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The Americans with Disabilities Act and the Exclusion of Inmates from Services in Prisons: A Proposed Analytical Approach Regarding the Appropriate Level of Judicial Scrutiny of a Prisoner's ADA Claim

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THE AMERICANS WITH DISABILITIES ACT AND THE EXCLUSION OF INMATES FROM SERVICES IN PRISONS: A PROPOSED ANALYTICAL APPROACH REGARDING THE APPROPRIATE LEVEL OF JUDICIAL SCRUTINY OF A PRISONER'S ADA CLAIM

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I. INTRODUCTION

The Supreme Court in *Pennsylvania Department of Corrections v. Yeskey*[1] resolved a division among the circuits regarding the applicability of the Americans With Disabilities Act (ADA)[2] to state prisons.[3] In *Yeskey*, the Supreme Court held that the ADA applies to state prisons,[4] yet the Court left some important issues unresolved, including the appropriate level of scrutiny a court should apply in deciding whether a disabled inmate has been excluded from a prison's services, programs, or activities[5] in violation of the ADA.[6] The ADA's application to prisons can fall into three general categories: (1) the prison's policies and procedures, (2) architectural barriers inmates confront, and (3) an inmate's ability to communicate.[7] When a court analyzes an inmate's claim under any of these categories, ample room for disagreement regarding the appropriate level of review

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1. 524 U.S. 206 (1998).

2. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 331 (codified as amended at 42 U.S.C. §§ 12101-12213 (2000)).

3. Christopher J. Burke, Note, *Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners' Statutory Claims Under the Americans With Disabilities Act*, 98 MICH. L. REV. 482, 483 (1999). For a copy of the amici brief filed on behalf of Yeskey, the respondent, see generally Brief of Amici Curiae ADAPT, Pennsylvania Coalition of Citizens with Disabilities et al., Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206 (1998) (No. 97-634).

4. *Yeskey*, 524 U.S. at 213.

5. I regularly refer to "services," however one could substitute the word "programs" or "activities" for purposes of this article.

6. Susan B. Hoppe, *Broad Statutory Language is Not Ambiguous: The Americans With Disabilities Act Applies in State Prisons*, 15 J. CONTEMP. HEALTH L. & POL'Y 275, 282 (1998). Although prisoners may allege violations under any title of the ADA, most litigation, not surprisingly, is brought under Title II, which applies to discrimination in services, programs, or activities by state and local entities. *Id.*

7. Paula N. Rubin & Susan W. McCampbell, *The Americans With Disabilities Act and Criminal Justice: Mental Disabilities and Corrections*, NIJ RESEARCH IN ACTION, July 1995, *available at* http://www.ncjrs.org/txtfiles/amdisact.txt.

arises from the deference courts have traditionally afforded to prison regulations and policies.[8]

Yeskey, and the controversy it has generated over the ADA's application to state prisons, seemed in many ways destined to collide with an earlier Supreme Court decision, *Turner v. Safley*.[9] In *Turner*, the Court applied a deferential standard of review to a prison policy that an inmate alleged infringed on his right to free speech under the First Amendment.[10] The *Turner* doctrine, under which a prison regulation challenged on the grounds of a constitutional right violation will be upheld so long as it is reasonably related to a legitimate penalogical interest, emerged from this decision.[11] How the *Turner* doctrine applies to prisoners' statutory rights has not been clear. Nevertheless, the *Yeskey* and *Turner* issues have converged. While some incorporation of the *Turner* doctrine into the ADA appears inevitable, its precise form and the weight assigned to prison policies are far from certain. Subsequent courts have either fully adopted the rationally related to legitimate penalogical interests approach or have adopted it in a modified form, generally by rejecting full incorporation of *Turner* or including the *Turner* principles within some part of the ADA analysis.[12]

Resolution of this issue will have far reaching consequences, and courts should avoid approaches that favor either extreme. The ease with which a prison can justify its regulation under the *Turner* doctrine threatens to eviscerate the applicability of the ADA from prisons altogether, manifesting a complete departure from the Supreme Court's decision in *Yeskey*.[13] On the other hand, incorporating the *Turner* principles within the

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8. *See infra* Part III.

9. 482 U.S. 78 (1987). A majority of courts disallow an action under Title II of the ADA brought against an individual. Berthelot v. Stadler, No. 99-2009, 2000 U.S. Dist. LEXIS 15615, at *7 (E.D. La. Oct. 20, 2000).

10. *Turner*, 482 U.S. at 89.

11. *Id.* A common example of a penalogical interest is prison security. Burke, *supra* note 3, at 485 n.21.

12. *See infra* Part III.

13. *See* Amos v. Md. Dep't of Pub. Safety & Corr. Servs., 126 F.3d 589, 607 (4th Cir. 1997), *vacated*, 524 U.S. 935 (1998). The Fourth Circuit, in fact, cited and discussed *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), as one reason why Congress had not intended to apply the ADA to state prisons. *Id.* This was contrary to the requirements of the ADA Accessibility Guidelines with which the ADA mandates compliance. Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans With Disabilities Act in Prison*, 15 YALE L. & POL'Y REV. 49, 82, 85 (1996). Also working against this proposal is the fact that courts, prior to the ADA, interpreted the Rehabilitation Act to apply to prisons and prisoners. Jennifer L. Lange, Note, *Biting the Hand That Feeds Them—State Prisons and the ADA: Responding to* Amos v. Maryland Department of Public Safety & Correctional Services, 1998 BYU L. REV. 875, 889 (1998). Following enactment of the ADA, extensive hearings were conducted on its impact on prisons, which was among the topics discussed and later codified into the interim rule. Robbins, *supra*, at 82.

existing ADA analytical framework without some methodological process to account for the security concerns of prisons could create outcomes that unduly interfere with prison policies.[14]

Unfortunately, courts have done just what should have been avoided. The underlying principles that drive the traditional deference to prisons' security concerns ought to be integrated into the meaning of the terms "reasonable accommodation"[15] and "fundamentally alter,"[16] with reliance on several factors to guide courts. Because considerable uncertainty remains with respect to the precise role of the *Turner* doctrine in the context of the ADA, courts can provide interested parties with better notice of a suit's likely outcome through announcing and applying common factors. Having at least settled part of the issue in *Yeskey*,[17] the Supreme Court should now provide guidance to lower courts regarding inquiries into the reasonableness of a prison's exclusionary policies or rules. In doing so, it would overrule those courts that have inappropriately placed the burden on plaintiffs to overcome the presumption that prison policies are reasonable.[18]

This article is designed to provide an analytical approach for courts to apply when analyzing ADA claims brought against prisons that will properly balance the needs of those inmates living with disabilities with the need for effective prison policies. With this goal in mind, Part II begins by describing the background and purpose of the ADA and the background of *Turner*. Part III discusses the range of approaches courts have adopted to decide the merits of ADA claims brought by inmates against prisons or other correctional facilities. Finally, Part IV explains that these approaches fall short of providing, on a consistent basis, satisfactory results for both sides, and that in light of the importance of both the ADA and effective prison policies, courts ought to adopt an approach that better balances these often-competing interests. In applying the ADA to prisons, courts can more successfully effectuate Congress's intent by applying a level of scrutiny that will result in meaningful enforcement against discrimination in the services provided to inmates with disabilities, without treading unnecessarily on the appropriate discretion of prison officials.

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14. *See generally Turner*, 482 U.S. 78.

15. 42 U.S.C. § 12111(9)(A) & (B) (2000).

16. *Id.* § 12182(b)(2)(A)(ii).

17. *See* Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206 (1998) (determining that the ADA applies to state prisons).

18. *See infra* Part III.

II. THE BACKGROUND AND PURPOSE OF THE ADA AND ITS APPLICATION TO STATE PRISONS

After nearly twenty years of hearings, investigations, and public debate, Congress enacted the ADA in recognition of the overwhelming public consensus that further structural and institutional changes were necessary in order to eliminate the barriers persons with disabilities encounter everyday.[19] The ADA recognized the harm of discrimination and that society had created insurmountable obstacles on those with disabilities. Justin Dart, whose views many in Congress found influential just prior to passing the ADA, described society's general attitude that persons with disabilities were less than whole as the most significant obstacle encountered by persons with disabilities.[20] Common experience suggests that being negatively stereotyped and stigmatized are likely among the most significant attitudinal barriers persons with disabilities face. After generations of ignoring and marginalizing people with disabilities, the ADA represented the emergence of a paradigm shift in which what has been coined an "integrative view" replaced the traditional segregationalist and sheltered focused view.[21] Rather than emphasizing physical and mental differences, the integrative approach seeks to achieve equality through emphasizing and harmonizing our similarities.[22]

A. BACKGROUND OF THE ADA

In 1990, Congress passed the ADA to expand the scope of protections afforded to persons with disabilities under the Rehabilitation Act of 1973.[23] Years earlier, Congress had tried to remedy discrimination against persons with disabilities by enacting laws targeting specific areas of public life, such as architectural barriers to education, transportation, and housing.[24] Much of what drove Congress to enact the ADA was Congress's perceived inadequacy of both state and federal legislation, particularly the

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19. *See* James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After* Seminole Tribe *and* Flores, 41 ARIZ. L. REV. 651, 691 (1999).

20. *See* Robert L. Mullen, *The Americans With Disabilities Act: An Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175, 177 (1994).

21. *Id.* at 178.

22. *See id.*

23. Lange, *supra* note 13, at 877; Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended 29 U.S.C. §§ 701-796*l* (2000)). The Rehabilitation Act's reach had been limited to prohibiting discrimination by entities receiving federal assistance. Lange, *supra* note 13, at 877.

24. Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mistique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 162–63 (2000).

Rehabilitation Act, which covered neither the private sector[25] nor those in the public sector that did not receive federal funding.[26] What some proclaimed to be the "Emancipation Proclamation" for persons with disabilities, the ADA forever changed the legal landscape for persons with disabilities by covering a multitude of services and programs in both the public and private sphere, and by affording each individual an individualized remedy.[27]

As part of its broad reach, Congress divided the ADA into separate Titles, which collectively cover most areas of public life.[28] Included in these are employment (Title I),[29] public services (Title II),[30] and public accommodations (Title III).[31] The overwhelming majority of ADA claims brought against prisons involve actions under Title II.[32] Title II is distinct from the others insofar as Congress refrained from providing much of its substantive content, opting instead to leave the task to the Attorney General.[33] Much of the generality surrounding the scope of Title II arises from the fact that unlike Titles I and III, Title II contains only a general prohibitory clause against discrimination in the areas of services, programs, and activities[34] and applies only to state and local governments.[35] As an interpretative matter, Congress modeled Title II after § 504 of the Rehabilitation Act so pre-ADA regulations and case law apply with equal force today.[36]

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25. *See* Hoppe, *supra* note 6, at 279.

26. *See id.* at 282–83.

27. Emily Alexander, Note, *The Americans With Disabilities Act and State Prisons: A Question of Statutory Interpretation*, 66 FORDHAM L. REV. 2233, 2237 (1998).

28. *See generally* Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 331 (codified as amended at 42 U.S.C. §§ 12101-12213 (2000)).

29. 42 U.S.C. §§ 12111-12117.

30. *Id.* §§ 12131-12165.

31. *Id.* §§ 12181-12189; PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001).

32. *See, e.g.*, Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 207 (1998). Title II provides, "Subject to the provisions of this subchapter, 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.

33. 42 U.S.C. § 12134(a); Michael H. Gottesman, Symposium, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 33 (2001).

34. Leonard, *supra* note 19, at 694–95, 739.

35. Mullen, *supra* note 20, at 196. Because Title II applies only to "public entities," individuals may not be sued in their individual capacities. Alsbrook v. City of Maumelle, 184 F.3d 999, 1010-11 (8th Cir. 1999).

36. *See* Armstrong v. Davis, No. 99-15152, 2000 U.S. App. LEXIS 6821, at *5 n.3 (9th Cir. Apr. 11, 2000); *see also* Cary LaCheen, *Using Title II of the Americans With Disabilities Act on Behalf of Clients in TANF Programs*, 8 GEO. J. ON POVERTY L. & POL'Y 1, 38 (2001).

To prevail in an ADA claim under Title II, plaintiffs bear the initial burden of showing that they are qualified individuals with disabilities who have been excluded from either a service, program, or activity based on the their respective disabilities.[37] As a general matter, to show that a plaintiff is otherwise qualified, that plaintiff must either "show[] that he or she is capable of participation in a program, either with or without [reasonable] accommodation."[38] The plaintiff must also show that denial of meaningful access was the result of one's disability or perceived disability.[39] Plaintiffs able to demonstrate that they are qualified individuals must then show they were excluded from participation, denied benefits, or subjected to discrimination by the public entity.[40]

Once an individual is able to satisfy these requirements, that individual becomes entitled to reasonable accommodation,[41] which can be found in the ADA's implementing regulations,[42] and operationally speaking, the burden shifts to the defendant.[43] Where a prison fails to make reasonable accommodations, it may argue as an affirmative defense that the requested modification would fundamentally alter the nature of the prison or impose an undue burden.[44] In other words, where the availability of reasonable accommodations are shown, the defendant bears the burden of persuasion to show that such "an accommodation would impose an undue hardship."[45]

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37. *See* Richard E. Kaye, *What Constitutes Reasonable Accommodation Under Federal Statutes Protecting Rights of Disabled Individual, as Regards Educational Program or School Rules as Applied To Learning Disabled Student*, 166 A.L.R. FED. 503, 514-16 (2000). To state a claim under this Title, the plaintiff must allege the following four elements:

> (1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

Thompson v. Davis, 282 F.3d 780, 783–84 (9th Cir. 2002).

38. Onishea v. Hopper (Onishea I), 126 F.3d 1323, 1330 (11th Cir. 1997), *vacated by* Onishea v. Hopper (Onishea II), 133 F.3d 1377 (11th Cir. 1998) (en banc).

39. Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001); Resel v. Fox, No. 01-1599, 2001 U.S. App. LEXIS 27045, at *11 (7th Cir. Dec. 20, 2001).

40. 42 U.S.C. § 12132 (2000).

41. Scott v. Kelly, 107 F. Supp. 2d 706, 711 n.12 (E.D. Va. 2000).

42. Kaye, *supra* note 37, at 514-16 (citing 28 C.F.R. § 35.130(b)(7) (2002)).

43. *See id.* at 515.

44. Mullen, *supra* note 20, at 198; Ann K. Wooster, *When Does a Public Entity Discriminate Against Disabled Individuals in its Provision of Services, Programs, or Activities Under the Americans with Disabilities Act, 42 U.S.C.A. § 12132*, 163 A.L.R. FED. 339, 359-63 (2000). The regulations define undue burden as a "fundamental alteration in the nature of a service, program, or activity or in undue financial or administrative burdens." 28 C.F.R. 35.150(a)(3).

45. Onishea I, 126 F.3d 1323, 1330 (11th Cir. 1997), *vacated*, 133 F.3d 1377 (11th Cir. 1998) (quoting Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522, 1526 (11th Cir. 1997)).

The public entity's decision to take this exemption must have been made by the person in charge of the entity.[46] Moreover, parties seeking this exemption generally find it difficult to convince a court because a court bases its decision to grant an exemption on all of the entity's available resources.[47] In cases where the accommodation is necessary, the plaintiff retains the burden of proving that reasonable accommodations were available throughout the litigation.[48]

B. JUDICIAL INTERPRETATION OF THE ADA AS APPLIED TO STATE PRISONS

As state prisoners' claims began to appear, circuit courts, based primarily on federalism principles,[49] were divided on the issue of whether the ADA applied to state correctional facilities.[50] The circuit split arose despite Congress's intent to delegate implementation of each title to the agencies responsible for issuing regulations[51] and subsequent ADA-based regulations promulgated by the Department of Justice specifically referring to state prisons.[52] Courts, nevertheless, were divided on the issue of whether Congress manifested a clear intent to abrogate state-managed prison facilities when it enacted the ADA in accordance with the principles of federalism.[53] For example, the Fourth Circuit in *Torcasio v. Murray*[54] held that state prisons, due to federalism principles, did not fall under the term "public entity" in the ADA.[55] The court found that Congress, when it enacted the ADA, did not speak with the unmistakable clarity required to abrogate state sovereignty in an area traditionally managed by the states.[56]

As alluded to above, the Supreme Court finally resolved the issue on the applicability of the ADA to state correctional facilities when it decided *Yeskey*.[57] The respondent, Yeskey, who was denied placement in the state's

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46. Mullen, *supra* note 20, at 198.

47. *Id.*

48. *Onishea I*, 126 F.3d at 1330.

49. *See generally* Leonard, *supra* note 19 (discussing the scope of the ADA's application in light of the Eleventh Amendment restrictions).

50. *See* Yeskey v. Pa. Dep't of Corrs., 118 F.3d 168, 172 (discussing the split among the circuits).

51. Hoppe, *supra* note 6, at 281–82.

52. *Id.* at 283–84.

53. *Id.*

54. 57 F.3d 1340 (4th Cir. 1995).

55. *Torcasio*, 57 F.3d at 1344–46.

56. *Id.*; *see also* Lange, *supra* note 13, at 895.

57. Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 208 (1998). In fact, *Yeskey* has been cited to by the Supreme Court as support for the proposition that the ADA's reach is broad. PGA Tour, Inc. v. Martin, 532 U.S. 661, 677 (2001).

motivational boot camp after receiving an initial recommendation by the sentencing court, sued, claiming that its refusal to admit him based on his medical history of hypertension violated the ADA.[58] Based on the disagreement among the circuit courts, the Pennsylvania Department of Corrections' (Pennsylvania) best chance of prevailing rested on the federalism issue.[59] Specifically, Pennsylvania argued that because state correctional facilities had been traditionally managed by the states, the ADA did not cover them because they were not explicitly mentioned in the Act.[60] On this issue, the Court rejected Pennsylvania's argument by noting that the ADA's language clearly included state prisons and prisoners because its broad language included state entities without exception.[61] According to the Court, the petitioner's reliance on *Gregory v. Ashcroft*,[62] where the Supreme Court held that the Age Discrimination in Employment Act[63] did not cover state judges,[64] was misplaced.[65] The Court interpreted *Gregory* only to apply where the language of a statute does not clearly abrogate state regulation of traditionally state-managed entities, such as when a statute contains exceptions.[66]

Looking beyond the federalism issue, a discussion of Pennsylvania's other defenses and the Supreme Court's treatment of them help define the parameters of the discussion that follows. With respect to the argument that state prisons do not provide prisoners with "benefits of the services, programs, or activities" as required under the ADA, the Court recognized that modern prisons provide inmates with a number of different services, activities, and programs, which all bestow benefits upon them.[67] A second argument that Pennsylvania relied upon was that the words "qualified individual with a disability" were ambiguous and were not meant to pertain to state prisoners.[68] The Court rejected this contention by noting that the definition of "qualified individual with a disability" unambiguously applies to anyone with a disability.[69]

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58. *Yeskey*, 524 U.S. at 208.
59. *See* Hoppe, *supra* note 6, at 277.
60. *Yeskey*, 524 U.S. at 208-09.
61. *Id.* at 209; Hoppe, *supra* note 6, at 277-78.
62. 501 U.S. 452 (1991).
63. 29 U.S.C. §§ 621-634 (2000).
64. *Gregory*, 501 U.S. at 467.
65. *Yeskey*, 524 U.S. at 209.
66. *Id.* at 209-10.
67. *Id.* at 210 (quoting 42 U.S.C. § 12132 (2000)).
68. *Id.*
69. *Id.* (applying 42 U.S.C. § 12132).

A third argument Pennsylvania made was that the words "eligibility" and "participation" implied voluntariness from the individual seeking to benefit from the service or program.[70] This argument was dismissed by citing to common usage dictionaries that define the term "eligible" without reference to voluntariness, and by analogizing to a situation in which a drug addict is required to undergo treatment where one's eligibility is a pre-requisite to admission.[71] Even where voluntariness would be necessary to fall within the term "eligible," a number of services, programs, and activities were available to inmates on a voluntary basis.[72] The final argument Pennsylvania relied on was that the ADA did not apply because neither state prisons nor state prisoners were discussed anywhere in the ADA's findings and purpose section.[73] The Court found this argument unpersuasive as it pointed to § 12101(a)(3)'s reference to institutionalization, a situation akin to a prison, and emphasized the breadth of the ADA's application to situations not expressly anticipated by Congress.[74] The Court, for as much as it did to resolve the underlying federalism controversy, left a number of important questions unanswered,[75] not the least of which was the scope of services, programs, or activities that should be provided in state prisons.[76] It has become recognized and accepted for the ADA to apply to circumstances not foreseen by Congress.[77]

C. RELEVANT BACKGROUND ON THE COURT'S *TURNER* DECISION

Although the Supreme Court did not discuss the ADA or statutory rights in the opinion, *Turner v. Safley* is often cited when a court assesses an inmate's ADA claim.[78] In *Turner*, the Court was asked to determine the constitutionality of the Missouri Division of Corrections' regulations pertaining to inmate marriages and inmate-to-inmate correspondence.[79] The marriage regulation in question restricted inmate marriages to when

70. *Id.* at 211.
71. *Id.*
72. *Id.*
73. *Id.* at 211–12.
74. *Id.* at 212.
75. *See* discussion *infra* note 104 and accompanying text.
76. Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 212 (1998).
77. Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1241 (11th Cir. 2000).
78. *See infra* Part III.
79. Turner v. Safley, 482 U.S. 78, 81 (1987). For a discussion of *Turner* and its progeny, see Burke, *supra* note 3, at 489-93. For a discussion of *Turner* and its likely impact on correctional facilities, see generally William C. Collins, *Use of* Turner *Test Deferring to Institutions' Security Concerns May Sharply Limit Inmates' ADA Protection*, CORR. L. REP., Feb. 1995, at 65.

permission was granted by the prison superintendent, whose approval was limited upon finding that "compelling reasons" were present.[80] The correspondence regulation related to communication among inmates at different institutions and only permitted correspondence that the classification/treatment team judged as "in the best interest of the parties involved."[81] This regulation, however, provided an exemption both to those inmates whose correspondence involved an immediate family member and those whose correspondence concerned legal matters.[82] The district court, applying the strict scrutiny standard,[83] held both regulations unconstitutional, and the Eighth Circuit affirmed.[84]

On appeal, the Supreme Court recognized that it had to finish the task that it had earlier set out to accomplish in *Procunier v. Martinez*[85]—fashion a standard of review for courts to follow for constitutional rights cases brought by prisoners.[86] The Court first acknowledged the *Martinez* precedent, which supported the principle that inmates have valid constitutional claims available.[87] A second principle that the Court relied on from *Martinez* was that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[88] *Martinez* involved a regulation that censored the content of the inmates' mail.[89] In striking down the content-based regulation of inmates' mail, the Court treated the regulation as a typical First Amendment issue and applied strict scrutiny.[90] The *Turner* Court differentiated the case before it from

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80. *Turner*, 482 U.S. at 82.

81. *Id.* at 81-82.

82. *Id.* at 81.

83. The district court in *Turner* applied the following standard of review:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

Safely v. Turner, 586 F. Supp. 589, 595 (W.D. Mo. 1984) (quoting Procunier v. Martinez, 416 U.S. 396, 413-14 (1974)).

84. *Turner*, 482 U.S. at 83.

85. 416 U.S. 396 (1974).

86. *Turner*, 482 U.S. at 84.

87. *Id.*

88. *Id.* (quoting *Martinez*, 416 U.S. at 405–06).

89. *Martinez*, 416 U.S. at 398.

90. *Turner*, 482 U.S. at 85.

Martinez by pointing out that the *Martinez* holding "turned on the fact that the challenged regulation caused a 'consequential restriction on the First and Fourteenth Amendment rights of those who [were] not prisoners.'"[91]

The Supreme Court next cited to and discussed four cases addressing prisoner rights decided during the time between *Martinez* and *Turner*.[92] In each of these cases, the Court noted that the standard applied to the prison regulation was "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penalogical objectives" rather than a "heightened scrutiny" standard relied on by the plaintiffs, the district court, and the court of appeals below.[93] The Eighth Circuit in *Turner* had characterized these decisions as distinguishable because they either concerned time, place, and manner restrictions or "'presumptively dangerous' inmate activities."[94] Ultimately, the Court disagreed with the Eighth Circuit's characterization of the four prior decisions and read them as having a broader reach than the court of appeals was willing to provide.[95]

Based on the direction that prisoner-rights jurisprudence appeared to be headed, the Supreme Court announced the rule that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penalogical interests."[96] To aid in the application of the rule, the Court extracted the following four factors from prior case law for future courts to analyze when determining the reasonableness of prison regulations: (1) the presence of a "'valid, rational connection' between the prison regulation and the legitimate governmental interest" provided;[97] (2) the availability of "alternative means of exercising the right that remain open to prison inmates";[98] (3) the consequences such an asserted constitutional right will have on prison guards, other inmates, and on prison resources;[99] and (4) the absence of ready alternatives.[100] In applying its announced rule and the factors to the facts before it, the Court

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91. *Id.* (quoting *Martinez*, 416 U.S. at 409).

92. *See id.* at 85-87 (citing Pell v. Procunier, 417 U.S. 817 (1974); Jones v. N.C. Prisoners' Union, 433 U.S. 119 (1977); Bell v. Wolfish, 441 U.S. 520 (1979); and Block v. Rutherford, 468 U.S. 576 (1984)).

93. *Id.* at 87.

94. *Id.*

95. *Id.* at 87–88.

96. *Id.* at 89.

97. *Id.*

98. *Id.* at 90.

99. *Id.*

100. *Id.* The Court was careful to point out that "[t]his is not a 'least restrictive alternative' test." *Id.* Instead, an inmate claimant can demonstrate the absence of ready alternatives by "point[ing] to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penalogical interests . . .." *Id.* at 91.

held that the prohibition on inmate mail correspondence was valid,[101] but the regulation on marriage was not.[102] As it has turned out under *Turner*, inmate plaintiffs bear the burden of demonstrating that a challenged prison regulation is unreasonable.[103]

III. APPROACHES USED BY COURTS IN DETERMINING EXCLUSION FROM SERVICES IN PRISONS UNDER THE ADA

Of the number of issues left unresolved by the Supreme Court in *Yeskey*, one of the most important relates to the appropriate level of scrutiny applicable to prisoners' ADA claims.[104] The Supreme Court, it turns out, is not alone. A number of lower courts have also been unable to shed much light on this topic, despite well-intentioned efforts. Indeed, prior to its decision in *Yeskey v. Pennsylvania Department of Corrections*,[105] the Third Circuit had noted the issue and chose to "'flag' it for another day."[106] By implication, the Supreme Court has left it to the lower courts to determine the circumstances under which a plaintiff would be entitled to relief. It is important to note that these approaches are only considered after a plaintiff

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101. *Id.* at 93.

102. *Id.* at 97.

103. *See* Casey v. Lewis, 4 F.3d 1516, 1520 (9th Cir. 1993).

104. *See generally* Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206 (1998). When the Supreme Court determined that the ADA applied to state correctional facilities, the Court limited its discussion to resolving the general applicability question—omitting substantive discussion of the appropriate standard of review, the relative importance of the Eleventh Amendment, and whether the ADA's application to state prisons was pursuant to Congress's Commerce Clause authority or section 5 of the Fourteenth Amendment. *See* Stanley v. Litscher, 213 F.3d 340, 343 (7th Cir. 2000) (holding that the ADA is only authorized under the Commerce Clause).

This question is important because "[f]ollowing the Supreme Court's holding in *Seminole Tribe*, Congress can abrogate Eleventh Amendment immunity only if it is acting pursuant to its powers under section 5 of the Fourteenth Amendment." Alsbrook v. City of Maumelle, 184 F.3d 999, 1006 (8th Cir. 1999); Estreicher & Lemos, *supra* note 24, at 160-72. For a discussion on the ADA's application to section 5 of the Fourteenth Amendment and the Commerce Clause, see generally James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 115–85 (2000). For a discussion on the ADA and the Eleventh Amendment, see LaCheen, *supra* note 36, at 70–78.

Another issue that the Supreme Court left undecided in *Yeskey* was whether Congress, in passing Title II, intended to abrogate state immunity. The Supreme Court recently held that Title I did not abrogate state immunity consistent with the Eleventh Amendment. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001). However, the circuits are split regarding Title II. Even if the Supreme Court one day definitively holds that Congress did not intend Title II to abrogate state immunity, the analytical approach raised in this article would not become moot because states are increasingly delegating penal responsibility to private parties. John G. Dipiano, Note, *Private Prisons: Can They Work? Panopticon in the Twenty-First Century*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 176–77 (1995).

105. 118 F.3d 168 (3d Cir. 1997).

106. *Yeskey*, 118 F.3d at 174–75.

has made a prima facie ADA case.[107] The approaches that the courts have followed have failed to provide a satisfactory methodology.

A. JUDICIAL APPROACHES

Of those decisions still standing as good law, one court has rejected application of the *Turner* doctrine to the ADA.[108] The lone court that did so relied on the plain language of the ADA to require that a party seeking to invoke the *Turner* doctrine show clear proof that Congress intended to apply the ADA to state prisons.[109] The validity of this decision may be in doubt, however, because it was decided prior to *Yeskey* and relied on an earlier version of the Eleventh Circuit's opinion in *Onishea v. Hopper (Onishea I)*,[110] which was subsequently vacated and modified.[111] *Onishea I* would have also been added to this short list, but for the fact that the decision was later vacated and modified with respect to its position on whether a lower court errs when it includes *Turner* in its analysis of "otherwise qualified."[112]

Even with the near circuit consensus that *Turner* applies in some form, the courts have adopted contrasting approaches. As a federal district court explained, accounting for the "significant differences between managing prisons and undertaking other endeavors" appears to be the result of a compromise and a recognition that courts can apply the law faithfully to prison policy.[113] Ultimately, the approach adopted will determine the degree of scrutiny under which a court will examine an inmate's ADA claim and the degree of deference given to a prison's policy.

B. THE "OTHERWISE QUALIFIED" INDIVIDUAL APPROACH

The course of consideration for the *Turner* doctrine in the Eleventh Circuit has been unique, as it has spanned almost twenty years. In *Onishea v. Hopper (Onishea III)*,[114] a class of plaintiffs alleged that the State of Alabama's practice of denying them access to services pursuant to an Alabama statute segregating inmates who tested positive for the HIV virus

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107. Teel v. Barnett, No. 7:01-CV-033-R, 2002 U.S. Dist. LEXIS 3333, at *8–*9 (N.D. Tex. Feb. 27, 2002); McIntyre v. Robinson, 126 F. Supp. 2d 394, 408 (D. Md. 2000); Higgins v. Beckworth, No. 5:00-CV-78, 2000 U.S. Dist. LEXIS 12708, at *7 (W.D. Mich. Aug. 28, 2000); Galvin v. Cook, No. CV-00-29-ST, 2000 U.S. Dist. LEXIS 12871, at *7 (D. Or. July 14, 2000).

108. Raines v. Florida, 987 F. Supp. 1416, 1420 (N.D. Fla. 1997).

109. *Id.*

110. 126 F.3d 1323 (11th Cir. 1997), *vacated*, 133 F.3d 1377 (11th Cir. 1998).

111. *Onishea I*, 126 F.3d at 1336.

112. Onishea v. Hopper (Onishea III), 171 F.3d 1289, 1293 (11th Cir. 1999) (en banc).

113. Herndon v. Johnson, 970 F. Supp. 703, 708 (E.D. Ark. 1997).

114. 171 F.3d 1289 (11th Cir. 1999).

amounted to a violation of Title II of the ADA.[115] Because of the segregation, the inmates were unable to participate in many of the services offered to non-HIV-positive inmates.[116] An earlier circuit panel agreed with most of the issues the plaintiff raised,[117] a determination that an en banc court later vacated.[118] *Onishea III* arose from the en banc court's decision to revisit the case after the parties provided new briefs.[119]

The district court, in evaluating the Department of Corrections' policy of segregating inmates based on HIV status, incorporated the *Turner* doctrine into the "otherwise qualified" determination.[120] The district court decided that the plaintiffs were not "otherwise qualified" based on two independent grounds.[121] First, the plaintiff's HIV-positive status posed too significant of a health risk to surmount the "otherwise qualified" requirement as similarly acknowledged in *School Board of Nassau County v. Arline*.[122] The Supreme Court in *Arline* held that the risk of an HIV-positive inmate spreading the HIV virus to other inmates and prison personnel fell under the "otherwise qualified" part of the ADA analysis.[123] Second, and more important for purposes of this article, inmates with an ADA claim must also show that their participation would not create disciplinary problems.[124] Thus, as part of the court's inquiry into the plaintiffs' qualifications to participate, it considered penalogical concerns.[125]

One of the challenges that the plaintiffs made against the district court's finding was that it had improperly relied on *Turner* in determining whether the plaintiffs were otherwise qualified.[126] The Eleventh Circuit conceded that, as a matter of its terms, *Turner* did not apply to statutory

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115. *Onishea III*, 171 F.3d at 1292–93.
116. *Id.* at 1292.
117. Onishea I, 126 F.3d 1323, 1336 (11th Cir. 1997).
118. *See generally Onishea II*, 133 F.3d 1377.
119. *Onishea III*, 171 F.3d at 1296.
120. *Id.* at 1295. The ADA defines a "qualified individual" as
> an 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 service, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (2000).
121. *Onishea I*, 126 F.3d at 1328.
122. 480 U.S. 273 (1987); *Onishea I*, 126 F.3d at 1328.
123. *Arline*, 480 U.S. at 287-89.
124. *Onishea III*, 171 F.3d at 1295.
125. *Id.*
126. *Id.* at 1299.

rights.[127] Nevertheless, the court noted that one who is "otherwise qualified" must "be able to meet all of a program's requirements in spite of his handicap."[128] A program's requirements, the court wrote, are an issue of fact.[129] Based on this legal principle, the circuit court gave the district court some deference to determine what requirements would apply, and determined that a district court may reasonably include penalogical considerations as part of the analysis.[130] The court strongly suggested that application of the *Turner* doctrine to the Rehabilitation Act "was not precisely correct as a matter of legal theory, determining whether penalogical concerns impose requirements for program participation is not error."[131] In other words, the court upheld the district court's approach because its decision did not constitute reversible error even though the court suggested that it might not have adopted the same analytical approach.[132]

The Fourth Circuit seems to have adopted an approach similar to the one followed by the district court in the Eleventh Circuit. In *Bowman v. Beasley*,[133] the plaintiffs brought a suit alleging that the South Carolina Department of Corrections' policy of segregating HIV-positive inmates from non-HIV-positive inmates was unlawful discrimination in violation of the ADA.[134] Without discussing the implications of adopting the rule, the Fourth Circuit simply wrote that "[t]he practice of segregating HIV-positive inmates is within the wide deference afforded to prison administrators, and it is 'reasonably related to legitimate penalogical interests.'"[135] After stating this rule, the court affirmed a portion of the district court's judgment that ruled the plaintiff failed to demonstrate that he was "otherwise qualified" under the ADA.[136]

In addition, a federal district court in Texas explained that prison officials must have some degree of discretion to determine whether an

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127. *Onishea I*, 126 F.3d at 1336. The Eleventh Circuit, in a decision later vacated en banc, provided the following two reasons why the *Turner* doctrine should not have been employed: (1) the ADA was a product of legislative and administrative bodies, separate from the judiciary which had been one of the reasons for the *Turner* doctrine, and (2) the ADA's considerations of "reasonable accommodation" and "fundamentally alter" are "somewhat duplicative" of the *Turner* doctrine. *Id.*

128. *Onishea III*, 171 F.3d at 1300 (quoting S.E. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979)).

129. *Id.*

130. *Id.*

131. *Id.* (citation omitted).

132. *Id.*

133. Nos. 00-7505, 00-7506, 2001 WL 427932 (4th Cir. Apr. 26, 2001).

134. *Bowman*, 2001 WL 427932, at *1.

135. *Id.* (citations omitted).

136. *Id.*

individual qualifies for participation on security grounds.[137] In *Clark v. Woods*,[138] the plaintiffs claimed that denying contact visitation when one of the plaintiffs had visual and aural disabilities was illegal discrimination based on his disability.[139] The district court found the defendants had established that one of the plaintiffs had been attending a KKK rally, while the plaintiff on the other end of the communication had been a member of the Aryan Nations.[140] On a motion for summary judgment, the plaintiffs failed to rebut this evidence.[141] As the district court framed it, the prison official, based on the security risk of allowing the contact visits, determined that the plaintiff inmate was not qualified to visit with the other inmate.[142]

Courts should not incorporate the *Turner* principles into the term "otherwise qualified." The primary reason is that plaintiffs seeking relief under the ADA bear the burden of proving that they are otherwise qualified.[143] As a matter of the public policy goals that the ADA advances, plaintiffs should not bear the burden of proving the unreasonableness of a prison's policy. To its credit, this approach does not embrace a full incorporation of *Turner*, but only attempts to include the concerns of *Turner* into the ADA.

The Supreme Court in *Arline* held that the risk of an HIV-positive inmate spreading the HIV virus to other inmates and prison personnel fell under the "otherwise qualified" part of the ADA analysis.[144] As consistent with *Arline* and other applications of "otherwise qualified," the qualifications of an inmate ought to be confined to aspects and characteristics of that individual, and not involve the potential reaction of other inmates based on their perception after the inclusion of the inmate with the disability into a service.[145]

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137. Clark v. Woods, No. 7:99-CV-173-R, 2001 WL 123668, at *5 (N.D. Tex. Jan. 16, 2001).

138. No. 7:99-CV-173-R, 2001 WL 123668 (N.D. Tex. Jan. 16, 2001).

139. *Clark*, 2001 WL 123668, at *1.

140. *Id.* at *3.

141. *Id.* at *6.

142. *Id.* at *5.

143. *See* 42 U.S.C. § 12132 (2000).

144. Sch. Bd. Of Nassau County v. Airline, 480 U.S. 273, 287 (1973) (stating that under the "otherwise qualified" inquiry, a district court must "conduct an individualized inquiry and make appropriate findings of fact" to determine whether integration of an individual with a contagious disease would pose "significant health and safety risks").

145. *Id.*

C. AS PART OF THE REASONABLE ACCOMMODATION APPROACH

An alternative approach to incorporating the *Turner* principles into the ADA in the prison context involves incorporating *Turner* into the terms "reasonable accommodation" and "fundamentally alter" of the ADA.[146] In *Gorman v. Bartch*,[147] the plaintiff brought an action alleging that he was unlawfully discriminated against because of the manner in which he was handled and transported following his arrest.[148] The primary issue in *Gorman* was whether Gorman's allegations fit within the ADA in light of the Supreme Court's decision in *Yeskey*.[149] Because the Eighth Circuit expressly left the evidentiary aspects untouched with respect to Gorman's condition and the information and options the police had available, the court did not provide the district court with any guidance with respect to where security concerns should be considered in the ADA analysis, if at all.[150]

A year later that chance would come after one of the defendant's claims provided the Eighth Circuit an opportunity to consider security concerns. In *Randolph v. Rodgers*,[151] the plaintiff, Randolph, sued after he was not provided with an interpreter, as required by state law, for his disciplinary hearing.[152] On appeal to the Eighth Circuit, the defendant argued that the district court committed reversible error when it refused to consider security concerns of the prison in determining whether providing a sign language interpreter was a reasonable accommodation or whether it imposed an undue burden.[153] The majority held that the presence of a state law that confers a right to the plaintiff for an interpreter did not similarly correlate to a right under federal law.[154] Based on the court's conclusion that the defendants had presented substantial evidence demonstrating that fulfilling the plaintiff's request for an interpreter could have created security issues, the court held that the district court abused its discretion and remanded the case for further proceedings.[155]

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146. 42 U.S.C. §§ 12111, 12182(b)(2)(A)(ii) (2000). For a proposal advancing this perspective and providing reasons to prefer it over the *Turner* standard, see Burke, *supra* note 3, at 504–14.

147. 152 F.3d 907 (8th Cir. 1998), *vacated by* Gorman v. Easley, Nos. 00-1029, 00-1030, 2002 U.S. App. LEXIS 20325 (8th Cir. 2002).

148. *Gorman*, 152 F.3d at 909–10.

149. *Id.* at 912–13; Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 210-13 (1998).

150. *Gorman*, 152 F.3d at 913–14.

151. 170 F.3d 850 (8th Cir. 1999).

152. *Randolph*, 170 F.3d at 853–54.

153. *Id.* at 857–58.

154. *Id.* at 859.

155. *Id.*

The Seventh Circuit has also issued a decision that very much reflects the *Turner* principles when characterizing the ADA's application to prisons, but did so in a way that more closely resembles the Eighth Circuit's approach than either of the other two approaches.[156] In *Crawford v. Indiana Department of Corrections*,[157] the plaintiff brought an action against the prison administration alleging that it had violated his rights under the ADA.[158] Because the case pre-dated the Supreme Court's decision in *Yeskey*, the Seventh Circuit's primary concern was to determine whether the ADA applied.[159] Chief Judge Posner wrote the majority opinion, and while he was discussing how Congress had spoken with unquestionable clarity that the ADA applied to all public entities, he stated, "It might seem absurd to apply the [ADA] to prisoners. Prisoners are not a favored group in society; the propensity of some of them to sue at the drop of a hat is well known; prison systems are strapped for funds . . .."[160] However, Judge Posner acknowledged that "[r]ights against discrimination are among the few rights that prisoners do not park at the prison gates."[161] On remand, he instructed the district court that the meaning of the terms "reasonable accommodation" and "undue burden" depend on the circumstances, and in the case of prisons, "security concerns . . . are highly relevant."[162]

Courts choosing to analyze ADA claims brought by prisoners within the meaning of the statutory language of "reasonable accommodation" and "fundamentally alter" have come closer to effectuating the goals of the ADA than the other two approaches. Indeed, this seems like the most logical approach. First, these terms imply that the context or setting of the facility should matter when determining whether a person with disabilities has been excluded from services. Second, these terms also speak to an inquiry into the nature of the facility to determine whether the ADA should apply. Nonetheless, as close as these courts have come, without providing any structure to their analysis, they may not have adequately weighed the interests at stake. The structure lacking in court decisions appears in abstract discussions regarding the security concerns of prisons without

156. Crawford v. Ind. Dep't of Corrs., 115 F.3d 481, 487 (7th Cir. 1997); *see also* Roop v. Squadrito, 70 F. Supp. 2d 868, 877 (N.D. Ind. 1999) (holding that "[t]he ADA does not trump legitimate penalogical concerns").

157. 115 F.3d 481 (7th Cir. 1997).

158. *Crawford*, 115 F.3d at 483.

159. *Id.*

160. *Id.* at 486.

161. *Id.* (citing Turner v. Safley, 482 U.S. 78, 84 (1987)).

162. *Id.* at 487.

substantive discussions seeking to balance the values of *Turner* and the ADA.

D. FULL INCORPORATION OF THE *TURNER* APPROACH

The case that seemed to spark this controversy is *Gates v. Rowland*.[163] *Gates* was a suit brought by HIV-positive, mobility-impaired, and mentally ill inmates who were alleging, among other claims, denial of access to medical and mental health care.[164] Having previously held that the Rehabilitation Act applies to state prisons,[165] the issue before the court in *Gates* was how the ADA applied in the prison setting.[166] The Ninth Circuit retreated from its earlier decision when it decided to incorporate the *Turner* doctrine into the inmates' ADA claim.[167] Applying the *Turner* doctrine to the plaintiffs' claim that being denied access to work in food service was unlawful discrimination, the court reversed the district court, holding that the evidence demonstrated that the perceived risk of infection had been, and likely would remain, a source of violence.[168]

In the Ninth Circuit's discussion of the segregation of HIV-positive inmates, the court found it logical that "just as constitutional rights of prisoners must be considered in light of the reasonable requirements of effective prison administration, so must statutory rights applicable to the nation's general population be considered in light of effective prison administration."[169] That, along with the fact that the ADA applied generally, not having been passed specifically to deal with prisons, enabled the court to rely on the standard of review set out in *Turner*.[170] Moreover, the court was persuaded by its recognition of the difficult task assigned to prison officials, as well as the appropriateness that decisions affecting prisons be made by the legislative and executive branches.[171] Thus, finding that many, if not all, of the reasons for affording greater deference to prison regulation of inmates applied when evaluating constitutional and statutory

163. 39 F.3d 1439 (9th Cir. 1994).

164. *Gates*, 39 F.3d at 1442–43. Judge Tallman's observation in the dissenting opinion in a recent case exemplifies the *Gates*' perspective: "*Turner* established that a prison regulation is valid *even where* it impinges on prisoners' constitutional rights . . .." Hargis v. Foster, 282 F.3d 1154, 1162 (9th Cir. 2002) (Tallman, J., dissenting) (second emphasis added). In dicta, the Fourth Circuit has cited *Gates* and *Turner* with approval. Torcasio v. Murray, 57 F.3d 1340, 1346, 1355 (4th Cir. 1995).

165. Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988).

166. *Gates*, 39 F.3d at 1444.

167. *Id.* at 1447.

168. *Id.*

169. *Id.* at 1446.

170. *Id.* at 1446–47.

171. *Id.* at 1448.

rights, the Ninth Circuit incorporated the *Turner* doctrine into the prisoners' ADA claim.[172]

Adoption of the *Turner* doctrine to the ADA typically means that prison officials no longer have to show that proposed modifications would create an undue burden.[173] The initial burden of proof switches to the prisoner to overcome the presumed "common sense" prison policy.[174] However, this re-allocation of the burden of proof does not automatically fall onto the prisoner. For example, the Third Circuit declined to decide definitively on whether to superimpose the *Turner* doctrine into the ADA because the defendants had resorted to asserting security concerns without reasoned support.[175] Unless a defendant makes an initial showing that security may be in fact implicated, the Third Circuit held that such a defense would not be considered.[176] Also, the Ninth Circuit has held that a prison facility wishing to invoke the *Turner* doctrine must, at a bare minimum, provide a reasoned explanation.[177] The test the Ninth Circuit articulated was that there be some penalogical reason "urged in the district court" that is "sufficiently articulated to permit meaningful . . . review."[178] Once a defendant satisfies this minimum threshold, the plaintiff must refute the reason.[179]

This approach is the least desirable of the three because it acts as a standard of review by which a court first determines whether the prison policy is reasonable on security grounds.[180] Full incorporation of *Turner* places plaintiffs on the defensive by requiring them to argue against the presumption that the prison regulation is reasonable.[181] Courts relying on *Turner* in this fashion, not surprisingly, quote language from prior decisions that support providing great deference to prison officials.[182] This judicial posture places inmates with disabilities in a position before the courts where they become merely inmates and their respective disabilities become irrele-

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172. *Id.*

173. *See* Armstrong v. Davis, No. 99-15152, 2000 U.S. App. LEXIS 6821, at *7 (9th Cir. Apr. 11, 2000).

174. *Id.*

175. Chisolm v. McManimon, 275 F.3d 315, 326–27 (3d Cir. 2001) (regarding the necessity of furnishing a particular auxiliary aid or service).

176. *Id.* at 327.

177. Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001).

178. *Id.* (quoting Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990)).

179. *Id.*

180. *See* Burke, *supra* note 3, at 499-503 (discussing application of the *Turner* doctrine by circuit courts).

181. *Id.* at 499.

182. *Id.* at 500.

vant for purposes of the courts' initial review.[183] Thus, those courts adopting a full incorporation of the *Turner* doctrine manifest an attitudinal shift contrary to the purpose of the ADA.[184]

In addition, plaintiffs not only bear the burden of showing that prison policies are unreasonable, but courts will also place plaintiffs' ADA claims on hold until they resolve the initial issue.[185] Furthermore, the way in which prison policies receive initial consideration by courts, it inevitably would seem to influence courts' perceptions of the validity of inmates' ADA claims.[186] It is conceivable that in cases in which plaintiffs escape the first hurdle and courts consider their ADA claims, potential security risks may still color courts' judgments.[187] Even without this risk, discrimination by prisons against inmates with disabilities is entitled to privilege from the enormous level of deference courts will ascribe to prison policies—so long as they are reasonably related to security issues, courts will not hear inmates' ADA claims.[188]

In sum, one method of incorporating the *Turner* principles involves considering penalogical interests, such as security concerns, within the meaning of the term "otherwise qualified." This approach places the burden of proof unfairly on the plaintiff to show a modification would not be inconsistent with the prison's interests. A second method involves considering the *Turner* principles within the term "reasonable accommodation." While a more logical fit, this approach lacks the analytical structure necessary to consider prisoners' interests. The final approach, full incorporation of *Turner*, is undesirable because it marginalizes inmates' disabilities and overwhelmingly tips the balance of policymaking on the side of the prisons.

IV. PROPOSED FRAMEWORK FOR DETERMINING WHETHER AN INMATE'S ADA CLAIM SHOULD PREVAIL

A. CRITICAL FACTORS COURTS SHOULD CONSIDER IN REVIEWING STATE PRISON SERVICE OR PROGRAM AVAILABILITY

As Part III illustrated, the lack of guidance with respect to how courts proceed through each approach risks reaching inconsistent judgments—not

183. *Id.*
184. *Id.*
185. *Id.* at 503.
186. *Id.*
187. *See id.* at 503-04.
188. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

to mention less predictable outcomes. The division among circuits is not the problem or the ill that this article seeks to alleviate. The inevitable convergence of *Yeskey* and *Turner* suggests that what truly is at stake is the very existence of the ADA in prisons. Instead of choosing which circuit approach would achieve the most favorable result, this article, more importantly, contributes to this discussion by providing factors that courts should consider when determining the validity of an inmate's ADA claim.

To determine whether an inmate has been excluded from a prison's service, courts should examine such a claim within the elasticity of the statutory language of "reasonable accommodation" and "fundamentally alter."[189] This approach begins where the status quo reasonable modification approach leaves off.[190] Courts should undergo an analysis of the parties' claims in light of a number of explicit factors, none of which courts have made any attempt to consider except on an ad hoc basis. Many of these factors, at least to my knowledge, have been discussed in prior cases, while others have not. These factors derive both from prior case law and from merging the principles underlying the ADA and *Turner*.

In order to engage in an analysis that balances the principles of the ADA and *Turner*, courts should begin by separating the analysis into two levels. Under what can be labeled the primary line analysis, the court's primary attention should be directed first to determining the purpose of the service and the needs of the individual inmate. Looking to the purpose or nature of the service, a court would look to the goal the service seeks to advance (penalogical or otherwise), the existence of other, non-ADA related reasons for exclusion, the service's relative prevalence in other state correctional facilities, and the need that the service satisfies for the inmate and the institution. Then, as far as the needs of the inmate are concerned, courts should assess the nature of the private interest at stake, giving proper attention to the importance of the sought-after service to that individual situated in a state prison. Much of the preceding consideration will aid in this part of the analysis.

Also important is the element of duration, both in terms of the amount of time in which the inmate alleges to have been discriminated against and the amount of time it took for the prison officials to provide a response.[191] In *Beckford v. Portuondo*,[192] the plaintiff challenged the correctional

189. *See* 42 U.S.C. §§ 12111, 12182(b)(2)(A)(ii) (2000).

190. For a discussion of the "reasonable modification" approach, see Burke, *supra* note 3, at 504-13.

191. *See* Beckford v. Portuondo, 151 F. Supp. 2d 204, 220 (N.D.N.Y. 2001) (evaluating a plaintiff's ADA claim that he had been placed in a non-wheelchair accessible cell).

192. 151 F. Supp. 2d 204 (N.D.N.Y. 2001).

facility's decision to deny him access to a wheelchair accessible cell.[193] The defendants had placed the plaintiff temporarily in a plastic-shielded cell, which was not wheelchair accessible at the time, in response to the plaintiff's earlier attempts to litter guards with feces and urine.[194] Once the plaintiff's misbehavior stopped, the defendants returned him to his wheelchair accessible cell.[195] The same district court dismissed the plaintiff's claim that he was denied access to outdoor recreation facilities because he had only been denied access while the ramp was in disrepair, and once notified, the prison officials promptly repaired it.[196]

Still within the primary line analysis, courts ought to inquire into the penalogical interests, which should only operate as a defense when prisons proffer sufficient evidence that including the inmates in the services would pose a dangerous, direct threat to other prisoners or prison officials.[197] Courts, in assessing the validity of a security concern claim, should reject reliance on generalizations and stereotypes, and instead demand objective evidence.[198] The temporal sequence of this inquiry is intentional because a court would first look to the individual and the service. This would minimize the risk of overlooking individuals' ADA claims and would enable courts to undergo a more thorough analysis of security because they would have greater awareness of context. Common sense can often determine the validity of many claims of heightened security risk.

In dicta from *Crawford v. Indiana Department of Corrections*, Judge Posner suggested that the reasonable accommodation defense be given greater consideration in the prison context, whether it be that no reasonable accommodation can be made or that reasonable accommodation will impose an undue burden.[199] Placing too much importance on the security concerns of prisons shifts the focus away from the ADA's purpose—to eliminate discrimination against persons with disabilities, which requires an examination of the individual, not scrutiny of the effects on the prison.

After conducting the primary line analysis, courts should conduct a secondary line analysis. Considerations falling under this category should accordingly receive less weight than those considerations in the primary line analysis. These factors deserve less weight because, in most cases, the

193. *Beckford*, 151 F. Supp. 2d at 220.

194. *Id.*

195. *Id.*

196. *Id.*

197. *See* Burke, *supra* note 3, at 505 (discussing the unique security concerns of prisons in relation to a reasonable modification analysis of ADA claims by prisoners).

198. Rubin & McCampbell, *supra* note 7.

199. Crawford v. Ind. Dep't of Corrs., 115 F.3d 481, 486 (7th Cir. 1997).

inference that they raise is less probative. In many cases, the outcome might become so one-sided that a court may forego this part of the analysis entirely. Realistically, the factors within the secondary line analysis would most likely significantly affect the outcome of a case only where a court is having a difficult time arriving at a decision after undergoing the primary line analysis.

One secondary factor would be determining attempts made by facility officials to accommodate individuals with disabilities and in other areas of accommodation, whether performed in response to a request or demand or done voluntarily.[200] A second factor would look to the track record of institutions' past compliance with the ADA.[201] These two legally relevant issues attempt to discern the presence of good or bad faith, which can help a court determine whether inmates have been excluded from services on account of their disabilities. These factors deserve less deference because they do not account for changes in prison administration policy and usually entail actions taken by the prison that are less proximately related to the immediate issue at hand.

B. A JUSTIFICATION FOR THIS FRAMEWORK

The above approach, if adopted by a court, would encourage reasoned judicial decision-making that accounts for both competing concerns. Without such a framework, there is a danger that courts may decide cases without regard to the principles of the ADA or *Turner*. What may at first glance appear to be a one-sided approach in favor of inmates with disabilities is indeed not the case. An expressed emphasis on the service itself and the needs of individual inmates is necessary in order for the ADA goals to be effectuated in the prison setting. In addition, without explicit discussion and recognition of the services and the needs of the individual in question, case outcomes run the risk of resulting from an overemphasis of the penalogical concerns.

Apart from litigation, an approach that sets forth the various considerations that a court will make would provide an opportunity for correctional institutions to engage in policy planning to ensure future compliance with the ADA. This proposed analytical framework retains the protections afforded to persons with disabilities provided by the ADA, yet also is cognizant of the unique issues that arise in the prison setting. For example,

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200. *See* Torcasio v. Murray, 57 F.3d 1340, 1356 (4th Cir. 1995) (evaluating the fact that the prison "took significant steps to address" the inmate's complaints).

201. *See* Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001) (stating that past conduct indicates a "significant possibility" that injurious acts will be repeated in the future).

allowing the unique security concerns of a state prison to trump the protection against discrimination afforded to inmates with disabilities without closely considering how the service exclusion harms inmates would promote further physical, emotional, and psychological injury to inmates. The reach of the ADA to prisons is not limited to "logistical matters of prison administration," but has also been extended to include substantive decision-making by prison officials and boards.[202]

This approach, as in the case of the ADA generally, is not meant to entitle any one individual or group with a privilege or subsidy. Rather, its purpose, pursuant to the ADA, is to eliminate a burden.[203] Emphasis on the individual and the service in question within the factored analysis is necessary in light of a couple of important considerations. Extreme caution in the area of the ADA's application to prisons generally is warranted given the fact that prisoners do not have a general right to choose the correctional facility where they will be placed. Thus, many of the "self-help" measures used to mitigate or avoid further injury are not available in a prison setting.[204]

Not to be overlooked, an affirmation by the courts that the ADA applies with some force to a group of individuals often the target of public scorn[205] reinforces the importance of the ADA and, as a corollary, the evils of discrimination against persons with disabilities. Moreover, as a Kansas district court wrote, "the ADA reflects, to some degree, contemporary standards of decency concerning treatment of individuals with disabilities."[206] The decency with which inmates are regarded in the area of discrimination in services is especially important because inmates who face architectural barriers or who are victims of discriminatory treatment in the provision of services, often do not have adequate means to mitigate or prevent such discrimination that tends to be more prevalent outside of prisons.[207] Despite additional difficulties that inmates with disabilities encounter in prisons, society has no choice but to incarcerate them. Also, because many prisoners with disabilities are released from prison we should facilitate their adjustment both into and out of prison by diminishing psychological, as well as physical barriers.[208] Another important

202. *See, e.g.*, Thompson v. Davis, 282 F.3d 780, 785 (9th Cir. 2002). As one court stated, "Rights against discrimination are among the few rights that prisoners do not park at the prison gates." *Crawford,* 115 F.3d at 486.

203. *Thompson,* 282 F.3d at 785.

204. Walker v. Washington, No. 96 C 0469, 1998 WL 30701, at *4 (N.D. Ill. Jan. 26, 1998).

205. Robbins, *supra* note 13, at 52–53, 66.

206. Schmidt v. Odell, 64 F. Supp. 2d 1014, 1031 (D. Kan. 1999).

207. Hoppe, *supra* note 6, at 276.

208. Crawford v. Ind. Dep't of Corrs., 115 F.3d 481, 486 (7th Cir. 1997).

consideration for adopting this approach is that, as the ADA requires exclusion, a prison is likely to have provided these services because they were either viewed as necessary or important.[209] In this light, courts will be aided by this inference.

A concern voiced by some scholars relates to the potential of subjecting prisons to greater financial burdens.[210] This concern is overstated in the context of the aforementioned proposal. First, nothing in the proposed approach seeks to limitlessly expand the ADA's application. More generally, an increase in litigation would be significantly diminished considering that plaintiffs, at a minimum, would still have the prima facie burden of establishing that they (1) are qualified individuals, (2) with disabilities, and (3) seek to prohibit discrimination by a public entity.[211]

In addition, aside from the full incorporation approach, relying on factors merely clarifying those considerations a court should make would not have a significant effect on the number of ADA cases brought by inmates.[212] Even without subjecting prisons to financial ruin, one may argue that by requiring compliance, state correctional entities' resources could be siphoned away from much needed education, recreation, and rehabilitation.[213] However, once an entity decides to provide a general service, the ADA requires that the methods used "do not have the purpose or effect of impairing its objectives with respect to individuals with disabilities."[214]

Second, regarding financial burdens that would be imposed,[215] such burdens would be balanced against those modifications that are reasonable.[216] The cost burden argument also provides a compelling need for the ADA in prisons. If prisons are indeed strapped for funding and by accommodating those individuals with disabilities would incur additional costs, then they are unlikely to take on the initiative to include inmates with disabilities in their available services because the incentive structure is for prisons to remain inactive or at least passive.[217] The fact that prisoners do

209. Hoppe, *supra* note 6, at 276.

210. *See, e.g.*, Sandra J. Carnahan, *The American with Disabilities Act in State Correctional Institutions*, 27 CAP. U. L. REV. 291, 316 (1999); D. Kyle Sampson, *Can State Prisoners Sue Under Federal Disabilities Law?*, 11 Sep. UTAH B.J. 17, 18 (1998).

211. Hoppe, *supra* note 6, at 283.

212. Burke, *supra* note 3, at 509-10.

213. Sampson, *supra* note 210, at 18.

214. Niece v. Pitzner, 922 F. Supp. 1208, 1217–18 (E.D. Mich. 1996) (quoting Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F. Supp. 986, 991 (S.D. Fla. 1994)).

215. Lange, *supra* note 13, at 897.

216. Burke, *supra* note 3, at 510-11.

217. Robbins, *supra* note 13, at 54 & n.25.

not enjoy equal opportunity and independence in the same way as those not incarcerated, and are not economically self-sufficient,[218] further demonstrates the need for an approach that fully considers their ADA rights and balances them against the security concerns of accommodation.

V. CONCLUSION

In order for courts to resolve controversies arising under the ADA in actions brought by prisoners with disabilities consistent with Congress's intent, courts must rely on factors that properly consider the services and the needs of individuals seeking inclusion in light of the unique setting of prisons. Under the approach discussed in this article, inmates with disabilities would be more likely to realize the full extent of the protection against discrimination guaranteed by the ADA because the multi-tiered approach would require courts to consider inmates' individual needs. At the same time, prisons would have ample opportunity to voice their concerns regarding an accommodation's impact on security.

Such an analytical framework would also promote greater consistency by informing state correctional facilities in day-to-day operational decisions and providing prisoners with disabilities, and their attorneys, with a more reliable forecasting device when deciding whether a claim should be brought. The proposed standards properly incorporate the special circumstances inmates confront in correctional facilities and, consistent with the intent of Congress, would provide inmates with a better opportunity to remedy discrimination in state prisons. At the same time, penalogical concerns raised by prison officials would be properly considered by courts to help ensure that such accommodations would not unreasonably create security risks. Requiring plaintiffs to overcome the obstacle of demonstrating unreasonableness pursuant to *Turner* does not afford courts an opportunity to properly evaluate ADA claims against prisons and, in a majority of cases, denies inmates the protections of the ADA.

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218. Lange, *supra* note 13, at 887.

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