 504 case by prisoner and his deaf fiancé to accommodate her disability with the TDD/relay system

[42] *See* 42 U.S.C. §12204; 28 C.F.R. pt.36, App. A (Standards for Accessible Design) & App. B (Analysis and Response to Comments). *See also* ADA Standards for Accessible Design, U.S. Dept. of Justice, http://www.usdoj.gov/crt/ada/stdspdf.htm, sometimes also referred to as Justice Department Standards of Accessible Design (JDSAD). Paralyzed Veterans of America v. Ellerbe Becket &Architects & Engineers, P.C., 950 F.Supp 389, 390 (D.D.C.,1996). The U.S. Department of Justice "ADA Home Page" is an invaluable resource for the ADA, Section 504, and other disability rights laws. *See* http://www.usdoj.gov/crt/ada/adahom1.htm.

entities, reasoning that, when Title II requires a government entity to remove barriers in buildings that pre-date the ADA or to construct new buildings in compliance with the ADA, ADAAG provides appropriate standards.[43]

The ADA also contains an anti-retaliation proviso, protecting any individual making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the ADA.[44]

A. Diminished Immunities

Because Title II ADA actions lie against state and local government entities, and not against individuals employed by those entities (although an individual's actions may cause liability on an agency theory),[45] issues of qualified ("good faith") immunity do not arise,[46] and thus neither does the interlocutory appeal problem. Nor is there municipal immunity.

Until recently, the law was unsettled as to the extent to which the ADA overcomes state sovereign immunity for Fourteenth Amendment purposes.[47] However, in *Board of Trustees of University of Alabama v. Garrett*,[48] the Supreme Court decided Title I of the ADA was an invalid use of Congress' §5 enforcement power under the Fourteenth Amendment. The court concluded Title I was unsupported by sufficient evidence of a history of discrimination, and, in any case, was not a proportional remedy. Therefore, with respect to Title I, Congress did not validly abrogate the States' Eleventh Amendment immunity. As a result, private citizens may not sue the States for money damages under Title I.[49] As noted, *Garrett* was limited to Title I.

Three years later, in *Tennessee v. Lane*, the Court addressed the same question with respect to Title II. The Court distinguished *Garrett* in determining that Congress had acted properly within its §5 powers and had validly abrogated Eleventh Amendment immunity from money damages in some contexts.[50] *Lane* implicated the fundamental right of access to the courts, and the Court found that Congress had intended to protect that right through the ADA. The Court's holding is limited in that respect and involves the pairing of the ADA with a fundamental right.

In both *Garrett* and *Lane*, the Court relied on reasoning from *City of Boerne v. Flores*[51] to determine whether Congress had legitimately exercised its §5 authority in each instance.[52] Thus, courts will apply this framework as they consider the validity of Title II with respect to rights besides access to the courts.

First, a court must identify the constitutional rights Congress sought to enforce when it enacted Title II. In *Lane,* the Supreme Curt found that Title II sought to enforce the prohibition against irrational discrimination based

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[43] *See, e.g.*, Garcia v. S.U.N.Y Health Sciences Center of Brooklyn, 280 F.3d 98, 107 (2nd Cir. 2001); Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000); Alsbrook v. City of Amumelle, 184 F.3d 999, 1004 n.8 (8th Cir. 1999) (en banc); Deck v. City of Toledo, 29 F.Supp.2d 431, 433 (N.D. Ohio 1998); Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C., 950 F.Supp 393, 395 (D.D.C. 1996); AMERICANS WITH DISABILITIES ACT: ADA COMPLIANCE GUIDE ¶840 (Thompson Publishing Group, 1994).

[44] 42 U.S.C. §12204.

[45] *See* Montez v. Romer, 32 F.Supp.2d 1235, 1240 (D. Colo. 1999) ("individual defendants in their individual capacities are not properly subject to suit under the Rehabilitation Act or the Disability Act"). *But see Henrietta D.*, 331 F.3d at 289 ("[n]either §504 nor Title II displays any intent by Congress to bar a suit against state officials in their official capacities for injunctive relief"); *and see* Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 374 n.9 (2001), *citing* Ex parte Young, 209 U.S. 123 (1908).

[46] *See* 28 C.F.R. §35.178 (2006). In one case, the Fifth Circuit seemed to imply, albeit in a brief per curiam opinion, that a state prison official might lose §1983 qualified immunity in a health care case if the trial court were to find the ADA, as applied in the case, constituted settled law and the official did not act objectively reasonably in the situation. *See* Hall v. Thomas, 190 F.3d 693, 695-97 (5th Cir. 1999) (affirming summary judgment against arrestee with diabetes, kidney condition, and epilepsy on §1983 and ADA claims against Harris County jail officials).

[47] Congress passed the ADA pursuant to the Commerce Clause (U.S. Const. Art. I) and §5 of the Fourteenth Amendment, and specifically overrode state sovereign immunity. 42 U.S.C. §§12101(b)(4), 12202. However, the U.S. Supreme Court since held that Commerce Clause legislation cannot abrogate state sovereign immunity, leaving only §5 as the only viable underpinning for Title II. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Indian tribe filed suit against Florida to compel negotiations under the federal Indian Gaming Regulatory Act).

[48] *Garrett*, 531 U.S. at 374.

[49] *Id.* at 370-74.

[50] *Lane*, 541 U.S. at 513-34.

[51] City of Boerne v. Flores, 521 U.S. 507 (1997).

[52] *Lane*, 541 U.S. at 522-33; *Garrett*, 531 U.S. at 370-74.

on disability, but that, as applied to a case involving access to the courts, it also implicated other constitutional rights such as the First, Sixth, and Fourteenth Amendments.[53]

Next, courts must consider whether Congress identified a pattern of unconstitutional discrimination by the states against people with disabilities.[54] Whereas in *Garrett* the Court found the record of unconstitutional employment discrimination on the basis of disability insufficient to support the broad remedies of Title I, in *Lane*, the high court found the evidence of discriminatory provision of public services ample under Title II.[55]

Finally, a court must consider whether the remedy provided by Title II is congruent and proportional to the violation. Whereas in *Garrett*, the Supreme Court took issue with the elements of Title I as overly broad and rigid, in *Lane*, the Court was impressed by Title II's limitations: that it requires only "reasonable modifications" which will not constitute an "undue" financial or administrative burden.[56] The varying means by which an entity could comply with Title II and the standards which were tailored differently toward existing as opposed to new facilities supported the court's finding that Title II was a congruent and proportional remedy for unconstitutional discrimination against people with disabilities in accessing the courts.

Two years after *Lane*, the Supreme Court decided another sovereign immunity case involving Title II, *United States v. Georgia*, holding that a prisoner could maintain a damages action, alleging conditions of confinement violated Title II, declaring:

> While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under §5 of the Fourteenth Amendment ... no one doubts that §5 grants Congress the power to "enforce ... the provisions" of the Amendment by creating private remedies against the States for actual violations of those provisions.... This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States.... Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.[57]

United States v. Georgia will facilitate suits by prisoners with disabilities against jails and prisons. It remains to be seen how Title II will fare in the circuits as applied to rights other than access to the courts.[58] The Eleventh Circuit recently extended *Lane* to public education.[59]

One should note the Eleventh Amendment problem arises only with regard to damages actions. Suits for injunctive and declaratory relief remain completely viable, whether under an *Ex parte Young* theory against officials in their official capacities or even directly against the entity since there is no practical or legal difference.[60]

B. The Section 504 Safety Net

However, to the extent that Title II is limited by state sovereign immunity in future cases, Section 504 will pick up the slack.[61] Section 504 rests on the Spending Clause: accepting federal money has an agreed-upon *quid pro quo*

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[53] *Lane*, 541 U.S. at 522-23.

[54] *See Lane*, 541 U.S. at 541; *Garrett*, 531 U.S. at 368.

[55] *Garrett*, 531 U.S. at 370-72; *Lane*, 541 U.S. at 529-31.

[56] *See Lane*, 541 U.S. at 531-33.

[57] United States v. Georgia, 126 S.Ct 877, 882 (2006) (citations omitted).

[58] *See* Pace v. Bogalusa City School Bd., 403 F.3d 272, 303 (5th Cir. 2005) (declining to decide whether Title II was valid exercise of Congress' enforcement power under the Fourteenth Amendment as applied to access to public education).

[59] Ass'n for Disabled Americans., Inc. v. Fla. Int'l Univ., 405 F.3d 954, 957-59 (11th Cir. 2005) (deciding that Title II is a valid exercise of §5 authority as applied to access to public education).

[60] *See Bd. of Trustees of Univ. of Alabama*, 531 U.S. at 374 n. 9, *citing* Ex parte Young, 209 U.S. 123 (1908); *and see* Miller v. King, 384 F.3d 1248 (11th Cir. 2004); *and* Henrietta D., 331 F.3d at 288 (a suit against a state official in his or her official capacity is in effect against a "public entity" and is authorized by Title II). *See also* McCarthy v. Hawkins, 381 F.3d 407, 417 (5th Cir. 2004); Chaffin v. Kansas State Fair Bd., 348 F.3d 850, 866-67 (10th Cir. 2003); *Henrietta D.*, 331 F.3d at 288; Bruggeman ex rel. Bruggeman v. Blagojevich, 324 F.3d 906, 913 (7th Cir. 2003); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1187 (9th Cir.2003); Carten v. Kent State Univ., 282 F.3d 391, 396 (6th Cir. 2002); Randolph v. Rodgers, 253 F.3d 342, 348 (8th Cir. 2001); Armstrong v. Wilson, 124 F.3d 1019, 1025-26 (9th Cir. 1997) (permitting prisoners and parolees to maintain suit for wide-ranging reforms of state prison system, based on violations of the ADA and Section 504).

[61] Title II monetary liability still continues to run against local government entities because sovereign immunity does not attach to them.

obligation to implement disability law requirements[62] that are virtually the same as those required by the ADA[63] and vice versa.[64]

The courts are clear that accepting federal funds is a waiver of sovereign immunity.[65]

In fact, if a Section 504 claim is paired with an ADA claim, a court may well avoid deciding the sovereign immunity issue under the ADA since there was a waiver under Section 504 and there is no practical difference between the two disability laws.[66]

C. Class Actions and Standing

As a general observation, the ADA for all practical purposes functions as a class statute when it comes to Title II access to government facilities and program, and framing relief. Congress devised the law that way. Its prospective plan of relief was through injunctive and declaratory relief, indicia of a class statute.[67] Thus, with some exceptions, there is little reason to file ADA cases as class actions.

Standing under the ADA is generous, and, as some of the subsequent footnotes observe, has great ramifications in actions against government entities.

The ADA and the Rehabilitation Act, respectively, provide relief to any person alleging discrimination on the basis of a disability (ADA), and any person aggrieved by the discrimination of a person on the basis of his or her disability (Rehabilitation Act).

Although the ADA states that no qualified individual with a disability shall be denied benefits by a public entity,[68] the ADA's Title II enforcement provision, states that the statute extends its remedies to "any person alleging discrimination on the basis of disability."[69] Similarly, the Rehabilitation Act protects "any person aggrieved" by discrimination because of his or her disability.[70]

As noted already, Congress granted authority to the Department of Justice to implement regulations pertaining to Title II. According to those regulations, a public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.[71]

In adopting these regulations, the Department of Justice was following the intent of Congress, which directed that Title II should be read to incorporate the provisions of Titles I and III that expressly define discrimination to include conduct based on relationship or association with persons with disabilities.[72]

In addition, the appendix to the regulations explains "the individuals covered … are any individuals who are discriminated against because of their known association with an individual with a disability."[73]

This associational standing rule applies not only to individuals, but also to entities.[74] For example, as the regulations note, if a local government refused to allow a theater company to use a school auditorium because it had

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[62] 42 U.S.C. §2000d-7. *See, e.g., Pace*, 403 F.3d at 282-89 (5th Cir. 2005) (acceptance of federal funds constituted knowing waiver of immunity under Rehabilitation Act); Barbour v. Washington Metropolitan Area Transit Authority, 374 F.3d 1161 (D.C. Cir. 2004) (deciding that accepting federal funds constituted knowing waiver of immunity under Rehabilitation Act).

[63] S*ee* 42 U.S.C. §12133 (stating that the "remedies, procedures, and rights" of Title II of the ADA are the same as those set forth in the Rehabilitation Act).

[64] *See* 42 U.S.C. §§12134(b), 12201(a) (requiring consistency between Section 504 and Title II); *and see* Rogers v. Department of Health, Envtl. Control, 174 F.3d 431, 433-34 (4th Cir. 1999) ("Relevant Rehabilitation Act precedent, then, may inform our understanding of what [Title II] requires.): Zukle v. Board of Regents of Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (*id.*).

[65] Miller v. Texas Tech University Health Sciences Center, 421 F.3d 342 (5th Cir. 2005) (en banc), c*ert. denied by* Louisiana Dept. of Educ. v. Johnson, 126 S.Ct 1332, 164 L.Ed.2d 49 (2006); *Barbour*, 374 F.3d 1161.

[66] *See ,e.g*., Bennett-Nelson v. Louisiana Bd. of Regents, 431 F.3d 448, 455 (5th Cir. 2005) (two deaf students brought claims under Section 504 and Title II that university had failed to provide them "reasonable accommodations," namely interpreters or note takers).

[67] *See* 42 U.S.C. §12188.

[68] *Id*. §12132.

[69] *Id*. §12133.

[70] 29 U.S.C. §794a(a)(2).

[71] 28 C.F.R. §35.130(g).

[72] 42 U.S.C. §§12112(b)(4), 12182(b)(1)(E).

[73] 28 C.F.R., pt. 35, App. A to 28, §35.130(g).

recently performed for an audience of individuals with HIV, the theater company would have a right of action because of the wrong done to it.[75]

Likewise, associational standing extends to familial relationships with an individual who has a disability. Companions, health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities. They all would have a cause of action for discrimination because of their association with persons with disabilities.[76] In this context, then, standing under the ADA and Section 504 may be more expansive than the state law standing that is usually incorporated into federal proceedings by virtue of 42 U.S.C. §1988.[77]

III. TITLE II POSSIBILITIES INSTEAD OF, OR IN ADDITION TO, §1983 ACTIONS

This section offers situations where Title II of the ADA (and Section 504) may be used instead of, or in conjunction with, §1983 to strengthen civil rights actions. As the following comments show, there is no end to legal creativity in situations that pertain to the civil rights of people with disabilities.

A. Self-Evaluation and Transition Plan

Civil rights cases often arise because of nonexistent policies and inadequate training. The remedies sought by litigation are improved policies and additional training. One area of the ADA offers great help in this situation, but is frequently overlooked by government entities: the requirement of a self-evaluation and subsequent modifications of the program, and, if physical alterations are required, a transition time or timetable within which the agency will make the alterations.[78]

The regulations promulgated by the Department of Justice to implement Part A of Title II of the ADA require each government entity to conduct a self-evaluation of its programs and services (or the lack thereof) related to persons with disabilities:

> (a) A public entity shall, within one year of the effective date of this part [that is, by January 26, 1993], evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.
>
> (b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.[79]

Section 504 has the same requirements.[80] Thus, as of 1978, when Section 504 regulations went into effect, a government entity should have done the self-evaluation and subsequent modifications, and met physical building access requirements. This makes it more difficult for a public agency to explain why it has not met its disability law mandate nearly thirty years later, which often is a powerful argument for a disability rights plaintiff.[81]

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[74] *See, e.g.,* MX Group, Inc. v. City of Covington, 293 F.3d 326 (6th Cir. 2002) (drug treatment provider challenging denial of zoning permit for methadone clinic and asserting claims under ADA and Section 504); Innovative Health Sys. Inc. v. City of White Plains, 117 F.3d 37, 44 (2nd Cir. 1997) (Title II and the Rehabilitation Act apply to discriminatory zoning decisions against rehabilitation center), *overruled on other grounds by* Zervos v. Verizon New York, 252 F.3d 163, 171 n.7 (2nd Cir. 2001).

[75] 28 C.F.R., pt. 35, App. A to 28, §35.130(g).

[76] *Id.*

[77] *See, e.g.*, L.J. McCoy, *et al.* v. Texas Dept. of Criminal Justice, *et al.*, 2006 WL 2331055 (S.D.Tex. Aug 09, 2006) (No. C.A. C 05 370) (unpublished) (denying parties' summary judgment motions and finding that standing under Texas wrongful death and survival statutes was superseded by standing under ADA and Section 504) (monetary settlement of case, pairing Title II and Eighth Amendment, where prisoner died during asthma attack, after being denied proper medical care) (the author was co-counsel for plaintiffs).

[78] The ADA requires retrofitting and alterations of buildings that existed as of January 26, 1992, to the extent that doing so does not cause an "undue burden" on the agency. Facilities built, or substantially renovated, after that date must be in compliance with the ADA, without exception. *See* 42 U.S.C. §2182(b) (2)(A)(iii); 28 C.F.R. §35.151.

[79] 28 C.F.R. §35.105(a)-(b); *see* 28 C.F.R. §35.151.

[80] *See* 28 C.F.R. § 35.105(d) 150(d)(4);.

[81] To have standing to raise the issue of no self-evaluation, a plaintiff need show only a causal connection between the self-evaluation and a concrete *threat* of discrimination, but not a causal connection between no self-evaluation and a particular injury. *See* Tyler v. Kansas Lottery, 14 F.Supp.2d 1220, 1225 (D. Kan. 1998).

Government agencies tend to be more proactive on physical access issues and deficient on *program* access issues. For example, a county sheriff may see to it that the jail and department offices are physically accessible, but fail completely to conduct any self-evaluation of procedures and training for law enforcement personnel about how to handle encounters with persons who have mental illness or another disability. When appropriate training and policies are lacking, a creative plaintiff can use this lack of self-evaluation and modification to push for better training programs and proper policies.

The absence of ill motive or intent is not an excuse for failing to conduct the Title II self-evaluation and program modification.[82] Nor does the excuse of inadequate government appropriations or lack of funds justify the failure to conduct a thorough self-evaluation and subsequent program and facility modification.[83]

Therefore, a beneficiary of the ADA may be entitled to a declaratory judgment concerning a government entity's failure to conduct a self-evaluation plan under Section 504 and the ADA and injunctive relief, requiring it to modify its programs and services to accommodate persons with disabilities. This may well entail implementation of new ADA-specific policies and training procedures. However, at least two circuits have ruled that the requirements to perform a self-evaluation and formulate a transition plan are not enforceable by individual citizens through a private cause of action, but only by the Department of Justice.[84]

Nevertheless, failure to comply with this federal mandate might inform a §1983 deliberate indifference claim against a municipality by a person with a disability. Conversely, doing the self-evaluation puts an entity on notice about the services and training it needs to provide to its officers and employees regarding people with disabilities, and the lack of such services and training may show the deliberate indifference needed to maintain a §1983 action against a municipality.[85]

B. Jails and Prisons

Conditions of confinement are subject to considerable civil rights litigation under both §1983 and the ADA.[86] In a unanimous 1998 opinion by Justice Antonin Scalia, *Pennsylvania Department of Corrections v. Yeskey*,[87] the Supreme Court made it clear that the ADA extends to state prisons, based on the plain reading of the statute. The Court suggested some prison activities to which the ADA would apply: medical services, education and vocation programs, library, visiting, recreational activities, and boot camp like that at issue in *Yeskey*.[88]

On the issue of sovereign immunity, the Supreme Court, in *United States v. Georgia*, overturned earlier circuit decisions that declared Title II an improper use of Congress' §5 power as applied to Title II violations in prisons.[89]

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[82] Tyler v. City of Manhattan, 857 F.Supp 800, 818-819 (D. Kan. 1994) (finding discrimination based on disability despite defendant's good faith effort to remove particular barriers).

[83] *See* L.C. by Zimring v. Olmstead, 138 F.3d 893, 904-05 (11th Cir. 1998) ("the ADA does not permit the State to justify its discriminatory treatment of individuals with disabilities on the grounds that providing non-discriminatory treatment will require additional expenditures of state funds."), *aff'd in part, vacated in part, and remanded*, 527 U.S. 581 (1999).

[84] Iverson v. City of Boston, 452 F.3d 94, 103 (1st Cir. 2006) ("The self-evaluation and transition plan regulations impose obligations different than, and beyond, those imposed by Title II of the ADA. Accordingly, they are not enforceable through the instrumentality of the private right of action available under that statute."); Ability Center of Greater Toledo v. City of Sandusky, 385 F.3d 901, 914 (6th Cir. 2004). *But see* Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 857-60 (10th Cir. 2003) (holding that both the self-evaluation and transition plan regulations are enforceable through a private action).

[85] *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989) ("[T]he inadequacy of police training may serve as a basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.").

[86] *See* Emily Alexander, *The Americans With Disabilities Act and State Prisons: A Question of Statutory Interpretation*, 66 FORDHAM L.REV. 2233, 2283 (1998).

[87] Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 213 (1998). *See* 28 C.F.R. §39.170(d)(1)(ii) (institutions administered by Federal Bureau of Prisons are subject to Section 504).

[88] *Id*. at 210. *See* Crawford v. Indiana Dept. of Corrections, 115 F.3d 481 (7th Cir. 1997) (education program provided by state prison is a program, and use of law library and dining hall are activities, within meaning of the ADA); Duffey v. Riveland, 98 F.3rd 447 (1996) (prison disciplinary and classification hearings are programs with definition of the ADA); Spurlock v. Simmons, 88 F.Supp.2d 1189, 1195 (D. Kansas 2000) (use of prison telephones is a service or activity under the ADA); *and see* Niece v. Fitzner, 922 F.Supp (E.D. Mich. 1996) (prison must accommodate communication needs of deaf fiancée of prisoner who was visiting him); and see 28 C.F.R. §35.190(b)(6) (ADA regulations apply to correctional facilities).

[89] *See* United States v. Georgia, 546 U.S. 151 (2006) ("insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteen Amendment, Title II validly abrogates state sovereign immunity

However, as noted in the earlier discussion on sovereign immunity, Title II in the state prison context will have to utilized to protect an Eighth or Fourteenth Amendment right, rather than Title II standing alone as it would for city and county jails.[90]

Four areas tend to predominate in prison ADA cases: physical accessibility[91]; accommodating prisoners with HIV infection; handling inmates who are suicidal or mentally ill; and interpreters/accommodations for prisoners who are deaf or blind.[92]

Federal courts accord enormous deference to prison officials in §1983 cases, alleging Eighth Amendment "cruel and unusual" prison conditions[93] and Fourteenth Amendment cases alleging pre-conviction violations of due process, especially regarding medical care.[94] The test is one of "deliberate indifference to a substantial risk to health or safety," a rather steep standard for a §1983 plaintiff.[95]

The ADA, on other hand, requires officials to reasonably accommodate the needs of a prisoner with a disability,[96] unless to do so would result in a fundamental alteration of the prison or undue financial and administrative burdens.[97] The obligation imposed by the ADA, depending on the situation, may be greater than that imposed by §1983. Because the ADA places an affirmative burden on the officials,[98] it may be sometimes easier for a prisoner with a disability to prevail under the ADA than under §1983.

In some instances, a court may even look to the ADA as a way of informing Eighth or Fourteenth Amendment standards.[99] This approach might offer great promise in prison and jail conditions litigation by prisoners with disabilities.

[even with respect to complaints concerning conditions of confinement]") (emphasis in original) (failure to accommodate paraplegic inmate).

[90] *See, e.g., Miller*, 384 F.3d 1248 (failure to accommodate paraplegic prison inmate violated Eighth Amendment and Title II); *L.J. McCoy*, 2006 WL 2331055 (denying parties' summary judgment motions in case where prisoner died during asthma attack, after being denied proper medical care).

[91] Love v. Westville Correction Center, 103 F.3d 558 (7th Cir. 1996) (confining quadriplegic prisoner in infirmary and denying him access to prison library and to education, transition, and work programs violated Title II).

[92] *See* Armstrong v. Wilson, 942 F.Supp 1252 (N.D.Cal. 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997) (injunction under Title II and Section 504 to improve prison facilities and programs for a range of prisoners with different physical disabilities); Raines v. Florida, 983 F.Supp 1362 (N.D. Fla. 1997) (approving settlement of class action by prisoners with physical and mental disabilities, suing for access to various prison programs).

[93] *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

[94] *See, e.g.*, Newton v. Black, 133 F.3d 301, 308-09 (5th Cir. 1998). Because Title II applies to prisons and jails alike, in light of *Yeskey*, this article uses cases involving them interchangeably. There is not much difference ultimately in the nature of rights afforded by the Eighth and Fourteenth Amendments, the former applying to persons convicted of crime and the latter applying to pre-trial detainees. *See* Hare v. City of Corinth, Miss., 74 F.3d 633, 648-49 (5th Cir. 1996) (en banc); City of Revere v. Massachusetts General Hosp., 463 U.S. 239, 244 (1983) (holding that city fulfilled its constitutional due process obligation by promptly taking injured detainee to hospital).

[95] *See Farmer*, 511 U.S. at 837.

[96] *See Yeskey*, 524 U.S. at 208, 213.

[97] 28 C.F.R. Pt.35, App. A at 466 (1995).

[98] See 42 U.S.C. §§12131-12165.

[99] *See* Stevens v. Illinois DOT, 210 F.3d 732, 738 (7th Cir. 2000) ("In sum, the ADA replaces the Fourteenth Amendment's constitutional protections with a higher set of legislative standards, thereby making illegal under the ADA conduct that is constitutional under the Fourteenth Amendment."); Schmidt v. Odell, 64 F.Supp.2d 1014, 1031 (D. Kansas 1999) ("Although ADA requirements are clearly not synonymous with or incorporated into the Eighth Amendment, the ADA reflects, to some degree, contemporary standards of decency concerning treatment of individuals with disabilities. Because the Eighth Amendment draws from the evolving standards of decency that mark the progress of a maturing society, a reasonable jury could find that treatment of a disabled inmate such as that described here falls short of the basic concept of human dignity at the core of the Eighth Amendment.") (citations omitted) (denying summary judgment for officials on claims brought under the Eighth Amendment, Section 504, and the ADA by inmate who had both legs amputated beneath knees and finding that use of toilet, shower, recreational areas, and obtaining meals are basic services within meaning of the ADA).

> Although ADA requirements are clearly not synonymous with or incorporated into the Eighth Amendment, the ADA reflects, to some degree, contemporary standards of decency concerning treatment of individu-

1. HIV

HIV is a major problem in jails and prisons.[100] One frequent inmate complaint is the treatment and isolation of prisoners with HIV. On the treatment issue, the ADA requires that a jail facility provide medical care that accommodates people with disabilities as part of the jail's genera; medical regime,[101] although the ADA *ipso facto* doesn't become a vehicle for an inmate specifying one kind of treatment over another.[102] The ADA also requires integrating the prisoner into the jail's facilities[103] and programs,[104] more so than what a §1983 action might require.

However, *Yeskey* notwithstanding, the Supreme Court refused to review an Alabama prison case allowing the segregation of HIV+ inmates from general prison activities for health and safety reasons.[105]

2. Suicidal and Mentally Ill Prisoners

America went through a de-institutionalization process in the latter part of the Twentieth Century, the goal of which was to move people with mental illnesses from large institutions to smaller, community-based housing and centers. The reality, however, was to shut down or "downsize" larger facilities and deny funding for appropriate services in the smaller settings.

As a result, more and more people with mental illness found themselves living on the streets or in other inappropriate settings. Many eventually end up in jails and prisons for their conduct, and that number is ever increasing.[106] This raises significant issues about how jails and prisons should accommodate them under the disability laws.

Suicide is a major problem in county jails, and it manifests itself in the cases.[107] For §1983 purposes, courts analyze these situations as either a "condition of confinement" case or as one involving an "episodic act or omission."[108]

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als with disabilities. Because the Eighth Amendment draws from the "evolving standards of decency that mark the progress of a maturing society," Rhodes v. Chapman, 452 U.S. at 346, a reasonable jury could find that treatment of a disabled inmate such as that described here falls short of "the basic concept of human dignity at the core of" the Eighth Amendment. *See* Gregg v. Georgia, 428 U.S. 153, 182 … (1976).

[100] Susan Okie, "Sex, drugs, prisons and HIV," NEW ENG. J.MED 356:105-108 (Jan. 11, 2007) (highlighting how U.S. prisons are acting as "reservoirs" of HIV infection, and that as many as 25% of HIV-infected individuals in the U.S. may be imprisoned at some point, as well as 33% of persons with hepatitis C virus (HCV) infection, and 40% of those with active tuberculosis).

[101] *See* McNally v. Prison Health Servs., 46 F.Supp.2d 49, 58 (D. Me. 1999) (applying distinction "between [non-actionable] claims that the medical treatment received for a disability was inadequate from [actionable] claims that a prisoner has been denied access to services or programs because he is disabled," and overruling summary judgment against ADA and §1983 claims by prisoner denied HIV medication for three days); Rivera v. Sheahan, No. 97 C 2735, 1998 WL 531875, at *4 (N.D. Ill. 1998) (granting motion to dismiss ADA, access to courts, and equal protection claims based on failure to plead properly and denying motion with respect to Eighth Amendment and §1983 claims for failure to provide treatment); May v. Sheahan, No. 99 C 0395, 1999 WL 543187, at *7 (N.D. Ill. 1999), *aff'd*, 226 F.3d 876 (7th Cir. 2000) (granting motion to dismiss ADA claim against sheriff on qualified immunity grounds and denying motion to dismiss on all other claims in a suit by a pre-trial county jail inmate with AIDS who was shackled to the bed).

[102] *Id.*

[103] *See* Roop v. Squadrito, 70 F.Supp.2d 868, 877 (D. Ind. 1999) (denying summary judgment on ADA and §1983 claims by HIV+ county jail inmate based on totality of conditions and treatment); John Doe, *et al.* v. Ed Richards, Sheriff of Williamson County, *et al.*, No. A-97-CA-643-JN (U.S. Dist. Ct., W.D. Tex., Austin Div. 1997) (settlement regarding medical care and access to county jail recreational activities for HIV+ prisoners) (the author was counsel for the *Doe* plaintiffs).

[104] Dennis Vaughn v. Texas Dept. of Criminal Justice, *et al*., No. H-00-0205 (U.S. Dist. Ct., S.D. Tex., Houston Div. 2000) (monetary settlement regarding denial of participation in parole diversionary alcohol treatment program because of HIV+ status) (the author was counsel for the plaintiff).

[105] Onishea v. Hopper, 171 F.3d 1289, 1305 (11th Cir. 1999), *cert. denied sub nom.*, Davis v. Hopper, 528 U.S. 1114 (2000), relying on Turner v. Safley, 482 U.S. 78 (1987) (regulation that infringes on a prisoner's constitutional right is valid if reasonably related to legitimate penological interest).

[106] *See* Doris J. James and Lauren E. Glaze, "Mental Health Problems of Prison and Jail Inmates," Bureau of Justice Statistics, U. S. Department of Justice (NCJ-213600, September 2006) (reporting that 56% of jail inmates in state prisons and 64% of inmates across the country reported mental health problems within past year).

[107] *See, e.g.*, Hare v. City of Corinth, 135 F.3d 320, 327 (5th Cir. 1998) (discussing a range of suicide cases); Flores v. County of Hardeman, 124 F.3d 736, 736-39 (5th Cir. 1997).

A "condition of confinement" case is a constitutional attack on general conditions, practices, rules, or restrictions of the facility.[109] In such cases, the court assumes, by the municipality's promulgation and maintenance of the complained-of condition, that it intended to cause the alleged constitutional deprivation.[110]

If the complained-of harm is caused by a particular act or omission of one or more officials, the action is characterized as an "episodic act or omission" case.[111] To hold a municipality accountable for such a violation, the plaintiff must show that the municipal employee violated clearly established constitutional rights with subjective deliberate indifference, and the violation resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference.[112] The question is whether the defendant had actual knowledge of the substantial risk of suicide and responded with deliberate indifference.[113]

In a suicide case with egregious facts, the Fifth Circuit extended qualified immunity to city jail officials of Corinth, Mississippi in a suit by the estate of a pre-trial detainee who committed suicide.[114] The court held the officials did have actual knowledge of the substantial risk of suicide; and that, at minimum, they had a duty not to be deliberately indifferent to the medical needs of pre-trial detainees. However, given their low level of suicide prevention training, their conduct regarding the possibility that the decedent would kill herself was objectively reasonable.[115] The court simply found the facts did not show objectively unreasonable conduct when applied against the subjective deliberate indifference standard.[116]

The opinion states that the objective reasonableness standard does not afford a "simple bright-line" test. Why this is true is unclear. The very reason the courts have revised the qualified immunity test over the years is to eliminate subjectivity from it, and to concentrate on objectivity. This case certainly appears to introduce subjectivity back into the test, but only as it favors the officer.[117] There is circularity in the court's reasoning: the officer's subjective knowledge provides the benchmark against which to measure objective conduct. The test has been, and should be, what a reasonable officer should have done in this situation, not what the officer was thinking.

The result of rulings like *Hare* is to take away whatever motivation a lawsuit offers to cajole jail officials into receiving appropriate training and exercising proper care. Under this ruling, the less officials know about appropriate conduct with respect to potentially suicidal inmates, the less objective legal responsibility they have. This cannot be consistent with the purpose of the Constitution, §1983, or the case law.[118]

There likely would be a very different result under the ADA, given the statute's affirmative duty to accommodate persons with mental illness, and, *a fortiori*, suicidal tendencies. The accommodations might include, for example, specialized training of jail staff, different kinds of selling alternatives, heightened level of medical care, and diligent surveillance.[119] One might also argue that the ADA mandate has removed from officers the ability to

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[108] *Flores*, 124 F.3d at 738 (citing *Hare*, 74 F.3d at 644).

[109] *Id.*

[110] *Hare*, 74 F.3d at 644-45.

[111] *Flores*, 124 F.3d at 738 (quoting *Hare*, 74 F.3d at 644).

[112] *Id.* (citing *Farmer,* 511 U.S. 825).

[113] *Id.* (citing *Hare*, 74 F.3d at 650); *see* Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997) (en banc).

[114] *Hare*, 135 F.3d at 329 (reversing denial of summary judgment on qualified immunity grounds, rendering judgment in favor of officers, and remanding).

[115] *Id.* In *Hare*, the officers knew the woman prisoner was suicidal, but did not remove the blanket from her cell because they believed, since she only weighed 100 pounds, she was not strong enough to tear it to hang herself, which is exactly what she did. Moreover, they only checked her cell once every forty-five minutes; and, when a trustee discovered her, he left her hanging until the state investigator arrived, though she may have survived with emergency treatment. *Id.* at 323, 328 & n.1.

[116] *Id*. at 329.

[117] *See id*. at 327-29.

[118] See, e.g., Anderson v. Creighton, 483 U.S. 635, 640 (1987)

[119] *See, e.g.,* Debbie Mergele, *etc. v.* Margo Frasier, *et al.*, Civil Action No. A-03-CA-836-SS (U.S. Dist. Ct., W.D. Tex., Austin Div. 2003) (settling suicide case for monetary damages and adoption of specialized suicide procedures); Janice Elliot, *etc.* v. Andrews County, Texas, *et al.*, Civil Action No. MO-03-CV-125 (U.S. Dist. Ct., W.D. Tex., Austin Div. 2003) (monetary settlement in suicide case); Carmen Morales v. U. E. Skains, Tom Green County Sheriff, No. 6-96CV-054-C (U.S. Dist. Ct., N.D. Tex., San Angelo Div. 1996)(settling suicide case for monetary damages and the adoption of specialized suicide procedures). The (the author was lead counsel for plaintiffs in *Elliott* and Morales..

plead they did not know any better; the ADA sets on them an affirmative requirement to act appropriately with respect to prisoners with mental disabilities.[120]

Finally, it is clear that jails and prisons may not discriminate against prisoners simply because of their mental illness.[121] The analysis in this section also applies with equal force to physical ailments that qualify as disabilities, such as asthma.[122]

3. Interpreters and Accommodating Blind Prisoners

There is not much dispute that prisoners are entitled to appropriate interpreting services[123]; the only question is which situations require an interpreter, and which allow alternate means.[124] The consensus seems to be that qualified American Sign Language interpreters should be present during important facets of incarceration, such as the booking in and classification processes, explanation of jail rules; other-than-routine medical[125] and attorney visits, and grievance hearings, for example.[126] At other times, other means (writing notes, using student interpreters, etc.) may pass muster.[127] Some jails have a video that explains jail rules to new prisoners, which is also captioned for the hearing impaired, and has a sign language interpreter in a cutaway in a corner of the screen.[128]

There are few cases involving accommodations for blind inmates, but the most comprehensive case required a prison to provide means to make use of its library and educational program and navigational assistance around the prison.[129]

4. Prison Litigation Reform Act

By way of caveat, one should note a provision of the Prison Litigation Reform Act (PLRA) bars prisoners' claims for mental and emotional damages without a prior showing of physical injury.[130] Both the Seventh and

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[120] *See, e.g.,* Moeineddin Ghavami v. Juan Alanis, *et al.,* Civil Action No. SA-05-CA-0700-RF (U.S. Dist. Ct., W.D. Tex., San Antonio Div. 1996) (monetary settlement of case, where mentally ill county jail prisoner was denied proper medical care) (the author was co-counsel for plaintiff).

[121] Sites v. McKenzie, 423 F.Supp 1190 (N.D.W.Va. 1976) (summary judgment granted in favor of prisoners who alleged denial of vocational rehabilitation opportunities to mentally ill prisoners violated Section 504); D.M. v. Terhune, 67 F.Supp.2d 401, 412 (D.N.J. 1999) (approving class action settlement of case in which inmates with mental disorders claimed to have been denied appropriate treatment and medication).

[122] *See, e.g., L.J. McCoy*, 2006 WL 2331055 (denying parties' summary judgment motions in case where prisoner died during asthma attack, after being denied proper medical care).

[123] *See, e.g.,* Brown v. King County Dep't of Adult Corrections, 1998 WL 1120381(D. Wash. Dec. 9, 1998) (failure to provide accommodations, such as TDD, TV captioning, and facilitate sign language during visitation actionable under Title II).

[124] *See, e.g.,* Randolph v. Rogers, 170 F.3d 850, 859 (8th Cir. 1999) (providing sign language interpreter for inmate as a reasonable accommodation involved question of fact and whether it implicated prison safety and security and posed undue financial burden)

[125] Bonner v. Lewsi, 857 F.2d 559, 563 (9th Cir. 1988) (failure to accommodate inmate who is deaf, mute, has tunnel vision, and has difficulty communicating with people who do not know American Sign Language actionable under Section 504).

[126] *See, e.g., Chisolm*, 275 F.3d at 332 (reversing summary judgment in favor of officials who denied a detainee's request for a sign language interpreter and a machine that allows those with hearing disabilities to communicate with others by telephone); Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996) (certified interpreter might be necessary for prison disciplinary and classification hearings).

[127] *See* Curtis Lynn Stainbrook v. Ralph López, Bexar County Sheriff, *et al.*, No. SA-97-CA-1468 (W.D. Tex., San Antonio Div. 1997) (comprehensive settlement regarding providing interpreters for jail classification, grievance and disciplinary processes, attorney visits, and medical care) (the author was lead counsel for plaintiff); Settlement Agreement Between the United States and the Office of the Sheriff, County of Fairfax, Virginia re: Effective Communication (DOJ Complaint No. 204-9-18), *available at* http://www.usdoj.gov/crt/ada/fairfax.htm (providing for TDD and interpreters for inmates who are deaf or hearing impaired, and appropriate training for jail officers); *and see* Clarkson v. Coughlin, 898 F.Supp 1019 (S.D.N.Y. 1995 (failure to provide interpreters, communications devises, and visual safety alarms for deaf inmates violated Title II of ADA); *but see Spurlock*, 88 F.Supp.2d at 1196 (restricting TDD phone calls to two 30-minute calls per week is not unreasonable accommodation in view of the burden placed on prison officials).

[128] *See Stainbrook, supra* n.127.

[129] Williams v. Illinois Dept. of Corrections, 1999 WL 1068669 (N.D. Ill. 1999) (granting summary judgment to legally blind inmate that denial of books on tape, braille materials, or large-print books violated ADA and Section 504 and entering injunctive relief).

District of Columbia Circuits have ruled that the plain language of the PLRA proviso also precludes claims for mental and emotional damages under the ADA and Section 504, to the extent they might be available, without a showing of physical injury, *Yeskey* notwithstanding.[131] Additionally, several courts have held that the PLRA's administrative remedy exhaustion requirement applies to claims brought under the ADA and Section 504.[132]

However, some courts have held that PRLA's restrictions on attorneys' fees awarded pursuant to 42 U.S.C. §1988, the standard civil rights fees statute, are trumped by the specific attorneys' fees provisions of the ADA and Section 504,[133] discussed later in this article.

5. Private Prison and Jail Facilities

Title III, not Title II, applies to private prisons and jails.[134] In these Title III cases, the standard negligence theories apply, not §1983 – although §1983 applies to private facilities.[135] There are no damages available through a private action for a violation of Title III. However, one might argue that Title III standards help define the parameters of reasonable care and negligence in cases involving prisoners with disabilities,[136] which, in turn, if the officials' misconduct is egregious enough, may show deliberate indifference for §1983 purposes.[137]

One important aspect of the ADA is that an entity cannot contract away its ADA responsibilities; there is joint and several responsibility and liability.[138] In the case of a private jail, for example, both the contracting county and the private jail are liable for non-compliance with the ADA. This is true of Section 504 responsibilities as well.[139]

C. Police Activities

Considerable judicial attention has focused on the interplay between Title II and police activities, especially after *Yeskey*.[140] Even before *Yeskey*, the U.S. Department of Justice ADA, the Congressionally-mandated enforcer of the ADA, had posted a manual on its website about ADA applicability to police activities, entitled "Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement."[141]

The ADA-sensitive areas listed in the manual include: receiving citizen complaints; interrogating witnesses; arresting, booking, and holding suspects; operating telephones (911) emergency centers; providing emergency

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[130] 42 U.S.C. §1997e(e).

[131] *See Yeskey*, 524 U.S. at 213; Cassidy v. Indiana Dept. of Corr, 199 F.3d 374, 375-76 (7th Cir. 2000) (PRLA limits ADA and Section 504 damages).

[132] Porter v. Nussle, 534 U.S. 516, 524, 532 (2002) (deciding that administrative remedy exhaustion requirement in the PLRA applies to §1983 and *Bivens* actions and all claims related to "prison life"); Anderson v. XYZ Corr. Health Servs., 407 F.3d 674, 677 (4th Cir. 2005); Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005) (holding that a blind inmate did exhaust his administrative remedies with respect to his ADA claims); Post v. Taft, No. 03-3664, 2004 WL 959070, at *2 (6th Cir. May 3, 2004) (dismissing claims under ADA, Section 504, and several constitutional amendments for failure to exhaust administrative remedies required by PLRA); Jones v. Smith, No. 04-6116, 2004 WL 2053280, at *2 (10th Cir. Sept. 13, 2004) ("Under the Prison Litigation Reform Act (PLRA), a prisoner who files a civil action challenging the conditions of his confinement must first exhaust administrative remedies ....").

[133] *E.g.*, Armstrong v. Davis, 318 F.3d 965, 974 (9th Cir. 2003); *D.M.*, 67 F.Supp.2d at 412; Beckford v. Irvin, 60 F.Supp.2d 85, 88 (W.D.N.Y. 1999); *but see Cassidy*, 199 F.3d at 375-76 (PLRA limits ADA and Section 504 attorney fees).

[134] *See* Warren Martin v. Corrections Corp. of Am., Inc., No. 3-97-CV-2895-BD (N.D. Tex., Dallas Div. 1997) (monetary settlement in suicide case alleging inappropriate self-medication regime for mentally ill and suicidal inmate). The author was co-counsel for plaintiffs.

[135] Richardson v. McKnight, 521 U.S. 399 (1997).

[136] *See, e.g.*, Smith v. Wal-Mart Stores, Inc., 167 F.3d 286, 293 (6th Cir. 1999) (using Title III physical access standards to establish negligence in personal injury case by customer with wheel chair).

[137] *See Hall*, 190 F.3d 695-97 (suggesting that state prison official might lose §1983 qualified immunity in health care case if trial court were to find that ADA, as applied in case, constituted settled law and official did not act objectively reasonably in situation).

[138] *See* 28 C.F.R. §35.130(b)(1).

[139] *Henrietta D.*, 331 F.3d at 286.

[140] *See, e.g.*, James D. Johnson, Note & Comment, *Does the Americans with Disabilities Act Apply to the Conduct of Law Enforcement Officers Pursuant to Arrests? A Survey of Gorman v. Bartch*, 14 GA. ST. U. L. REV. 901, 901-24 (1998).

[141] http://www.usdoj.gov/crt/ada/q&a_law.htm (U.S. Dept. of Justice**,** Civil Rights Div., Disability Rights) ("Last Revised April 4, 2006).

medical services; enforcing laws; and other duties. The manual specifically refers to disabilities, such as blindness, mental retardation, speech disabilities, physical impairments, mental illness, and neurological disorders.[142]

The areas of police accommodation for people with disabilities are as myriad as the functions the police perform.[143] Here, too, is where the self-evaluation process is very important. The areas where the ADA seems to come most into play involve accommodation of physical disabilities, appropriate use of force, mental illness calls, and the need for interpreting.[144] The courts, however, do tend to allow police more discretion about ADA accommodations before and during an arrest,[145] than afterwards when transporting someone to jail[146] or confining the person.[147]

1. Use of Force

In light of *Yeskey*, the Eighth Circuit Court of Appeals reversed a summary judgment ruling in favor of a police department on a claim by a person in a wheelchair that police denied him proper handling and transportation during and after his arrest.[148] The plaintiff claimed the Kansas City, Missouri Police Department failed to modify its arrest and transportation policies and procedures to accommodate individuals with spinal cord injuries, and to insure proper training for officers on handling such arrestees.[149] The appellate court held:

> Our task in considering whether [the plaintiff's] allegations come under the ambit of federal statutes has been made easier by the Supreme Court's unanimous decision … in [*Yeskey*]. In applying Title II of the ADA to state prisons and prison services, Justice Scalia emphasized the broad language used by Congress and its choice not to include exceptions ....
> A local police department falls "squarely within the statutory definition of 'public entity,'" ... just like a state prison.[150]

The Eighth Circuit noted the expanse of "programs" and "benefits" covered under the ADA; the fact the ADA can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[151] The court observed that the general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.[152]

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[142] *Id.*

[143] *See, e.g.*, "Recognizing Special Needs: A Police Officer's Field Guide to Selected Disabi-lities," by Municipal Police Officers' Education & Training Commission (Hershey, Pennsylvania 2001).

[144] Richard Bell, *et al.* v. Catfish Parlour, Inc., *et al.*, Civil Action No. A-01-CA-583-JN (U.S. Dist. Ct., W.D. Tex., Austin Div. 2002) (comprehensive settlement:http://www.usdoj.gov/crt/ada/-q&a-law.htm monetary and procedures for police to use interpreters when dealing with deaf people on calls).

[145] *Compare, e.g.*, Rosen v. Montgomery County, 121 F.3d 154, 157, 159 (4th Cir. 1997) (rejecting claim that police violated Title II by failing to provide an interpreter when stopping, detaining, or arresting individuals with hearing impairments, while commenting that fitting an arrest into the ADA "strikes us as a stretch of the statutory language and of the underlying legislative intent.") *with* Barber v. Guay, 910 F.Supp 790 (D. Me. 1995) (denying sheriff defendants summary judgment because plaintiff stated valid cause of action under the ADA by alleging that "he was denied proper police protection and fair treatment due to his psychological and alcohol problems"). *But see* Thompson v. Davis, 295 F.3d 890, 897 (9th Cir. 2002) (rejecting *Rosen*'s reliance on voluntariness as a required element of a "program or activity" under the ADA in light of *Yeskey*).

[146] *See, e.g.*, Gorman v. Bartch, 152 F.3d 907, 916 (8th Cir. 1998) (arrestee with paraplegia stated Title II claim based on manner in which he was transported from site of arrest to police station).

[147] *See, e.g.*, Smith v. Indiana, 904 F.Supp 877, 880 (N.D. Ind. 1995) (denying defendant doctor's motion for summary judgment because arrestee with paraplegia stated Title II claim based on treatment at jail following apprehension).

[148] *See Gorman*, 152 F.3d at 916.

[149] *Id.* at 910.

[150] *Id.* at 912 (citations omitted).

[151] *Id.* (quoting *Yeskey*, 524 U.S. at 212). *Gorman* further recognized that the ADA and Section 504 "must be interpreted broadly to include the ordinary operations of a public entity in order to carry out the purpose of prohibiting discrimination." *Id.* at 912-13 (citing Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997)). Nor may a public entity provide services in a manner denying disabled individuals equal benefit of the service. 28 C.F.R. §35.130(b)(1).

[152] *Gorman*, 152 F.3d at 913 (citations omitted). In reversing summary judgment, the Eighth Circuit held that the "allegations pass the threshold required to bring a case under the ADA and the Rehabilitation Act," and remanded the case for the trial judge to determine whether the plaintiff was actually discriminated against or denied the benefit of a service because of his disability. *Id.*

The Tenth Circuit also examined arrest situations in ADA terms in *Gohier v. Enright*,[153] a suit by a representative of the estate of Michael Lucero who died in a police shooting. There, an officer responded to a dispatch call that a man was wandering a street, bashing cars with a baseball bat. The officer saw Lucero walking down the middle of the street, and decided to question him, though Lucero did not match the description of the bat-wielding miscreant.[154]

The officer identified himself, and Lucero turned and charged the officer with a "Charles Manson-type look" in his eyes. Lucero began making a stabbing motion with a long slender object toward the officer with what he thought was a knife. The officer moved behind his car and ordered Lucero to stop and drop his weapon. Lucero approached the police car and lunged toward the officer, who then fired his gun twice, killing Lucero.[155]

The appellate court analyzed the case under a §1983 wrongful arrest theory and a "reasonable-accommodation-during-arrest" Title II theory.[156] The case was not actionable under a wrongful arrest theory because the officer used force to defend himself, not to arrest Lucero.[157]

The court then examined a "reasonable-accommodation-during-arrest" theory of Title II liability, and accepted the proposition that Lucero's estate could have argued that the police failed to reasonably accommodate Lucero's paranoid schizophrenia in the course of investigating him.[158] The problem for Lucero's estate, however, was that it chose not to pursue such a claim against the municipality, Colorado Springs, but only the officer. Thus, because a proper Title II entity thus was not before the court, the judge did not decide whether the facts stated a "reasonable-accommodation-during arrest" theory.[159]

The lower court had relied on an unpublished New Mexico District Court opinion for the proposition that "'the individual [police] protection of a particular person or ... class of persons is not ... a municipal service, benefit, or program.'"[160] The Tenth Circuit limited the opinion to its facts: the plaintiff there alleged that police failure to arrest him resulted in his ability to attempt his own life.[161] While a municipality may not have a duty to protect persons from the detrimental effects of their disabilities, even if suicidal, this principle did not limit the scope of Title II's application to actual police activities.[162]

In an Indiana case, *Lewis v. Truitt*, police officers arrested a deaf man, but refused to acknowledge he could not hear.[163] They entered his home without a warrant, and without cause, physically assaulted him, handcuffed him, verbally abused him, kicked and hit him causing several injuries, and charged him with resisting law enforcement.[164] The officers sought summary judgment on the man's ADA claims, but lost the motion. The district court noted the importance of training for law enforcement in situations involving persons with disabilities, quoting from a House Judiciary Committee Report:

> In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not re-

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[153] Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999).

[154] *Id.* at 1217

[155] *Id.* at 1218.

[156] *Id.*

[157] *Id.* at 1222.

[158] *Id.* at 1221-22 (relying on *Gorman*, 152 F.3d at 912-13).

[159] *Gohier*, 186 F.3d .at 1222.

[160] *Id.* at 1219.

[161] *Id.* at 1220-21. *Amirault* held the plaintiffs' claim failed under the second prong of *Tyler v. City of Manhattan*, 849 F.Supp 1429 at 1434-42, which requires a Title II plaintiff to show denial in participation in or the benefits of a public entity's services, programs, activities, or that he or she was otherwise discriminated against by the entity: "the City ... had no duty to protect plaintiff from himself ... nor was plaintiff denied a municipal or police service, benefit to which he or another individual or class of individuals was entitled...." (*Tyler*, 849 F.Supp at 1439).

[162] *Gohier*, 186 F.3d at 1220-21.

[163] Lewis v. Truitt, 960 F.Supp 175, 176-77 (D. Ind. 1997).

[164] *Id.* at 176.

> ceived proper training in the recognition of and aid of seizures. Such discriminatory treatment based on disability can be avoided by proper training.[165]

Thus, in light of congressional intent, courts have held plaintiffs may recover under the ADA against a public entity by showing (1) they were disabled, (2) the officers knew or should have known they were disabled, and (3) the officers arrested the plaintiff because of legal conduct related to the disability.[166] Part and parcel of this reasoning, including the rationale for proper training, is that the ADA mandate applies to pre-arrest interdiction.

Indeed, in a Pennsylvania case, a young man was involuntarily admitted to the hospital because he was exhibiting signs of mental illness.[167] While waiting to be evaluated, he escaped from the hospital. Later, when his whereabouts were discovered, two police officers were dispatched to take him back to the hospital. When they entered his house, a confrontation ensued, and the man was shot and killed by one of the officers. The court found that training officers to handle interactions with mentally ill individuals peacefully and modifying police practices to accommodate mentally ill individuals are included in "programs, services, or activities of a public entity" under §12132 of the ADA.[168] Thus, the plaintiffs had stated a claim under the ADA, and the court denied the motion to dismiss.[169]

There is no question this area will continue to see significant ADA litigation, particularly as society depends more and more on the police to handle problematic situations with people who have disabilities.[170]

2. Suicide Calls & Emergencies

Another common call to the police is for help with an individual who has suicidal tendencies, or is threatening suicide. In this situation, as well, the ADA would require police to adapt their procedures and policies to accommodate such situations, perhaps by being less confrontational, "talking down" the person, or stepping away from a stand off to give the individual "more space" to calm down.[171]

The courts are wrestling with how the ADA and Section 504 apply to these confrontations, especially in the pre-arrest context; the result often varies with whether the court focuses on the confrontation itself[172] or on the totality of circumstances leading up to, and involved in, the confrontation.[173] There will likely continue to be considerable litigation in this area.[174]

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[165] *Id.* at 178 (quoting H.R. REP. No. 101-485, pt. III, 101st Cong., 2nd Sess. 50, *reprinted in* 1990 U.S.C.C.A.N. 473). *See* 28 C.F.R. §35, App. A, Subpart B (Department of Justice commentary that the "general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities"). *See also* Ygnacia Martínez v. Carl L. Schrier, Jr., Beeville Police Officer, *et al.*, No. V-97-019 (S.D. Tex., Victoria Div. 1997) (alleging violations of ADA and §1983 and claiming officer's assault on woman with mental retardation resulted from lack of proper training as to how to identify and handle people with mental retardation, as opposed to judging and handling them as intoxicated) (settlement providing monetary damages). The author of this article was co-counsel for plaintiff.

[166] *See Lewis*, 960 F.Supp at 178 (citing Barber v. Guay, 910 F.Supp 790, 802 (D. Me. 1995); Jackson v. Inhabitants of Town of Sanford, 1994 U.S. Dist. LEXIS 15367, No. 94-12- P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994); Gorman v. Bartch, 925 F.Supp. 653, 656 (W.D.Mo., 1996)).

[167] Schorr v. Borough of Lemoyne, 243 F.Supp.2d 232, 233 (M.D. Pa. 2003).

[168] *Id.* at 235-37.

[169] *Id.* at 238-39.

[170] *See, e.g.*, Arnold v. City of York, 340 F.Supp.2d 550, 554 (M.D. Pa. 2004) (denying motions to dismiss Fourteenth Amendment, Section 504, and ADA claims based on city's failure to train officers to peacefully and properly handle individuals with mental illnesses). In *Arnold*, parents of mentally ill boy, who died of positional asphyxia from being "hog-tied," following struggle with police.

[171] *See* Rachel E. Brodin, Comment, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct under the Americans with Disabilities Act*, 154 U.PA L.REV. 157 (2005).

[172] Thompson v. Williamson County, 219 F.3d 555, 557 (6th Cir. 2000) (deciding that plaintiff failed to state a claim under the ADA after his mentally disturbed son was shot by a sheriff dispatched to assist him because he failed to show that his son was denied a public service because of his disability and not because of his threatening behavior); Hainze v. Richards, 207 F.3d 795, 803 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000) (dismissing ADA and Section 504 claims on the ground that those laws do not apply to pre-arrest police activity). In *Hainze*, plaintiff alleged that deputy wrongly shot him, a suicidal young man for whom his family had called the police to take him to the hospital for psychiatric treatment. The author is co-counsel for the plaintiff.

[173] *Arnold*, 340 F.Supp.2d at 554 n.2 (refusing to follow *Hainze*, "we decline to split the events ... into two distinct, pre- and post-seizure events," and finding reasoning in *Shorr* more persuasive); *Schorr*, 243 F.Supp.2d at 233; *See also* Pickens v. City of

D. Parole and Probation

Probation and parole are government programs and services. They seek to correct behavior, foster rehabilitation, and minimize recidivism. The result benefits the individual, and saves the taxpayers significant tax dollars that would otherwise be expended on incarcerating such persons.

People with disabilities should be able to benefit from these programs and services. Government agencies may have to modify them somewhat to provide reasonable accommodations,[175] but people with disabilities have as much right to participate in them as people without disabilities.[176]

One area certain to focus considerable attention on in the future will be juvenile probation programs and youth offender programs and how they should accommodate young people with disabilities, and modify themselves accordingly.[177]

E. Administration of Justice

In the administration of justice, the greatest ADA problems that tend to arise are physical access[178] and program access at the courthouse.[179] No state court is exempt from Title II.[180] The issues run the gamut from getting into the courthouse to getting into the jury box, from lower service counters in the tax office to real-time captioning or interpreters in trials.[181] The tables have flipped from the time that judges automatically excused citizens with disabilities from serving on juries; they now must make efforts to accommodate jurors with disabilities.[182]

Austin, No. A-04-CA-340-LY (U.S. Dist. Ct., W.D. Tex., Austin Div., March 15, 2005) (court refused to dismiss action brought by surviving children of mentally-ill woman who had been acting out for a day and whom police confronted after repeated visits, provoking her to act out even more, and police killed her, but jury rendered verdict against plaintiffs); *and see* Abraham v. Raso, 183 F.3d 279, 291 (3rd Cir. 1999) (expressing "… disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.'") (citations omitted) (reversing summary judgment against plaintiffs in a §1983 claim for killing a fleeing shoplifting suspect in mall parking lot) .

[174] For a detailed discussion of police use of force with people with mental disabilities, *see* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining The Totality of Circumstances Relevant To Assessing The Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUMAN RTS. L. REV. 261 (2003).

[175] *See, e.g.,* Mildred Weaver, *et al.* v. Texas Dept. of Criminal Justice, *et al.*, No. L-93-85 (S.D. Tex., Laredo Div. 1993) (class settlement providing, *inter alia*, specialized parole officers with adapted procedures for 1250 parolees with mental disabilities). The author was lead counsel for the *Weaver* plaintiffs.

[176] *See* Dennis Vaughn v. Texas Dept. of Criminal Justice, et al., No. H-00-0205 (S.D. Tex., Houston Div. 2000) (settlement of suit, alleging denial of participation in county alcohol treatment probation program because potential participant was HIV+ and was confined to prison instead). The author was co-counsel for plaintiff. *See also Thompson*, 295 F.3rd 890 (automatically denying parole to prisoners with substance abuse histories violates Title II of ADA).

[177] *See, e.g., In re* Nicholas M., 731 N.Y.S.2d 332, 328 (N.Y. Fam. Ct. 2001) (finding insufficient evidence to support claim of denial of services or benefits in violation of ADA while participating in residential treatment program because the program's provision of a single American Sign Language interpreter was a reasonable accommodation).

[178] *See, e.g.,* Settlement Agreement between the United States of America and Oklahoma County, Oklahoma (DOJ Complaint No. 204-60-22) (providing for physical access remedial measures at courthouse), *available at* http://www.usdoj.gov/-crt/ada/oklaco.htm.

[179] *See* Kristi Bleyer, *et al., Into the Jury Box: A Disability Accommodation Guide for State Courts*, 1994 A.B.A. Sec. State Justice Inst. (providing suggestions to assist courts in increasing access to jury service to disabled persons); Jeanne Dooley, *et al.*, *Opening the Courthouse Door: An ADA Access Guide for State Courts*, 1992 A.B.A. Sec. State Justice Inst. (suggesting ways in which courts can increase their physical accessibility and the accessibility of courthouse services to persons with disabilities); Nat'l Ctr. for State Cts., *The Americans with Disabilities Act: Title II Self-Evaluation* (1992) (providing courts with a comprehensive list to evaluate the compliance of their physical premises and their policies and procedures under the ADA).

[180] *Tennessee v. Lane*, 541 U.S. 509; *and see, e.g.*, Chris Jonas, *et al.* v. General Servs. Comm'n, No. A-95-CV-468-JN (U.S. Dist. Ct., W.D. Tex., Austin Div. 1995) (settlement of Section 504 and ADA physical access suit against the Texas Supreme Court Building). The author was lead counsel for plaintiffs.

[181] Texas Civil Rights Project, *Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities*, Third Annual Report on the State of Human Rights in Texas (1996).

[182] Settlement Agreement between United States of America and Florida State Courts System (June 20, 1996), *available at* http://www.usdoj.gov/crt/foia/fl11.txt (setting forth guidelines in "court proceedings where real-time transcription services are utilized as a reasonable and necessary method of ensuring effective participation by a party, witness, attorney, judge, court employee, juror, or other participant who is deaf or hard of hearing").

This area of litigation will see considerable attention, too, because the rights under the ADA are substantially better than any rights required by §1983.

F. Damages & Jury Trials

As noted earlier, with some exceptions involving particularly bad fact situations, the courts generally only allow compensatory damages,[183] but not punitive damages,[184] in Title II and Section 504 cases.[185] Damages are never available in a Title III case.

The question of whether compensatory damages under Title II of the ADA (and Section 504) require a showing of intentional discrimination remains unsettled, although most circuit courts of appeal have ruled that way with regard to Section 504,[186] which controls for Title II purposes.[187]

Generally, however, intent is not difficult to prove -- by showing a person has made and request for accommodation, which was rejected,[188] or the discrimination is so obvious that it a specific request was unnecessary,[189] or the governmental entity has failed to follow specific regulations, implemented under the ADA or Section 504.

Neither Title II of the ADA nor the Rehabilitation Act specifically creates a right to a jury trial, in contrast to other civil rights statutes that do explicitly create a jury right to a jury trial.[190] Courts have consistently held that, when a federal statute does not explicitly provide for a right to a jury trial, a party may not demand one.[191] Because the ADA and Section 504 do not specifically provide for jury trials, courts have routinely denied juries in suits under those statutes.[192] As noted already, the legal procedures applicable to ADA and Rehabilitation Act claims are identical. Thus, if no right to a jury exists under the Rehabilitation Act, no such right exists under the ADA.

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[183] *E.g.*, Rodgers v. Magnet Cove Pub. Schls, 34 F.3d 642, 645 (8th Cir.1994) ("... plaintiffs are afforded the full range of legal remedies under the Rehabilitation Act."); Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830 & n. 9 (4th Cir.1994); Miener v. Missouri, 673 F.2d 969, 979 (8th Cir) ("damages are available under §504 as a necessary remedy for discrimination against an otherwise qualified handicapped individual"), *cert. denied*, 459 U.S. 909 (1982); Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir.1990) ("plaintiffs suing under section 504 of the rehabilitation act 'may pursue the full panoply of remedies, including ... monetary damages'")(citation omitted), *cert. denied*, 501 U.S. 1217 (1991); Waldrop v. Southern Co. Services, Inc., 24 F.3d 152, 156-57 & n. 5 (11th Cir.1994). *See also*, *supra*, n.35.

[184] *E.g.*, Moreno v. Consolidated Rail Corp., 99 F.3d 782, 790-92 (6th Cir. 1996) (no punitive damages); *but see* Beckford v. Irvin, 49 F.Supp.2d 170, 185 (W.D.N.Y 1999) (allowing punitive damages of $25,000 to plaintiff whose requests to use wheelchair and treat bed sores were denied).

[185] However, as noted earlier, damages are not recoverable against the federal government under Section 504 because the U.S. Supreme Court has found no waiver of sovereign immunity by the United States for Section 504 purposes. *Lane*, 518 U.S. at 192.

[186] *E.g.*, *Powers*, 184 F.3d at 1153 (Section 504 requires intent); *Ferguson*, 157 F.3d at 674-75 (Section 504 and ADA Title II require discriminatory intent); *Wood*, 978 F.2d 1214 (Section 504 requires intent); *Carter*, 725 F.2d 261(*id.*).

[187] 42 U.S.C. §12201 (2000).

[188] *E.g. Love*, 103 F.3d at 561.

[189] Reed v. LePage Bakeries, Inc., 244 F.3d 254, 261 n.7 (1st Cir. 2001) (noting that a request for accommodation may not be required, for example, where the disabled individual's needs are "obvious"); *Chisolm*, 275 F.3d at 330 (reversing district court's holding that request for accommodation was necessary, where the public entity "had knowledge of [plaintiff's] hearing disability but failed to discuss related issues with him") (citing *Randolph*, 170 F.3d at 858-59); Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 165 (5th Cir.1996) (noting that the disabled individual's burden to request an accommodation applies "[w]here the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent"); *L.J. McCoy*, 2006 WL 2331055*26-*28).

[190] *See*, *e.g.*, 42 U.S.C. §1981a(c).

[191] *See*, *e.g.*, Goar v. Compania Peruana de Vapores, 688 F.2d 417, 424 (5th Cir. 1982). *See also* Landgraf v. USI Film Prods, 511 U.S. 244 (1994) (Civil Rights Act of 1991, creating the right to a jury trial in employment discrimination cases, did not apply retroactively); *but see* Waldrop v. Southern Co. Services, Inc. 24 F.3d 152, 157-59 (11th Cir. 1994) (holding that jury trial required to measure Section 504 monetary relief, but not equitable relief).

[192] *See, e.g.*, Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1407 (5th Cir. 1983) ("jury trials do not appear to be a matter of right under the Rehabilitation Act… the 'procedures' available do not include juries"); *Tyler*, 849 F.Supp at 1443 ("ADA does not provide ... a right to a jury trial"); Rivera Flores v. Puerto Rico Telephone Co., 776 F.Supp 61, 71 (D. P.R. 1991) (Section 504 "provides no statutory right to a jury trial"); *but see Waldrop*, 24 F.3d at 157-59 (holding that jury trial required to measure Section 504 monetary relief, but not equitable relief).

Even determining the amount of damages, as opposed to finding liability, appears to be an equitable matter, and hence not something for a jury.[193]

G. Attorney's Fees, Costs, and Litigation Expenses

One should note, finally, that ADA actions allow a potentially broad recovery of a successful attorney's out-of-pocket expenses, as well as the attorney's fees and costs.[194] This is important because damages are not available in Title III actions, and minimally available, if at all, in Title II suits. Nor are attorneys' fees awards particularly large, thus making the recovery of out-of-pocket expenses all the more important. These expenses include expenses of experts whom ADA plaintiffs need to employ, such as an expert assessing compliance with ADAAG's physical access requirements or a jail expert on suicide prevention.

The ADA proviso is broader than the traditional civil rights fees statute, 42 U.S.C. §1988, in that the latter provides for attorney's fees, costs, and limited expert fees, but not "litigation expenses," and does not allow fees against a judicial officer unless the officer acted "clearly in excess" of the officer's jurisdiction.[195] The ADA does not contain language, extending protection to judicial officers.[196]

The ADA is not clear as to the meaning of "litigation expenses," although Congressional history does offer guidance. The House of Representatives attempted to clarify "litigation expenses" by publishing, for the record, an explanatory comment, the relevant portion of which states:

> Litigation expenses include the costs of expert witnesses. This provision explicitly incorporates the phrase "including litigation expenses" to respond to rulings from the Supreme Court [footnote omitted] that items such as expert witness fees, travel expenses, etc., be explicitly included if intended to be covered under an attorney's fee provision. Further, such expenses are included under the rubric of "attorney's fees" and not "costs"....[197]

The Senate adopted the "litigation expenses" language used by the House of Representatives and the accompanying report.[198] *Crawford Fitting,*[199] the Supreme Court ruling referenced in the House comment, which Congress clearly sought to overrule, held that, absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's expert witness as "costs," federal courts are bound by the parsimonious $40/day limitation in 28 U.S.C. §§1821 and 1920.[200]

Congress passed §12205 of the ADA as an incentive for private attorneys to take ADA cases and thus help enforce the ADA as matter of national policy.[201] Perhaps because of the ADA's language, the regulation promulgated thereunder,[202] and the clear congressional intent, there has been little litigation on this point.[203]

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[193] *See* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 (1983) (indicating that, while recovery of money damages is available under Rehabilitation Act, the nature of the remedy is equitable).

[194] 42 U.S.C. §12205 provides:

> In any action or administrative proceeding commenced pursuant to this Act, 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.

Attorneys' fees are also available under Section 504. 29 U.S.C. §794a(b).

[195] 42 U.S.C. §§1988(b), 1988(c).

[196] *See* 42 U.S.C. §§12101-12189.

[197] H.R. Rep. No. 101-485, pt. III, § 505, at 73 (1990), *citing* Crawford Fitting Co. v. Gibbons, 482 U.S. 437 (1987).

[198] S. 933, 101st Cong. (1989). The Senate bill passed in lieu of the House bill (H.R. 2273, 101st Cong. (1990)) after its language was amended to contain much of the text of the House bill. H.R. REP. NO. 101-485, pt. III, at 1. The Senate, through acquiescence, signaled its adoption of the House's language (codified at 42 U.S.C. §12205) and accompanying explanatory comments.

[199] *Crawford Fitting Co*., 482 U.S. at 445.

[200] Congress also subsequently amended 42 U.S.C. §1988 to provide for expert fees for actions under 42 U.S.C. §§1981, 1981a. *See* 42 U.S.C. §1988(c).

[201] Congress has done this as well for other civil rights statutes, for example, enacting the attorneys' fees provision of 42 U.S.C. §1988 as a way of encouraging private attorneys to handle civil rights cases under 42 U.S.C. §§1981, 1981(A), &1983. *See* H.R. REP. NO. 1558, at n.5 (1976). *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (aggrieved parties more likely to vindicate Congressional policy and advance the public interest when not forced to bear their own attorneys' fees.).

IV. CONCLUSION

While this article considers only the ADA and Section 504 and how they interface with government in the context of law enforcement, one should recognize that other federal laws also protect people with disabilities in a whole host of situations, in virtually every facet of people's lives in the community.

One should also note that states often have their own disability laws that a plaintiff may join with ADA and Section 504 claims by way of supplemental jurisdiction,[204] depending on the nature of the statute.[205] In fact, in some instances, a state law might be broader[206] than federal law or might enhance the recovery of damages.[207] All the states and the District of Columbia have disability laws in some fashion or another.[208]

As this article suggests, the possibilities are limited only by the creativity of counsel and the consensus of the courts when calling forth the ADA to fill in the void left by §1983 decisional law for people with disabilities, to augment a civil rights action along with §1983, and to set contemporary standards that inform §1983.

Thus, when pleading a lawsuit in which there is a viable ADA claim, counsel first should plead the ADA Title II action against the government entity involved and, if appropriate, also plead a Section 504 claim. Next, plead a §1983 action, carefully and in great factual detail, against an individual and/or municipality, as appropriate, to overcome potential immunity issues. Finally, as part the second step, use the ADA (and Section 504) to establish the standards applicable for the "reasonableness" and "well-settled law" prongs of the qualified immunity test or that establish municipal liability.[209]

Hopefully, this article has provided insight as to how the ADA may provide relief in civil rights cases in which §1983 itself would not typically allow recovery for people with disabilities with regard to government and law enforcement because of various court-created doctrines and decisional law that have come to make §1983 more problematic.

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[202] The preamble to ADA Title II regulations explains "[l]itigation expenses include items such as expert witness fees, travel expenses, etc." 28 C.F.R. Pt.35, App.A, Section-by-Section Analysis, §35.175.

[203] *See* Lovell v. Chandler, 303 F.3d 1039 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); Corbett v. National Products Co., No. 94-2652, 1995 WL 284248 (E.D.Pa. May 9, 1995) (finding §12205's specific language allowing "litigation expenses is much broader than the provisions of §1920 controls" and granting plaintiffs expert witness fees, in excess of what §1920 permitted. *But see* Clark v. Virginia Bd. of Bar Examiners, No. 94-211-A, 1995 WL 795674 (E.D. Va. Aug. 22, 1995) (construing "costs" in §12205, but not "litigation expenses," and denying reimbursement for expert fees as costs); Lara v. Cinemark USA, Inc., 207 F.3d 783 (2000) (adversely construing plaintiffs' expert expenses in dictum,) (the author was counsel for the *Lara* appellants).

[204] *See, e.g.,* Tex. Gov. Code §469 (Elimination of Architectural Barriers); Tex. Human Resources Code Ann. §§121.001-121.004 (providing private cause of action, with an unlimited statutory penalty of at least $100 and attorney's fees, for discrimination against persons with disabilities and violation of their rights); §§121.005-121.007 (prohibition of discrimination against people with disabilities using animals). Some states offer broader protection than the ADA.

[205] There is the caveat, however, that the Eleventh Amendment bars a federal court from adjudicating supplemental state law claims against non-consenting state defendants. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 120-21 (1984). Nor may a state be sued in its own courts, without its consent, for Title II violations. *See* Alden v. Maine, 527 U.S. 706 (1999) (suit in state court by probation officers against state for violation of overtime provisions of federal Fair Labor Standards Act barred by Eleventh Amendment).

[206] *See, e.g.*, Colmenares v. Braemar Country Club, Inc., 130 Cal.Rptr.2d 662 (Cal. 2003) (unlike the ADA, which requires that the individual's condition pose a "substantial limitation" to a major life activity, the California Fair Employment and Housing Act protects any limitation, substantial or not).

[207] *See, e.g.*, Department of Corrections v. Human Rights Comm'n, --- A.2d ---- (Vt. 2006), 2006 WL 3821475 (Dec 29, 2006) (holding that Vermont's public accommodations law, which prohibits disability discrimination, applies to state prisons). Vermont's public accommodations law allows suits for compensatory and punitive damages and attorneys' fees. VT ST T. 9 §4506(a).

[208] John W. Parry, A.B.A. Comm'n on Mental and Physical Disability Law, *Monograph on State Disability Discrimination Laws With State Charts on Employment, Public Services, Public Accommodations, Housing, and Education* (a comprehensive compilation of state disability discrimination laws in the 50 states and the District of Columbia). American Bar Ass'n (2005).

[209] *See City of Canton*, 489 U.S. at 388.

ADDENDUM: ADA AMENDMENTS ACT OF 2008

The ADA Amendments Act — Pub.L. No. 110-325, 122 Stat. 3553 (2008), effective January 1, 2009, makes several important changes to the ADA and Section 504 (Rehabilitation Act), many of which are definitional:

I. MITIGATING MEASURES

A. Mitigating measures are no longer considered in assessing disability

The ADA Amendments Act overturns the mitigating-measures analysis; disability must now be assessed without considering mitigating measures.

In addition, the Act's findings expressly disapprove of the *Sutton* trilogy, stating that one of its purposes is to reject Sutton's mitigating-measures analysis. The new law also eliminates two findings in the original ADA that the Supreme Court relied on for its mitigating measures analysis.

B. Definition of mitigating measures

The Act defines mitigating very broadly, and the definition includes a non-exhaustive list. But mitigating measures do not include "ordinary eyeglasses or contact lenses." In other words, whether or not a person's vision is substantially limited may be assessed in light of his or her eyeglasses.

However, an employer cannot use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless it is job-related and consistent with business necessity. Thus, "if an applicant or employee is faced with a qualification standard that requires uncorrected vision (as the sisters in the *Sutton* case were), an employer will be required to demonstrate that the qualification standard is job-related and consistent with business necessity."

II. BROAD INTERPRETATION OF DISABILITY

The Rules of Construction require that the definition of disability "shall be construed . . . in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this Act." The Act expressly disapproves the contrary holding of *Toyota Motor v. Williams*.

Proof of disability should no longer require extensive evidence. The Act explicitly states that the primary subject in ADA cases "should be whether [covered entities] 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."

A. "Substantial limitation" is broadly interpreted

The Act states that the *Toyota Motor* standard for assessing "substantially limits," both in the Supreme Court and as applied by lower courts in numerous decisions, "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA."

The Act rejects the holding in Toyota Motor "that the term[] 'substantially' . . . in the definition of disability under the ADA 'need[s] to be interpreted strictly to create a demanding standard for qualifying' as a disability." The Act also rejects the Toyota Motor view that "substantial" requires proof of a severe restriction. Further, the Findings disapprove the EEOC Title I regulation defining the term "substantially limits" to mean "significantly restricted," finding that it sets too high a standard. One explicit purpose of the new law is to reject that standard.

Importantly, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

B. The definition of "major life activities" is expanded

One purpose of the new law is to reject the analysis in *Toyota Motor* that:

- the term "major" in the ADA's definition of disability must be interpreted strictly to create a demanding standard for disability, and
- the term refers only to "activities that are of central importance to most people's daily lives."

Major life activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."

But "major life activities" are also defined to include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

Both the list of major life activities and major bodily functions are illustrative and non-exhaustive, and the absence of a particular life activity or bodily function from the list does not create a negative implication as to whether such activity or function constitutes a major life activity under the statute.

Only one major life activity need be limited; an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. This confirms that an individual is not excluded from coverage because of an ability to do many things, as long as the individual is substantially limited in one major life activity.

C. "Impairment"

Although the Act does not include a definition for the term "impairment," the legislative history supports the EEOC's current regulatory definition of the term.

III. REGARDED-AS CLAIMS

The "regarded as" prong is changed substantially, in two different ways.

A. Regarded-as disability only requires proof of an impairment

"Regarded as" simply requires proof of an actual or perceived impairment; there is no requirement that the impairment be limiting in any way (either actually or perceived). But the impairment (whether actual or perceived) cannot be something that is both transitory and minor. "Transitory" means lasting less than six months. The term "minor" is not defined in the statute, but the legislative history suggests that it refers to trivial impairments.

B. No accommodations in regarded-as claims

A regarded-as disability will not support a failure-to-accommodate claim.

In creating this exception, Congress expressed confidence that individuals who need accommodations or modifications will receive them because those individuals will now qualify for coverage under the first or second prongs (under the less demanding interpretation of "substantial limitation").

But "regarded as" will support a claim involving any other conduct that violates the ADA.

IV. EXAMPLES OF DISABILITIES

Among the conditions referenced in the legislative history as disabilities are epilepsy, diabetes, muscular dystrophy, amputation, intellectual disabilities, multiple sclerosis, cancer, head trauma, cerebral palsy, heart conditions, mental illness, HIV, immune disorders, liver disease, kidney disease, dyslexia, and learning disabilities.

V. OTHER MATTERS

A. Authority to issue regulations

The Act clarifies that the authority to issue regulations implementing the Act's definition of disability is granted to the EEOC, DOJ, and DOT.

B. Rehabilitation Act conformed

The Act changes the definition of disability for claims under the Rehabilitation Act of 1973 to conform to the above.