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## How the ADA Regulates and Restricts Solitary Confinement for People with Mental Disabilities

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In a landmark decision two decades ago, United States District Judge Thelton Henderson emphasized the toxic effects of solitary confinement for inmates with mental illness. In *Madrid v. Gomez*, a case about California's Pelican Bay prison, Judge Henderson wrote that isolated conditions in the Special Housing Unit, or SHU, while not amounting to cruel and unusual punishment for all prisoners, were unconstitutional for those "at a particularly high risk for suffering very serious or severe injury to their mental health . . ." <sup>1</sup> Vulnerable prisoners included those with pre-existing mental illness, intellectual disabilities, and brain damage. Henderson concluded that "[f]or these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe." <sup>2</sup>

In Pelican Bay and elsewhere, constitutional litigation has led to orders excluding prisoners with serious mental illness from solitary confinement. <sup>3</sup> Nevertheless, people with mental disabilities remain vastly overrepresented in prison and jail restrictive housing units <sup>4</sup> because they are frequently difficult to manage in the general prison population and because they often decompensate once in solitary and commit further disciplinary infractions. One important, but not yet fully utilized tool to address this problem is the Americans with Disabilities Act (ADA). The ADA enacts a textual and purposive commitment to individuation and modification when governmental approaches fail to allow people with disabilities equal access to programs, services, and activities. Properly understood, the ADA requires prisons and jails to do much more than most are currently doing to keep

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<sup>1</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

<sup>2</sup> *Id.*

<sup>3</sup> For a compilation of extant orders, see *Special Collection: Solitary Confinement*, CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=40> (last visited Apr. 11, 2016).

<sup>4</sup> ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011-12, at 6-7 (Oct. 2015), available at <http://www.bjs.gov/content/pub/pdf/urhuspi1112.pdf> (relating that prisoners with mental illness reported having spent time in restrictive housing at about twice the rate of other prisoners).

prisoners with disabilities out of solitary confinement.<sup>5</sup> Moreover, designed to help achieve equality rather than prevent overwhelming harm, the ADA bans conditions milder than those reachable by an Eighth Amendment deliberate indifference lawsuit, when those conditions are discriminatory.

In this Issue Brief, I argue that solitary confinement of prisoners with mental illness or intellectual disabilities frequently constitutes disability discrimination, challengeable under Title II of the ADA<sup>6</sup> and the Rehabilitation Act<sup>7</sup>—federal statutes that proscribe discrimination on the basis of disability in state and local government services and federally conducted or supported services, respectively.

After briefly setting out the trends in solitary confinement litigation and the statutory framework supporting ADA and Rehabilitation Act challenges, I describe three ways in which the ADA and the Rehabilitation Act restrict and regulate prisons' and jails' use of solitary confinement for prisoners with disabilities.<sup>8</sup> I also evaluate three potential defenses, arguing that even when factually supported and accepted, each of the three requires individuated planning and therapeutic and disability-supportive practices that would curb prison and jail overuse of solitary confinement for prisoners with disabilities.<sup>9</sup>

## I. Trends in the Solitary Confinement Debate

As American incarceration rates ballooned in the 1980s and 1990s, so too did our prisons' and jails' use of solitary confinement and other forms of restrictive housing.<sup>10</sup> Between prisons and jails—federal, state, and local—an estimated 90,000 to 115,000 prisoners live in solitary confinement

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<sup>5</sup> This theme is explored in depth in Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DENV. U. L. REV. 55 (2012).

<sup>6</sup> 42 U.S.C. § 12131 *et seq.* Title II provides, in relevant part, “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” § 12132.

<sup>7</sup> 29 U.S.C. § 794 *et seq.* The Rehabilitation Act provides, in relevant part, “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.” § 794(a).

<sup>8</sup> A very useful summary of the overall statutory framework and its application to prisons and jails is included in *Miller v. Smith*, United States’ Memorandum of Law as Amicus Curiae on Issues under the Americans with Disabilities Act and Rehabilitation Act that are Likely to Arise on Summary Judgment or at Trial, No. 6:98-cv-109-JEG (S.D. Ga. June 21, 2010), available at [http://www.ada.gov/briefs/miller\\_amicus.pdf](http://www.ada.gov/briefs/miller_amicus.pdf). Note that this brief was filed in June 2010, and there were new regulations—though not very different in pertinent part—published September 2010.

<sup>9</sup> I do not here address two peripheral issues that may turn out to matter a great deal for lawyers. There is an argument with some textual and caselaw support that the Prison Litigation Reform Act attorneys’ fee cap does not apply to ADA or Rehabilitation Act claims. *See, e.g.,* *Armstrong v. Davis*, 318 F.3d 965, 973-74 (9th Cir. 2003) (fees in suits enforcing the Americans with Disabilities Act and the Rehabilitation Act are not limited by the PLRA because these statutes have fee provisions separate from § 1988). In addition, several courts have held that the PLRA’s exhaustion requirement compels prisoners suing under the Rehabilitation Act to first complain to the U.S. Department of Justice (DOJ), under 28 C.F.R. § 39.170. That seems very wrong (and because the cases are all or nearly all pro se, it has not been extensively briefed), but it is a potential pitfall that needs to be considered and managed. *Compare, e.g.,* *William G. v. Pataki*, No. 03-cv-8331-RCC, 2005 WL 1949509, at \*5-6 (S.D.N.Y. Aug. 12, 2005) (requiring use of the DOJ procedure) *with, e.g.,* *Veloz v. New York*, 339 F. Supp. 2d 505, 517–18 (S.D.N.Y. 2004), *aff’d*, 178 Fed. App’x. 39 (2d Cir. Apr. 24, 2006) (declining to so require).

<sup>10</sup> *See, e.g.,* Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC’Y 163 (1999).

today.<sup>11</sup> These tens of thousands of men and women are confined to twenty-two or more daily hours of in-cell lockdown, with minimal chance for social interaction, programming, or occupation.

Advocacy efforts to reverse this trend have been intense and longstanding, and seem finally to be approaching fruition. President Obama recently wrote an op-ed in *The Washington Post* describing current practices as “an affront to our common humanity,”<sup>12</sup> and three Supreme Court justices have inveighed against solitary confinement in recent, separate writings.<sup>13</sup> Many corrections leaders are themselves beginning to seek change. The Association of State Correctional Administrators (ASCA), the national organization representing directors of state correctional agencies, last year released a report that begins, “Prolonged isolation of individuals in jails and prisons is a grave problem drawing national attention and concern.” The report also explicitly “supports ongoing efforts to . . . limit or end extended isolation.”<sup>14</sup>

Litigation continues to be a key lever for reform in this area; lawsuits push for change, and both settlements and litigated orders have modeled what that change could look like.<sup>15</sup> Nearly all that litigation has proceeded chiefly under the Eighth Amendment’s Cruel and Unusual Punishments Clause.<sup>16</sup> I argue in this Issue Brief that ADA and Rehabilitation Act cases have an important role to play going forward.

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<sup>11</sup> The Association of State Correctional Administrators and Yale Law School’s Liman Program together surveyed state prison systems, and found a solitary usage rate of 6%, which works out to about 90,000 state prisoners. *See* LIMAN PROGRAM & ASS’N OF STATE CORR. ADM’RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 3, 15 (Aug. 2015), available at [https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman\\_administrativesegregationreport.pdf](https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf). If the usage rate in jails is half that—a reasonable estimate—another 24,000 jail inmates are added, for a total of about 115,000. The Bureau of Justice Statistics estimated a lower usage rate in 2011: 4.4% of prison inmates and 2.7% of jail inmates—which worked out to total about 90,000. *See Table: Estimated Number of Persons Under Correctional Supervision in the United States, 1980-2014*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, <http://www.bjs.gov/index.cfm?ty=kfdetail&iid=487> (last visited Apr. 13, 2016). Similar rates in 2014, the most recent year for which we have solid prison and jail population data, would add up to 89,000. Finally, the DOJ’s 2005 Census of State and Federal Correctional Facilities included data that 80,000 prisoners were housed in restrictive housing in state or federal prisons (jails are excluded). *See Census of State and Federal Adult Correctional Facilities, 2005 (ICPSR 24642)*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, available at <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/24642?q=24642> (last visited Apr. 13, 2016).

<sup>12</sup> Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html).

<sup>13</sup> *See* *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (“[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.”), *reh’g denied*, 136 S. Ct. 14; *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J. dissenting; joined by Ginsburg, J.) (“[I]t is well documented that such prolonged solitary confinement produces numerous deleterious harms.”), *reh’g denied*, 136 S. Ct. 20.

<sup>14</sup> TIME-IN-CELL, *supra* note 11, at i, iii.

<sup>15</sup> For a timeline listing and linking to the key cases, and their settlements, see Amy Fettig & Margo Schlanger, *Milestones in Solitary Reform*, SOLITARY WATCH, <http://solitarywatch.com/resources/timelines/milestones/> (last visited Apr. 11, 2016).

<sup>16</sup> For pretrial detainees, cases are formally brought under the Due Process Clause, but tend to apply the same test as under the Eighth Amendment. *See, e.g.,* United States’ Proposed Complaint-in-Intervention, *Nunez v. City of New York*, No. 1:11-cv-05845 (S.D.N.Y. Dec. 18, 2014), available at <http://www.clearinghouse.net/chDocs/public/JC-NY-0055-0006.pdf>.

## II. ADA and Rehabilitation Act Statutory Frameworks

The ADA and Rehabilitation Act protect individuals with disabilities from discrimination in a variety of contexts—including incarceration. The U.S. Supreme Court has explained that the Rehabilitation Act guarantees “meaningful access” to qualified individuals with a disability to each federally conducted or supported program, service, or activity.<sup>17</sup> The Court has also held that ADA Title II’s reference to “services, programs, or activities” encompasses the operations of prisons and jails.<sup>18</sup> Prisoners with disabilities can bring lawsuits under the ADA or the Rehabilitation Act if they can show that they are: 1) disabled within the meaning of the statutes;<sup>19</sup> 2) “qualified” to participate in the relevant program; and 3) excluded from, not allowed to benefit from, or subjected to discrimination<sup>20</sup> in the program because of their disability.<sup>21</sup> The Rehabilitation Act does not define “qualified individual with a disability,” but the ADA does. That definition provides:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.<sup>22</sup>

Reasonable modification is thus ADA Title II’s (and Title III’s) equivalent of the more familiar “reasonable accommodation” requirement in Title I of the ADA, which addresses employment discrimination.<sup>23</sup>

Between the two statutes, every American prison and jail is covered. The ADA’s Title II covers all non-federal jails and prisons—its definition of “public entity” includes state and local government agencies, without respect to federal support.<sup>24</sup> The Rehabilitation Act also covers most state and

<sup>17</sup> *Alexander v. Choate*, 469 U.S. 287, 301 (1985). The Rehabilitation Act provides “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.” 29 U.S.C. § 794(a).

<sup>18</sup> *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210–11 (1998).

<sup>19</sup> Under both the ADA and the Rehabilitation Act, a person has a disability if: (i) a physical or mental impairment substantially limits one or more of his or her major life activities; (ii) he or she has a record of such an impairment; or (iii) he or she is regarded as having such an impairment. 29 U.S.C. § 705(20)(B); 42 U.S.C. §§ 12102(1)-(2). Particularly relevant here, “mental” impairments are expressly included if they substantially limit major life activities. The ADA regulations on the definition of disability, 28 C.F.R. § 35.104(1)(i), are quite capacious. Moreover, in the ADA Amendments Act of 2008, Congress clarified and broadened the definition. Under the Amendments Act, an impairment constitutes a disability even if it: (1) only substantially limits one major life activity; or (2) is episodic or in remission, if it would substantially limit at least one major life activity if active. ADA Amendments Act of 2008, Pub. L. No. 110-325 Sec. 3, 122 Stat. 3553, 3556.

<sup>20</sup> Discrimination can mean categorical “exclu[sion] from participation in or . . . deni[al of] the benefits of the services, programs, or activities of a public entity,” but the language “or be subjected to discrimination by any such entity” makes it clear that discrimination is also broader. 42 U.S.C. § 12132. The concept is further developed in caselaw and the ADA regulation. *See* discussion *infra* Parts II & III.

<sup>21</sup> 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

<sup>22</sup> 42 U.S.C. § 12131(2).

<sup>23</sup> *See* 42 U.S.C. §§ 12111(8)-(9).

<sup>24</sup> 42 U.S.C. § 12131(1).

local prisons and jails, because they receive federal financial assistance.<sup>25</sup> Federal agencies, while not included under Title II, are covered by the Rehabilitation Act.

All prison and jail officials therefore are forbidden from discriminating against prisoners with disabilities in all their facilities' services, programs, or activities—including in the use and rules governing solitary confinement.

### III. Three Approaches to Challenging Solitary Confinement Under the ADA

The key source for understanding what constitutes disability discrimination is the ADA's Title II regulations, which add considerable detail to the statutory non-discrimination requirements set out in Part II and, as legislative regulations, are entitled to substantial deference.<sup>26</sup> They include a ban against disparate treatment of inmates with disabilities; a requirement for reasonable modifications to policies and practices when needed to achieve equality of those with disabilities; and a mandate to maximize integration of those with disabilities in services, programs, and activities.<sup>27</sup>

#### A. Disparate Treatment and Disparate Impact

##### I. Disparate Treatment

Most simply, isolating prisoners “because of” their serious mental illness, intellectual disability, or physical disability violates the statutory ban against disparate treatment. The ADA regulations explain that public entities must afford qualified people with disabilities the same opportunity as non-disabled people to benefit from the entity's services. This means a prison or jail may not, because of an inmate's disability, deny the inmate the “opportunity to participate” in a service offered to other inmates, may not provide an alternative service “that is not equal to that afforded others,” and must provide aids, benefits or services that would enable the inmate to “gain the same benefit, or to reach the same level of achievement as that provided to others.”<sup>28</sup>

A prison violates this regulation if it assigns people with disabilities to segregation cells—where prisoners are denied most prison privileges, programs, activities, and services—simply because of their disability. This kind of assignment is far from unheard of. For example, in *Armstrong v. Brown*, the district court held that the state was “regularly housing *Armstrong* class members [prisoners with

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<sup>25</sup> See 29 U.S.C. § 794(b)(1)(A) (defining “program or activity” as “a department, agency, special purpose district, or other instrumentality of a State or of a local government”). For indexes to federal support, see *Possible Federal Sources of Assistance to Federally Assisted Programs or Activities*, U.S. DEPT OF JUSTICE (Aug. 6, 2015), <http://www.justice.gov/crt/possible-federal-sources-assistance-federally-assisted-programs-or-activities> (last updated Aug. 6, 2015).

<sup>26</sup> See 42 U.S.C. § 12134(a); see also *Olmstead v. L.C.*, 527 U.S. 581, 597-98 (1999) (“Because the Department is the agency directed by Congress to issue regulations implementing Title II, . . . its views warrant respect. We need not inquire whether the degree of deference described in [*Chevron*] is in order”). ADA regulations are also consistent with, but newer, more detailed, and sometimes stricter than Rehabilitation Act regulations. See 42 U.S.C. § 12201(a) (“nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. §§ 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title”); 42 U.S.C. § 12134(b) (“regulations . . . shall be consistent with . . . the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on Jan. 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29.”).

<sup>27</sup> 28 C.F.R. § 35.130(d) (2011).

<sup>28</sup> 28 C.F.R. § 35.130(b)(1).

mobility impairments] in administrative segregation due to lack of accessible housing . . . .”<sup>29</sup> Similarly, in a U.S. Department of Justice’s (DOJ) findings letter addressing conditions of confinement at the Pennsylvania State Correctional Institution at Cresson—a key document in the development of the law governing solitary confinement under the ADA—the DOJ concluded that the ADA required Cresson to “modify its policies and practices so prisoners with serious mental illness or intellectual disabilities are not automatically or categorically housed in segregation and instead receive the services they need.”<sup>30</sup> These findings were based on a disparate treatment theory.<sup>31</sup> That is, they accused the state of intentional disability discrimination, not merely of imposing a neutral policy that had a disparate impact on prisoners with disabilities.

## 2. Disparate Impact

But what if a housing assignment is not directly motivated by the prisoner’s disability (and the prison’s inability to otherwise cope with that disability), but by some conduct *caused by* the disability? For example, what if the prison officials place a prisoner in solitary confinement not because he has a serious mental illness, but because of misconduct whose origin is serious mental illness? The caselaw on this question has arisen outside the prison and jail context—mostly in employment discrimination cases—but is relevant to how courts might consider the issue in a prison or jail case.

A minority of courts categorize decisions that penalize a disabled employee’s misconduct as nonetheless “because of disability,” and therefore, similarly, illegal disparate treatment.<sup>32</sup> The majority of courts, however, have rejected disparate treatment liability where the employee plaintiffs’ disability caused conduct that was, in turn, the reason for the defendant’s adverse action. In some of these cases, however, the courts have—sometimes explicitly—left open the alternative theories of disparate impact and reasonable accommodation/modification.

The most prominent example is the Supreme Court’s decision in *Raytheon Co. v. Hernandez*,<sup>33</sup> an ADA employment action in which the Court rejected the Ninth Circuit’s holding that a ban on rehiring past employees who had been dismissed for misconduct constituted disability discrimination when the misconduct in question was caused by a disability. In an opinion by Justice Thomas, the Court

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<sup>29</sup> Order Granting Motion for Further Enforcement, *Armstrong v. Brown*, No. 4:94-cv-02307 (N.D. Cal. Feb. 3, 2015), 2015 WL 496799, available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf>.

<sup>30</sup> See Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to The Honorable Tom Corbett, Governor of Pa., *Re: Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation*, 33-34 (May 31, 2013), available at [http://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson\\_findings\\_5-31-13.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf) [hereinafter Cresson Letter].

<sup>31</sup> The DOJ’s Cresson finding was a bit ambiguous on this issue. The sentence before the one just quoted mentions “methods of administration that have the effect of subjecting prisoners with serious mental illness or intellectual disabilities to discrimination,” which sounds more like disparate impact than disparate treatment. *Id.* But when the DOJ restated its position in a subsequent filing, in *Coleman v. Brown*, the theory was more firmly grounded in disparate treatment language. See Response of the United States of America to Defendants’ Motion in Limine No.4: To Exclude the Statement of Interest, *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Nov. 12, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0041.pdf>.

<sup>32</sup> See Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 211-22 (2005). Professor Timmons catalogs cases that have found that a response to disability-caused misconduct occurs “because of” disability.

explained that the challenged practice did not constitute disparate treatment—and that it could not be attacked by a disparate impact claim because the plaintiff had not timely raised disparate impact.<sup>33</sup> Similarly, Judge Richard Posner wrote in *Matthews v. Commonwealth Edison Co.*,<sup>34</sup> the most-cited of these misconduct cases, that disparate treatment was the wrong label for this kind of claim: “If [a dyslexic plaintiff] wants to show instead that reading quickly is not a necessary qualification for the job in question—then he has to switch to the disparate-impact approach and challenge the qualification on the basis of its effect and its reasonableness rather than on the basis of its motivation.” Both these opinions identified disparate impact as the appropriate theory when plaintiffs allege that a general rule or policy penalizing their conduct has the effect of discriminating against them because of their disability.

Disparate impact is certainly available, in theory. The ADA’s Title II regulations include two uses of the word “effect,” which unambiguously reference a disparate impact theory of liability.<sup>35</sup> These two provisions forbid “criteria or methods of administration” that have the “effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability,” or have the “purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.” In addition, the regulation suggests a disparate impact approach when it states, “A public entity shall not impose or apply eligibility criteria that screen out or *tend to screen out* an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”<sup>36</sup> Moreover, there is caselaw holding that ADA Title II disparate impact claims do state a private cause of action.<sup>37</sup> Consequently, a disparate impact challenge to a prison rule that is disproportionately adverse to prisoners with disabilities seems plausible as a matter of theory. Moreover, the defense (“necessary for the provision of the service, program, or activity”) seems narrow indeed.

Nonetheless, as a strategic matter, disparate impact claims—under the ADA as under other civil rights statutes—make judges extraordinarily suspicious, and are notoriously difficult to win. In fact, courts have been so hesitant to find disparate impact liability that it is more a hypothetical theory of liability than a practical approach to vindicating an individual’s or group’s rights.<sup>38</sup> So, could a

<sup>33</sup> *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

<sup>34</sup> 128 F.3d 1194, 1196 (7th Cir. 1997).

<sup>35</sup> *See* 28 C.F.R. §§ 35.130(b)(3)(i)-(ii).

<sup>36</sup> 28 C.F.R. § 35.130(b)(8) (emphasis added).

<sup>37</sup> *See, e.g.*, *Ability Ctr. of Greater Toledo v. City of Sandusky*, 181 F. Supp. 2d 797, 798 (N.D. Ohio 2001), *aff’d*, 385 F.3d 901 (6th Cir. 2004); *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006).

<sup>38</sup> There are remarkably few examples of successful disparate impact litigation under *any* civil rights statute in the past 15-20 years, including only a handful under the ADA’s Title II. *See* *May v. Sheahan*, No. 99-cv-0395, 1999 WL 543187 (N.D. Ill. 1999) (holding that the ADA forbids the jail’s hospital shackling policy, because it had a more severe impact on disabled inmates, who are likely to spend more time in hospitals—but granting the defendant qualified immunity on this issue); *Crowder v. Kitigawa*, 81 F.3d 1480, 1483 (9th Cir. 1996) (striking down a dog quarantine that kept service-dog users from travelling to Hawaii, because “Congress intended to prohibit . . . those forms of discrimination which deny disabled persons public services disproportionately due to their disability.”); *Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993) (citing disparate impact language to support requiring the University of Nebraska to treat a student

challenge to assignment of prisoners to solitary confinement because of disability-related misconduct be framed as a disparate impact claim? The relevant caselaw and regulations suggest that the answer is yes—but practical experience counsels strongly against it. And disparate impact theory is not necessary for the kinds of challenges contemplated here: a plaintiff would be on more solid strategic ground—with stronger precedents and a firmer basis in the regulations—attacking the same policies or practices but framing the legal claim as a prison’s failure to implement reasonable modification.<sup>39</sup>

## B. Requiring Prisons to Make Reasonable Modifications

Relying on a “reasonable modification” theory to challenge conditions of confinement also starts with the Title II ADA regulations, the relevant portion of which states:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.<sup>40</sup>

A failure to implement a reasonable modification needed by a person with a disability is a type of discrimination; under the ADA, a prison must “take certain pro-active measures to avoid the discrimination proscribed by Title II.”<sup>41</sup> Under this theory, the claimed reasonable modifications could cover the *route into solitary*, the *conditions in solitary*, and the *route out of solitary*.

The ADA supports prisoners with disabilities who seek adjustments to the *route into solitary* by, for example, asking for modifications to policies and practices that:

- Fail to take account of mental illness or intellectual disability in making housing decisions, which often assign disabled prisoners to double cells in which conflict and violence are likely.<sup>42</sup>

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with a disability like other students in assignment of dormitory roommates, notwithstanding the University’s explanation that its exclusion of the plaintiff was not because of her disability but because of her need for occasional personal attendant care).

<sup>39</sup> These types of liability are best considered as conceptually separate. *See Wis. Cmty. Servs., Inc.*, 465 F.3d at 753 (quoting *Wash. v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 847 (7th Cir. 1999)) (ADA Title II liability “may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant’s rule disproportionately impacts disabled people.”); *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 460 (6th Cir.1997) (holding that plaintiff could establish liability by offering evidence that the defendant “could have reasonably accommodated his disability, but refused to do so [or] it might be possible under the ADA for the plaintiff to rely on a disparate impact theory.”) (internal citations omitted); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276–77 (2d Cir. 2003) (“[A] claim of discrimination based on a failure reasonably to accommodate is distinct from a claim of discrimination based on disparate impact.”).

<sup>40</sup> 28 C.F.R. § 35.130(b)(7). The separate requirement of program accessibility has a similar defense that no “fundamental alteration in the nature of the service, program or activity or . . . undue financial or administrative burdens” are required. 28 C.F.R. § 35.150(a)(3).

<sup>41</sup> *Chisolm v. McManimon*, 275 F.3d 315, 324-25 (3d Cir. 2001); *see also Tenn. v. Lane*, 541 U.S. 509 (2004) (describing the reasonable modification requirement as prophylactic).

<sup>42</sup> *See, e.g., Madrid*, 889 F. Supp. at 1221.

- Provide inadequate mental health care more generally, including a variety of obstacles to obtaining treatment.<sup>43</sup> Without treatment, prisoners with mental illness are more likely to run into trouble of various kinds, leading them to solitary, either as a disciplinary or management response.
- Use solitary confinement as a routine management technique to cope with the difficulties presented by prisoners with disabilities.<sup>44</sup>
- Treat behavior that manifests serious mental illness or intellectual disability as a disciplinary rather than mental health or habilitation matter.<sup>45</sup>

The ADA similarly entitles prisoners with disabilities to modifications of the *conditions in solitary*. As the DOJ has found, for those prisoners whose disabilities mean they simply cannot be safely managed in general population, prisons retain the “obligation to provide the prisoners with the opportunity to participate in and benefit from mental health services and activities, and other services, programs, and activities to which prisoners without disabilities have access.”<sup>46</sup> Even if a prison has a safety interest in substantial physical isolation, that should not mean that prisoners with disabilities are denied phone calls, books, education, rehabilitative programming, exercise, and the like.<sup>47</sup>

Prisons should also accommodate disabled prisoners’ particular, disability-related vulnerability to the conditions of isolated confinement by softening those conditions.<sup>48</sup> Prisoners with mental illness and intellectual disabilities are less resilient to the absence of social interaction and the enforced idleness of solitary confinement. Consequently, these features should be modified for them; they could, for example, receive controlled programming, increased recreation hours, expanded access to

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<sup>43</sup> See, e.g., Agreed Order, *Rasho v. Baldwin*, No. 1:07-CV-1298-MMM-JAG (C.D. Ill. May 8, 2013), at 3-4, available at <http://www.clearinghouse.net/chDocs/public/PC-IL-0031-0008.pdf>; Plaintiff’s Response to Motion for Summary Judgment, *Anderson v. Colo.*, No. 10-cv-01005-WYD-KMT (D. Colo. July 21, 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0006.pdf>; Plaintiff’s Trial Brief, *Anderson v. Colo.*, No. 10-cv-01005-WYD-KMT (D. Colo. Apr. 23, 2012), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0007.pdf>.

<sup>44</sup> Cresson Letter, *supra* note 30, at 1.

<sup>45</sup> See, e.g., Private Settlement Agreement, *Disability Advocates, Inc. v. New York State Office of Mental Health*, No. 1:02-cv-04002-GEL (S.D.N.Y. Apr. 27, 2007), at 12, available at <http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf>; Settlement Agreement and General Release, *Disability Rights Network of Pennsylvania v. Wetzell*, No. 1:13-cv-00635-JEJ (M.D. Pa. Jan. 9, 2015), at 16, available at <http://www.clearinghouse.net/chDocs/public/PC-PA-0031-0003.pdf>.

<sup>46</sup> Cresson Letter, *supra* note 30, at 37 (citing 28 C.F.R. § 35.130(b)).

<sup>47</sup> For an account of a litigation making this point, see Glidden & Rovner, *supra* note 5.

<sup>48</sup> This argument was made by the plaintiffs in *Disability Advocates, Inc. v. N.Y. State Office of Mental Health*, 1:02-cv-04002-GEL (S.D.N.Y. May 28, 2002) (case description available at <http://www.clearinghouse.net/detail.php?id=5560>). The stressful conditions of isolated confinement, and attendant lack of access to programs, including post-release planning, were claimed in that case to have an impermissibly harsh and more frequent impact upon inmates with serious mental illness.

educational materials and similar accommodations.<sup>49</sup> This applies even to disabled prisoners whose path into solitary was unconnected to their disability.<sup>50</sup>

The eligibility criteria for various kinds of in-unit programming or services—visits, phone calls, various property privileges, group therapy, etc.—should also be adjusted so those criteria do not deprive prisoners with disabilities the opportunity to participate in and benefit from those programs. Otherwise, such criteria unlawfully “screen out” prisoners with disabilities from “fully and equally enjoying” such programs or make it difficult for them to “obtain the same result [or] gain the same benefit” from these programs.<sup>51</sup>

Finally, the ADA requires modifications to the *route out of solitary*—that is, to eligibility and step-down type requirements for prisoners in solitary confinement or other high-security housing that are ill-suited or even impossible for prisoners with disabilities.<sup>52</sup> Indeed, the same theory could reach denials of opportunities for a route out of prison altogether, if parole is denied on the basis of a solitary stint, or on lack of completion of rehabilitative programming that is unavailable to those in solitary.

Anti-discrimination remedies like these—narrowing the route in, softening the conditions, and widening the route out of solitary—have been incorporated in the dozen or so major solitary confinement settlements in recent years.<sup>53</sup> The claims have also gotten some, albeit limited, support in federal district court opinions. In a couple of cases, district courts have held that the ADA requires modification of disciplinary procedures.<sup>54</sup> Similarly, at least one court has held that administrative classification processes used to put prisoners into solitary confinement must be reasonably modified to take account of the needs of prisoners with disabilities.<sup>55</sup> And finally, a recent

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<sup>49</sup> See, e.g., Settlement Agreement, Peoples v. Fischer, No. 1:11-cv-02694-SAS (S.D.N.Y. Dec. 16, 2015), available at <http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0011.pdf>.

<sup>50</sup> See, e.g., Stipulation, Parsons v. Ryan, No. 2:12-cv-00601 (D. Ariz. Oct. 14, 2014), at 8, available at <http://www.clearinghouse.net/chDocs/public/PC-AZ-0018-0028.pdf>.

<sup>51</sup> 28 C.F.R. § 35.130(b)(8) & (1)(iii).

<sup>52</sup> See Plaintiff's Response to Motion for Summary Judgment, *supra* note 43; Plaintiff's Trial Brief, Anderson v. Colo., No. 10-cv-01005-WYD-KMT, 2011 WL 1195393 (D. Colo. Mar. 30, 2011); Sardakowski v. Clements, No. 12-cv-01326-RBJ-KLM, 2013 WL 3296569 (D. Colo. July 1, 2013) (argued by the same counsel before the same judge as *Anderson*). See also Plaintiff's Response to Defendants' Motion for Summary Judgment, Sardakowski v. Clements, No. 12-cv-01326-RBJ-KLM (D. Colo. Dec. 26, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0024-0001.pdf>.

<sup>53</sup> See, e.g., sources cited *supra* notes 42-52.

<sup>54</sup> See Purcell v. Pa. Dep't of Corr., No. 00-cv-181J, 2006 WL 891449, at \*13 (W.D. Pa. Mar. 31, 2006) (finding a genuine issue of material fact as to whether a “reasonable accommodation” was denied when the Department of Corrections refused to circulate a memo to the staff concerning a prisoner's Tourette's Syndrome to explain that some of his behaviors were related to his condition, not intentional violations of prison rules); Scherer v. Pa. Dep't of Corr., No. Civ.A. 3:04-cv-00191, 2007 WL 4111412, at \*44 (W.D. Pa. Nov. 16, 2007) (because the prisoner's misconduct may have been a result of his mental illness, “the lack of modification of its disciplinary procedures to account for . . . [his] mental illness . . . possibly resulted in a violation of Title II of the ADA.”).

<sup>55</sup> See Biselli v. Cnty. of Ventura, No. 09-cv-08694 CAS (Ex), 2012 U.S. Dist. LEXIS 79326, at \*44-45 (C.D. Cal. June 4, 2012) (placement in administrative segregation based on conduct specifically linked to mental illness, without input from mental health staff, may constitute a violation of the ADA).

district court opinion accepted a reasonable modification argument seeking greater access for prisoners with disabilities to a solitary confinement “step-down” program.<sup>56</sup>

### C. Challenging Solitary Confinement as a Violation of ADA’s Integration Mandate

The ADA regulations include a provision, usually termed the “integration mandate,” which directs that “A public entity shall administer services, programs, and activities in *the most integrated setting appropriate* to the needs of qualified individuals with disabilities. . . .”<sup>57</sup> The regulation that deals specially with program access in prisons and jails adds some detail to this general mandate. It provides, in pertinent part:

- (b)(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a public entity—
  - (i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;
  - (ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment; [and]
  - (iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed. . . .<sup>58</sup>

Prisons often house prisoners with disabilities in various kinds of special housing that are, if not quite solitary confinement, at least close to it; they impose far more locked-down time than ordinary housing, restrict access to property, limit various privileges, etc. This kind of dedicated housing for people with disabilities (as well as infirmary assignments that do not actually provide medical care or treatment) violate the plain dictates of the ADA’s regulations if the housing area is not “the most integrated setting appropriate” to the prisoners’ needs.<sup>59</sup>

Similarly, a prison would violate the regulation if, for example, all the mental health housing is high security, so that prisoners who would otherwise have access to gentler conditions in minimum or medium security are forced into harsher environments in order to get treatment.<sup>60</sup> As already

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<sup>56</sup> See *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM, 2013 WL 3296569, at \*9 (D. Colo. July 1, 2013), (rejecting a motion to dismiss for failure to state a claim given plaintiff’s argument “that he has been unable to complete the requirements of the leveling-out program successfully because of his mental impairment and because CDOC officials have prevented him from obtaining adequate treatment and accommodation so that he may progress out of solitary confinement.”). See also Reporter’s Transcript: Hearing on Motion for Summary Judgment and Final Trial Preparation Conference, *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM (D. Colo. Feb. 25, 2014), at 41, *available at* <http://www.clearinghouse.net/chDocs/public/PC-CO-0024-0002.pdf> (rejecting defendants’ motion for summary judgment on the same claim).

<sup>57</sup> 28 C.F.R. § 35.130(d) (emphasis added).

<sup>58</sup> 28 C.F.R. § 35.152.

<sup>59</sup> 28 C.F.R. § 35.130(d).

<sup>60</sup> This argument was made in some detail by the plaintiffs in the pioneering case *Disability Advocates, Inc. v. N.Y. State Office of Mental Health*, 1:02-cv-04002-GEL (S.D.N.Y. 2007) (description available at <http://www.clearinghouse.net/detail.php?id=5560>).

described, in *Armstrong v. California* the Northern District of California found that the plaintiff prisoners, who had mobility impairments, were being housed in solitary confinement simply because there were no accessible cells available elsewhere.<sup>61</sup> This, the district court held, violated the clear terms of the provisions quoted above.

More commonly, though, confinement of prisoners with disabilities to restrictive housing is not because of a shortage of accessible cells elsewhere, but rather because prisons choose to manage difficult, disability-related behavior with solitary confinement rather than less harsh housing assignments and services. In *Olmstead v. L.C.*, the Supreme Court required states to deinstitutionalize people with disabilities who had been unjustifiably assigned to receive various state-provided services in segregated institutions rather than in the community.<sup>62</sup> In prison or jail, when solitary confinement is triggered by a prisoner’s disability (and resulting conduct), that means that prison services are provided in a setting that lessens the prisoner’s contact with other, non-disabled prisoners. This is “segregated” not only in the way the term is used in prison, but also in the way the term is used in the *Olmstead* opinion to describe civil institutionalization, which the Court held can be a form of unlawful discrimination.<sup>63</sup>

The ADA’s integration mandate presumes that such segregation is harmful. That is, the regulation itself bans an under-justified decision to isolate people with disabilities from other, non-disabled people; plaintiffs need not demonstrate how that decision hurts them. In addition, a decade of litigation under *Olmstead* in other settings has established that the solution for violations of the integration mandate is the provision of services in integrated settings that avoid the need to segregate.<sup>64</sup> For example, in *United States v. Delaware*, an *Olmstead* settlement between the DOJ and the state of Delaware required statewide crisis services to “[p]rovide timely and accessible support to individuals with mental illness experiencing a behavioral health crisis, including a crisis due to substance abuse.”<sup>65</sup> The settlement detailed numerous items that would form a “continuum of support services intended to meet the varying needs of individuals with mental illness.” This included Assertive Community Treatment teams—multidisciplinary groups including a psychiatrist, a nurse, a psychologist, a social worker, a substance abuse specialist, a vocational rehabilitation specialist and a peer specialist—to “deliver comprehensive, individualized, and flexible support,

<sup>61</sup> See Order Granting Motion for Further Enforcement, *Armstrong v. Brown*, No. C 94-2307, 2015 WL 496799 (N.D. Cal. Feb. 3, 2015), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf>.

<sup>62</sup> 527 U.S. 581 (1999). For more on *Olmstead* and its implementation, see Civil Rights Division, U.S. Dep’t of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (June 22, 2011), available at [http://www.ada.gov/olmstead/q&a\\_olmstead.pdf](http://www.ada.gov/olmstead/q&a_olmstead.pdf).

<sup>63</sup> The plaintiffs in California’s *Coleman* litigation, a class action on behalf of prisoners with serious mental illness, have made the fullest version of this argument. In the end, the District Court did not address the argument, ruling entirely on constitutional grounds. See Notice of Motion & Motion for Enforcement of Court Orders & Affirmative Relief Re: Improper Housing & Treatment of Seriously Mentally Ill Prisoners in Segregation, *Coleman v. Brown*, 2:90-cv-00520-LKK-JFM (E.D. Cal. May 6, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0066.pdf>; Plaintiffs’ Post-Trial Brief Regarding Enforcement of Court Orders and Affirmative Relief Regarding Improper Housing and Treatment of Seriously Mentally Ill Prisoners in Segregation, *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Jan. 21, 2014), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0065.pdf>.

<sup>64</sup> See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

<sup>65</sup> Settlement Agreement, *U.S. v. Delaware*, 1:11-cv-00591-LPS (D. Del. July 6, 2011.), at 3, available at <http://www.clearinghouse.net/chDocs/public/PB-DE-0003-0002.pdf>.

services, and rehabilitation to individuals in their home and communities,” and various kinds of case management.<sup>66</sup> And it provided for “an array of supportive services that vary according to people’s changing needs and promote housing stability” and “integrated opportunities for people to earn a living or to develop academic or functional skills”.<sup>67</sup> Other *Olmstead* decrees contain similar provisions.<sup>68</sup>

The Delaware and other *Olmstead* cases provide a very helpful model for how prisons could comply with the integration mandate, managing the needs of prisoners with disabilities to keep them out of the segregated solitary confinement setting. The possibilities are broad: provision of mental health treatment and other supports, perhaps assignment to a one-person cell to minimize intra-cell conflict, and many more.

#### IV. Three ADA Defenses

Prisons and jails faced with challenges to the ways they use solitary confinement for prisoners with disabilities have several available defenses. They can argue that the requested modifications would “fundamentally alter” their programs; that the modifications pose real safety risks; or that solitary confinement is actually helping the disabled prisoners get effective access to services. In this part, I explore those defenses, and explain how even their successful invocation would assist reform, by requiring careful, individuated consideration of the needs of prisoners with disabilities—the very type of consideration that could curb prison and jail overuse of solitary confinement.

##### A. Fundamental Alteration/Undue Financial and Administrative Burden

As already noted, the ADA’s obligation to make “reasonable modifications in policies, practices, or procedures” is not unbounded; a modification is not required if it would “fundamentally alter the nature of the service, program, or activity.”<sup>69</sup> The separate ADA requirement of ready program accessibility is cabined by similar language—public entities need not take an action that they “can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.”<sup>70</sup> Thus the major obstacle to ADA reasonable modification liability is a prison’s defense that the requested modification would “fundamentally alter” the policy, practice, or procedure, or, pose “undue financial and administrative burdens.” Just as “reasonable modification” is the analog to Title I’s “reasonable accommodation” requirement, “fundamental alteration” and “undue burden” are the analogs of Title I’s “undue hardship.”

Whether the particular change to a prison policy or practice a prisoner with a disability seeks is a fundamental alteration, which a prison is not required to undertake, or rather a reasonable modification that it must, is determined by a fact-intensive analysis. The burden the modification imposes is a key part of the calculus—both its cost (in comparison with the agency’s budget) and

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<sup>66</sup> *Id.* at 5-6.

<sup>67</sup> *Id.* at 7-8.

<sup>68</sup> See *Special Collection: Olmstead Cases*, CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=7> (last visited Apr. 11, 2016) (listing cases).

<sup>69</sup> 28 C.F.R. § 35.130(b)(1)(7).

<sup>70</sup> 28 C.F.R. § 35.150(a)(3).

any other onerous features.<sup>71</sup> In addition, the nature of the requested change matters; as in so many situations, whether it is considered fundamental turns in part on the level of generality used to describe the program and its “essential aspect[s].”<sup>72</sup> Is the essence of solitary confinement its restrictive nature, or that it adequately safeguards safety and security? Is the essence of prison discipline that it punishes misconduct, or that it punishes culpable misconduct? And so on.

These kinds of arguments put the onus on the jail or prison to justify why they cannot make a requested change, if not for everyone, than for this particular disabled prisoner. The idea that some aspects of a program or policy are fundamental—but others are not—means that prisoner restrictions that have been treated as irrevocably bound together are conceptually untied, encouraging more individuation, more flexibility. As Professors Brittany Glidden and Laura Rovner summarized the point, “Because the accommodations should be specific and individualized, prison officials must demonstrate why in each case the particular prisoner cannot receive the requested services. As a result, it becomes more difficult for the prison to rely on generalized assertions of ‘safety’ to support the deprivations and instead forces an articulation of the reason for the particular condition.”<sup>73</sup> If the prison asserts a narrow defense, this may amount to a substantial concession—for example, a defense focusing on safety risks posed by a prisoner’s requested physical proximity to other people cannot justify bans on non-contact visits. If the defense is too broad, the court may well find for the plaintiff.

## B. Legitimate Safety Requirements and Direct Threat

The ADA regulations provide two defenses related to health and safety. The first allows that:

A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.<sup>74</sup>

The second regulatory defense similarly provides:

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the

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<sup>71</sup> *Olmstead*, 527 U.S. at n.16.

<sup>72</sup> See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 663 (2001).

<sup>73</sup> Glidden & Rovner, *supra* note 5, at 69.

<sup>74</sup> 28 C.F.R. § 35.130(h).

potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.<sup>75</sup>

These defenses allow prison officials to argue that changes to solitary confinement policies would pose a “direct threat” to others, and therefore, the ADA does not require accommodations in those circumstances. Similarly, the prison could argue that their challenged decisions are based on “legitimate safety requirements” for the safe operation of their services, programs, or activities, including classification, housing, and mental health services.

The direct threat defense had its origin in *School Board of Nassau County v. Arline*, in which the Supreme Court held (without a statutory or regulatory textual hook) that a direct threat under Section 504 of the Rehabilitation Act requires a showing of a significant risk to the health or safety of others that could not be eliminated or reduced to an acceptable level by reasonable modification of policies, practices, or procedures.<sup>76</sup> This requirement was then codified for ADA Titles I and III, and incorporated into the Title II regulations.<sup>77</sup> As the Supreme Court has explained, “The direct threat defense must be ‘based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.’”<sup>78</sup> The defense also requires an “individualized assessment” of the plaintiff’s safety risk, including the likelihood and severity of the potential harm.

Generally, public entities denying an individual with a disability the opportunity to participate in and benefit from services, programs, and activities on the basis of direct threat bear a “heavy burden,” in proving their claims. The same would presumably be true of legitimate safety criteria.<sup>79</sup> But of course, courts are very deferential to prison officials’ claims of danger. Arguments center on whether the prison has “ensure[d] that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities,”<sup>80</sup> and whether the claim of direct threat is appropriately based on “individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.”<sup>81</sup>

As the DOJ further explained in a brief filed in 2013, “[P]risoners with disabilities cannot be automatically placed in restrictive housing for mere convenience . . . the individualized assessment

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<sup>75</sup> 28 C.F.R. § 35.139.

<sup>76</sup> 480 U.S. 273, 278-88 (1987).

<sup>77</sup> See 42 U.S.C. § 12113(b), 42 U.S.C. § 12182(b)(3), and 35 C.F.R. § 35.139 (codifying the “direct threat” defense in the Title I and III statutes and Title II regulations, respectively).

<sup>78</sup> *Echazabal v. Chevron*, 536 U.S. 73, 86 (2002); see also *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (“[T]he risk assessment must be based on medical or other objective evidence.”).

<sup>79</sup> See, e.g., *Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007); *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 347 (S.D.N.Y. 2010); *Celano v. Marriott Int’l, Inc.*, No. C 05-4004 PJH, 2008 WL 239306, at \*16 (N.D. Cal. Jan. 28, 2008).

<sup>80</sup> 28 C.F.R. § 35.130(h).

<sup>81</sup> 28 C.F.R. § 35.139(b).

should, at a minimum, include a determination of whether the individual with a disability continues to pose a risk, whether any risk is eliminated after mental health treatment, and whether the segregation is medically indicated.”<sup>82</sup>

As with the fundamental alteration defense, the direct threat/legitimate safety requirement defenses push prisons and jails to individuate, to provide reasonable modifications, and to accommodate individuals with mental disabilities.

### C. Effective Services

As I explained in Part II, ADA regulations generally restrict jails and prisons from adopting “different or separate aids, benefits, or services” for individuals with mental disabilities.<sup>83</sup> The regulations do provide an exception, if differentiation or separation is necessary to ensure that the disabled prisoner has access to “aids, benefits, or services that are as effective as those provided to others.”<sup>84</sup> A prison seeking to fend off a challenge to placement of prisoners with disabilities in solitary confinement or high-security mental health housing might argue that the housing assignment is needed in order to provide adequate services (e.g., safety) to those prisoners, and therefore authorized by the regulations. But if that were the case, one would expect conditions of confinement to be as therapeutic as possible. This defense, then, encourages prisons and jails to demonstrate a softer, more individuated, less punitive form of isolation in order to prevail. In the absence of that kind of evidence—which could rarely be produced—this defense is simply implausible.<sup>85</sup> In addition, any arguments plaintiffs make explaining how prisons could have avoided solitary confinement by undertaking reasonable modifications will undermine the idea that a separate “benefit” (solitary) was necessary.

## V. Conclusion

Eighth Amendment lawsuits have been a crucial impetus to solitary confinement reform—producing strong evidence of the damage solitary wreaks, judicial statements condemning that damage, and models of solutions that get and keep prisoners out of solitary. But the high bar Eighth Amendment liability demands has failed many individuals with disabilities. Notwithstanding two decades of precedents that emphasize the vulnerability of prisoners with mental disabilities to the toxicity of solitary confinement, such prisoners remain overrepresented in restrictive housing. Prisons and jails resort too easily to isolating prisoners with disabilities instead of treating them and modifying policies and practices that would allow equal access to programs, services, and activities.

To an extent not yet fully implemented, the ADA requires jails and prisons to work at keeping prisoners with disabilities out of solitary confinement and instead promote disabled prisoners’ access to programs. This Issue Brief has offered a guide to the various provisions and theories that emerge

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<sup>82</sup> Response of the United States of America to Defendants’ Motion in Limine No.4: To Exclude the Statement of Interest, *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Nov. 12, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0041.pdf> (and Appendix).

<sup>83</sup> 28 C.F.R. § 35.130(b)(i)(iv).

<sup>84</sup> *Id.*

<sup>85</sup> See Cresson Letter, *supra* note 30, at 11-12.

from carefully reading and analyzing the regulations, the limited caselaw, and recent litigation documents. The overall theme is one of individuation. The ADA and its regulations require prison and jail officials to offer very robust justification for the isolation and disadvantaging of prisoners with disabilities; alternatives, which frequently require modification to policies or practices, are generally reasonable, and therefore compelled. This route can lead to fewer prisoners with disabilities in solitary confinement, and less harsh conditions for those whose isolation survives review. The ADA will not stop solitary, but it can reduce its use and severity for prisoners with mental disabilities.

## About the Author

Margo Schlanger is the Henry M. Butzel Professor of Law at the University of Michigan. She teaches constitutional law, torts, and classes relating to civil rights (recent seminars include Civil Rights and Homeland Security, and Police and Surveillance Reform) and to prisons (such as Prisons and the Law, and the Constitutional Law of Incarceration). She also founded and runs the Civil Rights Litigation Clearinghouse.

Professor Schlanger is the court-appointed monitor for a statewide settlement dealing with deaf prisoners in Kentucky, and she serves on the Department of Homeland Security's Advisory Committee on Family Residential Centers. She took a two-year leave from the University in 2010 and 2011, serving as the presidentially appointed Officer for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security. As the head of civil rights and civil liberties for DHS, she was the Secretary's lead advisor on civil rights and civil liberties issues; in that capacity, she testified before Congress; chaired the Privacy, Civil Rights, and Civil Liberties Subcommittee of the federal Information Sharing Environment's Information Sharing and Access Interagency Policy Committee; chaired the Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities; served on the first U.S. Delegation to the U.N. Universal Periodic Review; and met with community leaders and groups across America to ensure that their perspectives regarding civil rights and homeland security were considered in the Department's policy process.

Professor Schlanger earned her J.D. from Yale in 1993. She served as book reviews editor of the Yale Law Journal and received the Vinson Prize. She then served as law clerk for Justice Ruth Bader Ginsburg of the U.S. Supreme Court from 1993 to 1995. From 1995 to 1998, she was a trial attorney in the U.S. Department of Justice Civil Rights Division, where she worked to remedy civil rights abuses by prison and police departments and earned two Division Special Achievement awards.

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